

Developing Anti-Discrimination Law in Europe

**The 28 EU Member States, the Former Yugoslav
Republic of Macedonia, Iceland, Liechtenstein,
Norway and Turkey compared**

EUROPEAN COMMISSION

Directorate-General for Justice and Consumers
Directorate D — Equality
Unit JUST/D1

*European Commission
B-1049 Brussels*

Developing Anti-discrimination Law in Europe

**The 28 EU Member States, the Former Yugoslav
Republic of Macedonia, Iceland, Liechtenstein, Norway
and Turkey compared**

**Prepared by Isabelle Chopin and Catharina Germaine
for the European Network of Legal Experts in the Non-discrimination Field**

**December 2014
(Based on information current to 1 January 2014¹)**

European Commission
Directorate-General for Justice and Consumers

Manuscript completed in January 2015

¹ As regards major significant changes in a few Member States, information may be based on data after 1 January 2014.

The text of this report was drafted by Isabelle Chopin and Catharina Germaine for the **European Network of Legal Experts in the Non-discrimination Field** (covering the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation), managed by:

Human European Consultancy

Maliestraat 7

3581 SH Utrecht

Netherlands

Tel +31 30 634 14 22

Fax +31 30 635 21 39

office@humanconsultancy.com

www.humanconsultancy.com

Migration Policy Group

Rue Belliard 205, Box 1

1040 Brussels

Belgium

Tel +32 2 230 5930

Fax +32 2 280 0925

info@migpolgroup.com

www.migpolgroup.com

For more information on publications of the European Network of Legal Experts in the Non-discrimination Field and of the activities of the European Commission in this area see, respectively:

<http://ec.europa.eu/social/main.jsp?catId=615&langId=en>

<http://ec.europa.eu/social/main.jsp?catId=423&langId=en>

© Photography and design by Ruben Timman / www.nowords.nl

***Europe Direct is a service to help you find answers
to your questions about the European Union.***

Freephone number (*):

00 800 6 7 8 9 10 11

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

This publication was commissioned by the European Commission under the framework programme PROGRESS (Decision 1672/2006/EC of the European Parliament and the Council, OJ L 315/1 of 15.11.2006).

For more information on PROGRESS see:

<http://ec.europa.eu/social/main.jsp?catId=327&langId=en>

LEGAL NOTICE

This document has been prepared for the European Commission however it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

More information on the European Union is available on the Internet (<http://www.europa.eu>).

Luxembourg: Publications Office of the European Union, 2015

ISBN 978-92-79-46193-4

doi: 10.2838/94057

© European Union, 2015

Contents

Preface	4	<i>E. Public security, public order, criminal offences, protection of health, and protection of the rights and freedoms of others</i>	79
Introduction	5	<i>F. Other exceptions</i>	79
1 Protected grounds of discrimination	7	<i>G. Positive action</i>	79
<i>A. Introduction to the transposition of the anti-discrimination Directives</i>	8	<i>Table: Positive action</i>	82
<i>B. Which grounds are covered?</i>	10	4 Access to justice and effective enforcement	85
<i>Table: Protected grounds</i>	11	<i>A. Judicial and administrative procedures</i>	86
<i>C. Racial or ethnic origin</i>	13	<i>Legal action in the private sector</i>	86
<i>D. Religion or belief</i>	15	<i>Legal action in the public sector</i>	89
<i>Specific provisions on religion or belief – ethos-based organisations</i>	19	<i>Obstacles to effective access to justice</i>	89
<i>E. Disability</i>	20	<i>B. Legal standing and associations</i>	91
<i>Specific provisions on disability – the reasonable accommodation duty</i>	24	<i>Entities which may engage in procedures</i>	91
<i>Table: Reasonable accommodation</i>	29	<i>Table: Legal standing</i>	93
<i>Specific provisions on disability – health and safety</i>	31	<i>To engage 'on behalf of'</i>	96
<i>F. Sexual orientation</i>	32	<i>Collective redress</i>	97
<i>G. Age</i>	33	<i>Legitimate interest</i>	99
<i>Specific provisions on age</i>	34	<i>C. Burden of proof</i>	100
<i>H. Assumed and associated discrimination</i>	40	<i>D. Victimisation</i>	104
<i>I. Multiple discrimination</i>	43	<i>Table: Victimisation</i>	106
2 Definitions and scope	45	<i>E. Sanctions and remedies</i>	107
<i>A. Direct discrimination</i>	46	5 The role of equality bodies compared	113
<i>Table: Direct discrimination</i>	47	<i>A. Grounds covered</i>	115
<i>B. Indirect discrimination</i>	49	<i>Table: Specialised bodies</i>	115
<i>Table: Indirect discrimination</i>	49	<i>B. Competencies of equality bodies</i>	121
<i>C. Harassment</i>	52	6 Implementation and compliance	129
<i>Table: Harassment</i>	54	<i>A. Dissemination of information and social and civil dialogue</i>	130
<i>D. Instructions to discriminate</i>	56	<i>Dissemination of information and awareness-raising</i>	131
<i>Table: Instructions to discriminate</i>	56	<i>Social and civil dialogue</i>	133
<i>E. Personal scope</i>	59	<i>B. Ensuring compliance</i>	135
<i>F. Material scope</i>	60	Conclusion	139
<i>Table: Material scope of the Directives</i>	60	ANNEX 1 Signature/ratification of international conventions	143
<i>Employment</i>	61	ANNEX 2 Main national specific anti-discrimination legislation	147
<i>Social protection</i>	62	ANNEX 3 National specialised bodies	157
<i>Social advantages</i>	63		
<i>Education</i>	63		
<i>Access to and supply of goods and services</i>	67		
<i>Beyond the Directives</i>	70		
3 Exceptions to the principle of equal treatment and positive action	73		
<i>A. Genuine and determining occupational requirements</i>	74		
<i>B. Armed forces and other specific occupations</i>	75		
<i>C. Nationality</i>	76		
<i>Table: Nationality</i>	76		
<i>D. Family benefits</i>	78		

Preface

Over 10 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/EC) and the Employment Equality Directive (2000/78/EC). The transposition and implementation of these legal provisions into the national legal systems of the 28 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 (the **former Yugoslav Republic of Macedonia, Iceland** and **Turkey**) and, since 2012, EEA countries (**Liechtenstein** and **Norway**).² The Network 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 national reports are written by independent national experts in each country covered by the Network. The information is provided in response to questions set out in a template format which closely follows the provisions of the two Directives, although all countries included in the Network do not have the same compliance obligations. The 33 reports cover national law, the establishment of enforcement mechanisms, jurisprudence and the adoption of other measures. They contain information current as of 1 January 2014.³ As such, they are a valuable source of information on national anti-discrimination law and can be found on the Network's website at: www.non-discrimination.net.

This Comparative Analysis, drafted by Isabelle Chopin and Catharina Germaine (Migration Policy Group), compares and analyses the information set out in the 2013 country reports in a format mirroring that of the country reports themselves and draws some conclusions from the information contained in them.

Isabelle Chopin (Migration Policy Group)

Piet Leunis (Human European Consultancy)

Brussels – Utrecht

² Please note that **Iceland** has the status of both an EU candidate country and an EEA country.

³ Where major changes in legislation have been adopted at national level after the cut-off date of 1 January 2014, they have been included and this has been indicated accordingly.

Introduction

The objective of this report is to compare and contrast anti-discrimination law in the 28 EU Member States and EU candidate countries (namely the **former Yugoslav Republic 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 report includes EEA countries, namely **Iceland** (which is also an EU candidate country), **Liechtenstein** and **Norway**, which became part of the Network in 2012.

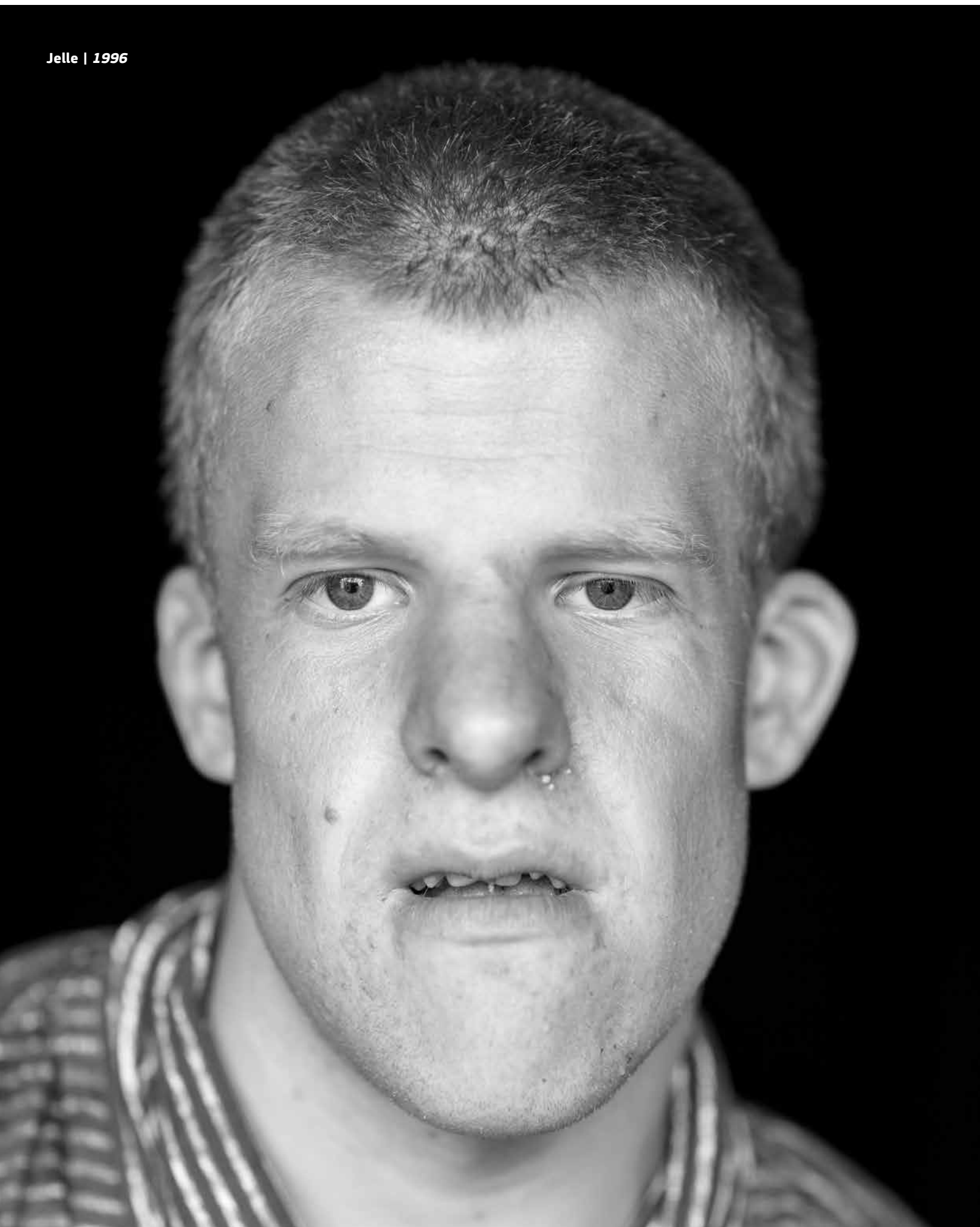
The grounds of discrimination listed in the Directives – racial or ethnic origin, religion or belief, disability, age and sexual orientation – are considered individually and collectively. It should be recalled throughout that the purpose of this report is to provide an overview of national laws and to contrast them. In addition, compliance obligations differ considerably between EU Member States, candidate countries and EEA countries. Consequently, 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 2014.

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 the 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 and the Employment Equality Directive had to be transposed into national law by 19 July 2003 and 2 December 2003 respectively in the EU 15 Member States. The 10 countries acceding to the EU on 1 May 2004 had to transpose both Directives by that date, while **Bulgaria** and **Romania** had to transpose them by 1 January 2007, the date of their accession to the EU. Entering the EU as its most recent Member State on 1 July 2013, **Croatia** had to transpose the legislation by that date. If and when they accede, the **former Yugoslav Republic of Macedonia**, **Iceland** and **Turkey** will have to align their national legislation with EU law by the date on which they enter the EU. EU directives on anti-discrimination are not binding on EEA countries, as the EEA agreement only provides obligations on those countries vis-à-vis EU legislation related to the internal market. In practice, provisions on anti-discrimination exist, but the level of protection varies greatly compared with EU standards. As a general tendency, protection against discrimination in these countries is much more developed in relation to the ground of gender than for the other grounds.

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 equality bodies.

Jelle | 1996



Chapter 1

Protected grounds of discrimination

A. Introduction to the transposition of the Anti-discrimination Directives

Further to the introduction of ex-Article 13 TEC⁴ by the Amsterdam Treaty (now Article 19 TFEU⁵), two ground-breaking EC Directives were adopted in 2000, banning discrimination on grounds of racial or ethnic origin, religion or belief, age, disability and sexual orientation. The Directives presented profound challenges to the existing approaches to combating discrimination based on these grounds across Europe and aimed to ensure that all individuals living in the EU, regardless of their nationality, could benefit from effective legal protection against such 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 Directive⁶ requires Member States to prohibit certain forms of discrimination, namely direct and indirect discrimination, harassment and instructions to discriminate, on the grounds of racial or ethnic origin. It covers employment, self-employment and occupation, as well as vocational training, social protection including social security and healthcare, social advantages, education and access to and supply of goods and services available to the public, including housing. The Employment Equality Directive⁷ 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 discriminate, 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'.⁸ Since the entry into force of the Lisbon Treaty in December 2009, the Charter has the same binding legal value as the Treaties.

Even though all Member States have transposed the two Directives into their national law, certain discrepancies still remain. For instance, the Anti-discrimination Act of the most recent Member State **Croatia** (in force since January 2009) raises doubts as to whether it brings national law into full compliance with the Directives. Exceptions to the prohibition of discrimination may still be too wide, unclear and open to interpretation despite amendments adopted in 2012.

As far as the candidate countries are concerned, the first comprehensive Anti-discrimination Act in the **former Yugoslav Republic of Macedonia** entered into force on 1 January 2011, but without explicitly mentioning sexual orientation as a protected ground. Although most of the recent **Turkish** legislative changes reflect an attempt towards harmonisation, there are still major shortcomings (see below), and the anti-discrimination provisions currently in force as part of criminal, administrative and civil law contain different non-exhaustive lists of protected grounds.⁹ In both candidate

⁴ Treaty establishing the European Community.

⁵ Treaty on the Functioning of the European Union, also called the Lisbon Treaty (the Lisbon Treaty amended the TEC and changed its name to the TFEU).

⁶ 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.

⁷ 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.

⁸ Article 21 of the Charter.

⁹ A draft Law on Combating Discrimination and Establishment of an Equality Council was presented by the Government in 2009. After the text was submitted for public consultation, expectations were high for this new comprehensive piece of legislation. However, although amendments significantly removed all references to sexual orientation and sexual identity, the bill has not yet been adopted.

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.

Concerning the EEA countries, only **Norway** has comprehensive anti-discrimination legislation, in line with both the Employment Equality Directive and the Racial Equality Directive. **Iceland**¹⁰ and **Liechtenstein** both have some anti-discrimination provisions scattered among various pieces of legislation, including constitutional law, civil law, administrative law, criminal law and labour law, but they are far from reflecting the standards of the Directives.¹¹

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 it considers to have failed to fulfil their Treaty obligations, for instance by failing to transpose the Racial Equality Directive or the Employment Equality Directive. It may initiate proceedings for non-communication of transposition or for non-conformity where the transposition, or eventually the implementation, is incomplete or incorrect. Since the deadline for transposition, 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 throughout the territory of a Member State 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, more than 10 years after the adoption of the Directives, there are still some pending cases.¹² In June 2011, the Commission referred **Italy** to the Court of Justice for failure to transpose the Employment Equality Directive with regard to the duty to provide reasonable accommodation. The Court subsequently found that the Italian transposition of Article 5 of the Directive was not sufficient,¹³ and Italy eventually amended its legislation to ensure compliance with EU law.¹⁴

¹⁰ Iceland currently enjoys the dual nature of EEA country and acceding country to the EU. A comprehensive anti-discrimination bill was due to be presented to the Icelandic Parliament in 2012, but this did not happen.

¹¹ **Iceland** and **Liechtenstein** have traditionally developed legislation related to gender, with concepts of discrimination specifically related to that area, and there are only a few provisions regarding the other protected grounds.

¹² Romania and Greece concerning non-conformity with Directive 2000/78/EC, Finland concerning Directive 2000/43/EC and Belgium concerning both Directives.

¹³ C-312/11, *Commission v Italian Republic*, judgment of 4 July 2013 (not yet reported), ECLI:EU:C:2013:446.

¹⁴ Italian Law decree of 28 June 2013 No 76, in Official Journal No 150 of 28 June 2013.

On 17 January 2014, the European Commission adopted its second report on the state of implementation of the Racial Equality Directive and the Employment Equality Directive in the EU Member States.¹⁵ In this report the Commission notes that all 28 Member States have transposed the Directives and acquired some experience of working within this framework. The focus of the report is therefore on the application by the Member States of the Directives and their interpretation by national courts as well as by the Court of Justice of the EU. The issues of concern raised by the Commission mirror those that are raised in this report.

B. 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, and supply of and/or access to goods and services, including housing. The Directives do not contain any definition of the grounds. This section examines how the Member States, candidate countries and EEA countries have incorporated the different grounds of discrimination into 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 (for instance, **Croatia**, the **former Yugoslav Republic of Macedonia**, **France**, **Greece**, **Hungary**, **Poland**, **Romania** and **Slovenia**). 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 definitions 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 does not have a written constitution, **Denmark**, which does not include a general anti-discrimination clause in the Constitution, **Liechtenstein**, which only includes reference to women and men, and **Norway**, which generally refers to human rights¹⁶). 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**, **Denmark**, **Estonia**, **Iceland**, **Liechtenstein**, **Luxembourg**, the **Netherlands**, **Slovenia**, **Spain** and **Turkey**, constitutional provisions are deemed to be applicable to horizontal relations as well.¹⁷ In a minority of countries, horizontal direct effect remains theoretical or largely debatable (for instance, **Belgium**, **Croatia**, the **former Yugoslav Republic of Macedonia**, **Ireland**, **Italy**, **Poland** and **Portugal**).

In the majority of countries, general constitutional equality guarantees apply, thus theoretically covering the material scope of the Directives (see Chapter 2), 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 **Croatia**, **Cyprus**, **Finland**, the **Netherlands** and **Spain**, the scope of national law

¹⁵ COM (2014) 2 final, 17 January 2014, available at http://ec.europa.eu/justice/discrimination/files/com_2014_2_en.pdf.

¹⁶ After the cut-off date of this report, on 20 June 2014, the Norwegian Council of Ministers approved and adopted an amendment to the Norwegian Constitution adding a new Section 98 containing a general equality clause.

¹⁷ In **Turkey**, Article 10 of the Constitution (general non-discrimination provision) has been directly applicable since January 2012, further to the constitutional reform on the right to initiate a constitutional review by individuals.

is broad, at least in relation to the public sector. 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.

Some countries, such as **Sweden**¹⁸ and the **UK**,¹⁹ having in past years opted for a single act, have taken the opportunity to clarify existing provisions and to fill the gaps and inconsistencies caused by a patchy legal framework. In **Finland**, a draft law was published by the Ministry of Justice in November 2012, proposing a comprehensive reform of national anti-discrimination legislation. The Act would bring other discrimination grounds to a closer or to the same level of protection as for ethnicity.²⁰

In contrast, a few attempts to adopt a single comprehensive instrument have failed, for instance in **Spain**. The anticipated dissolution of Parliament and the general elections that followed in November 2011 disrupted the decision-making process and the new government showed no intention to follow up on the proposal. Similarly, in the **Netherlands**, the previous government was 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, would be integrated into one single act. Since this government fell in the spring of 2012, however, it is unclear whether the new coalition government will proceed with this planned reform.

A number of Member States, such as **Belgium, Bulgaria, 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 **former Yugoslav Republic of Macedonia** covers extra grounds not provided for in the Directives, it does not include sexual orientation.

The table below shows the variety of grounds which have been introduced at the national level (including the five grounds mentioned in the two Directives) in specific anti-discrimination legislation and other types of law granting protection against discrimination.

Grounds protected on the national level in various 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, nationality, birth, class.
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.

¹⁸ **Swedish** 2008 Discrimination Act (2008:567).

¹⁹ **UK** Equality Act 2010 of 8 April 2010.

²⁰ The draft was presented to Parliament in April 2014, and is now awaiting first reading.

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 to which the Republic of Bulgaria is a party.
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	Community, race, ethnic origin, religion, disability, age, sexual orientation language, sex, political or other conviction, national or social descent, birth, colour, wealth, social class, or any other ground.
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, sexual identity.
FORMER YUGOSLAV REPUBLIC of MACEDONIA	Race, colour, gender, belonging to 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 or any other ground.
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 organisation, other situation, attribute or condition of a person or group.
ICELAND	Gender, race, ethnic origin, colour, language, religion, political or other opinion, national or social origin, association with a national minority, family origin, nationality, sexual orientation, age, disability, property, financial status, residence, social class, health, parentage, cultural, economic, social or other status in society, birth or other status.
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.
LIECHTENSTEIN	Gender, pregnancy, disability, sexual orientation, race, national origin, nationality, ethnicity, language, religion or belief.
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 an employers' association, language, national or social origin, association with a national minority, property, birth or other status, sexual orientation, age, religion or belief and gender identity.
NETHERLANDS	Race, religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality and civil (marital) status, disability and chronic disease, age.
NORWAY	Ethnicity, national origin, descent, skin colour, language, religion or belief, disability, age, sexual orientation, political affiliation, membership of trade unions, part-time/temporary work.
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, sex, 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, health condition, 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.
TURKEY	Language, race, gender, political opinion, philosophical belief, religion and sect or any such considerations, colour, disability.
UNITED KINGDOM	Northern Ireland: disability and dependant status, racial grounds, including grounds of colour, nationality (including citizenship), ethnic origins, national origins, membership of the Irish Traveller community, religion, political belief and belief, racial group, age, marital status, sexual orientation, gender.
	Great Britain (England, Wales and Scotland): racial grounds, including grounds of colour, nationality (including citizenship), ethnic origins, national origins, gender, including gender reassignment, pregnancy and maternity, marriage/civil partnership status, disability, religion/belief, sexual orientation, age.

C. Racial or ethnic origin

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

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** 2008 Discrimination Act refers to ethnicity (Ch. 1 S. 5 pt. 3), defined as ‘national or ethnic origin, skin colour or similar circumstance’. 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 most legal texts to be replaced with ‘ethnic affiliation’. 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 or ethnicity. However in May 2013 the French National Assembly adopted a bill removing the words ‘race’ and ‘racial’ from all national legislation, including legislation which ratifies international treaties or transposes the Racial Equality Directive. These terms will be replaced by ‘racist’, ‘for racist reasons’ or ‘alleged race’, if the bill is also adopted by the Senate, where it

is currently awaiting its first hearing.²¹ Although the **Hungarian** Fundamental Law refers to 'race' and 'colour', the Equal Treatment Act also mentions 'racial affiliation' and 'belonging to a national minority'.

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, 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*²²

'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 Directive 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.'

Nevertheless, it is undeniable that the concepts of ethnicity and religion are closely linked. The European Court of Human Rights (ECtHR) 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.²³

In the **Netherlands**, case law has recognised the possibility for discrimination against Jews,²⁴ and in certain circumstances Muslims,²⁵ to be challenged as racial discrimination. In the **United Kingdom**, discrimination against Sikhs²⁶ or Jews²⁷

²¹ Bill No 139 adopted by the National Assembly on 16 May 2013.

²² Lucy Vickers, *Religion and Belief: Discrimination in Employment – EU law*, Thematic report by the European Network of Legal Experts in the Non-Discrimination Field, 2007.

²³ Para. 55, *Timishev v Russia*, Applications 55762/00 and 55974/00, 13 December 2005.

²⁴ Opinion 1998/48, Equal Treatment Commission.

²⁵ Opinion 1998/57, Equal Treatment Commission.

²⁶ *Mandla v Dowell Lee* [1983] 2 AC 548.

²⁷ *Seide v Gillette Industries Ltd.* [1980] IRLR 427.

has been accepted as discrimination on racial grounds (specifically, ethnic origin). The UK Equality Act also requires the Government to introduce secondary legislation to make caste an aspect of 'race' as a protected ground.²⁸ 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 **Iceland** and **Turkey**,²⁹ have set up such a body, although several Member States did not comply with this requirement until several years after the end of the transposition period. For instance, the Czech Republic and Spain only put in place their equality bodies in 2009 while the existing Polish Office of the Ombudsperson (Commissioner for Civil Rights Protection – *Rzecznik Praw Obywatelskich*) was designated as the equality body in 2010. In 2013, the Commission launched infringement proceedings against Finland concerning the competences of the equality body. In the **former Yugoslav Republic of Macedonia**, the Anti-discrimination Act made provision for the establishment of the Commission for Protection from Discrimination in 2011.³⁰ Of the EEA countries, only **Norway** has a specialised body mirroring the requirements of the Racial Equality Directive.³¹

D. 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. In **Hungary**, Article 6 of Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities stipulates that religious activities are linked to a world view directed towards the transcendental and showing a system of faith-based principles which are focused on existence as a whole. It also embraces the entire human personality through specific requirements of conduct that do not offend morals and human dignity.

In the context of the second implementation report on the Racial Equality Directive and the Employment Equality Directive adopted on 17 January 2014,³² the Commission clarified that the concept of 'belief' should be read in the context of 'religion or belief' and that it refers to a belief or a philosophical conviction which does not need to be of a religious nature, but it does not cover political opinion.

²⁸ Although a government regulation to this effect entered into force on 25 June 2013, it has still not been implemented. The Government has announced its intention to introduce the required legislation into Parliament in 2015.

²⁹ In 2012 **Turkey** did, however, set up a Human Rights Institute with a mandate which includes protection of human rights, preventing violations and reviewing complaints. Combating discrimination is not explicitly listed.

³⁰ The founding session of the Commission was held on 17 January 2011.

³¹ **Iceland** has no specialised body with regard to racial and ethnic origin and **Liechtenstein** has a specialised body of some description dealing with disability.

³² SWD(2014) 5 final of 17.1.2014 accompanying COM (2014) 2 final, 17 January 2014, available at <http://eur-lex.europa.eu/>.

Nathasja | 1990



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**.³³

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

(paras 51-53) *'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 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...

*The Baha'i faith, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism are all religions for the purposes of this provision.*³⁴

Most of the controversy around the 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. This exception is examined in further detail below.³⁵

There has been a serious increase in case law arising since the adoption of the Directives relating to dress codes and religious symbols,³⁶ 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, Spain,**³⁷ **Sweden** and the **United Kingdom**. In **Sweden**, further to a hotly debated case regarding a student who wore a niqab during training to become a day care teacher,³⁸ the School Inspectorate issued guidelines on a ban on veils covering an individual's face in classrooms, with the support of the Equality Ombudsman. There is legislation regulating access to employment in, for instance, **Germany** where several *Länder* (e.g. Baden-Württemberg, Bavaria and Hesse) enacted a new law prohibiting the display of religious symbols in violation of the principle of neutrality, further to a case where a civil servant returned to work wearing a burka. In **Turkey**, a regulation related to the general attire of staff in public administration has been occasionally invoked to

³³ In the Netherlands, the term *levensovertuiging* (philosophy of life) has been adopted because this had already been interpreted through case law. It includes broad philosophies, such as humanism, but it does not extend to every view of society. In addition to *levensovertuiging*, the **Dutch** General Equal Treatment Act (GETA) also covers *godsdienst* (religion).

³⁴ http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpgaen_20100015_en.pdf.

³⁵ See page 19.

³⁶ See, for instance, *Lautsi and others v Italy* (No 30814/06), ECtHR (Grand Chamber) Judgment of 18 March 2011 or *Eweida and others v United Kingdom* (No 48420/10; 59842/10; 51671/10; 36516/10), ECtHR Judgment of 15 January 2013.

³⁷ See, for instance, Decision No 35/2012 of Court 32 of Madrid, 25 January 2012.

³⁸ Equality Ombudsman Decision, Case 2009/103 of 30 November 2010.

prohibit the wearing of the Islamic headscarf in the public sector.³⁹ Moreover, a ban has been imposed in universities since 1983 by the High Board of Education, which was upheld by the Constitutional Court.⁴⁰

Secularity and neutrality of private employers in France – the ‘Baby Loup’ case

The *Baby Loup* case concerns an employee of a privately run day care centre for underprivileged children who was dismissed when she returned from maternity and parental leave for wearing an Islamic veil in violation of the centre’s internal regulations. The claimant filed a complaint arguing that the dismissal violated the principle of non-discrimination on the ground of religion.

The first and second instance courts dismissed her claim on the ground that the association managing the day care centre, Association Baby Loup, was pursuing action targeting underprivileged young children and the social integration of women and therefore aimed, in accordance with its mission, to offer a neutral environment especially for children who, because of their young age, were to be preserved from exposure to the staff’s religious beliefs. The courts held that given the legitimacy of these objectives, the day care centre’s in-house regulations were justified in stating that respect for the freedom of religion of all its staff members cannot prevent enforcement of the principles of secularity and neutrality in all the activities conducted by the association.

In March 2013, the Social Chamber of the Supreme Court (*Cour de cassation*) held that the principle of secularity (Article 1 of the Constitution) is not applicable to employees of the private sector who are not in the position of managing a public service. It therefore cannot be invoked by a private employer to hinder the protection against discrimination provided by the Labour Code. The Supreme Court held in addition that restrictions to freedom of religion must be justified by the nature of the particular occupational activities concerned or of the context in which they are carried out, and constitute a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. The general and imprecise restriction contained in the in-house regulations did not comply with these requirements and the dismissal was therefore null and void. The case was sent back before another court of appeal.

In November 2013, the Court of Appeal of Paris followed a different legal argument, based on the case law of the ECtHR on the protection of philosophical and religious orientations of organisations with an ethos based on religion or belief. The Court held that the purpose of maintaining the secular credo of the child care centre, as expressed in its statutes and in-house regulations, constituted a legitimate mission of public interest often carried out by a public service. In addition, given the duty to protect the freedom of religion and belief of the children as recognised by Article 14 of the Convention of the Rights of the Child the day care centre could be considered as an organisation with an ethos based on the ‘belief’ of secularity.

Meanwhile, the Court of Appeal did not address the fact that the French Parliament has not transposed into French law the possibility under Article 4 (2) of the Employment Equality Directive to provide an exception from the prohibition of discrimination on the ground of religion or belief for employers with an ethos based on religion or belief.

³⁹ Regulation Concerning the Attire of Personnel Working at Public Institutions, Official Gazette No 17849, 25 October 1982.

⁴⁰ Despite the attempt by the Director of the High Board of Education in October 2010 to end the ban on the wearing of headscarves, several universities were reported to be continuing with the prohibition in practice.

As a result of the Court of Appeal's decision, the case was sent back to the Supreme Court, this time to be decided by the plenary session.⁴¹

Shortly after the Court of Appeal of Paris issued its decision, the Council of State (supreme court in administrative matters; *Conseil d'Etat*) rendered a legal opinion on the scope of the principle of secularity regarding private as opposed to public employees.⁴² The opinion had been requested by the Defender of Rights (the national equality body) and clearly determined that the duty of neutrality only applies to public sector employees. It cannot be imposed on beneficiaries of public services, and there is no intermediary category between employees and beneficiaries upon which the duty of neutrality could possibly be imposed.

Specific provisions on religion or belief – ethos-based organisations

Most of the controversy around the 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). 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 people 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 differential treatment on the grounds of religion or belief, and cannot be used to justify discrimination on another ground, for example sexual orientation.

Hungarian legislation on ethos-based organisations possibly in breach of the Directives

In Hungary, Article 12, paragraph (2) of Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities stipulates that, 'since church institutions are ideologically committed, such conditions may be determined concerning recruitment and the establishment, maintenance and termination of the legal relationship of employment as are necessary to preserve their specific identity'.

It remains to be seen how the relation of this provision with Article 22, paragraph (1), point (b) of the Equal Treatment Act (ETA) on ethos organisations will be interpreted. Article 12 of Act CCVI does not specify what types of special conditions may be set and therefore the provision could be interpreted along the lines of Article 22 as a declarative rule which merely reinforces already existing special rights of organisations based on a religious ethos put in place under the ETA.

However, it could also be argued that there would have been no point in re-declaring an already existing right, and therefore the legislator's intention behind the adoption of Article 12 of Act CCVI was to allow church institutions to set conditions going beyond those already permitted under the ETA. In this case there would be a collision between the ETA and the new provision. Based on the principle of *lex posterior derogat legi priori* ('the later law overrules the earlier one'), this collision could be solved in favour of

⁴¹ After the cut-off date of this report, the plenary session of the Supreme Court rendered the final decision in the *Baby Loup* case: Decision No 612 of 25 June 2014 (13-28.369), ECLI:FR:CCASS:2014:AP00612.

⁴² Study adopted by the General Assembly of the Council of State on 19 December 2013, available at: http://www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2014/09/conseil_detat_-_etude_voile_et_liberte_religieuse_-_2013.pdf.

Article 12. However, this interpretation opens the door for employment-related differentiation that goes far beyond what is allowed by the Employment Equality Directive.

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. The **Dutch** (then) Equal Treatment Commission found in 2012⁴³ that a church, when renting out houses owned by the church, cannot make distinctions between potential tenants based on their religion as this activity falls outside the internal affairs of the church, placing them within the scope of national anti-discrimination law.

Not all countries chose to include the Article 4(2) exception: such was the case of **France, Portugal, Romania**, and **Sweden**. Although the **Romanian** anti-discrimination law (Ordinance 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, 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, Croatia, Cyprus**, the **Czech Republic, Denmark**, the **former Yugoslav Republic of Macedonia, Germany, Greece, Hungary, Italy, Ireland, Latvia, Lithuania, Luxembourg, Malta**, the **Netherlands, Norway, Poland, Slovakia, Slovenia** and the **United Kingdom**.

Some states have provided exceptions that appear to go beyond the strict terms of the Directive (e.g. **Hungary**⁴⁴) or which remain ambiguous (e.g. the **Netherlands** and the **UK**). For instance, there are concerns in several states that the exceptions based on Article 4(2) may be too wide (e.g. **Greece, Ireland** and **Italy**). Meanwhile, 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.

E. Disability

On 23 December 2010, the EU ratified the UN Convention on the Rights of Persons with Disabilities and was thus the first international organisation to accede to an international treaty on human rights.⁴⁵ 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’ in the case of *Chacón Navas*, distinguishing disability from sickness.⁴⁶ In 2013, the CJEU eventually rendered another landmark decision on the concept of ‘disability’, while also referring explicitly to the obligations of EU Member States following the ratification by the EU of the UN

⁴³ Opinion of the Equal Treatment Commission (ETC), ETC 2012-84 dd of 4 May 2012.

⁴⁴ Regarding the Hungarian legislation, see textbox on page 19.

⁴⁵ For the full list of countries which have signed/ratified the Convention, please see Annex 1.

⁴⁶ Paras. 43–45, Case C-13/05 *Chacón Navas v Eurest Colectividades SA*, Judgment of 11 July 2006, [2006] ECR I-6467. See commentary by Lisa Waddington (2007), *Common Market Law Review* 44, p. 487.

CRPD.⁴⁷ The Court underlined the importance of interpreting the Employment Equality Directive in a manner which is consistent with the UN Convention, and held that the concept of 'disability' must be understood as:

a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers. (para. 38)

The Court also noted that the impairment must be 'long-term' and that a curable or incurable illness which leads to the required degree of limitation does fall within the concept of 'disability'. An illness which does not cause such a limitation, however, does not constitute a 'disability' within the meaning of the Directive.⁴⁸

The majority of national legislation contains many examples of definitions of disability (e.g. **Austria, Belgium, Croatia, Cyprus, the Czech Republic, Estonia, the former Republic of Macedonia, France, Germany, Iceland, Lithuania, Luxembourg, Norway, Portugal, Slovakia, Spain, Sweden and Turkey**) but these stem from the context of social security legislation rather than anti-discrimination law. As far as candidate countries are concerned, there is no definition of disability in the Anti-discrimination Act in the **former Yugoslav Republic of Macedonia** mirroring *Chacón Navas* or *HK Danmark*.⁴⁹ The **Turkish** definition refers to difficulties in adapting to social life and the need for protection,⁵⁰ which significantly differs from the definition provided by the CJEU. In **Iceland**, the definition of disability does not refer to professional life and merely includes mental or physical disability which requires special services and assistance without further specifying in which areas of life.

A tentative assessment of national definitions of 'disability' as compared with the CJEU's recent *HK Danmark* ruling indicates that the definitions of 'disability' applied in most of the EU Member States for the purpose of anti-discrimination appear *a priori* in line with the ruling. Some discrepancies exist however, in countries such as **Cyprus, Greece**,⁵¹ **Poland** and **Slovakia**.⁵² 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'⁵³ – 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. In addition, the definitions of disability in a

⁴⁷ CJEU, joined cases C-335/11 and C-337/11, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, judgment of 11 April 2013, not yet reported, ECLI:EU:C:2013:222. Commentary by Lisa Waddington (2013) in *European Anti-discrimination Law Review*, issue 17, page 11.

⁴⁸ CJEU, *HK Danmark*, paras 39-42.

⁴⁹ The ratification by the former Yugoslav Republic of Macedonia of the UN CRPD implies that the provisions of the Convention are in theory directly applicable before national courts, including the definition of 'disability'. It is, however, unlikely that a national court would apply international law directly.

⁵⁰ 'A person with a disability is a person who has difficulties in adapting to social life and in meeting daily needs due to loss of physical, mental, psychological, sensory or social capabilities at various levels by birth or by any reason thereafter and who therefore needs protection, care, rehabilitation, advice and support services', Article 3(a) of the 2005 Law on Persons with Disabilities.

⁵¹ However, the ratification by Greece of the UN CRPD implies that the provisions of the Convention are legally binding in Greece.

⁵² However, the ratification by Slovakia of the UN CRPD implies that the provisions of the Convention take precedence over Slovak legislation.

⁵³ Integration of Persons with Disabilities Act, Sections 1.1 and 1.2 Additional Provisions.

number of countries fail to make reference to the interaction with various barriers, only focusing on the limitations and impairments of the person concerned. These countries' definitions would thereby not be fully consistent with the case law of the CJEU and with Article 1 of the UN CRPD. These countries are **Austria, Bulgaria, Czech Republic, Estonia, Finland, Germany, Iceland, Ireland, Italy, Latvia, Liechtenstein, Luxembourg, Norway, Romania, Slovenia, Sweden** and the **United Kingdom**. Some countries, including **Estonia, Hungary, Lithuania** and **Malta**, go beyond the employment field by referring to everyday activities or all aspects of social life and, likewise, **Sweden** and **Norway** do not restrict the scope of relevant impairment to professional activities only.

In Denmark epilepsy and Asperger's Syndrome do not constitute disabilities

In a decision of February 2013, the Danish Equal Treatment Board found that the epilepsy of a complainant who had not provided any medical data regarding her condition could not be recognised as a disability for the purposes of the protection provided by the Act on Prohibition of Discrimination in the Labour Market etc.⁵⁴ The complainant was a teacher in an after-school programme who had informed her employer when she was hired that she was in medical treatment for her epilepsy and that she did not have seizures. However, during the first week of employment she had at least one epileptic seizure, and she was dismissed due to reasons both related and unrelated to her condition. She claimed that she had been discriminated against because of disability, but the Board found that under such circumstances the complainant's epilepsy could not be characterised as a disability.

In another case in 2012, the Board of Equal Treatment had already found that in principle a diagnosis of Asperger's Syndrome does not by itself predict the specific impairments that will develop over time. In the case at hand medical records showed that the person with Asperger's Syndrome was under medication, showed normal psychomotor speed and had no symptoms of psychosis, depression or anxiety. Under such circumstances the equality body found that any possible impairment could not be deemed with sufficient certainty to constitute a disability within the meaning of the anti-discrimination legislation.⁵⁵

German Federal Labour Court interprets social reactions to a symptom-free condition as constituting a disability

The claimant was living with HIV without showing any symptoms, and argued that he had been dismissed illegally during the probation period due to a disability. The first and second instance courts had found no discrimination, but the Federal Labour Court (*Bundesarbeitsgericht*) reversed the lower instance decisions and reconceptualised the definition of disability.⁵⁶ The Court held that an interpretation of disability in the light of EU law must lead to a wide concept of disability, combining the elements that are advantageous for a disabled person in EU law and in national law. The concept of disability as covered by anti-discrimination law is thus broader than the concept defined by the national Social Code, and should follow the definition adopted by the CJEU in the *HK Danmark* ruling. The Court added that German law goes beyond the CJEU definition by regarding a physical impairment that lasts longer than six months as sufficient to constitute (a physical) disability and by referring not only to inclusion in the workforce but to inclusion in social life in general.

⁵⁴ Danish Board of Equal Treatment Decision No 47/2013 of 27 February 2013.

⁵⁵ Decision No 275/2012 of 9 May 2012.

⁵⁶ German Federal Labour Court Decision No 6 AZR 190/12 of 19 December 2013, para 43ff.

Finally, the Court explicitly stated – in the context of HIV infection without impairing symptoms – that a disability can be created by social reactions to a long-term illness impairing the participation in society of the person concerned. It is thus the disadvantageous treatment of persons with an HIV infection without symptoms which impairs the inclusion of the person in social life. The Court also clarified that a lack of reasonable accommodation can preclude the possibility of justification of unequal treatment; if an employer has not taken sufficient measures of reasonable accommodation, this can lead consequently to discrimination.

As the lower courts did not sufficiently consider these matters the case was referred back to the lower instance for reconsideration.

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 **Austria**⁵⁷ and **Germany**⁵⁸ impairments must be likely to last for more than six months in order to amount to disabilities, while in the **United Kingdom**⁵⁹ the impairment should last or be likely to last for at least 12 months. In contrast, other states require the impairment to be indefinite in duration (**Cyprus**⁶⁰ and **Sweden**⁶¹).

It is not yet clear whether the Court regards the formula provided in *Chacón Navas* and *HK Danmark* as an exhaustive definition of disability. In particular, this definition leaves no space for the protection of those assumed to be disabled or likely to have a future disability. These scenarios are anticipated in some national legislation. 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.⁶² **Dutch** law covers 'an actual or assumed disability or chronic disease',⁶³ 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'.⁶⁴ **Slovak** and **UK** law also protect individuals with respect to past disabilities.

In the **Czech Republic**, employment agencies have been prohibited since 1 January 2012 from assigning persons with a disability to temporary work. Although this measure was adopted in an attempt to protect persons with disabilities from exploitation and to ensure their regular employment, it seemed to be in breach of the Employment Equality Directive as it provides for an absolute ban on employing persons with disabilities in a certain category of work, i.e. temporary work.⁶⁵

⁵⁷ Para. 3, Federal Disability Equality Act.

⁵⁸ Section 2, Social Code IX and Section 3, Disabled Equality Act.

⁵⁹ Section 1(1), Disability Discrimination Act 1995.

⁶⁰ Act 127(II)/2000.

⁶¹ Chapter 1, Section 5, paragraph 4, Discrimination Act (2008:567).

⁶² Section 6(1)(a), Employment Equality Act 1998-2011.

⁶³ Article 1(b), Act of 3 April 2003 to establish the Act on Equal Treatment on the Grounds of Disability or Chronic Disease, *Staatsblad* 2003, 206.

⁶⁴ Section 2a, paragraph 11(d) of 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.

⁶⁵ After the cut-off date of this report, on 18 June 2014, Act No 136/2014 was adopted to amend Section 66 of the Employment Act 435/2004, thereby removing the prohibition on employment agencies assigning persons with a disability to temporary work. The amendment took place following infringement proceedings initiated by the European Commission and entered into force on 1 January 2015.

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'.⁶⁶ This provision has been implemented very unevenly across the states. In its landmark decision *HK Danmark*, the CJEU provided further clarification on the concept of reasonable accommodation as defined by the Employment Equality Directive. The Court held that in this regard the Directive must be interpreted in accordance with the UN CRPD as 'referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers'.⁶⁷ Reasonable accommodation may therefore include both material and organisational measures such as adapted working hours.

In many countries judicial interpretation is still scarce or lacking regarding the limits and scope of the duty to provide reasonable accommodation. However, it can be said that the following states have legal provisions that approximate to the reasonable accommodation duty found within the Directive: **Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, the former Yugoslav Republic of Macedonia,**⁶⁸ **France, Greece, Hungary, Ireland, Italy,**⁶⁹ **Latvia, Liechtenstein, Lithuania,**⁷⁰ **Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia,**⁷¹ **Spain, Sweden, and the United Kingdom.** 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. **Croatia, the former Yugoslav Republic of Macedonia, Latvia and Sweden**) 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 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). Having said this, outside the field of employment, the duty is not absolute and quite restricted. In **Malta**, reasonable accommodation is restricted to employees, hence to the exclusion of job seekers which is in breach of Directive 2000/78/EC.

Italy amends reasonable accommodation legislation following CJEU ruling

Italy had implemented the Employment Equality Directive without adopting any provisions regarding the duty to make reasonable accommodation. Following infringement proceedings initiated by the European

⁶⁶ Article 5, Directive 2000/78/EC.

⁶⁷ CJEU joined cases C-335/11 and C-337/11, *HK Danmark (Ring and Skouboe Werge)*, para 54.

⁶⁸ Clear provisions regarding reasonable accommodation have been introduced with the entry into force of the Anti-discrimination Act.

⁶⁹ Italy only adopted legislation imposing the duty to provide reasonable accommodation in July 2013. However, the legislation states that public employers 'shall apply this provision without any additional burden and with human, financial and instrumental resources already available'. See textbox, page 24.

⁷⁰ However, the wording of the Equal Treatment Act lacks precision and seems to be softer than the Employment Equality Directive. **Lithuania** has also ratified the UN Convention on the Rights of Persons with Disabilities which entered into force in September 2010 but it is not clear whether failure to provide reasonable accommodation can be considered as discrimination.

⁷¹ 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.

Commission in 2011, the Court of Justice (CJEU) ruled on 4 July 2013 that Italy had therefore failed to correctly transpose Article 5 of the Directive.⁷²

The Court rejected the Italian Government's argument that the duty to provide reasonable accommodation was already in force in Italy when the Directive was adopted, through the existence of a number of laws covering the rights of persons with disabilities.⁷³ Although these existing laws provide for measures of aid and support, social integration and protection of people with disabilities, the Court found that none of them established a general duty to provide reasonable accommodation, that is, to offer effective solutions to eliminate 'the various barriers that hinders the participation of disabled people in professional life', as required by the Directive. The Court also rejected the Government's argument concerning the lack of a definition of the concept of 'disability' in the Directive, by noting that Member States must respect both the previous ruling of the CJEU in this regard, *HK Danmark*, and the UN Convention on the Rights of Persons with Disabilities, both of which provide definitions of 'disability'.

Only days before the CJEU delivered its ruling, Italy eventually amended its existing legislation to transpose Article 5 of the Directive, by adding a new Article 3, paragraph 3-bis to Legislative Decree 216/2003.⁷⁴ The added provision does not define reasonable accommodation or offer employers any sort of guidance. It does, however, state as regards public employers specifically, that although they have a duty to provide reasonable accommodation, they 'shall apply this provision without any additional burden and with human, financial and instrumental resources already available'.

The concept of reasonable accommodation has not been included in national legislation in **Iceland**⁷⁵ and **Turkey**⁷⁶. In **France**,⁷⁷ the duty to provide reasonable accommodation is narrower in scope than under the Directive, as it has not been transposed, for instance, to cover officials working in the parliament who can only rely on the direct application of the Employment Equality Directive on the basis of domestic case law.⁷⁸ In **Hungary**, the duty of reasonable accommodation has not entirely been implemented. Concerns are particularly serious 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 contains the obligation to accommodate the needs of people with disabilities in the course of recruitment and to adapt the working environment for current employees, but does not seem to prescribe that reasonable effort should be made to adapt the workplace to special needs with a view to actually employing a person with a disability. In **Bulgaria** the Protection against Discrimination Act, Articles 16 and 32, makes provision for reasonable accommodation for persons with disabilities in

⁷² CJEU, *Commission v Italy*, C-312/11, 4 July 2013, not yet reported, ECLI:EU:C:2013:446.

⁷³ The Government referred notably to the Framework Law on care, social integration and rights of disabled people (Act no. 104/1992); Act no. 68/1999 on the right to work of disabled people; Act no. 381/1991 on Social Co-operatives and Legislative Decree no. 81/2008 on workplace health and safety.

⁷⁴ Legislative Decree of 28 June 2013 No 76, then converted into Law No 99 of 9 August 2013 No on Preliminary urgent measures for the promotion of employment, in particular of youngsters, the promotion of social cohesion, and other urgent financial measures.

⁷⁵ The Act on the Equality of People with Disabilities does provide that assistance in employment should be given when necessary, including adapting the working environment to the worker's needs.

⁷⁶ However, the Persons with Disabilities Act requires both public and private employers to take necessary measures to eliminate or alleviate the barriers and hardship faced by employees with disabilities or job applicants in employment processes and to make physical adjustments. A very limited duty to provide reasonable accommodation is provided by the Civil Servants Act, addressed at people with disabilities working in the public sector. 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.

⁷⁷ See Administrative Supreme Court decisions in the *Perreux* case of 30 October 2009 and the *Bleitrach* case of 30 October 2010.

⁷⁸ For more details on the **French** situation regarding reasonable accommodation, please also see the tables below.

Marcel | 1986



employment and education respectively. In **Romania**, the 2000 anti-discrimination law (Ordinance 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 Ordinance, establishes the duty to ensure reasonable accommodation in access to various public and private services and facilities and in labour relations.

Reasonable accommodation affecting French prosecutor's functions and remuneration⁷⁹

After a prosecutor from the public prosecution office of the Court of Besançon (eastern France) became deaf, his public hearings were assigned to colleagues and replaced with administrative tasks to accommodate his condition. In France, courts sit until hearings on the court roll finish, which often results in night sessions. The extra burden of work was compensated by higher allowances for the plaintiff's colleagues, whereas the plaintiff's remuneration was reduced to the lowest rate of allowances paid by the Court. The General Prosecutor argued that the rate was objective and reasonable as his remuneration was adjusted to reflect his effective participation in the functioning of the institution.

The Council of State (the supreme administrative court) overruled the lower courts' decisions, which held that the duty to provide reasonable accommodation did not apply to allowances related to additional duties of prosecutors. The Council recalled that, in accordance with French case law, Directive 2000/78/EC was directly applicable. It then ruled that the duty to provide reasonable accommodation also implied that the measures taken did not create a disadvantage with regard to remuneration and allowed for career progression. The Council observed that the plaintiff's disability had to be taken into consideration when assessing his participation in the functioning of the public administration and calculating allowances completing his remuneration. It recognised that the lower instances had committed an error in law and concluded that there was indirect discrimination.

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, Croatia, Cyprus, France, Germany, Ireland, Italy** (public employers), **Latvia, Lithuania**, the **Netherlands, Norway, Portugal, Slovakia** and **Spain**). 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, Liechtenstein, Malta, Norway, Spain** and the **United Kingdom**;
- the scale and financial resources of the organisation or undertaking: **Austria, Finland, Ireland, Liechtenstein, Malta, Norway, Slovakia** and the **United Kingdom**; and
- the possibility of obtaining public funding or any other assistance: **Austria, Cyprus, Finland, France, Germany, Ireland, Liechtenstein, Malta**, the **Netherlands, Norway, Portugal, Spain, Slovakia** and the **United Kingdom**.

National legislation is often ambiguous about whether failure to provide reasonable accommodation is to be treated as a form of unlawful discrimination (e.g. **Hungary** and **Latvia**). In some countries there is still no case law that could lead to the conclusion that such an approach is being taken (e.g. **Lithuania** and **Luxembourg**). In **Cyprus**, no reasonable accommodation case has ever been tried in the courts, but the Code of Conduct on Disability Discrimination

⁷⁹ Council of State, Decision No 347703 of 11 July 2012.

in the workplace issued by the equality body in 2010⁸⁰ explicitly provides that an employer's failure to adopt reasonable accommodation measures amounts to unlawful discrimination and is punishable with a fine or imprisonment, like all other forms of discrimination.⁸¹ **Irish** case law holds that a failure to provide reasonable accommodation amounts to discrimination.⁸² 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 **Greece**, failure to meet the duty on reasonable accommodation was found to amount to direct discrimination.⁸³

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.⁸⁴ In **Sweden**, failure to provide reasonable accommodation constitutes direct discrimination in the fields of employment and education.⁸⁵ In contrast, failure to provide reasonable accommodation constitutes indirect discrimination in **Austria**⁸⁶ and **Denmark**.⁸⁷ 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 and in the **Netherlands** as a prohibited form of distinction.⁸⁸ In the **Czech Republic**, the Anti-discrimination Act stipulates that failure to provide reasonable accommodation constitutes indirect discrimination on the ground of disability, and the applicable sanctions are the same as for other forms of discrimination.⁸⁹ In addition, there is a separate provision of the Labour Code which requires employers to secure the necessary workplace accommodation, working conditions, protected workshops and workplaces, special training and guidance for employees with disabilities, although this provision is limited to employees who are registered by the social security authorities as having a disability.⁹⁰ As there is no case law on the issue it is unclear how national courts would apply these two parallel provisions.

Danish employers' duty to provide reasonable accommodation independently of the disabled employee's demands

In 2013, the Danish Board of Equal Treatment held that the employer's duty to provide reasonable accommodation applies independently of whether or not the employee with a disability has asked for any such measures to be put in place.

⁸⁰ This code of conduct was issued by the equality body in order to clarify Art. 5(1) of the Law on Persons with Disabilities No 127(II)2000, as amended by Law No 72(II) of 2007.

⁸¹ Available (in Greek) at: www.no-discrimination.ombudsman.gov.cy/sites/default/files/kodikas_gia_diakriseis_logo_anapirias_ergasia.pdf.

⁸² *A Complainant v Bus Éireann* DEC E2003-04.

⁸³ Decision 2048/2008 of the Court of First Instance of Athens.

⁸⁴ Labour Code, Article LS212-6, para. 2.

⁸⁵ Discrimination Act (2008:567), Chapter 2, Section 1.

⁸⁶ Act on the Employment of People with Disabilities, §7c.

⁸⁷ Act on Prohibition of Discrimination in the Labour Market etc., Section 1(3).

⁸⁸ See above, footnote 16.

⁸⁹ Section 3, paragraph 2 of the Anti-discrimination Act.

⁹⁰ Section 103, paragraph 5 of the Labour Code (2007).

The complainant was employed as a healthcare assistant in a psychiatric hospital. As a result of a broken hand, the complainant was diagnosed with a malposition of the little finger of her right hand, which among other things made handwriting painful and slow.

The complainant was dismissed due to a combination of disability / sickness absences as well as the sense of insecurity and mistrust that the complainant's colleagues felt towards her, which hindered cooperation. Her colleagues' sense of insecurity was primarily due to the fact that the complainant arguably could not use her hand fully, for example in situations where patients should be controlled and retained. The complainant had not required any measures of accommodation from her employer before being dismissed.

The Board stated that the employer had not conducted a thorough investigation of the possibility of transferring the complainant to another department and/or of providing her with technical aids for her documentation tasks.⁹¹ The employer had therefore not fulfilled the obligation to take steps to provide reasonable and appropriate accommodation with regard to the complainant's specific needs. The fact that the complainant had not asked for special accommodation did not make any difference according to the Board, which emphasised the independent obligation of the employer to provide reasonable accommodation. Thus, the complainant was awarded compensation of DKK 245,000 (approx. EUR 33,000).

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, where people with a specific religion can benefit from reasonable accommodation, such as not working on religious holidays or adapting working hours during Ramadan. In **Germany** for instance, the Federal Administrative Court has provided guidance in several recent judgments on the limits of freedom of religion in the field of education, and on the duty of schools to remain religiously neutral without impeding pupils' religious beliefs.⁹²

Reasonable accommodation (RA) is provided for people with disabilities and extended by law to other grounds (in the case of decentralised states only federal law is indicated)

	RA provided for people with disabilities Law	RA extended to other grounds than disability
AUSTRIA	Employment of People with Disabilities Act, §§ 7c (4)-(6) Federal Disability Equality Act, §§ 6(3), 6(4)	No but judicial interpretation is required of the Viennese Anti-discrimination Act. ⁹³
BELGIUM	General Anti-discrimination Federal Act, Arts 4,12° and 14.	No.
BULGARIA	Protection Against Discrimination Act, Arts 16 and 32. ⁹⁴	For religion ⁹⁵ and age. ⁹⁶

⁹¹ Board of Equal Treatment Decision No 67/2013 of 20 March 2013.

⁹² See for instance two decisions of the Federal Administrative Court dated 12 September 2013: No 6 C 25.12 on the participation of a Muslim girl in co-educational swimming classes; and No 6 C 12.12 on the participation of a Jehovah's Witness in a class where a film was shown which included scenes featuring magic.

⁹³ Viennese Anti-discrimination Act, §3.

⁹⁴ Protection can also be found in the Integration of Persons with Disabilities Act (Articles 17-18, 20, 24), and the Labour Code (Article 314).

⁹⁵ Protection against Discrimination Act, Article 13.

⁹⁶ Labour Code, Articles 301-305, 307 and 309.

	RA provided for people with disabilities	RA extended to other grounds than disability
	Law	
CROATIA	Anti-discrimination Act, Art. 4(2).	For religion. ⁹⁷
CYPRUS	Act on Persons with Disabilities, Art. 5(1A) and 9(1)	No.
CZECH REPUBLIC	Anti-discrimination Act, Section 3 §2.	No.
DENMARK	Act on Prohibition of Discrimination in the Labour Market etc., Art. 2(a)	No.
ESTONIA	Equal Treatment Act, Art. 11(2)	No.
FINLAND	Non-discrimination Act, Section 5.	No.
FRANCE⁹⁸	Labour Code, Arts L5121-13, L 5212-2, L5212-13 and L5213-6.	Race or ethnic origin ⁹⁹ and possibly religion. ¹⁰⁰
	Law No 2005-102 for Equal Opportunities and Integration of Persons with Disabilities, Arts 24 V, 32 and 37	No
FORMER YUGOSLAV REPUBLIC of MACEDONIA	Prevention and Protection Against Discrimination Act, Arts 5, para. 1, pt 12; 8, para. 2; 15, para. 1, line 3	For race, religion ¹⁰¹ and age. ¹⁰²
GERMANY	Social Code IX, Art. 81.4.	Possibly religion. ¹⁰³
GREECE	Equal Treatment Act, Art. 10	No.
HUNGARY	Act on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities, Art. 15. ¹⁰⁴	No.
ICELAND	Not explicitly. ¹⁰⁵	No.
IRELAND	Employment Equality Act, S. 16(3).	No.
	Equal Status Act, S. 4	No.
ITALY	Legislative Decree 216/2003, Art. 3, para. 3-bis ¹⁰⁶	No.
LATVIA	Labour Law, Art. 7(3).	No.
LIECHTENSTEIN	Act on Equality of People with Disabilities, Arts 11-14.	No.
LITHUANIA	Equal Treatment Act, Art. 7.	No.

⁹⁷ Act on Holidays, Remembrance Days and Non-Working Days of 30 April 1996 (Article 3).

⁹⁸ There are gaps in the **French** legislation regarding reasonable accommodation for some people such as judges who are not considered as civil servants, unregistered disabled persons, non-salaried disabled workers and disabled persons who are members of the professions or self-employed. The duty to provide for reasonable accommodation for persons with disabilities is therefore incomplete.

⁹⁹ Circular No 2002-063 of 20 March 2002 as last amended in 2012 regards administrative arrangements for special classes admitting non-French speaking children.

¹⁰⁰ In **France** accommodations result from judicial decisions relating to the application of freedom of religion. (Please see the jurisprudence of the Administrative Supreme Court regarding reasonable accommodation on religious grounds of the pupil's duty to attend school and Ministerial Instruction of the Ministry of Public Service No 2106 of 14 November 2005 regarding authorisations of absence on religious grounds.)

¹⁰¹ Limited accommodation is granted in respect of race/ethnicity and religion according to the law on holidays of the Republic of Macedonia (Arts 1 and 2).

¹⁰² Special measures do exist regarding working hours or night shifts for women over 57 and men over 59 according to Art. 179 and 180 of the Labour Law.

¹⁰³ Depending on judicial interpretation of Article 4 of the Basic Law (Constitution).

¹⁰⁴ The Disability Law is clear regarding any aspect of employment except for access to employment where it still needs to be judicially interpreted.

¹⁰⁵ National law does not explicitly include employer's duty to accommodate the needs of persons with disabilities, nor does it define what reasonable accommodation is. Nevertheless, Article 29 of the Act on the Affairs of Persons with Disabilities states that those should be given assistance in their employment when necessary.

¹⁰⁶ See p. 24. Italy included the concept of reasonable accommodation in its legislation following the infringement proceedings initiated by the European Commission and the judgment of the Court of Justice of the EU in Case C-312/11.

	RA provided for people with disabilities	RA extended to other grounds than disability
	Law	
LUXEMBOURG	Equal Treatment Act, Art. 20.	No.
	Disabled Persons Act, Art. 8	No.
MALTA	Equal Opportunities (Persons with Disabilities) Act, Arts 7 and 20.	No.
	Equal Treatment in Employment Regulations, Art. 4.	No.
NETHERLANDS	Disability Discrimination Act, Art. 2.	No.
NORWAY	Anti-discrimination and Accessibility Act on Prohibition of Discrimination on the Basis of Disability, S. 16, 17 and 26.	No.
POLAND	Act on Vocational and Social Rehabilitation and Employment of Persons with Disabilities ¹⁰⁷ , Art. 23a.	No.
PORTUGAL	Labour Code, Arts 84-88.	No.
ROMANIA	Act 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap, Art. 5(4).	For religion. ¹⁰⁸
SLOVAKIA	Act on Equal Treatment in Certain Areas and Protection against Discrimination, Section 7.	No. ¹⁰⁹
SLOVENIA	Act on Equal Opportunities of People with Disabilities, Art. 3(3).	No.
SPAIN	General Law on the Rights of Persons with Disabilities and their Social Inclusion, Art. 2.m	For religion. ¹¹⁰
SWEDEN	Discrimination Act, Ch. 2, S. 1.	For race or ethnic origin, religion or belief and sexual orientation. ¹¹¹
TURKEY	No. ¹¹²	No.
UNITED KINGDOM	(UK) Equality Act, S. 20.	No.
	(NI) Disability Discrimination Act 2006, S.4A	No.

Specific provisions on disability – health and safety

With regard to disabled people, Article 7(2) of Directive 2000/78/EC 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. **Croatia, Cyprus, Greece, Ireland, Luxembourg** and the **Netherlands**. 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.¹¹³ In the **former Yugoslav Republic of Macedonia**, the Anti-discrimination Act sets out three exceptions regarding pregnant women or mothers, the educational needs of

¹⁰⁷ As amended by the Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment of 3 December 2010.

¹⁰⁸ Art. 134(1) letter F of the Labour Code in relation to observance of religious celebrations of the employees grants two vacation days for two religious celebrations each year, to be taken according to the faith of the employee, under the condition that the faith of the employee is a state recognised religion.

¹⁰⁹ Although judicial interpretation is required of Section 2, para. 3 of the Act on Equal Treatment in Certain Areas and Protection Against Discrimination.

¹¹⁰ Law 24/1992, of 10 November, adopting the cooperation agreement between the State and the Federation of Evangelical Religious Entities of **Spain**, Article 12.1; Law 25/1992, of 10 November, adopting the cooperation agreement between the State and the Jewish Communities of **Spain**, Articles 12.1 and 2, Law 26/1992, of 10 November, adopting the cooperation agreement between the State and the Islamic Commission of **Spain**, Articles 12.1 and 2.

¹¹¹ There is no direct duty to apply reasonable accommodation within the Discrimination Act to grounds other than disability, but for the grounds of race or ethnic origin and religion or belief Chapter 3, Section 4 of the Discrimination Act might be used. Regarding the ground of sexual orientation, the School Act may in specific instances be used to achieve such a duty indirectly.

¹¹² Judicial interpretation will be required notably of the Law on Persons with Disabilities.

¹¹³ Section 4(4) Equal Status Act 2000-2011.

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 capabilities¹¹⁴ in view of the specific dangers for employees with a reduced work capability,¹¹⁵ 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 Ordinance does not provide specific exceptions in relation to disability in the context of the health and safety provisions of the Directive. However, the general exception of objective and justified limitation, allowed by Article 9 of the Anti-discrimination Ordinance, could be applicable.

F. Sexual orientation

The introduction of legal protection against discrimination for the first time on the ground of sexual orientation was 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'.¹¹⁶ 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.¹¹⁷ In the **Netherlands**, the concept of sexual orientation has not been interpreted in a way that covers transsexuality and transvestism. Discrimination on these grounds is regarded as sex discrimination, in contrast with **Denmark** where they are considered to be aspects of sexual orientation. In **France**, legislation was adopted in 2012 to include sexual identity as an additional, separate protected ground of discrimination.¹¹⁸

Although explicitly mentioned in the **Hungarian** Equal Treatment Act of 2003, the provision prohibiting discrimination in the new Fundamental Law of **Hungary**¹¹⁹ does not list sexual orientation among the grounds protected from discrimination.¹²⁰ However, the Constitutional Court, ordinary courts and the Equal Treatment Authority have in the past acknowledged sexual orientation as one of the other protected grounds listed in Article 70/A of the former Constitution. Anti-discrimination provisions in the **former Yugoslav Republic of Macedonia**,¹²¹ **Iceland** and **Turkey** do not explicitly mention sexual orientation as a protected ground. As far as EEA countries are concerned, national legislation in **Liechtenstein** gives no definition of sexual orientation. **Norway** provides a similar definition as in many countries, as sexual orientation covers heterosexual, homosexual and bisexual orientation. Transsexualism is encompassed in the definition of gender. The revision and harmonisation of Norwegian anti-discrimination legislation which took place

¹¹⁴ Article 16 (1.2a).

¹¹⁵ Article 16 (1.3).

¹¹⁶ Regulation 2(1), Employment Equality (Sexual Orientation) Regulations 2003, S.I. 1661.

¹¹⁷ See Federal Constitutional Court (*Bundesverfassungsgericht*) of 6 December 2005; 1 BvL 3/03, paragraph 48 *et seq.*

¹¹⁸ Law No 2012-954 of 6 August 2012 on Sexual Harassment.

¹¹⁹ The new Constitution came into force on 1 January 2012.

¹²⁰ Article XV of the Fundamental Law states: 'Hungary grants 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'.

¹²¹ It is, however, mentioned as a ground protected from discrimination in other laws, such as for instance the Law on Labour Relations, Official Gazette of the Republic of Macedonia, No 52/2012, Article 6.

in 2013 did not include any changes to this definition, although gender identity and gender expression were added as separate protected grounds of discrimination, in the Sexual Orientation Anti-discrimination Act.¹²²

Refusal to rent a room to a same-sex couple amounts to direct discrimination on grounds of sexual orientation

The UK Supreme Court recently upheld the decision of the Court of Appeal of England and Wales that the refusal of the defendants, who ran a seven bedroom private hotel, to provide the claimants (a same-sex couple) with a double room for occupation, amounted to direct sexual orientation discrimination.¹²³

The defendants argued that, as Christians, they only let double bedded rooms to married couples, because to do otherwise would be to promote sinful sexual behaviour. They also argued that to find them in breach of the relevant legislation would breach their rights to manifest their religious beliefs under Article 9 of the European Convention on Human Rights. The Supreme Court found that because same-sex couples could not get married in the UK, discrimination between married and unmarried couples would have been indirect. Discrimination between married (differently sexed) and civilly partnered (same sex) couples, which was at issue in the case at hand, was, however, direct. The Court specifically noted that the appellants would not have been willing to let the respondents share a room even if they had been married, and the appellants' policy was therefore unlawful under the Equality Act (Sexual Orientation) Regulations 2007 (since replaced by the materially similar Equality Act 2010).

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.¹²⁴

Another key issue relates to partners' benefits (see the *Maruko* case¹²⁵) 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 individual victims from initiating proceedings. Moreover, in some states the wider political climate remains unfriendly or openly hostile to equality for lesbian, gay and bisexual people (e.g. the **former Yugoslav Republic of Macedonia, Poland and Lithuania**).

G. 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**

¹²² Sexual Orientation Anti-discrimination Act (SOA) of 21 June 2013 No 59, in force on 01.01.2014.

¹²³ Supreme Court decision *Bull & Anor v Hall & Anor* [2012] UKSC 73 of 27 November 2013.

¹²⁴ See ECtHR, *Lillian Ladele and Gary McFarlane v the United Kingdom*, Application numbers 48420/10 and 59842/10, Judgment of 15 January 2013.

¹²⁵ Case C-267/06, *Maruko v Versorgungsanstalt der deutschen Bühnen*, [2008] ECR I-1757.

Employment Equality Act 1998–2011 limits its application to ‘persons above the maximum age at which a person is statutorily obliged to attend school’.¹²⁶ Similarly, in **Denmark** legislation was adopted in 2006 which removes protection from persons under 18 if differential treatment is stipulated in a collective agreement.¹²⁷ 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 apply only to discrimination suffered by adults over the age of 18; children under this age are not protected by this extension of age discrimination legislation.¹²⁸

The transposition of Directive 2000/78/EC 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. In **Sweden** new legislation entered into force on 1 January 2013, extending the protection against discrimination on the ground of age to the fields of goods and services including housing; meetings and public events; health, medical care and social services; social and unemployment insurance and financial aid for education; and public sector employment.¹²⁹

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*,¹³⁰ 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,¹³¹ might potentially greatly affect national implementation, particularly as the

¹²⁶ Section 6(f)(3).

¹²⁷ Act No 31/2006.

¹²⁸ Equality Act 2010 (Commencement No 9) Order 2012 of 18 June 2012.

¹²⁹ Act 2012:673.

¹³⁰ Case C-144/04, *Mangold v Helm*; [2005] ECR I-9981.

¹³¹ Case C-555/07, *Seda Küçükdeveci v Swedex GmbH & Co. KG*; [2010] ECR I-00365.

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.¹³²

Differing interpretations on number of days of paid holiday depending on age

In both Germany and Sweden, collective agreements for public sector employees provide that the number of days of paid holiday increases with the employee's age, rather than with his or her experience. In both countries these provisions were challenged by employees considering that such a distinction constituted direct discrimination on the ground of age.

The Swedish Ombudsman handled a complaint in 2009 and was of the opinion that such a distinction based on age is justified as it constitutes an appropriate and necessary means to reach the legitimate goal of ensuring that older workers can keep working until they benefit from full retirement benefits.¹³³ Therefore the Ombudsman decided not to go to court on behalf of the plaintiff.

In March 2012, the German Federal Labour Court (*Bundesarbeitsgericht*) found after conflicting decisions at lower instance that the provision formed discrimination on the ground of age, violating Section 9 of the Law on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*).¹³⁴ Considering that the provision did not serve the purpose of providing extended holidays to meet the needs of elderly employees, the Court found that there was no justification. In any case, such needs, the court argued, do not exist for the respective life periods covered by the provision. In consequence, younger employees – as claimed by the plaintiff – are entitled to the longer holiday period.¹³⁵

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 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 of the Employment Equality Directive 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.

¹³² *Mangold*, and in particular the CJEU's exercise of powers in that case, was (unsuccessfully) challenged before the Federal Constitutional Court in **Germany**, showing the still fragile authority of EU law in **Germany** regarding the general principle of age discrimination. See Decision by the **German** Federal Constitutional Court (*Bundesverfassungsgericht*), 2 BvR 2661/06 of 6 July 2010.

¹³³ Decision of the Discrimination Ombudsman (*Diskrimineringsombudsmannen*), No 2009/80.

¹³⁴ Decision of the Federal Labour Court (*Bundesarbeitsgericht*) of 20 March 2012, 9 AZR 529/10.

¹³⁵ After the cut-off date of this report, on 21 October 2014, the German Federal Labour Court found that the provision of additional holidays for employees aged above 58 was justified because it was based on the additional need for rest of older workers in this field of work (shoe production). See Decision 9 AZR 956/12.

Sifra | 1993



Compulsory retirement age for pilots is lawful

KLM pilots were obliged to retire at the age of 56 pursuant to the collective agreement in force. By contrast, pilots who had worked part time and who had not accrued a sufficient pension could maintain their employment relationship until the age of 60. When several pilots challenged the compulsory retirement age of 56, the board of KLM and the trade union (*Vereniging van Nederlandse Verkeersvliegers*, VNV) argued that the measure aimed to ensure a balanced workforce (in terms of age and experience, including a balanced distribution of job opportunities), to guarantee foreseeable and regular movement of pilots between grades and to allow personnel costs to be controlled.

Referring to CJEU case law, in particular the *Mangold* (C-144/04) and *Kücükdeveci* (C-555/07) cases, the Supreme Court observed that the principle of non-discrimination on the ground of age is a general principle of EU law.¹³⁶ Recalling the *Rosenblatt* ruling (C-45/09), the Court held that Member States, including social partners, have a wide margin of appreciation in formulating their policies with regard to a compulsory retirement age for certain categories of workers taking into account social policy objectives and the means to achieve these aims. The objective was not to guarantee the safety of airline traffic, as in the *Prigge* case (C-447/09). The Court therefore ruled that the justifications were covered by Article 6(1) of Directive 2000/78/EC and Article 7(1) of the Anti-discrimination Act. The means were deemed appropriate and necessary as 56-year-old pilots were not put in a difficult financial situation as they received a good pension. In addition, they were not prevented from continuing working. In the light of these observations, the Court concluded that KLM/VNV did not discriminate against pilots on the ground of age.

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 is not disproportionate to require civil servants to retire at pensionable age.¹³⁷ In **Cyprus**, 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 'different things... can only be dealt with differently'. By contrast, in the **United Kingdom**, the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011, which came into force on 6 April 2011, removed the possibility for employers to enforce compulsory retirement ages without risk of unfair dismissal claims by amending the Equality Act 2010. Since 1 October 2011, all age-related dismissals have had to be justified by the employer.

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 unfair dismissal for workers after a certain age. In general, this includes the **Czech Republic, Estonia, Poland and Slovakia**. Retirement ages are not specified in national legislation in **Denmark**, but these are commonly found in collective agreements. The Danish Supreme Court found in 2013 that a collective agreement providing for mandatory retirement at the age of 67 is justified where it aims to achieve a more appropriate age distribution among employees and to reduce the workforce by age-related departures rather than dismissals.¹³⁸ In **Germany**, although there is no general mandatory retirement age, there are a number of special regulations regarding maximum ages for specific categories

¹³⁶ Supreme Court (*Hoge Raad*) Decision No LJN: BW3367 of 13 July 2012.

¹³⁷ Case 2003-12-01, Decision of 18 December 2003.

¹³⁸ Supreme Court Decision of 27 August 2013, Case 183/2011.

of public servants, both on federal and *Land* level. In addition, similarly to the situation in Denmark, both collective agreements and individual employment contracts commonly stipulate that retirement is to coincide with the federal pensionable age of 67 (being phased in).

In a second group of states, retirement ages are specified for public sector employees only. The precise age varies: **Belgium** (65), **Cyprus** (65 – being phased in), **Latvia** (65 – being phased in), **Luxembourg** (68), **Norway** (70 – with exceptions for certain sectors such as the armed forces), **Portugal** (70) and **Spain** (65). In **France**, the retirement age specified for public sector employees (65) can be subject to derogation. In 2013, the French Administrative Supreme Court found that the retirement age for public sector employees is justified. This measure was found to constitute a proportionate means to reach the legitimate aim of promoting a better employment distribution among generations.¹³⁹ In **Bulgaria**, in some sectors, such as the professional army¹⁴⁰ and the police,¹⁴¹ 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. In 2011, **Hungary** adopted legislation imposing a mandatory retirement age on public sector employees which coincides with the general pensionable age (currently 62-65 being phased in). The mandatory retirement age of legal professionals such as judges and notaries had until then been fixed at 70, and this abrupt lowering of the retirement age without any transitional period was consequently challenged by the European Commission who brought infringement proceedings against Hungary on this account. In November 2012 the CJEU found that this legislation was in breach of the Employment Equality Directive, and following this ruling the Hungarian Government submitted a bill introducing a transitory period for the implementation of the 2011 legislation.

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** (70), **Malta** (65 – being phased in), the **Netherlands** (67 – being phased in), **Romania** (63-65),¹⁴² **Sweden** (67), **Croatia** (65), and the **former Yugoslav Republic of Macedonia** (62-64).¹⁴³ In **Ireland**, an employee may be dismissed after he or she has reached the 'normal retiring age' for that position. In **Bulgaria** the Labour Code was amended in 2012, and the right of employers to dismiss employees solely on the ground of age when they reached the applicable pensionable age was abolished.¹⁴⁴ In 2011, the CJEU examined the compatibility with the Employment Equality Directive of a collective agreement providing for the automatic termination of employment contracts at retirement age in the case of *Prigge and Others v Deutsche Lufthansa*.¹⁴⁵ The Court found the relevant provision of the collective agreement to constitute direct discrimination on grounds of age, and that the measure could not be justified under the exception provided in Article 2(5) of the Directive regarding public security. The Court also determined that possessing physical capabilities as an airline pilot can fall within the meaning of Article 4(1) of the Directive on genuine and determining occupational requirements, and that such capabilities may diminish with age. However, although the objective relating to airline safety therefore was legitimate within the meaning of Article 4(1), the social partners had imposed a disproportionate requirement as both national and international legislation authorised pilots to carry out their professional activities until the age of 65, under certain conditions, while the collective agreement at hand provided for the automatic retirement of airline pilots at the age of

¹³⁹ France; Supreme Administrative Court (*Conseil d'Etat*), Decision No 351183, 22 May 2013.

¹⁴⁰ 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.

¹⁴¹ Ministry of Interior Act, Article 245(1). The limit is 60 years.

¹⁴² The retirement age is 63 for women and 65 for men.

¹⁴³ The retirement age is 62 for women and 64 for men.

¹⁴⁴ Labour Code, Article 328.10, as amended. Academic workers (professors, assistant professors and doctors of science) are, however, excluded from this amendment and may still be dismissed on age grounds when they reach the age of 65.

¹⁴⁵ Case C-447/09, *Prigge and Others v Deutsche Lufthansa AG*, ECR [2011] p. I-08003.

60. Finally, the Court proceeded to the justification test under Article 6 of Directive 2000/78/EC and ruled that air traffic safety did not constitute a legitimate aim related to employment policy, labour market and vocational training.

Mandatory early retirement age fixed by the French state-owned railway company deemed unlawful¹⁴⁶

After 27 years of employment, the national state-owned railway company (SNCF) ended the plaintiff's employment contract as he had turned 55, granting him an annual pension of EUR 7,619. The plaintiff challenged the decision, alleging that employees retiring at the age of 65 were granted EUR 10,420 and that he had faced discrimination.

The Court of Cassation held that the fact that a decree allowed mandatory early retirement did not preclude the possibility of a decision being incompatible with anti-discrimination legislation. Mandatory retirement may not be considered as discriminatory depending on the justification brought forward by the employer, in particular in relation to health and safety or professional integration as provided for by Article 1133-2 of the Labour Code. In the present case, the financial justification of reducing the number of staff employed by the company did not meet the requirement of Directive 2000/78/EC regarding social and political objectives. Consequently, the decision was annulled and the employer was ordered to reinstate the plaintiff and to contribute to his retirement scheme for the period when he had not been employed. In addition, the company was ordered to pay EUR 130,137 as compensation for the difference between the pension received and the salary he would have earned as an employee and EUR 10,000 for non-material damages.

Another key issue is the justification with regard to age, and national practice varies greatly in this area. 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 or practices which aim to protect and to promote young employees, or to ensure a balance of age in the workforce. For instance, the **UK** permits age distinctions in the payment of the national minimum wage in order to encourage employers to employ younger workers, which seems controversial under the CJEU case law on age. In **Denmark**, the Act on the Prohibition of Discrimination in the Labour Market etc. provides a general exception allowing collective agreements to establish different conditions of employment, remuneration and dismissal for employees aged below 18. The Danish Supreme Court recently found that this provision is in compliance with the Employment Equality Directive, as it constitutes an appropriate means to ensure the integration of young employees in the labour market.¹⁴⁷ As a matter of fact, confusion around the justification issue is clearly noticeable throughout the EU, in particular as regards compulsory retirement, and domestic case law also shows that national jurisdictions are not always consistent in finding discrimination.

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 requirement of a certain 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

¹⁴⁶ Court of Cassation, 9 February 2012 No 10-28651.

¹⁴⁷ Supreme Court Decision of 14 November 2013, Case 185/2010.

and a minimum period of training for entrance to professions). The **Greek** Council of State has declared that an age limit for access to a profession is unconstitutional unless it is justified by reason of necessity.¹⁴⁸

German Federal Labour Court provides guidance on age discrimination¹⁴⁹

The claimant was a 36-year-old lawyer with professional experience whose application was rejected for a place in a trainee programme aimed at 'graduates/young professionals'. Claiming that his application was unlawfully rejected on the ground of age, he brought an action before the labour courts. At the first two instances, his claims remained unsuccessful. The Federal Labour Court, however, returned the case to the Berlin-Brandenburg *Land* Labour Court to examine the actual reason for the rejection, and whether it was the applicant's age or his final examination grades.

According to the ruling of the Federal Labour Court, vacancies targeting specifically university graduates and young professionals may suggest age discrimination, shifting the burden of proof to the defendant. If the employer is not able to present factual arguments for the selection of the successful candidate(s), the unsuccessful applicant(s) may claim compensation for unlawful discrimination on the ground of age. The Court held specifically that general references to the declining learning abilities of older employees are not sufficient for the employer to demonstrate that no unlawful discrimination has taken place.

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, and confusion still remains. An exception is the **Netherlands**, where every government department was obliged to produce 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/EC 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; 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* [2010] ECR I-0000 and C-447/09, *Prigge* [2011] ECR I-08003.

H. 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, Iceland, Italy, Latvia, Liechtenstein, Malta, Poland, Romania, Slovenia, the UK¹⁵⁰** and **Turkey**.

¹⁴⁸ Council of State, 9 May 2012, Decision No 1624 /2012. However, it is noteworthy that the Council of State did not invoke national anti-discrimination law or the Employment Equality Directive, but only the constitutional principles of proportionality, professional freedom and participation in economic and social life.

¹⁴⁹ Federal Labour Court (*Bundesarbeitsgericht*) Decision of 24 January 2013 No Az. 8 AZR 429/11. For another interesting case on age discrimination, see also the Spanish Constitutional Court's Decision No 78/2012 of 16 April 2012, regarding an upper age limit imposed on pharmacists.

¹⁵⁰ However, in the **United Kingdom** the explanatory notes to the 2010 Equality Act make it clear that discrimination by association and discrimination on the basis of perception are intended to be covered by the Act.

CJEU ruling in landmark Coleman case on discrimination by association¹⁵¹

On 17 July 2008, the Court of Justice of the European Union delivered judgment in the case of *Coleman v Attridge Law and Steve Law*. The judgment interprets the meaning of the prohibition of direct discrimination and harassment in employment and occupation on grounds of disability pursuant to Article 2(2)(a) and Article 2(3) of the Employment Equality Directive and especially the meaning of discrimination by association.

The CJEU stated that the purpose of the Directive is to prohibit all forms of discrimination in employment and occupation on the protected grounds, namely disability, sexual orientation, age and religion or belief and is not limited to a particular category of person. As the ECJ explained, 'An interpretation limiting its application only to people who are themselves disabled is liable to deprive the Directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.' (para. 51).

The Court concluded that Directive 2000/78/EC '...must be interpreted as meaning that the prohibition of direct discrimination laid down by those provisions is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a).' (para. 56).

In relation to harassment, the Court used the same reasoning to conclude that '...the prohibition of harassment laid down by those provisions is not limited only to people who are themselves disabled.' (para. 63).

This judgment is very important, as it asserts the general principle that discrimination should also be prohibited when it results in view of the association of a person with other persons to whom a prohibited discrimination ground applies.

Ireland provides a rare example where legislation explicitly forbids both discrimination where a ground is 'imputed' to exist and discrimination due to association.¹⁵² **Croatia** prohibits discrimination based on misconception¹⁵³ (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 both discrimination on perceived or assumed grounds and discrimination by association.¹⁵⁴ As mentioned earlier, in several states the legislation refers to 'real or assumed' race or ethnicity (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** legislation provides protection to individuals who experience discrimination or harassment due to their close relationship with a person whose sex,¹⁵⁵ ethnic affiliation, religion, belief, age, sexual orientation¹⁵⁶ or disability¹⁵⁷ constitutes the

¹⁵¹ Case C-303/06, *S. Coleman v Attridge Law, Steve Law*, [2008] I-05603.

¹⁵² Section 6(1)(b), Employment Equality Act 1998-2011.

¹⁵³ Article 1(3) of the Anti-discrimination Act.

¹⁵⁴ Additional Provisions, Section 1.8.

¹⁵⁵ Para. 5/4 Equal Treatment Act.

¹⁵⁶ Paras. 19/4, 21/4 Equal Treatment Act.

¹⁵⁷ Para. 4/2 Federal Disability Equality Act and para. 7b/5 Employment of People with Disabilities Act.

ground for discrimination or harassment. 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. Perceived or assumed discrimination is covered by the **Norwegian** Anti-discrimination Act, the Anti-discrimination and Accessibility Act and the Working Environment Act, provided that it has actually resulted in a worse or less favourable treatment. In 2013, **Spain** introduced for the first time explicit protection against discrimination by association, covering only the ground of disability.¹⁵⁸

Belgian court finds discrimination by association¹⁵⁹

The complainant was employed as the manager of a fitness centre when he had a child with a serious disability requiring specific care. When the complainant informed his employer of his child's disability, he was dismissed because the employer considered that the complainant's enthusiasm for work could be affected and that he might need days off work to care for his child. With the support of the Centre for Equal Opportunities and Opposition to Racism, the complainant filed a complaint for discriminatory dismissal.

On 10 December 2013, the Labour Court of Leuven found that the employer had discriminated against the complainant based on the disability of his child, and ordered the employer to pay compensation amounting to six months of salary and additional damages. This is the first Belgian conviction for discrimination by association, which is not explicitly prohibited by the anti-discrimination legislation in Belgium. The Court referred directly to the decision of the CJEU in *Coleman* to hold that discrimination based on association with persons with a disability is implicitly forbidden under federal law and constitutes direct discriminations.

In the context of the second implementation report on the Racial Equality Directive and the Employment Equality Directive adopted on 17 January 2014,¹⁶⁰ the Commission referred to the existing national case law and maintained that the Directives also prohibit a situation where a person is directly discriminated against on the basis of a wrong perception or assumption of protected characteristics.¹⁶¹

¹⁵⁸ Royal Legislative Decree 1/2013 of 29 November, approving the Consolidated Text of the General Law on the Rights of Persons with Disabilities and their Social Inclusion.

¹⁵⁹ Judgment No. 12/1064/A of the Labour Court of Leuven of 10 December 2013.

¹⁶⁰ COM (2014) 2 final, 17 January 2014, available at http://ec.europa.eu/justice/discrimination/files/com_2014_2_en.pdf.

¹⁶¹ COM (2014) 2 final, 17 January 2014, p. 10, available at http://ec.europa.eu/justice/discrimination/files/com_2014_2_en.pdf.

I. Multiple discrimination

The EU has recognised the significance of multiple discrimination, although both the Employment Equality Directive and the Racial Equality Directive do not specifically address the issue. Explicit provisions are provided in a few Member States only. For instance, in **Greece**, a provision adopted in 2011 explicitly refers for the first time to multiple discrimination.¹⁶² The Protection against Discrimination Act in **Bulgaria** defines multiple discrimination as ‘discrimination based on more than one [protected] ground’.¹⁶³ It places a statutory duty on public authorities to give priority to positive action measures to the benefit of victims of multiple discrimination.¹⁶⁴ In case of multiple discrimination, the Commission for Protection against Discrimination (the equality body) holds hearings in a larger panel of five members, instead of the ordinary three-member panel.¹⁶⁵ In the **Netherlands**, the government decided not to follow the then Equal Treatment Commission’s suggestion to include multiple discrimination in the General Equal Treatment Act.¹⁶⁶ In **Germany**, Section 4 of the General Act on Equal Treatment provides that any unequal treatment on the basis of several prohibited grounds has to be justified with regard to each of these grounds. In addition, Section 27.5 states that in cases of multiple discrimination the Federal Anti-discrimination Agency (*Antidiskriminierungsstelle des Bundes*) and the competent agents of the federal Government and the *Bundestag* must co-operate. Multiple discrimination constitutes an aggravating circumstance under the **Romanian** anti-discrimination law,¹⁶⁷ as well as in **Portugal** where the level of compensation may then be higher. In **Turkey**, segregation and institutional discrimination based on one or more grounds is mentioned in the draft anti-discrimination law but multiple discrimination is not specifically addressed. However, all existing national provisions bear limited effects in practice and case law remains very scarce. In the few existing cases reported, no specific approach with regard to the comparator had been followed by either the courts or the equality bodies.

¹⁶² See Article 2(1) of Act 3996/2011 concerning the general reform of the Labour Inspectorate adopted on 5 August 2011: ‘The labour inspectorate supervises the implementation of the principle of equal treatment irrespective of racial or ethnic origin, religion or other beliefs, disability, age or sexual orientation, taking into consideration instances of multiple discrimination in accordance with Article 19 of Act 3304/2005’.

¹⁶³ Additional Provisions, § 1.11.

¹⁶⁴ Article 11(2). Under Art. 11(1) authorities are placed under a general statutory duty to take positive action whenever necessary to achieve the legislation’s goals.

¹⁶⁵ Article 48(3).

¹⁶⁶ *Tweede kamer* 2011–2012, 28 481, No 16, p.4.

¹⁶⁷ Article 2(6) states that, ‘Any distinction, exclusion, restriction or preference based on two or more of the criteria foreseen in para. 1 shall constitute an aggravating circumstance in establishing responsibility for a minor offence, unless one or more of its components is not subject to criminal law’.

Msgana | 1994



Chapter 2

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 EU Member States, the **former Yugoslav Republic of Macedonia** and **Norway** 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, Croatia, Cyprus, Denmark, Estonia, Finland**, the **former Yugoslav Republic of Macedonia, France** (although hypothetical comparison is not covered, in breach of the Directives), **Germany, Greece, Ireland** (although not providing for a hypothetical comparator in employment cases), **Italy, Latvia**,¹⁶⁸ **Lithuania, Luxembourg, Malta**, the **Netherlands**,¹⁶⁹ **Norway, Poland** (although the definition of direct discrimination given in the Labour Code is still erroneous with regard to the comparator), **Portugal, Slovakia, Slovenia, Spain** (although the law only refers to 'a comparable situation', without determining whether past and hypothetical comparators are covered), **Sweden** and the **United Kingdom**. 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.

Although different from the definitions proposed by Directive 2000/43/EC and Directive 2000/78/EC, the 2000 **Romanian** Anti-discrimination Ordinance provides a detailed definition, attempting to cover the whole range of actions and omissions leading to discrimination. The Ordinance allows justifications of direct discrimination in the fields of housing and access to goods and services (in breach of Directive 2000/43/EC), if such a 'restriction is objectively justified

¹⁶⁸ It should however be noted that in several fields, such as education, access to and provision of goods and services, social protection and social advantages, **Latvian** legislation provides for a general justification of discrimination without distinguishing between direct and indirect discrimination. Judicial interpretation by the courts will indicate whether or not this justification is in breach of the Directives.

¹⁶⁹ The **Dutch** legislation was amended in November 2011, replacing the previous definition of direct discrimination with the definition found in the Directives: see *Wet van 7 November 2011, Staatsblad 2011, 554*.

by a legitimate purpose and the methods used to reach such a purpose are adequate and necessary'.¹⁷⁰ In **Hungary**, a general objective justification for direct discrimination applies to the grounds covered by the Employment Equality Directive when the act is 'found by objective consideration to have a reasonable ground directly related to the relevant legal relationship'. However, it is unclear whether this exemption applies in the field of employment.¹⁷¹ In **Slovakia**, the prohibition of general justification of direct discrimination is not explicit and can only be derived from interpretation. In **Bulgaria** the Protection against Discrimination Act does not permit general justification for direct discrimination with respect to any grounds.

In **Turkey** there is no legislation defining direct discrimination on any ground, although the Law on Persons with Disabilities was amended in 2013 to include provisions specifically prohibiting direct discrimination on the ground of disability.¹⁷² There is no legislation related to direct discrimination on any of the protected grounds in **Iceland**, while in **Liechtenstein**, direct discrimination is explicitly prohibited on the grounds of gender and disability only.

Prohibition of direct discrimination in national law (in the case of decentralised states only federal law is indicated)

	Law	Article
AUSTRIA	Federal Equal Treatment Act	§§ 13//1 and 13a/1
	Equal Treatment Act	§§ 17/1, 18, 19/1, 30, 31, 32/1, 43/1 and 44/1
	Employment of People with Disabilities Act	§ 7b/1
	Federal Disability Equality Act	§§ 4/1 and 5/1
BELGIUM	Racial Equality Federal Act	Arts 4, 6°-7°, and 12
	General Anti-discrimination Federal Act	Arts 4, 6°-7°, and 14
BULGARIA	Protection Against Discrimination Act	Arts 4(2)
CROATIA	Anti-discrimination Act	Arts 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 on Persons with Disabilities	Arts 2, 3(a)
CZECH REPUBLIC	Anti-discrimination Act	S. 2, para. 3
DENMARK	Act on Prohibition of Discrimination in the Labour Market etc.	Art. 1(2)
	Ethnic Equal Treatment Act	Art. 3(2)
ESTONIA	Equal Treatment Act	Art. 3(2)
FINLAND	Non-Discrimination Act	S. 6(2)1
FRANCE	Act on the Adaptation of National Law to Community Law in Matters of Discrimination	Art. 1
FORMER YUGOSLAV REPUBLIC of MACEDONIA	Prevention and Protection against Discrimination Act	Art. 6, para. 1
GERMANY	General Equal Treatment Act	Art. 3.1
GREECE	Equal Treatment Act	Arts 3(a) and 7(1)(a)
HUNGARY	Act on Equal Treatment and the Promotion of Equal Opportunities	Art. 8
ICELAND	_173	-

¹⁷⁰ Article 10, Act 324/2006 on the Amendment of Government Ordinance 137/2000 on the Prevention and Punishment of All Forms of Discrimination, (20 July 2006).

¹⁷¹ Article 7, paragraph (2) of the Equal Treatment Act.

¹⁷² Law No 6462 of 25 April 2014 amending Article 14(3) of the Law on Persons with Disabilities (No 5378).

¹⁷³ Direct discrimination is only defined and prohibited in the Gender Law, but this provision has been found by the EFTA Surveillance Authority not to fully comply with EU gender law. An amendment to this provision is pending in Parliament.

	Law	Article
IRELAND	Employment Equality Act	S. 6
	Equal Status Act	S. 3
ITALY	Legislative Decree No 215/2003 on the Implementation of Directive 43/2000	Art. 2, para. 1
	Legislative Decree No 216/2003 on the Implementation of Directive 78/2000	Art. 2, para. 1
	Law No 67/2006 on Measures for the Judicial Protection of Persons with Disabilities Victims of Discrimination	Art 2, paras 1 and 2
LATVIA	Labour Law	Art. 29(5)
	Law on Prohibition of Discrimination against Natural Persons who are Economic Operators	Art. 4(2)
LIECHTENSTEIN	Act on Equality of People with Disabilities	Art. 6§1
LITHUANIA	Equal Treatment Act	Art. 2, para. 7
LUXEMBOURG	Equal Treatment Act	Arts 1a and 18
MALTA	Equal Treatment in Employment Regulations	Art. 3(2)(a)
	Equal Treatment of Persons Order	Art. 2(2)(a)
	Equal Opportunities (Persons with Disabilities Act) ¹⁷⁴	Arts 3,5 and 6
	Equality for Men and Women Act ¹⁷⁵	Art. 2(4A)
NETHERLANDS	General Equal Treatment Act	Art. 1.a and b
	Disability Discrimination	Arts 1.a and b
	Age Discrimination Act	Art. 1(1)
NORWAY	Anti-discrimination Act on Prohibition of Discrimination based on Ethnicity, religion, etc.	Art. 6(2)
	Working Environment Act	Art.13-1
	Anti-discrimination and Accessibility Act on Prohibition of Discrimination on the Basis of Disability	Art. 5(2)
	Act relating to a Prohibition against Discrimination on the Basis of Sexual Orientation, Gender Identity and Gender Expression	Art. 5(2)
POLAND	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment	Art. 3
PORTUGAL	Racial Equal Treatment Act	Arts 3(3)(a)
	Act on the Prohibition of Discrimination based on Disability and Pre-Existing Risk to Health	Art. 3(a)
	Labour Code	Arts 23(1)(a), and 25(1)
ROMANIA	Act 324/02006 amending the Ordinance on the Prevention and Punishment of All Forms of Discrimination	Art. 2(1)
SLOVAKIA	Act on Equal Treatment in Certain Areas and Protection against Discrimination Equal Treatment 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
	Act on Equal Opportunities of People with Disabilities	Art. 3(2)
SPAIN	Act on Fiscal, Administrative and Social Measures	Art. 28.1.b
	General Law on the Rights of Persons with Disabilities and their Social Inclusion	Art. 2.c
SWEDEN	Discrimination Act	Ch. 1 S. 4 pt. 1
TURKEY	Law on Persons with Disabilities	Art. 14(3)
UNITED KINGDOM	(UK) Equality Act	S. 13
	(NI) The Race Relations Order	Art. 3
	(NI) Fair Employment and Treatment Order	Art. 3
	(NI) Disability Discrimination Act	S. 3A
	(NI) Employment Equality (Age)	Reg. 3
	(NI) Equality Act (Sexual Orientation) Regulations 2006	Reg. 3

¹⁷⁴ Even though direct discrimination is prohibited, it is nevertheless not defined in the law.

¹⁷⁵ Even though direct discrimination is prohibited, it is nevertheless not defined in the law.

B. Indirect discrimination

A large proportion of states have introduced a definition of indirect discrimination that generally reflects the definition adopted in the Directives. This includes **Austria, Belgium, Bulgaria, Croatia, Cyprus**, the **Czech Republic, Estonia, Finland**, the **former Yugoslav Republic of Macedonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta**, the **Netherlands**,¹⁷⁶ **Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden** and the **United Kingdom**. In **Iceland** and **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 **Liechtenstein**, indirect discrimination covers disability and gender only.

The **Lithuanian** legislation provides a sufficient definition of indirect discrimination; however, its implementation in practice has not yet been established. In **Latvia**, the definition of indirect discrimination contained in the Labour Law is compatible with the Directives but there is still no national case law interpreting the concept.

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.¹⁷⁷ In **Slovenia**, the law requires the individual complainant to be in an 'equal or similar situation and conditions' to the comparator for indirect discrimination to be established.¹⁷⁸

Prohibition of indirect discrimination in national law (in the case of decentralised states only federal law is indicated)

	Law	Article
AUSTRIA	Federal Equal Treatment Act	§§ 13/1 and , 13a/2
	Equal Treatment Act	§§ 17/1, 18, 19(2), 30, 31, 32(2), 43/1 and 44/2
	Employment of People with Disabilities Act	§ 7/b/1 and 7c(2)
	Federal Disability Equality Act	§§ 4/1 and 5(2)
BELGIUM	Racial Equality Federal Act	Arts 4, 8°-9°, and 12
	General Federal Anti-discrimination Act	Arts 4, 8°-9°, and 14
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)
	Act on Equal Treatment irrespective of Race or Ethnic Origin Act	Arts 2, 5(2)(b)
	Act on Persons with Disabilities	Arts 2, 3(a)
CZECH REPUBLIC	Anti-discrimination Act	S. 3, para. 1 and 2
DENMARK	Act on Prohibition of Discrimination in the Labour Market etc.	Art. 1(3)
	Ethnic Equal Treatment Act	Art. 3(3)
ESTONIA	Equal Treatment Act	Art. 3(4)
FINLAND	Non-Discrimination Act	S. 6(2)2
FRANCE	Act on the Adaptation of National Law to Community Law in Matters of Discrimination	Art. 1

¹⁷⁶ The Dutch legislation was amended in November 2011, replacing the pre-existing national definition of indirect discrimination with the definition found in the Directives: see Wet van 7 November 2011, *Staatsblad* 2011, 554.

¹⁷⁷ Section 19 of the Equality Act 2010.

¹⁷⁸ Article 4 §3 of the Act Implementing the Principle of Equal Treatment.



FORMER YUGOSLAV REPUBLIC of MACEDONIA	Prevention and Protection against Discrimination Act	Art. 6, para. 2
GERMANY	General Equal Treatment Act	Art. 3.2
GREECE	Equal Treatment Act	Arts 3(b) and 7(1)(b)
HUNGARY	Act on Equal Treatment and the Promotion of Equal Opportunities	Art. 9
ICELAND	¹⁷⁹	-
IRELAND	Employment Equality Act	Ss 19(4)(a), 22 and 31
	Equal Status Act	S. 3(1)(c)
ITALY	Legislative Decree No 215/2003 on the Implementation of Directive 43/2000	Art. 2, para. 1
	Legislative Decree No 216/2003 on the Implementation of Directive 78/2000	Art. 2, para. 1
	Law No 67/2006 on Measures for the Judicial Protection of Persons with Disabilities Victims of Discriminations	Art. 2, para.3
LATVIA	Labour Law	Art. 29(6)
	Law on Prohibition of Discrimination against Natural Persons who are Economic Operators	Art. 4(2)
LIECHTENSTEIN	Act on Equality of People with Disabilities	Art. 6§2
LITHUANIA	Equal Treatment Act	Art. 2, para. 4
LUXEMBOURG	Equal Treatment Act	Arts 1b and 18
MALTA	Equal Treatment in Employment Regulations	Art. 3(2)(b)
	Equal Treatment of Persons Order	Art. 2(2)(b)
	Equality for Men and Women Act ¹⁸⁰	Art. 2(4A)
	Equal Opportunities (Persons with Disabilities) Act ¹⁸¹	Arts 4 and 5
NETHERLANDS	General Equal Treatment Act	Art. 1.c
	Disability Discrimination Act	Art. 1.c
	Age Discrimination Act	Art. 1(1)
NORWAY	Anti-discrimination Act on Prohibition of Discrimination based on Ethnicity, Religion, etc.	Art. 6
	Working Environment Act	Art.13-1
	Anti-discrimination and Accessibility Act on Prohibition of Discrimination on the Basis of Disability	Art.5(2)
	Act relating to a Prohibition against Discrimination on the Basis of Sexual Orientation, Gender Identity and Gender Expression	Art. 5(2)
POLAND	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment	Art. 3
PORTUGAL	Racial 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)
	Labour Code	Arts 23(1)(b), 24(1) and 25(1)
ROMANIA	Act 324/2006 amending the Ordinance on the Prevention and Punishment of All Forms of Discrimination	Art. 2(3)
SLOVAKIA	Act on Equal Treatment in Certain Areas and Protection against Discrimination	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
	Act on Equal Opportunities of People with Disabilities	Art. 3(2)

¹⁷⁹ Indirect discrimination is only defined and prohibited in the Gender Law, but this provision has been found by the EFTA Surveillance Authority not to fully comply with EU gender law. An amendment to this provision is pending in the Parliament.

¹⁸⁰ Even though indirect discrimination is prohibited, it is nevertheless not defined in the law.

¹⁸¹ Even though indirect discrimination is prohibited, it is nevertheless not defined in the law.

SPAIN	Act on Fiscal, Administrative and Social Measures	Art. 28.1.c
	General Law on the Rights of Persons with Disabilities and their Social Inclusion	Art. 2.d
SWEDEN	Discrimination Act	Ch. 1 S. 4 pt. 2
TURKEY	-	-
UNITED KINGDOM	(UK) Equality Act	S. 19
	(NI) Race Relations Order	Art. 3
	(NI) Fair Employment and Treatment Order	Art. 3
	(NI) Employment Equality (Age)	Reg. 3
	(NI) Employment Equality (Sexual Orientation)	Reg. 3

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.¹⁸² The majority of states have adopted definitions of harassment that appear similar to that contained in the Directives. This includes **Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, the former Yugoslav Republic of Macedonia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Slovenia** and the **United Kingdom**. However, in a number of Member States the definition does not explicitly require the conduct to be unwanted, including in **Denmark, France, Hungary, the Netherlands, Slovakia** and **Sweden**. In **Spain**, 'hostile' and 'degrading' are not included in the national definition, which refers to the creation of an intimidating, humiliating or offensive environment only. In **Sweden**, the definition does not require that the behaviour creates any specific type of environment, but only that it violates the dignity of a person. In **Romania**, harassment is defined in the 2000 Anti-discrimination Ordinance, in the Act on Equal Opportunities between Men and Women and in the Criminal Code, but none of the definitions provided are in complete compliance with the definition of harassment set out in the Directives. The definition in the Anti-discrimination Ordinance refers only to the effect of the unwanted conduct related to any of the protected grounds, thereby excluding conduct with the purpose (but without the effect) of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In **Turkey**, only sexual harassment is explicitly prohibited and is punishable under criminal law if it constitutes defamation.¹⁸³ Otherwise the concept has not been defined by law. Likewise, only sexual harassment and harassment on grounds of gender is protected in **Iceland** and in **Liechtenstein** only harassment on grounds of disability and gender is covered.

UK courts provide clarifications on the scope of racial harassment

Two cases decided by equality tribunals in the **United Kingdom** provide some indication of how the concept of harassment in relation to the ground of racial origin can be interpreted on the national level. In October 2012, a tribunal ruled that the repeated use of the words 'my nigga' by a white colleague to the claimant, a black man, amounted to harassment related to race regardless of the context and, in particular, of the fact that the claimant had been the first to use those words and that his colleague had not intended to be offensive.¹⁸⁴ According to the Tribunal, 'the phrase is such an insulting phrase to use towards a black person that [it] could not conceive of any circumstances where its use would not violate dignity and create a degrading, humiliating or offensive environment'.

¹⁸² Article 2(3).

¹⁸³ See Articles 24 and 25 of the Labour Law and Articles 94 and 105 of the Criminal Code.

¹⁸⁴ Employment Tribunal, 24 October 2012, *Beyene v JDA International Ltd*, Case No 2703297/11.

Subsequently, another equality tribunal ruled that the use of the word 'nigger' on a single occasion by a younger white colleague to the claimant, an older black man, amounted to racial harassment.¹⁸⁵ By contrast with the tribunal in the previous case, the tribunal did not take the view that the use of the word would always amount to harassment (it had been argued that the word had been 're-appropriated' by some black rap musicians). The tribunal did, however, accept that its use was indefensible in the instant context. The claimant was awarded EUR 5300 (GBP 4500) for injury to feelings which had been compounded by the fact that the word was used to the claimant in front of another employee and that his employers had failed to deal adequately with his complaint.

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.

Austrian Supreme Court found no post-employment harassment¹⁸⁶

The case concerns a lawsuit brought by a cleaning worker who claimed harassment on the ground of ethnic affiliation by her former employer. The alleged harassment took the form of an insulting letter (with negative ethnicity-related remarks), which was sent to the plaintiff during a written dispute about payments owing after the work relationship had already ended. After this letter the two parties had never been in contact again.

The Supreme Court decided it was clear that the defendant's conduct in this case was unwanted and inappropriate and related to ethnic affiliation in the meaning of the definition of harassment. The Court held that it could even be argued that the incident happened in the course of dismissal and was therefore still included by the definition of 'in the workplace'. Nevertheless, the Court dismissed the claim, stating that the fact that there had been no further contact between the parties made clear that by sending the letter in question the respondent was not able to create an intimidating, hostile, degrading, humiliating or offensive environment – as they did not share any environment.

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 countries 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.¹⁸⁷ Similarly, **Norway** imposes a special duty on employers to prevent harassment in

¹⁸⁵ Employment Tribunal, 5 November 2012, *Henry v Ashted Plant Hire Co Ltd*, Case No 3202933/11.

¹⁸⁶ Supreme Court Decision No 90bA21/12x of 27 February 2012.

¹⁸⁷ Section 12.4 AGG.

their areas of responsibility. **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.¹⁸⁸ **Ireland** also prohibits harassment by an employer, a colleague, a client, customer or other business contact of the employer.¹⁸⁹ In addition, employers and service providers are liable for harassment by employees and third parties such as tenants, clients and customers. In **Sweden** harassment by colleagues or third parties is not prohibited as such, although the employer can be held liable for damage caused by his/her failure to investigate and implement measures to prevent harassment between employees. This duty, however, does not extend to harassment by third parties such as clients. In the **Netherlands**, colleagues cannot be held responsible for harassment whereas the employer or individuals acting on their behalf can be held liable. In **Belgium**, further to the dismissal of a trade union representative charged with harassment in November 2010, the **Belgian** association of employers called for the development of a general code of practice on harassment with trade unions but it has not yet been adopted. In **Hungary**, the Equal Treatment Act does not provide protection against harassment committed by colleagues at work and in the **United Kingdom** the Government announced its intention to repeal the provisions dealing with employers' vicarious liability for third-party harassment.

Prohibition of harassment in national law (in the case of decentralised states only federal law is indicated)

	Law	Article
AUSTRIA	Federal Equal Treatment Act	§§ 13/1 and 16
	Equal Treatment Act	§§ 17/1, 18, 21/2, 30, 31, 35/1, 43/1 and 47/2
	Employment of People with Disabilities Act	§§ 7b/1 and 7d
	Federal Disability Equality Act	§§ 4/1 and 5/4
BELGIUM	Racial Equality Federal Act	Arts 4, 10°, and 12
	General Federal Anti-discrimination Act	Arts 4, 10°, and 14
BULGARIA	Protection Against Discrimination Act	Art. 5 in conjunction with § 1.1 Additional provisions
CROATIA	Anti-discrimination Act	Art. 3
CYPRUS	Act on Equal Treatment in Employment and Occupation	Arts 2 and 6(1)(c)
	Act on Equal Treatment irrespective of Race or Ethnic Origin	Arts 2 and 5(2)(c)
	Act on Persons with Disabilities	Arts 2 and 3(b)
CZECH REPUBLIC	Anti-discrimination Act	S. 4, paras 1 and 2
DENMARK	Act on Prohibition of Discrimination in the Labour Market etc.	Art. 1(4)
	Ethnic Equal Treatment Act	Art. 3(4)
ESTONIA	Equal Treatment Act	Art. 3(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
FORMER YUGOSLAV REPUBLIC of MACEDONIA	Prevention and Protection against Discrimination Act	Art. 7, para. 1
GERMANY	General Equal Treatment Act	Art. 3.3
GREECE	Equal Treatment Act	Art. 2
HUNGARY	Act on Equal Treatment and the Promotion of Equal Opportunities	Arts 7, para. 1 and 10, para. 1
ICELAND	_190	-

¹⁸⁸ Article 5(5) of the Labour Act.

¹⁸⁹ Section 14A (1)(a), Employment Equality Act 1998-2011.

	Law	Article
IRELAND	Employment Equality Act	Ss 14A and 15
	Equal Status Act	S. 11
ITALY	Legislative Decree No 215/2003 on the Implementation of Directive 43/2000	Art. 2, para. 3
	Legislative Decree No 216/2003 on the Implementation of Directive 78/2000	Art. 2, para. 3
	Law No 67/2006 on Measures for the Judicial Protection of Persons with Disabilities who are Victims of Discrimination	Art. 2, para.4
LATVIA	Labour Law	Art. 29(7)
	Law on Prohibition of Discrimination of Natural Persons who are Economic Operators	Art. 4(4)
LIECHTENSTEIN	Act on Equality of People with Disabilities	Art. 8
LITHUANIA	Equal Treatment Act	Art. 2, para. 5
LUXEMBOURG	Equal Treatment Act	Arts 1(3) and 18
MALTA	Equal Treatment in Employment Regulations	Art. 3(3)
	Equal Treatment of Persons Order	Art. 2(2)(c)
	Equal Opportunities (Persons with Disabilities) Act	Art. 5
NETHERLANDS	General Equal Treatment Act	Art. 1.a
	Disability Discrimination Act	Art. 1.a
	Age Discrimination Act	Art. 2
NORWAY	Anti-discrimination Act on Prohibition of Discrimination based on Ethnicity, religion, etc.	Art. 9
	Working Environment Act	Art.13-1(2)
	Anti-discrimination and Accessibility Act on Prohibition of Discrimination on the Basis of Disability	Art. 8
	Act relating to a Prohibition against Discrimination on the Basis of Sexual Orientation, Gender Identity and Gender Expression	Art. 8
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)
	Racial Equal Treatment Act	Art. 3(4)
ROMANIA	Act 324/2006 amending the Ordinance on the Prevention and Punishment of All Forms of Discrimination	Art. 2(5)
SLOVAKIA	Act on Equal Treatment in Certain Areas and Protection against Discrimination	S. 2a, para. 4
SLOVENIA	Act Implementing the Principle of Equal Treatment	Art. 5
	Employment Relationship Act	Art. 7
SPAIN	Act on Fiscal, Administrative and Social Measures	Art. 28.1.d
	General Law on the Rights of Persons with Disabilities and their Social Inclusion	Art. 2.f
SWEDEN	Discrimination Act	Ch. 1 S. 4 pt. 3
TURKEY	-	-
UNITED KINGDOM	(UK) Equality Act	S. 16
	(NI) Race Relations Order	Art. 4A
	(NI) Fair Employment and Treatment Order	Art. 3A
	(NI) Employment Equality Act (Sexual Orientation) Regulations 2006	Reg. 5
	(NI) Disability Discrimination Act	S. 3B
	(NI) Employment Equality (Age)	Reg. 6
	(NI) Equality Act (Sexual Orientation) Regulations	Art. 21

¹⁹⁰ Harassment is only defined and prohibited in the Gender Law, but this provision has been found by the EFTA Surveillance Authority not to fully comply with EU gender law. An amendment to this provision is pending in Parliament.

D. Instructions to discriminate

Article 2(4) of the Racial Equality Directive and of the Employment Equality Directive stipulates that ‘an instruction to discriminate (...) shall be deemed to be discrimination’.¹⁹¹ A similar provision has been included in the national legislation of the great majority of countries,¹⁹² with a small number of exceptions (e.g. **Iceland** and **Turkey**). Under **Bulgarian** law, only an intentional instruction to discriminate is regarded as discrimination. Following amendments to the Anti-discrimination Act in 2012, a similar requirement of intent was removed from **Croatian** law, bringing the provisions on instructions to discriminate into line with the Directives.¹⁹³ The **Bulgarian** Protection against Discrimination Act was also amended in 2012, removing a requirement that the perpetrator be in a position of influencing others. In **Norway**, a relationship of subordination, obedience or dependency between the instructor and the person receiving instructions must exist. In **France** such a provision was introduced by Act 2008-496, although general legal principles on complicity and liability were previously able to produce similar effects. **UK** law regulates instructions to discriminate, as well as causing and inducing another to discriminate.

Prohibition of instructions to discriminate in national law (in the case of decentralised states only federal law is indicated)

	Law	Article
AUSTRIA	Federal Equal Treatment Act	§§13/1, 13a/3 and 16/3
	Equal Treatment Act	§§ 17/1, 18, 19(3),21/3, 30, 31, 32(3), 35/2/1, 43/1, 44/3 and 47/3
	Employment of People with Disabilities	§§ 7/b/1, 7c(8) and 7d/3/1
	Federal Disability Equality Act	§§ 4/1, 5/1/3, 5(4) and 5/5/1
BELGIUM	Federal Racial Equality Act	Art. 4, 12°, and 12
	General Federal Anti-discrimination Act	Art. 4, 13°, and 14
BULGARIA	Protection Against Discrimination Act	Art. 5 in conjunction with § 1.5 Additional provisions
CROATIA	Anti-discrimination Act (judicial interpretation required) ¹⁹⁴	Art. 4(1)
CYPRUS	Act on Equal Treatment in Employment and Occupation	Arts 2 and 6(1)(d)
	Act on Equal Treatment irrespective of Race or Ethnic Origin	Arts 2 and 5(2)(d)
	Act on Persons with Disabilities	Arts 2 and 3(a)
CZECH REPUBLIC	Anti-discrimination Act	S. 4, para. 4
DENMARK	Act on Prohibition of Discrimination in the Labour Market etc.	Art.1(5)
	Ethnic Equal Treatment Act	Art. 3(5)
ESTONIA	Equal Treatment Act	Art. 3(5)
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
FORMER YUGOSLAV REPUBLIC of MACEDONIA	Prevention and Protection against Discrimination Act	Art. 9
GERMANY	General Equal Treatment Act	Art. 3.5
GREECE	Equal Treatment Act	Art. 2

¹⁹¹ Article 2(4), Directives 2000/43/EC and 2000/78/EC.

¹⁹² In **Liechtenstein** instructions to discrimination are explicitly prohibited on the grounds of gender and disability only.

¹⁹³ **Croatian** law refers to ‘encouragement to discriminate’ rather than ‘instructions’: Article 4(1) of the Anti-discrimination Act.

¹⁹⁴ The law prohibits intentional encouragement to discriminate, but it does not specifically address instructions to discriminate.

	Law	Article
HUNGARY	Act on Equal Treatment and the Promotion of Equal Opportunities	Art. 7(1)
ICELAND	-	-
IRELAND	Employment Equality Act ¹⁹⁵	Ss 2(1), 8(4)A and 14
ITALY	Legislative Decree No 215/2003 on the Implementation of Directive 43/2000	Art. 2, para. 4
	Legislative Decree No 216/2003 on the Implementation of Directive 78/2000	Art. 2, para. 4
LATVIA	Labour Law	Art. 29(4)
	Law on Prohibition of Discrimination against Natural Persons who are Economic Operators	Art. 4(3)
LIECHTENSTEIN	Act on Equality of People with Disabilities	Art. 9
LITHUANIA	Equal Treatment Act	Art. 2, para. 8
LUXEMBOURG	Equal Treatment Act	Arts 1 and 18
MALTA	Equal Treatment in Employment Regulations	Art. 3(4)
	Equal Treatment of Persons Order	Art. 2(2)(c)
NETHERLANDS	General Equal Treatment Act	Arts 1.a and b
	Disability Discrimination Act	Art. 1.a
	Age Discrimination Act	Art. 1(2)
NORWAY	Anti-discrimination Act on Prohibition of Discrimination based on Ethnicity, religion, etc.	Art. 11
	Working Environment Act	Art.13-1(2)
	Anti-discrimination and Accessibility Act on Prohibition of Discrimination on the Basis of Disability	Art.10
	Act relating to a Prohibition against Discrimination on the Basis of Sexual Orientation, Gender Identity and Gender Expression	Art. 10
POLAND	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment	Art. 3 and 9
PORTUGAL	Racial Equal Treatment Act	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) and 5(1) (a) to (c)
	Labour Code	Art. 23(2)
ROMANIA	Act 324/2006 amending the Ordinance on the Prevention and Punishment of All Forms of Discrimination	Art. 2(2)
SLOVAKIA	Act on Equal Treatment in Certain Areas and Protection against Discrimination	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 pt. 5
TURKEY	_196	-
UNITED KINGDOM	(UK) Equality Act	S. 111
	(NI) The Race Relations Order	Art. 30
	(NI) Fair Employment and Treatment Order	Art. 35
	(NI) Disability Discrimination Act	S. 16C/28UB
	(NI) Equality Act (Sexual Orientation) Regulations	Art. 21
	(NI) Employment Equality (Age) Regulations	Art. 5

¹⁹⁵ The Equal Status Act does not itself include any provision on instructions. Nevertheless the Employment Equality Act includes a reference to the Equal Status Act implying that instructions are also prohibited under the terms of the latter.

¹⁹⁶ However, the Law on Civil Servants prohibits the managers of civil servants from giving them orders that are in violation of the law.

Romeo | 1987



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.¹⁹⁷ Even so, some countries have included nationality in their list of protected grounds (see table, page 76).

Recital 16 of the Racial Equality Directive states that it is important to protect all natural persons against discrimination and that Member States should also provide, where appropriate and in accordance with their national traditions and practice, protection for legal persons where they suffer discrimination on the grounds of the racial or ethnic origin of their members. The Employment Equality Directive does not have an equivalent recital, but there is no reason why both natural and legal persons should not be understood under the term 'persons' in this Directive as well. In most countries both natural and legal persons are protected against discrimination. Where the law does not expressly distinguish between the two, this is assumed, as for instance in **Bulgaria** and **Slovenia**. Legal persons remain categorically unprotected in **Swedish** law,¹⁹⁸ 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. Similarly, the Act on Equality of People with Disabilities in **Liechtenstein** seems to refer to natural persons only.

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**,¹⁹⁹ the **Netherlands**²⁰⁰ 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. In **Sweden**, a discriminator who is not the employer can only be held liable if he/she has the authority to represent the employer to the (other) employees. 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.

¹⁹⁷ However, see below, chapter 3, section C. 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.

¹⁹⁸ 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.

¹⁹⁹ Section 8(1) of the Employment Equality Act 1998-2011 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.

²⁰⁰ **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.

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.²⁰¹ Similarly, in the **Netherlands** records of parliamentary debates are thought to make clear that the **Dutch** legislature did not intend that anti-discrimination legislation should be enforceable against a colleague or a third party, on the basis that there is no contract or relationship of authority between the parties.²⁰² 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.²⁰³ In the **former Yugoslav Republic 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. In **Denmark**, however, trade unions are liable if an employee of the trade union discriminates against one of its members, although this liability is restricted to the actions of employees only. In **Norway**, trade unions can be held liable for actions of their members only if they operate on behalf of the organisation or if key members give instructions.

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.

Material scope of the Racial Equality and Employment Equality Directives

Racial Equality Directive	Employment Equality Directive
a. conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion	a. conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion
b. access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience	b. access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience
c. employment and working conditions, including dismissals and pay	c. employment and working conditions, including dismissals and pay
d. membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations	d. membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations
e. social protection, including social security and healthcare	
f. social advantages	
g. education	
h. access to and supply of goods and services which are available to the public, including housing	

²⁰¹ Article 551(3) of the Labour Code.

²⁰² 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.

²⁰³ Article 5(5) of the Labour Act.

The material scope of the Directives is met in **Austria, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, the former Yugoslav Republic of Macedonia, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden** and the **United Kingdom**, but not in **Iceland, Liechtenstein** and **Turkey**. In **Latvia** and **Lithuania** judicial interpretation is required regarding the implementation of the Racial Equality Directive in certain fields of application such as social protection. In **Belgium**, the division of competences between the different levels of government still causes discrepancies regarding the implementation of the material scope of the Directives.²⁰⁴ In the **Czech Republic** the Anti-discrimination Act of 17 June 2009 has quite a 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 goods 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 **former Yugoslav Republic 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 **Latvia**, while in the **Netherlands** the Age Discrimination Act has applied to military service only since 1 January 2008.

In **Greece, Lithuania**²⁰⁵ and the **United Kingdom**, self-employment and/or occupation are not fully covered. Since the entry into force in **Latvia** on 2 January 2013 of the Law on Prohibition of Discrimination against Natural Persons who are Economic Operators, national law finally provides protection against discrimination in self-employment on all the grounds covered by the EU Directives.²⁰⁶ In **Portugal**, Act 3/2011 of 5 February 2011 has eventually transposed the EU

²⁰⁴ 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.

²⁰⁵ 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 is required.

²⁰⁶ Law on Prohibition of Discrimination against Natural Persons who are Economic Operators of 19 December 2012.

Directives with regard to self-employment. **Maltese** law does not apply to military personnel or to people who work or perform services in a professional capacity or as contractors for others where the work or service is not regulated by a specific contract of service. With respect to people 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 Ordinance 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 **former Yugoslav Republic of Macedonia**.

Irish volunteer workers are protected by employment anti-discrimination law

The claimants were volunteer workers whose long-standing volunteer involvements were terminated when they reached the age of 70. They claimed that the termination amounted to discriminatory dismissal on grounds of age, contrary to the Employment Equality Acts 1998 to 2008. The respondent claimed that they were volunteers rather than employees and that the Employment Equality Act did not apply.

The Equality Tribunal found that both complainants had a contractual relationship with the respondent, based on the facts that the complainants were paid an amount for their work in addition to expenses, and that tax was deducted. It also found that the contract in question was one of employment (rather than a contract for services) in that the work was carried out by the complainants in discharging their duties with materials and supervision provided by the respondent, and there was an obligation to carry out those duties in person, with no option to send a self-selected replacement in case of illness or other unavailability. They were therefore found to be employees for the purposes of the protection provided by the Employment Equality Act.

The Equality Tribunal noted that the respondent never provided any evidence of a potential justification of the mandatory retirement, which therefore was found to amount to discriminatory dismissal on the ground of age. The complainants were each awarded EUR 1,200, which reflected slightly less than two years' service.²⁰⁷

Social protection

Concerns remain with regard to the transposition of the Racial Equality Directive beyond the employment sphere 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

²⁰⁷ Irish Equality Tribunal, Case No DEC-E2013-027 – *Dunican & Spain v Offaly Civil Defence*.

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.²⁰⁸ There are no specific provisions referring to social protection on the protected grounds of the Directives in **Iceland**, **Liechtenstein** and **Turkey**. In **Poland**, the 2010 Equal Treatment Act widens the material scope of anti-discrimination legislation on grounds of racial and ethnic origin and fully covers fields beyond employment, including social protection and healthcare, education, and access to goods and services, including housing.

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. In **Italy**, the decree transposing Directive 2000/78/EC applies only to employment and occupation, while the field of social protection is only covered by the general equality principle of the Constitution. However, the Immigration Act 1998 also protects against discrimination on the grounds of religion and nationality in this area, and disability is in principle also covered by Act 67/2006.

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.²⁰⁹ In the **Dutch** Government's view, the notion of social advantages refers to advantages of an economic and cultural nature which may be granted by both private and public entities. These may include student grants and 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.²¹⁰

²⁰⁸ Equal Opportunities Ombudsperson, Annual Report for 2010, available in Lithuanian at <http://www.lygybe.lt>.

²⁰⁹ 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.

²¹⁰ A thematic report written in 2014 by Lilla Farkas, ground-coordinator for race and ethnic origin for the European Network of Legal Experts in the Non-discrimination Field, entitled *Report on discrimination of Roma children in education*, provides a more detailed analysis and state of the art of this issue. It constitutes an update to a previous report by the same author published in 2007, entitled *Segregation of Roma children in education, addressing structural discrimination through the Race Equality Directive*.

Roma segregation in education provides a good example of the serious challenges faced by several states in terms of implementation and effective enforcement, including **Bulgaria, Croatia, Cyprus,**²¹¹ the **Czech Republic, Finland,** the **former Yugoslav Republic of Macedonia, Greece, Hungary, Poland, Romania** and **Slovakia**.

There are Roma in all the countries covered with the apparent exception of **Iceland, Liechtenstein, Luxembourg** and **Malta**. In **Bulgaria,** the **Czech Republic, Hungary, Latvia, Poland, Romania** and **Slovakia,** 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.²¹² In **Romania,** 60% of Roma children attending pre-school in 2011 went to segregated kindergartens, according to a UNICEF report.²¹³ In January 2013 the ECtHR found discrimination in **Hungary** due to the lack of safeguards accompanying the placement of Roma children in remedial schools for children with 'mild mental disabilities'.²¹⁴ In the **Czech Republic,** in spite of the National Action Plan for Inclusive Education developed in 2010, segregation of Roma children continues, which was heavily criticised by the UN Committee on the Rights of the Child in its concluding remarks adopted on 17 June 2011.²¹⁵

Segregation of the Roma also occurs in some mainstream schools through the existence of segregated classes. This is the case in **Bulgaria, Croatia,** the **Czech Republic, Finland, Greece, Hungary, Latvia, Romania, Slovakia** and **Slovenia**. In **Poland** there were a number of segregated 'Roma classes' or 'remedial classes' which followed a special curriculum but the situation has been gradually improving since 2008. As of 2011 there should be no more Roma classes in **Poland**. In **Croatia,** the number of Roma-only classes has been increasing continuously since 2004, despite certain measures taken by the Government in recent years to tackle segregation. 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.

There are only a few instances where segregated classes have been challenged under national legal systems, for instance in **Bulgaria, Croatia, Denmark, Finland, Greece, Hungary,**²¹⁶ **Romania** and **Slovakia**. In **Finland** there has been one case where *de facto* segregation of immigrant children at school was successfully challenged.²¹⁷ In **Greece** intervention by 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's facilities

²¹¹ In 2011 the equality body issued a report on the first complaint ever filed in relation to discrimination against Roma, which concerned the adequacy of measures for the support and integration of Roma children in the educational system, Equality Body Report AKR 18/2008 of 27 September 2011.

²¹² See thematic report by Lilla Farkas (*op. cit.* at footnote 194).

²¹³ UNICEF, the **Romanian** Ministry of Education, and the Impreună Agency released a study of access of Roma children to quality education: *A school for everybody? Access of Roma children to quality education (O școală pentru toți? Accesul copiilor romi la o educație de calitate)*.

²¹⁴ ECtHR, *Horváth and Kiss v Hungary* (application No 11146/11), Judgment of 29 January 2013.

²¹⁵ UN Committee on the Rights of the Child Concluding Observations of 17 June 2011, CRC/C/CZE/CO/3-4. After the cut-off date of this report, on 25 September 2014, the European Commission initiated infringement proceedings against the Czech Republic for failure to correctly implement the provisions of the Racial Equality Directive relating to the prohibition of discrimination on the ground of racial/ethnic origin in the field of education.

²¹⁶ See **Hungarian** Supreme Court Decision No Pfv.IV.20.037/2011/4 of 29 June 2011.

²¹⁷ In **Finland,** segregation was not aimed at Roma children in particular.

were inadequate.²¹⁸ In 2003, 57 **Croatian** citizens of Roma origin lodged a complaint before the ECtHR arguing that they had been segregated at primary school on the grounds of their racial or ethnic origin. The Court found that there had been a difference in treatment based on ethnic origin and that such separations, resulting from a lack of command of the **Croatian** language, had not been objectively justified, appropriate and necessary.²¹⁹ Similarly, the ECtHR found in 2013 that **Hungary** had discriminated against Roma by not adopting sufficient safeguards to ensure that the special needs of Roma children as members of a disadvantaged group were taken into account during the tests put in place for children with alleged mild mental disabilities. The applicants were of Roma origin and had been placed in 'special' schools for children with mild mental disabilities although an independent evaluation later established that they could have followed an ordinary curriculum in a mainstream school.²²⁰

Successful actio popularis in a segregation case in Slovakia²²¹

For the first time an *actio popularis* was launched in a Roma case against the Elementary School of Šarišské Michaľany. The NGO acting on behalf of the Roma pupils alleged long-lasting and systemic segregation practices, in particular with regard to separated classes established for all grades of primary education. The school argued that Roma classrooms allowed teachers to adopt an individualised approach, as pupils came from socially disadvantaged background. In addition, this 'equalising' measure aimed at precluding negative feelings for not doing as well at school as others. Finally, the separation was also justified on the ground that 50 non-Roma children left the school when classrooms were mixed to go to another school for non-Roma pupils only.

The court rejected the school's arguments and found direct discrimination on the ground of ethnicity considering that the school failed to carry out its obligations, preferring unlawful segregated education rather than the development of inclusive education. The court requested the school to publish the ruling in a special professional journal for teachers and to redress the situation by installing mixed classrooms. The school was ordered to pay the costs of proceedings. After an appeal by the defendant school, the decision was confirmed in all its material parts by the Regional Court, although the order to publish the court's ruling in a teachers' periodical was cancelled.²²²

In many states, including **Belgium, Croatia, Cyprus, Finland, Lithuania** and **Portugal**, 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.²²³ In the **former Yugoslav Republic 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.²²⁴ In **Poland** the school

²¹⁸ The **Greek** Ombudsman has been reported as increasingly examining complaints related to Roma pursuant to Act 3304/2005. In addition, the Deputy Chief Prosecutor of the Supreme Court issued an internal decree on 22 February 2011 requesting all prosecutors to combat Roma discrimination and exclusion (Protocol Number 720 /22-02-2011).

²¹⁹ ECtHR, *Oršuš and Others v Croatia* (No 15766/03), Chamber Judgment of 16 March 2010.

²²⁰ ECtHR, *Horváth and Kiss v Hungary* (No 11146/11), Chamber Judgment of 29 January 2013.

²²¹ Prešov District Court, Decision 25 C 133/10-229, *Center for Civil and Human Rights v Elementary School of Šarišské Michaľany* of 5 December 2011.

²²² Prešov Regional Court, Decision of 30 October 2012 (No 20Co 125/2012).

²²³ *Romų padėties tyrimas: Romai švietimo ir darbo rinkos sankirtoje, Socialinių tyrimų instituto etninių tyrimų centras, 2008 gruodis*, www.tmid.lt/wp-content/uploads/2009/05/sti_tmid_romu-padetis-tyrimas-2008_ataskaita.doc.

²²⁴ www.unicef.org/tfymacedonia/MK_SITAN_ENG.pdf.

Ilse | 1991



attendance rate among the Roma was 82% in 2009/2010. In **Romania**, the vast majority of pupils who drop out of school due to poverty and the low quality of education are from the Roma population (70%).²²⁵

In a large number of Member States, for example, residence patterns also lead to a high concentration of Roma children (e.g. **Bulgaria, Cyprus, Hungary, Romania** and **Slovakia**) or children from particular ethnic minorities (e.g. **France**, the **Netherlands**, and the **United Kingdom**²²⁶) in certain schools, resulting in so-called 'ghetto schools'. 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 such *de facto* segregation arising from residence patterns. These schools follow the same curriculum but the quality of education and 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. The European Court of Human Rights found that **Greece** is discriminating against Romani children due to the practice of segregation in a Roma-only 'ghetto' school, first in 2008²²⁷ and then again – regarding the same school – in 2012.²²⁸

There have been several attempts by governments to address the segregation of Roma pupils.²²⁹ 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, but the 2011 Education Law did not include a prohibition of segregation similar to previous legislation. In **Hungary**, the Secretary of State for Social Inclusion has launched a number of initiatives to improve the situation of Roma such as support amounting to HUF 275,500,000 (EUR 950,000) for innovative methods aimed at promoting the successful elementary education of disadvantaged children.²³⁰ The **former Yugoslav Republic of Macedonia** strategy for the Roma population sets out education as one of the Government's priorities. In **Norway**, the governmental action plan to improve the Roma situation in Oslo includes elements related to schooling,²³¹ in particular specific education provided in Norwegian as well as classes in the mother tongue. Computers are also made available for distance and home education.

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,

²²⁵ Ivasiuc, A., Duminică, G., (2010) *O școală pentru toți? Accesul copiilor romi la o educație de calitate, A School for Everybody? Access of Roma children to quality education*, Bucharest, Vanemonde. The report is available at: http://www.agentiainpreuna.ro/files/O_scoala_pentru_toti.pdf.

²²⁶ 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 certain 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.

²²⁷ ECtHR, *Sampanis and others v Greece* (Application No 32526/05), Judgment of 5 June 2008.

²²⁸ ECtHR, *Sampani and others v Greece* (Application No 59608/09), Judgment of 11 December 2012.

²²⁹ For a discussion of some of these measures, see the section in Chapter 4 on positive action.

²³⁰ Since this initiative was launched in February 2012, visible results have yet to be seen.

²³¹ There are 71 registered Roma pupils in 22 schools in Oslo, out of a total of 700 Roma.

and most states do indeed restrict protection to publicly available goods and services. Exceptions include **Bulgaria, Croatia, the former Yugoslav Republic of Macedonia, France, Italy, Lithuania,**²³² **Luxembourg,**²³³ **Malta,**²³⁴ **Romania, Slovenia, Spain and Norway**, where legislation does not distinguish between goods and services available to the public and available privately, and is thus presumed to apply to both. 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 provided 'outside the private or family sphere', 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 relationship of trust and proximity between the parties or their families, including the letting of flats. The **Finnish** Non-Discrimination Act covers the 'supply of or access to housing and movable and immovable property and services on offer or available to the general public other than in respect of legal acts falling within the scope of private affairs and family life'. 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 must 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.²³⁵ 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. Some of these situations can be found in countries such as **Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, the former Yugoslav Republic of Macedonia, France, Italy, Lithuania, Poland, Portugal, Romania, and Slovakia**. In recent years, many cases have been reported of forced expulsion and segregation (e.g. in **Greece, Romania and Turkey**) or in relation to campsites and stopping places for Roma and Travellers (e.g. in **France** and the **UK**). In recent years, the European Committee for Social Rights has declared both **France** and **Portugal** in contravention of the European Social Charter with regard to the right to housing of Roma and precarious living conditions as well as unlawful expulsions.²³⁶ In April 2012 the ECtHR found that collective forced evictions of an entire Romani community in **Bulgaria** were in breach of the affected persons' rights to a home and to private and family life.²³⁷

²³² 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.

²³³ 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.

²³⁴ Although the Equal Treatment of Persons Order does not explicitly cover private supply of goods and services, such supply would be covered by the general prohibitions of discrimination.

²³⁵ A thematic report written in 2013 by Nicolas Bernard and Julie Ringelheim entitled *Discrimination in housing* provides an extensive analysis of legislation and reoccurring issues across Europe in this specific field. Available at <http://www.non-discrimination.net/content/media/Discrimination%20in%20Housing%20-%20EN.pdf>.

²³⁶ European Committee of Social Rights, Decision on the Merits of 30 June 2011 in Complaint No 61/2010, *European Roma Rights Centre (ERRC) v Portugal*; and Decision on the Merits of 11 September 2012 in Complaint No 67/2011, *Médecins du Monde – International v France*.

²³⁷ ECtHR, *Yordanova and others v Bulgaria* (Application No 25446/06), Judgment of 24 April 2012.

Further to the EU framework for National Roma Integration up to 2020 adopted in April 2011 by the European Commission,²³⁸ EU Member States were requested to prepare or revise National Roma Integration Strategies in order to address more effectively the challenges of Roma inclusion to tangibly improve the situation of the Roma population. This is the first time that Roma inclusion has been addressed at the EU level and set out as an important priority by all Member States to develop a sustainable approach that combines efforts in different areas including education, employment, health and housing. In December 2013, this priority was reaffirmed by the Council of the EU through the unanimous adoption of a Recommendation on effective Roma integration strategies in the Member States.²³⁹ In addition, the Decade of Roma Inclusion 2005-2015, formally signed in 2005, aims to improve the socio-economic status and social inclusion of Roma in **Bulgaria, Croatia, the Czech Republic, the former Yugoslav Republic of Macedonia, Hungary, Romania, Slovakia and Spain. Slovenia** has observer status under this initiative.²⁴⁰ Governments are required to draw up and implement action plans over a 10-year period until 2015.

Final ruling of the Romanian High Court of Cassation and Justice on the construction of a segregation wall

In July 2011, a wall of 1.8-2 metres high and 100 metres long was erected between a Roma neighbourhood and the main road in the Romanian city of Baia Mare. The Mayor argued that the wall was designed to prevent traffic accidents. The National Council for Combating Discrimination (NCCD) initiated proceedings based on its *ex officio* investigation and petitions filed by an NGO and by the Ministry of Regional Development and Tourism.

The NCCD found harassment in conjunction with a violation of human dignity, as the construction was found to negatively affect the life of the entire Roma community while less invasive measures could adequately have been adopted to prevent traffic accidents.²⁴¹ Consequently, the NCCD imposed a fine of RON 6,000 (approximately EUR 1,500) and recommended the demolition of the wall. The Mayor appealed the decision.

Cluj Court of Appeal ruled that the aim of ensuring public safety invoked by the Mayor was legitimate and that the means to achieve that aim were proportionate, underlining that human dignity was not necessarily violated by the construction of a wall surrounding an area, and that the existence of exits from the main road precluded ethnic segregation.²⁴² The Court observed that the wall allowed for the best control of access to the main road, considering that the majority of the population in the area were children, which made permanent supervision by adults impossible. The NCCD challenged the decision before the High Court of Cassation and Justice.

In September 2013, the High Court of Cassation and Justice rendered its final ruling in this case, overturning the decision of the Court of Appeal.²⁴³ The High Court took facts into account which had been

²³⁸ Communication 'An EU Framework for National Roma Integration Strategies up to 2020', COM(2011)173 of 5 April 2011.

²³⁹ Council recommendation adopted at the Employment, Social policy, Health and Consumer affairs Council meeting on 9 and 10 December 2013: [http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32013H1224\(01\)](http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32013H1224(01)).

²⁴⁰ www.romadecade.org/ Note that the Roma Decade also includes the following non-EU countries: Albania, Bosnia Herzegovina, Montenegro and Serbia, and the United States as an observer.

²⁴¹ National Council for Combating Discrimination, Decision No 439 of 15 November 2011 in Case No 4A/2011.

²⁴² Cluj Court of Appeal, Section II Civil, Administrative and Fiscal Law Decision No 141/2012 of 24 February 2012 in Case No 1741/33/2011.

²⁴³ High Court of Cassation and Justice, File 1741/33/2011 of 27 September 2013, Decision No 640/27.09.2013.

overlooked by the Court of Appeal, and held that the construction of the wall was not an appropriate and proportionate means of achieving the aim of preventing traffic accidents. Following this decision, the NCCD can issue new sanctions against the Mayor for refusing to demolish the wall (as had been initially ordered by the NCCD), as it is still standing.

In parallel to this case, a Roma NGO (Romani CRISS) initiated an action to annul the Mayor's authorisation to erect the wall, which was rejected by the Bucharest Court.²⁴⁴ The Court held that the building of an enclosure on a local authority's property could not be considered as discriminatory, in particular if access to houses was not made impossible. Moreover, the wall seemed appropriate for the purposes of managing the property and ensuring road traffic safety. The NGO was ordered to pay RON 1,170 (EUR 300) in legal fees to the Mayor.

Beyond the Directives

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 most provincial legislation it is levelled up.²⁴⁵
- 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.²⁴⁶ 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.
- 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.
- Denmark extends the prohibition of discrimination on the grounds of religion or belief and sexual orientation to the fields of education and access to goods and services including housing.
- 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'.²⁴⁷
- 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.

²⁴⁴ Bucharest Court (*Tribunalul Bucuresti*), Decision No 4506 of 13 November 2012.

²⁴⁵ Only Lower Austria has not followed the line.

²⁴⁶ Protection against Discrimination Act, Article 6.

²⁴⁷ 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 Union shall fully respect the responsibility of the Member States for the content of teaching and the organisation of education systems.

- The Irish Employment Equality Act 1998-2011 and Equal Status Act 2000-2011 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 against discrimination based on race, religion and nationality that mostly overlaps with that of the Decrees, covering 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 Malta, the Equality between Men and Women Act, as amended in 2012, provides protection against discrimination on the grounds of sexual orientation, age, religion or belief and gender identity in the fields of education and banking services.
- 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,²⁴⁸ trade union activities or other status.²⁴⁹ 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, age²⁵⁰ and sexual orientation. The prohibition on discrimination in goods, services and housing applies to all the above-mentioned grounds as well.
- 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 Ordinance 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 has broad prohibitions against discrimination on grounds of political opinion.
- Although not an EU member, Norway has committed itself in having high and even higher standards regarding discrimination than the requirements set up at the EU level.²⁵¹

²⁴⁸ The Slovak word 'rod' can be translated as either lineage or gender.

²⁴⁹ Section 2, paragraph 1 of the Anti-discrimination Act.

²⁵⁰ Age was only included in the list of protected grounds by an amendment to the Discrimination Act which entered into force on 1 January 2013.

²⁵¹ See Government White Paper on *Strengthened protection against discrimination in working life*, NOU 2003:2 *Skjerpet vern mot diskriminering i arbeidslivet*, p. 7.

Anne | 1988



Chapter 3

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. **Latvia**²⁵² and **Slovenia**). In **Romania**, justifications of direct discrimination were allowed in the field of access to goods and services including housing until 2013 when the legislation was amended through the adoption of an emergency ordinance.²⁵³

Justification of direct discrimination in Slovenia

Slovenian law provides for possible justification of direct discrimination in quite confusing terms, allowing for contradicting interpretations. Article 2a of the Act Implementing the Principle of Equal Treatment states that different treatment on the basis of certain personal circumstances is not excluded, provided that it is justified by a legitimate goal and that the means for achieving the goal are appropriate and necessary (para. 1). However, paragraphs 2 and 3 of Article 2a prohibit any discrimination, regardless of the provision of paragraph 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 a particular gender; in the area of insurance; or in other cases defined by laws adopted pursuant to European Union law. The relationship between these provisions therefore appears to be confusing, notably with regard to the scope of application of paragraph 1 since paragraphs 2 and 3 exclude application of derogations within their scope, in compliance with the Directives.

However, parallel to the possibility of objectively justifying indirect discrimination, the Directives permit a number of exceptions applicable to the ban on both direct and indirect discrimination. Some of these apply to all grounds of discrimination (e.g. genuine occupational requirements), whereas others are ground-specific (e.g. employers with a religious ethos). This section will examine the implementation of each of these exceptions.²⁵⁴

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

A. Genuine and determining occupational requirements

Article 4 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, religion or belief, age, disability or sexual

²⁵² Latvian legislation in fields such as social security, education and access to goods and services does not distinguish between direct and indirect discrimination, thereby causing confusion regarding the limits of the possibility to justify (indirect) discrimination. See for instance Article 2.1(1) of the Law on Social Security.

²⁵³ Emergency Ordinance No 19/2013 amending Government Ordinance No 137/2000 regarding the prevention and the punishment of all forms of discrimination (27 March 2013).

²⁵⁴ The Employment Equality Directive contains a number of specific exceptions regarding the ground of age. These have, however, been discussed above in Chapter 1.F and will not be mentioned here.

orientation] 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. All countries surveyed, except **Iceland** and the **Netherlands**, 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 *external racial appearances* may constitute a genuine occupational requirement.²⁵⁵ 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 the basis for a distinction, to the exclusion of sociological differences.

EEA countries have also chosen to include the genuine and determining occupational requirements exception into their equality and anti-discrimination legislation. The Equality for People with Disabilities Act in **Liechtenstein** provides that exceptions are permitted if special skills or physical conditions are required for a specific job. Similarly, **Norway** allows justification of direct discrimination if it is necessary for the performance of the work, in line with the Employment Equality Directive.

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: **Denmark**,²⁵⁶ **France**, **Greece**, **Ireland**, **Italy**, **Norway**,²⁵⁷ **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, the **former Yugoslav Republic of Macedonia** and **Slovenia**. But in **Slovenia**, the Police Act states that employment with 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**, **Luxembourg** and **Sweden**. In several states, the exceptions seem to be wider

²⁵⁵ Article 2(4)(b) General Equal Treatment Act, as inserted by the 2004 EC Implementation Act.

²⁵⁶ The **Danish** Act on the Prohibition of Discrimination in the Labour Market etc. stipulates that the Ministry of Defence can make exceptions for the armed forces in relation to age and disability. The Ministry has made use of this possibility (Executive Order No 350 of 30 March 2012).

²⁵⁷ **Norway** does not contain any specific exception with regard to disability, only to age.

than provided for in Article 3(4). For example, **Greek** and **Irish**²⁵⁸ law provides exemptions on the basis of age in respect of the police, the prison service or any emergency service.

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.'

In addition to the protected grounds covered by the two Directives, several Member States have included nationality as an expressly protected ground in national anti-discrimination law, including **Belgium, Bulgaria, the Netherlands, Portugal, Romania** and **Spain**.²⁵⁹ In other countries, the terms 'race' or 'ethnic origin' are considered to include nationality such as in **Sweden**, where nationality is explicitly listed as an aspect of ethnicity, and the **UK**, where, although nationality is not specifically mentioned as a protected ground, the Equality Act expressly defines race as including nationality. 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**.

Nationality is an explicitly protected ground in anti-discrimination legislation (in the case of decentralised states only federal law is indicated)

	Law	Article
AUSTRIA	No ²⁶⁰	-
BELGIUM	Racial Equality Federal Act	Art. 4, 4°
BULGARIA	Protection Against Discrimination Act	Art. 4(1)
CROATIA	No	-
CYPRUS	The Combating of Racial and other forms of Discrimination (Commissioner) Law No 42(I)/2001 ²⁶¹	Art. 5(b)(i)
CZECH REPUBLIC	No ²⁶²	-
DENMARK	No	-
ESTONIA	No	-
FINLAND	Non-Discrimination Act	S. 2
FRANCE	No ²⁶³	-

²⁵⁸ Section 37, Employment Equality Act 1998-2011.

²⁵⁹ In EU law discrimination on grounds of nationality is prohibited under Article 18 TFEU.

²⁶⁰ Difference of treatment based on nationality is generally regarded as discrimination on the basis of ethnicity unless the difference is based on immigration laws or other legally demanded requirements (see Equal Treatment Act, §§ 17/2 and 31/2).

²⁶¹ Nationality is a protected ground in the above-mentioned legislation that sets out the mandate of the equality body, as this mandate covers all rights protected under Protocol 12 to the European Convention of Human Rights. The laws transposing the Directives do not include nationality among the protected grounds. The equality body itself has always considered nationality to be part of its mandate and refers to it repeatedly in its annual reports when it lists the grounds covered.

²⁶² The concept of nationality as 'citizenship' is not covered. The concept of 'národnost' (national origin) is covered in several laws.

²⁶³ Judicial interpretation is required of Law No 2001-1066 on the Fight against Discrimination as its scope has been reduced. Furthermore the term 'nation' is often referred to as a proxy for nationality. The remaining protection does not explicitly cover national origin except in the Penal Code (Art. 225-1) and the Labour Code (Art. 1132-1).

	Law	Article
FORMER YUGOSLAV REPUBLIC of MACEDONIA	Prevention and Protection Against Discrimination Act ²⁶⁴	Art. 3
GERMANY	No ²⁶⁵	-
GREECE	No	-
HUNGARY	Act on Equal Treatment and the Promotion of Equal Opportunities ²⁶⁶	Art. 8
ICELAND	No ²⁶⁷	-
IRELAND	Employment Equality Act	S. 6
	Equal Status Act	S. 3(h)
ITALY	No ²⁶⁸	-
LATVIA	No	-
LIECHTENSTEIN	No ²⁶⁹	-
LITHUANIA	No ²⁷⁰	-
LUXEMBOURG	No	-
MALTA	No	-
NETHERLANDS	General Equal Treatment Act	Art. 1 b
NORWAY	No ²⁷¹	-
POLAND	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment ²⁷²	Arts 1 and 3
PORTUGAL	Racial Equal Treatment Act	Art. 3(2)
	Prohibition of Racial Discrimination	Art. 1
	Labour Code	Arts 24.1 and 25.1
ROMANIA	Act 324/2006 amending the Ordinance on the Prevention and Punishment of All Forms of Discrimination	Art. 2
SLOVAKIA	Act on Equal Treatment in Certain Areas and Protection against Discrimination	S. 2, para. 1 ²⁷³
SLOVENIA	No ²⁷⁴	-
SPAIN	No ²⁷⁵	-

²⁶⁴ The term 'citizenship' is used in the law.

²⁶⁵ Nationality is a protected ground under the Work Constitution Law in its Article 75.

²⁶⁶ Nationality is not explicitly mentioned in the law but is protected as 'other situation, attribute or condition of a person or group'.

²⁶⁷ There is no anti-discrimination legislation in Iceland, but the General Penal Code, the Act on Trade Unions and Trade Disputes and the Act on Worker's Terms of Employment and Pension prohibit nationality discrimination.

²⁶⁸ Nationality is protected under the Legislative Decree No 286 Consolidated Text of Provisions on the Regulation and the Condition of Foreign Citizens of 25 July 1998 as last amended in 2011.

²⁶⁹ Nationality is mentioned in the Constitution.

²⁷⁰ If nationality is interpreted as national identity/ethnicity it is included in the list of protected grounds in the Equal Treatment Act. If nationality refers to citizenship then judicial interpretation of Art. 2 para 7(4) of the Equal Treatment Act would be necessary as it states that 'different rights applied on the basis of citizenship as established by laws' is not considered as direct discrimination.

²⁷¹ Under the Anti-discrimination Act, national origin is a protected ground. National origin includes also stateless persons, as it is not focusing on which nationality, but national origin other than Norwegian.

²⁷² However, 'nationality' (narodowość) is understood as the fact of belonging to a nation (citizenship is not covered verbatim).

²⁷³ Nationality would be covered by 'other status' included in the non-exhaustive list of protected grounds in the Act on Equal Treatment in Certain Areas and Protection against Discrimination.

²⁷⁴ Discrimination on the basis of nationality is not explicitly prohibited in national law. However, although the Constitution, the Act implementing the Principle of Equal Treatment and the Employment Relationship Act do not list nationality as a protected ground, they do include 'any other personal circumstance'. Therefore judicial interpretation is required in order to determine whether nationality could be a protected ground.

²⁷⁵ Nationality is protected under Organic Law 4/2000 on Rights and Liberties of Aliens in **Spain** and their Social Integration, Art. 2bis, 23 and 54.

	Law	Article
SWEDEN	No ²⁷⁶	-
TURKEY	No ²⁷⁷	-
UNITED KINGDOM	(UK) Equality Act	S. 9
	(NI) Race Relations Order	Art. 5

D. Family benefits

Implementation of the Directives came 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 among 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 **Belgium, Denmark, France,**²⁷⁸ **Iceland, the Netherlands, Norway, Portugal, Spain, Sweden** and the **United Kingdom,**²⁷⁹ 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, national legislation on the recognition of same-sex partnerships has had the impact of requiring marital benefits to be extended to registered partners. However, this is not 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.²⁸⁰ The compatibility of such practices with the Directive was tested in a preliminary reference case judged on 1 April 2008 by the CJEU in *Maruko*.²⁸¹ 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.²⁸²

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 experts that courts would interpret the law as permitting benefits to be officially restricted to married employees (e.g. the **former Yugoslav Republic of Macedonia, Greece, Latvia, Lithuania** and **Poland**).

²⁷⁶ Although nationality is not explicitly mentioned as a protected ground in anti-discrimination legislation, it is included as an explicit aspect of ethnicity according to the Discrimination Act (Ch. 1, S. 5, point 3).

²⁷⁷ Nationality is explicitly mentioned in the Criminal Code (Art. 3(2)).

²⁷⁸ Law No 2013-404 was adopted on 17 May 2013, introducing the right of same-sex couples to get married in France.

²⁷⁹ The Marriage (Same-Sex Couples) Act 2013 was adopted on 17 July 2013, making it possible for same-sex couples to get married in England and Wales. In addition, the Marriage and Civil Partnership (Scotland) Act 2014 was adopted after the cut-off date of this report, introducing the right of same-sex couples to get married and to enter into registered partnerships in Scotland. Marriage for same-sex couples is not permitted in Northern Ireland.

²⁸⁰ BVerwG, 2 C 43.04, 26 January 2006.

²⁸¹ Case C-267/06, *Maruko*, [2008] ECR I-1757.

²⁸² **German** Federal 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. In **Croatia**, an exception for conduct aimed at 'preserving health and preventing criminal acts and misdemeanours' was amended in 2012 to include a note that such conduct cannot lead to direct or indirect discrimination on the grounds of race or ethnic origin, skin colour, religion, gender, ethnic or social origin, sexual orientation or disability.

In the **United Kingdom** anti-discrimination legislation typically includes an exception for action taken 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 a rather 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 **former Yugoslav Republic of Macedonia**, the Anti-discrimination Act provides three exceptions regarding measures aimed 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 **Cyprus**, the Supreme Court has been called upon several times to determine the constitutionality of several sets of legal provisions granting priority in employment

to different categories of people such as people with disabilities, veterans of war, etc., in the public sector. The Supreme Court has consequently developed a practice of declaring void and unconstitutional any law introducing positive action which is challenged.²⁸³ In **Croatia**, the Constitutional Act on the Rights of Ethnic Minorities²⁸⁴ provides for positive action for proportionate representation of members of ethnic minorities in the state administration, the judiciary and local authority bodies and administrations, and the Judiciary Act²⁸⁵ provides for positive measures with respect to ethnic origin, for instance regarding the nomination of judges. These provisions were challenged before the Constitutional Court as discriminatory. The Constitutional Court²⁸⁶ 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 people 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. In the **Netherlands**, the then Equal Treatment Commission²⁸⁷ found in a case involving preferential treatment by a pre-school of children with language difficulties that a measure which does not make a direct distinction based on a protected ground (in this case race or ethnic origin) cannot fall under the provisions on positive action measures. Thus, in the case at hand, the ETC applied the general justification test for indirect discrimination, and found that the measure was objectively justified.²⁸⁸ In **Norway**, where the legislation refers to 'positive differential treatment',²⁸⁹ the scope for positive action measures has been interpreted as very narrow, based on the CJEU's case law on gender. In **Turkey**, amendments to the Constitution introduced in 2011 the principle of positive action²⁹⁰ and other legislation also provide for such measures in a number of areas including education. Discussions are, however, still new in the field.

Norwegian trainee programme for applicants with non-Western background

In Norway, the equality body has only rarely dealt with cases concerning positive action measures in an area other than gender. One such case however concerned a trainee programme established in 2010 by a large state Directorate with the aim of recruiting more employees with a non-Western background. The trainee programme was part of a strategy to increase staff diversity to around 5% non-Westerners before 2012. The programme would train eight people over 18 months, and was reserved for applicants with a 'non-Western' background. The Equality and Anti-discrimination Ombud found that the requirements of the CJEU's case law on gender discrimination must be used also for the assessment under the Racial Equality Directive and Norwegian legislation. The Ombud found that the requirement of proportionality was not fulfilled, and the programme thus did not qualify as positive action under Section 8 of the Anti-discrimination Act.²⁹¹

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 9.2)). The **former Yugoslav Republic of Macedonia** has developed a set of positive actions, as a result of the armed conflict in 2001 and the

²⁸³ See for instance *Charalambos Kittis et al v The Republic of Cyprus* (2006), Appeal case No 56/06 (08.12.2006).

²⁸⁴ *Ustavni zakon o pravima nacionalnih manjina*, Official Gazette 155/02.

²⁸⁵ Article 78(7) and (8), *Zakon o sudovima*, Official Gazette 150/2005, 16/2007 and 113/08.

²⁸⁶ 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.

²⁸⁷ The Equal Treatment Commission was replaced on 2 October 2012 by the Netherlands Human Rights Institute.

²⁸⁸ Equal Treatment Commission Opinion 2012- 151 of 14 September 2012.

²⁸⁹ Through legislative amendments adopted in 2013, the wording has been changed from 'positive action' to 'positive differential treatment'. See Anti-discrimination Act, Section 8; Anti-discrimination and Accessibility Act, Section 5; Sexual Orientation Act, Section 7; and Working Environment Act, Section 13-6.

²⁹⁰ The new Article 10 of the Constitution stipulates that positive action taken for children, elderly people, people with disabilities, widows and orphans of martyrs, invalids and veterans shall not be considered as a violation of the principle of equality.

²⁹¹ Equality body Decision No 10/508, of 5 February 2013.

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,²⁹² 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 the public administration and public institutions. In **Norway**, a pilot project introduced a moderate quota system in favour of non-ethnic Norwegians in 12 state-owned companies. In addition, as of January 2009, employers, public authorities and employer/employee organisations are under a legal obligation to make active, targeted and systematic efforts and to report annually on their efforts to promote equality and prevent discrimination on grounds of disability, ethnicity and sexual orientation.²⁹³ The obligation comprises pay and working conditions, promotion, development opportunities and protection against harassment. The annual report and budget must list all measures carried out throughout the year to fulfil the duty of making active efforts. The obligation is enforced by the Equality and Anti-discrimination Ombud, and a similar duty is imposed on employers with more than 50 employees. 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.²⁹⁴ The Act requires authorities to take such measures as a priority for the benefit of victims of multiple discrimination.²⁹⁵ 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 carry out goal-oriented work to actively promote ethnic diversity in working life.

Positive obligation to pay due regard in the United Kingdom

Since April 2011, all public authorities in Britain have been under positive obligation to have due regard to the need to 'eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the 2010 Equality Act, 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 Essential Guide to the Public Sector Equality Duty gives a suggested approach to help public authorities to comply with the equality duty. Public authorities are required to:

- Establish the relevance of the equality duty to their functions
- Adopt an evidence-based approach in their decision-making process by collecting and using equality information
- Assess the impact on equality of their decision-making and policies and practices
- Engage with people with different protected characteristics to help to develop an evidence-based approach
- Comply with the equality duty when undertaking procurement (as well as commissioning) at all stages, including reviews of their procurement policies and contractor's performance. In addition,

²⁹² Constitution of the Republic of Macedonia, Amendments IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII and XVIII, official website of the Assembly of the Republic of Macedonia: <http://sobranie.mk/the-constitution-of-the-republic-of-macedonia.nspx> Last accessed on 02.07.2014.

²⁹³ Anti-discrimination Act, Sections 13-15; Anti-discrimination and Accessibility Act, Sections 18-20; and Sexual Orientation Act, Sections 12-14.

²⁹⁴ Article 11(1).

²⁹⁵ Article 11(2).

procurement could impose equality conditions or require full compliance with the Equality Act to tenderers, suppliers and subcontractors.

Moreover, certain public authorities are also required to publish equality information and equality objectives with regard to their specific equality duties to better perform the general equality duty for the purpose of the Equality Act 2010.

The equality duty is monitored and enforced by the Equality and Human Rights Commission, whose powers include advising the Government and monitoring and the effectiveness of the equality and human rights legislation.

Disability is the ground for which the most positive action measures are probably 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 people in **Austria, Belgium** (mostly public sector), **Bulgaria, Croatia** (public sector only), **Cyprus** (in the wider public sector), the **Czech Republic**,²⁹⁶ **France, Germany, Greece, Italy, Malta, Poland, Portugal**,²⁹⁷ **Romania, Slovenia, Spain** and **Turkey**.²⁹⁸ However, alternatives to employing disabled people, such as paying a fee or tax, are almost always offered. In **Liechtenstein**, Article 20 of the Act on Equality of People with Disabilities envisages the integration of workers with disabilities into the labour market. In other words, local authorities are entitled to support pilot projects to explore incentives for employing people with disabilities, including in the private sector. In **Iceland**, there is no quota system but the Act on the Affairs of Persons with Disabilities provides assistance when necessary to workers with disabilities, and priority should be given for positions in the public sector if their qualifications are equivalent to other applicants.

Main grounds and fields where positive action is used in practice (in the case of decentralised states according to federal law)

AUSTRIA	Ethnicity (employment in the police), national minorities (language, cultural rights, education), disability (in the workplace, vocational training, quota, protection against redundancy).
BELGIUM	Disability (quotas for people with disabilities in the Federal Administration); Roma (integration, housing).
BULGARIA	Race, ethnicity and Roma (education, healthcare, social assistance, housing and employment), disability (education, accessibility of buildings, infrastructure, information and communications, vocational training and employment, self-employment), age (social inclusion, education, healthcare).
CROATIA	Ethnicity and Roma (employment, education), disability (employment).
CYPRUS	Disability (civic participation, employment), race and ethnic origin, religion (education).
CZECH REPUBLIC	Disability (mandatory quota system in employment for disabled workers), Roma (education).
DENMARK	Disability and age (employment), race, ethnic origin, age, disability, religion or belief, sexual orientation (public/governmental projects on employment/integration),
ESTONIA	Disability (employment), ethnic origin (employment)
FINLAND	Roma (education), disability (employment)
FRANCE	Disability (employment, education), age (employment).

²⁹⁶ In the **Czech Republic**, employers with more than 25 employees have to implement one of three types of measures: employing at least 4% of employees with disabilities; commissioning goods or working programmes from employers who employ at least 50% of employees with disabilities; or making payments to the State budget. The system has been criticised for its lack of effectiveness as most employers choose to make payments to the State budget.

²⁹⁷ The quota system in **Portugal** is, however, not being enforced.

²⁹⁸ However, figures in 2013 show that while the total number of people with disabilities working in the public administration in **Turkey** should be 58,749, only 32,877 civil servants with disabilities are effectively employed.

FORMER YUGOSLAV REPUBLIC of MACEDONIA	Ethnicity including Roma and language (employment and education), age (social protection and housing), disability (employment).
GERMANY	Disability (social inclusion/integration including employment), age and race (integration including employment).
GREECE	Race and disability (employment).
HUNGARY	Disability (employment, education), ethnic origin/social status (education).
ICELAND	Disability (employment).
IRELAND	Travellers (education, employment).
ITALY	Disability (employment), linguistic minorities (all fields of social life, employment, education, health care, access to public services, access to justice).
LATVIA	Disability (employment).
LIECHTENSTEIN	Disability (education, employment).
LITHUANIA	Disability (education, employment, integration), Roma and ethnic minorities (integration, employment, education), age (social protection).
LUXEMBOURG 299	-
MALTA	Disability and age (employment).
NETHERLANDS	Race (employment). ³⁰⁰
NORWAY	Ethnicity, disability (employment).
POLAND	Ethnic origin (education, employment, healthcare, living conditions, security), age (employment), disability (employment and education).
PORTUGAL	Disability (inclusion, employment, housing and accessibility), age (employment, housing), Roma, race, ethnic origin or nationality (inclusion/integration, education, housing employment, health).
ROMANIA	Roma (education), disability (housing, education, employment), youth (housing, employment).
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), ethnicity (employment, social and community work, healthcare, housing and education).
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).
SWEDEN	Disability (employment), ethnicity (employment, integration, education)
TURKEY	Disability (employment), age (social services).
UNITED KINGDOM	Race (education, training and welfare, under-representation in employment, membership among under-represented racial groups – GB: England, Wales and Scotland (EWS) and NI), age (employment – EWS and NI), disability (employment, education, access to goods, facilities and services – EWS), religion or belief (employment – EWS and NI, access to goods and services – EWS), sexual orientation.

²⁹⁹ Although there are no positive action measures *per se*, there are other measures such as the National Plan for Integration and against Discrimination targeting the grounds of race or ethnic origin, religion or belief, age, disability and sexual orientation.

³⁰⁰ Special schemes for disabled persons do exist in the Netherlands such as general social policies aiming at enhancing/improving the equal opportunities of disabled persons to participate in society. Nevertheless, these are not officially listed as positive action measures.

Lauran | 1956



Chapter 4

Access to justice and effective enforcement

Both access to justice and effective remedies are essential to victims of discrimination, otherwise there is a risk that non-discrimination obligations imposed on Member States will not be enforced.

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 may 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, Spain** and **Sweden**, or separately, as for example in **Croatia**, the **former Yugoslav Republic of Macedonia**, **Hungary** and **Slovakia**.³⁰¹ 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.³⁰² 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. Two additional institutions were created in Turkey in 2012, both of which are competent to hear individual complaints of alleged human rights violations. The Ombudsman Institution is tasked with reviewing the acts and operations of the administration while the mandate of the Human Rights Institution of Turkey covers promotion and protection of human rights, although this institution has no specific competence in the discrimination field. The decisions of these different institutions in **Turkey** 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**.³⁰³ In addition, in **Lithuania** employment dispute commissions, regulated by the Employment Code, are the primary bodies mandated to resolve employment disputes. The 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.

³⁰¹ There is however no record that mediation has been used in discrimination cases.

³⁰² **Romanian** Act 370/2009 amending Act 192/2006 on Mediation (26 November 2009).

³⁰³ For a detailed analysis of the role and competences of labour inspectorates in discrimination cases in Europe, see Janka Debrecéniová, *Ex officio investigations into violations of the principle of equal treatment: the role of labour inspectorates and other bodies*, in *European Anti-discrimination Law Review*, issue 17, page 23.

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

Some countries propose conciliation, such as **Austria** (mandatory for disability cases)³⁰⁴ or **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 **Liechtenstein**, the ordinary courts are entitled to designate an arbitration board to reach an agreement between the conflicting parties instead of initiating a trial in the courts. In **Malta**, the National Commission for Persons with Disability (NCPD) 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. In addition, since 2012, the NCPD has been allowed to take any appropriate administrative and/or judicial action to eliminate discrimination.³⁰⁵ By virtue of the 2007 Equal Treatment of Persons Order on the one hand and subsequently of Act IX of 2012 on the other, 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, as well as the grounds of sexual orientation, age, religion or belief and gender identity. In **Finland**, 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 for the equality bodies 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. The **Portuguese** High Commissioner for Immigration and Intercultural Dialogue (ACIDI) 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. By contrast, the Equality Tribunal in **Norway** has a limited competence restricted to the issuance of administrative orders. It can order the payment of a coercive fine only if the time limit foreseen to comply with the order is exceeded. Except for this coercive power (which has never been used in practice), the Equality Ombud and the Equality Tribunal cannot award compensation to victims.

In **Hungary**, the Equal Treatment Authority can take action against any discriminatory act and can impose severe sanctions on people and entities violating the prohibition of discrimination. On 1 January 2012 the **Hungarian** Ombudsman

³⁰⁴ Paras. 14-16 Federal Disability Equality Act.

³⁰⁵ Act No 2 of 2012, entitled the Various Laws (Disability Matters)(Amendment) Act, 2012.

(Commissioner for Fundamental Rights) replaced the previous four Ombudsmen and can also investigate cases of discrimination by any public authority or public service provider, provided that all administrative remedies have been exhausted or none exist. The **Austrian** Equal Treatment Commission and the **Netherlands** Institute for Human Rights³⁰⁶ can both 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 opinion into consideration and give clear reasons for any dissenting decisions. In the **former Yugoslav Republic of Macedonia**, the 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.³⁰⁷

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 **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.

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 chairperson and two lay members. In **Italy**, the 2003 decrees transposing the Anti-discrimination Directives and subsequent national law provided a special procedural regime for discrimination cases. This procedure was abolished in 2011 and general provisions on fast track procedures under the Code of Civil Procedure now apply to discrimination cases at first instance. Under these provisions, a simplified procedure is followed for discrimination cases but is not as informal as in the past. The judge issues an order but an application for review may be filed with a court of appeal, as it can in ordinary cases. If an order is not appealed, it has the same binding force as a final judgment.

In **Ireland**, a specialised Equality Tribunal has an investigative role in hearing complaints.³⁰⁸ 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 1998-2011. A mediated settlement agreed by the parties becomes legally binding and its terms can be enforced at the Circuit Court.³⁰⁹ The Equality Authority may provide assistance in the enforcement procedures.³¹⁰ In **Poland** a 'compensation complaint' procedure has been operating under the Labour Code since 1 January 2004.³¹¹ victims of discrimination in employment 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. In addition, the 2010 Act on Equal Treatment introduced a compensation complaint available to any person (natural or

³⁰⁶ As of 2 October 2012 the Netherlands Institute for Human Rights (NIHR) has replaced the previous Equal Treatment Commission.

³⁰⁷ However, the Act does not specify which authority.

³⁰⁸ The Government has announced its intention to merge a number of existing institutions in the field of employment relations, including the Equality Tribunal, into a new Workplace Relations Service. The implementing legislation has not yet been adopted.

³⁰⁹ Section 91(2), Employment Equality Act 1998-2011.

³¹⁰ Section 67(1)(b)(iii) Employment Equality Act 1998-2011.

³¹¹ Article 18, 3d.

legal) who claims an infringement to the principle of equal treatment, in any field of application of the act. The relevant general provisions of the Civil Code and the Civil Procedure Code apply.

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 sector 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 by 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 the 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 sector employment, ordinary administrative law procedures apply. In **Liechtenstein** employment disputes in the private sector are referred to the ordinary courts, whereas discrimination complaints in the public sector are examined by an administrative court, with the Constitutional Court acting in last instance.

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 has gone 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 have traditionally been used but which pose difficulties in terms of proof and the prerogative of the state prosecutor. One potentially important barrier to effective access to justice is the lack of effective remedies, including compensation, for victims of discrimination.³¹²

A number of deterrents and potential barriers to litigation can, however, still be identified. First, 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).

The lack of sufficient financial means to pursue a case is another barrier cited in a number of countries and is closely related to the lack of adequate representation. In **Norway**, fees related to the representation by a legal counsel in courts are high and it is difficult to obtain free legal aid in discrimination cases. 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. In the **Czech Republic** and **Lithuania**, 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 (or against a symbolic contribution) is quite low and hence a relatively large number of people cannot afford legal services. In addition, NGOs cannot claim in

³¹² For further information, please see section E below, page 107.

courts reimbursement for expenses which cannot be borne by the victims or their own resources, in contrast to attorneys, limiting further access to free legal aid.³¹³ At the same time, court fees may be too high to encourage victims to initiate a legal action, for instance in the **Netherlands** and **Slovakia**.

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 or 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 rejection of a job application by the applicant or with the knowledge of the disadvantageous behaviour. In **Ireland**, the Equal Status Act 2000-2011 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 for instance in **Austria, Cyprus, Estonia, Slovakia** and **Croatia**, and there are serious concerns in **Hungary** and **Slovenia** that some judicial proceedings take over three years to complete. In **Portugal**, lengthy procedures may be explained by the poor institutional mechanisms for communication between the ACIDI, the general inspectorates and the public prosecutor. In **Cyprus**, the equality body is unable to provide any remedy in cases of discrimination when the delay in treating the case has caused a third party to acquire rights which cannot be revoked, as it does not have the power to award compensation.³¹⁴

Basic adjustments to proceedings and court buildings to accommodate the needs of disabled complainants are often lacking and can deter disabled complainants, such as in **France, Portugal** or **Turkey**, where the effective removal of all barriers has been postponed.

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, for instance, **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

³¹³ Amendment to the Civil Procedure Act in 2011, Act No 332/2011 Coll.

³¹⁴ See, for instance, Report Ref. A.K.I. 32/2008 dated 06 April 2012, regarding discriminatory age requirements for recruitment to police special services.

the claimants' right to interpretation in court. 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).

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. The media are likely to report even less in countries where cases are not made public. For instance, in **Turkey** only a selection of Court of Cassation and Council of State rulings is published. Likewise, in **Italy** and the **former Yugoslav Republic of Macedonia**, there is no systematic publication of decisions by either the judges or the equality body. Little information is available in **Liechtenstein** regarding court cases, especially from the first instance (ordinary instance) courts which are competent to decide upon civil and criminal discrimination claims.

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].'

Under the Directives, EU 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 compare. Being able to 'support' a victim is more common than the power to engage in proceedings 'on behalf' of a victim.

Entities which 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 **Iceland**, court procedures must be carried out in person or by a mandated representative, which can be a lawyer or an association. In the **former Yugoslav Republic of Macedonia**, the Law on Labour Relations grants the right to engage in judicial or other proceedings only to trade unions, but the Anti-discrimination Act extends this to all organisations and institutions dealing with equality issues. Similarly in **Liechtenstein**, trade unions and equality organisations may act as representative provided that a specific proxy is given by the complainant. 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. **Greek** procedural law permits NGOs and trade unions with a legitimate interest in ensuring the principle of equal treatment to represent people 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 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 people engaged in the protection of the right to equal treatment related to the group whose rights are at issue in the proceedings. 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.³¹⁵ Furthermore, they can initiate proceedings themselves without an individual complainant where the rights of many parties are affected.³¹⁶ 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.

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 1998-2011), while only the Equality Authority may represent victims before the civil courts.³¹⁷ In **Estonia**, staff members of 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 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 in a court proceedings.

³¹⁵ 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.

³¹⁶ Article 72(3), Protection against Discrimination Act.

³¹⁷ Other bodies and associations may only represent discrimination victims in civil courts at the informal discretion of the court.

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 **Norway**, organisations must bear the ‘purpose, wholly or partly, to oppose discrimination according to the grounds as prohibited by law’.

In **Austria**, although 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. An 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. Similarly, the **Maltese** Equal Opportunities (Persons with Disability) Act was amended in 2012 to provide any person or legal entity which has a legitimate interest in ensuring compliance with the provisions of the Act, including associations and organisations, with the power to initiate legal action before the First Hall of the Civil Court against alleged perpetrators of discrimination on the ground of disability.

Legal standing in court of organisations for discrimination cases

NGOs/trade unions have legal standing in court for discrimination cases		
	Law	Article
AUSTRIA	Equal Treatment Act (with limitations) ³¹⁸	§ 62
	Employment of People with Disabilities Act	§ 7q
	Federal Disability Equality Act	§ 13
BELGIUM	Racial Equality Federal Act	Art. 32
	General Anti-discrimination Federal Act	Art. 30
BULGARIA	Protection Against Discrimination Act	Art. 71(2)
CROATIA	Anti-discrimination Act	Art. 24
CYPRUS	Act on Equal Treatment Irrespective of Race or Ethnic Origin	Art. 12
	Act on Equal Treatment and Occupation	Art. 14
	Act on Persons with Disabilities	Art. 9D
CZECH REPUBLIC	Anti-discrimination Act	Section 11
	Civil Procedure Code	Section 26
DENMARK	Administration of Justice Act (with restrictions) ³¹⁹	Art. 260(6)
ESTONIA	Labour Conflict Resolution Act ³²⁰	Art. 14 (2 ¹)
FINLAND	No ³²¹	-

³¹⁸ This right is only granted for the Litigation Association of NGOs against Discrimination. The right to intervention and/or representation varies between the provinces.

³¹⁹ The Act makes a difference between trade unions and other membership organisations and NGOs. NGOs do not have the same standing. The law also includes restrictions.

³²⁰ This possibility exists for the resolution of labour conflicts. Trade unions have a guaranteed right to represent and defend their members (Article 17(7) of the Law on Trade Unions).

³²¹ The role of organisations is limited to requesting a statement from the tribunal. This statement can only regard the application of the Non-Discrimination Act in general and not in individual cases.

Nora | 2003



NGOs/trade unions have legal standing in court for discrimination cases		
	Law	Article
FRANCE ³²²	Labour Code ³²³	Arts 1132-1, 1134-2 and 1134-3
	Act on the Adaptation of National Law to Community Law in Matters of Discrimination	Art. 6
	New Code of Civil Procedure	Art. 31
FORMER YUGOSLAV REPUBLIC of MACEDONIA	Prevention and Protection against Discrimination Act	Arts 39 and 41
GERMANY	General Equal Treatment Act ³²⁴	Art. 23
GREECE	Equal Treatment Act ³²⁵	Art. 13.3
HUNGARY	Act on Equal Treatment and the Promotion of Equal Opportunities	Arts 3 and 18
ICELAND	Civil Procedure Act	Arts 16(1) and 25(3)
IRELAND	Employment Equality Act	Ss 67 and 77(11)
	Equal Status Act	Ss 67 and 77(11)
ITALY	Legislative Decree No 215/2003 on the Implementation of Directive 43/2000 ³²⁶	Art. 5
	Legislative Decree No 216/2003 on the Implementation of Directive 78/200	Art. 5
	Law No 67/2006 on Measures for the Judicial Protection of Persons with Disabilities who are Victims of Discrimination ³²⁷	Art. 4
LATVIA	Law on Organisations and Foundations	Art. 10(3)
LIECHTENSTEIN	Code of Civil Procedure	Arts 11, 25, 26 and 28
	Act on Equality of People with Disabilities	Art. 31
LITHUANIA ³²⁸	Equal Treatment Act	Art. 12, para. 2
LUXEMBOURG	Equal Treatment Act	Arts 7 and 18
MALTA	Equal Treatment of Persons Order	Art. 16
	Equal Treatment in Employment Regulations	Regulation 11
	Equal Opportunities (Persons with Disabilities) Act	Art. 33A
NETHERLANDS	Civil Code	Art. 3:305a
NORWAY	Act on Civil Procedures/Dispute Resolution Act	Art. 1-4(1)
POLAND	Code of Civil Procedure	Art. 61
PORTUGAL	Racial Equal Treatment Act	Art. 5
	Labour Procedure Code	Art. 5
	Act on the Prohibition of Discrimination based on Disability and Pre-Existing Risk to Health	Art. 15(1)
ROMANIA	Act 324/2006 amending the Ordinance on the Prevention and Punishment of All Forms of Discrimination	Art. 28

³²² Other legislation also provides for legal standing in courts of organisations in discrimination cases, such as Law No 2001-1066 on the Fight against Discrimination (Art. 2) and Law No 2002-73 on Social Modernisation (Art. 24-1).

³²³ For cases relating to private-sector labour matters.

³²⁴ Organisations can support plaintiffs but not represent them.

³²⁵ Organisations in **Greece** have legal standing subject to certain restrictions. Their official objects should include the guarantee and protection of the principle of equal treatment.

³²⁶ Regarding race and ethnicity only, legal standing is granted to organisations that are included in a list approved by a joint Decree of the Ministries of Labour and Welfare.

³²⁷ Similarly, regarding disability, legal standing is granted to organisations identified by a joint Decree of the Ministries of Labour and Equal Opportunities.

³²⁸ Legal standing for organisations and trade unions is also stipulated in the Code of Civil Procedure, Arts 12, para. 2, and 56, paras 5 and 6.

NGOs/trade unions have legal standing in court for discrimination cases		
	Law	Article
SLOVAKIA	Act on Equal Treatment in Certain Areas and Protection against Discrimination ³²⁹	S. 10
	Civil Procedure Act ³³⁰	Art. 26, para. 2
SLOVENIA	Act Implementing the Principle of Equal Treatment ³³¹	Art. 23
	Civil Procedure Act ³³²	Arts 199-202
SPAIN	Act on Fiscal, Administrative and Social Measures ³³³	Art. 31
	General Law on the Rights of Persons with Disabilities and their Social Inclusion	Art.76
SWEDEN	Discrimination Act ³³⁴	Ch. 6, S. 2
TURKEY ³³⁵	No	-
UNITED KINGDOM	No ³³⁶	-

To engage 'on behalf of'

A number of countries allow associations to engage in proceedings 'on behalf of' victims of discrimination, including **Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, the former Yugoslav Republic of Macedonia, France, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, and Sweden**. However, the conditions for associations to engage on behalf of victims of discrimination as well as the scope of such potential action vary among the countries. **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 **Austria**, although associations and other legal entities may act on behalf of victims of discrimination, this possibility is limited to proceedings where representation by a barrister is not mandatory, which are very rare. In **Latvia**, associations may represent victims of discrimination before the courts, although amendments were adopted in late 2013 restricting this possibility to the lower instances.³³⁷ Thus, as of 1 January 2014, an association having acted on behalf of a victim of discrimination before the first two instances may no longer appeal the decision of the court of appeal before the court of cassation, where a barrister needs to be present. It is noteworthy that most cases of discrimination have hereto been brought before the civil courts by NGOs or legal practitioners other than barristers, which may indicate that the amended provisions could have a very negative impact

³²⁹ This Act grants legal standing to NGOs and the Slovak National Centre for Human Rights.

³³⁰ The Civil Procedure Act grants legal standing to trade unions.

³³¹ As the general provision included in the Act is too vague to be operational, legal standing is restricted by other procedural laws.

³³² Organisations need to ask for and be granted status of a third party intervener by the court.

³³³ Organisations do have the possibility to engage in civil and administrative proceedings but not in labour proceedings or in pre-judicial matters.

³³⁴ Trade unions also have the right to represent their members in all disputes regarding employment (Procedure in Labour Law Cases Act, Ch. 4, S. 5 and Ch. 6 Art.2).

³³⁵ Judicial interpretation is needed of the Law on Trade Unions.

³³⁶ In the UK, only victims of discrimination may litigate, although bodies with a 'sufficient interest' may bring judicial review challenges against actions of public authorities. Judicial interpretation of the Senior Court Act 1981 is therefore required.

³³⁷ Amendments to the Civil Procedure Law (*Grozījumi Civilprocesa likumā*), 19 December 2013, published in the Latvian Herald (*Latvijas Vēstnesis*) 2(5061), 03.01.2014, available in Latvian at: www.vestnesis.lv/?menu=doc&id=263490.

on the (already low) number of court decisions in discrimination cases in Latvia. However, in 2003 the Constitutional Court found a similar provision to be in violation of the Constitution, and was repealed.³³⁸ In **Lithuania**, the Equal Treatment Act has stipulated since 2008 that 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, it is unclear how this provision will interact with more restrictive general provisions of the Code of Civil Procedure. In **Finland**, the right to bring a case before the Discrimination Tribunal is reserved to the victim or the Ombudsman for Minorities. With regards to legal action before the courts, as of 1 January 2013, only individual lawyers who have been granted a special authorisation to act as a legal attorney can represent victims in courts. However, according to the exception laid down in Section 2 of the Judicial Procedure Code, lawyers working for bodies such as the Ombudsman for Minorities and social partners (trade unions and employer organisations) do not need to apply for such authorisation. In **Italy**, only those associations that have been included in a list established by a joint decree of the Ministries of Labour and of Equal Opportunities may act on behalf or in support of victims of discrimination. The list was updated in 2013 and now contains more than 550 associations.³³⁹

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. 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. In **Slovenia**, only law firms can represent victims in courts, and this concretely means that NGOs can intervene only if they engage an entity entitled to go to courts, most frequently a qualified lawyer. 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. **Turkish** law does not fully guarantee the right of associations, organisations or other legal entities with a legitimate interest to engage in judicial or administrative procedures in support of victims of discrimination.

Collective redress

The European Commission has been assessing the need for a common EU approach to collective redress. In a working document published in 2011,³⁴⁰ it recognised that collective redress is necessary where the same breach of rights provided under EU law 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. Following this public consultation, the Commission issued in 2013 a Recommendation to the effect that all Member States should introduce collective redress mechanisms to facilitate the enforcement of the rights that all EU citizens have under EU law.³⁴¹ Such action is not covered by the two Anti-discrimination Directives but can be divided into class action or group action (claims on behalf of an undefined group of claimants or identified claimants and multiple claims) and *actio popularis*.³⁴² In many

³³⁸ Decision of the Constitutional Court of the Republic of Latvia in Case No 2003-04-01 of 27 June 2003, available in Latvian at: <http://www.satv.tiesa.gov.lv/?lang=1&mid=19>.

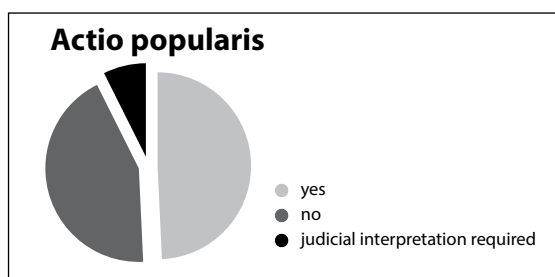
³³⁹ Decree of the Labour and Social Policy Office of 13 March 2013, available at: http://www.asgi.it/public/parser_download/save/decreto_min_lavoro_13032013.pdf.

³⁴⁰ Commission Staff Working Document Public Consultation: *Towards a coherent European approach to collective redress*, 4 February 2011.

³⁴¹ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.7.2013, p. 60–65.

³⁴² For further information, see L. Farkas, 'Collective actions under European anti-discrimination law', *European Anti-discrimination Law Review*, Issue 19, November 2014, p. 25.

countries, there is no specific procedure for discrimination cases but consumer protection law envisages group action, which can be relevant in the field of access to goods and services. However, in practice, application of these provisions is subject to judicial interpretation.

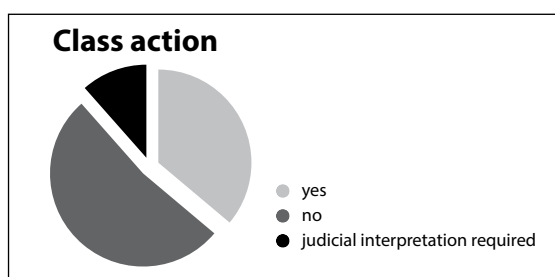


Actio popularis is a very useful tool as it allows organisations to act in the public interest on their own behalf, without a specific victim to support or represent. *Actio popularis* is permitted by national law for discrimination cases in 16 countries (**Bulgaria, Croatia, France, the former Yugoslav Republic of Macedonia, Germany,**³⁴³ **Hungary, Italy, Liechtenstein,**³⁴⁴ **Luxembourg, the Netherlands, Norway, Portugal, Romania, Slovakia, Spain**³⁴⁵ and

Turkey). In **Turkey** for example, the Procedural Act adopted on 12 January 2011 introduced *actio popularis* claims. According to Article 113, associations and other legal entities may initiate a 'group action' to protect their interests or the interests of their members or the sector they represent 'for the determination of the rights of the related parties on their behalf, removal of the illegal situation or the prevention of any future breach of their rights.' However, general rules concerning the shifting of the burden of proof apply. In **Hungary**, 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.

In three countries judicial interpretation would be required. In **Austria**, even though some kind of group litigation is possible, the group litigation model neither clearly allows *actio popularis* nor establishes class action, therefore judicial interpretation is needed of the Federal Disability Equality Act.³⁴⁶ In **Malta** the Equal Treatment of Persons Order needs to be interpreted by courts. In **England** and **Wales** the Senior Court Act 1981 also needs interpretation.

Where *actio popularis* is not permitted by law for discrimination cases, it should be noted that in **Cyprus** the equality body accepts and investigates complaints from organisations acting in the public interest on their own behalf without a specified victim. This approach should nevertheless be attributed to the liberal approach followed by the equality body rather than to an interpretation of the law allowing *actio popularis*.



Class actions (possibility given to organisation to act in the interest of more than one individual victim for claims arising from the same event) are permitted by law for discrimination cases in 12 countries: **Bulgaria, Denmark, the former**

³⁴³ This possibility exists only on the basis of disability law.

³⁴⁴ This possibility is nevertheless restricted. Articles 27 to 29 and 31 of the Act on Equality of People with Disabilities entitle associations for people with disabilities to make legal claims on their own behalf for accessibility provision in public buildings, for accessibility of public roads and traffic areas, and for accessibility on public transport systems.

³⁴⁵ *Actio popularis* is possible in **Spain** only in criminal proceedings.

³⁴⁶ It has to be noted that in **Austria**, § 13 of the Federal Disability Act gives the NGO the Austrian National Council of Disabled Persons the restricted possibility to file an action on behalf of an unidentifiable group of affected persons with disabilities. Nevertheless, no financial compensation or any other remedies are possible.

Yugoslav Republic of Macedonia, France, Iceland,³⁴⁷ Liechtenstein, the Netherlands, Norway, Portugal, Romania, Slovakia and Slovenia. In **France** where class action is only permitted for housing cases, a draft law was tabled in 2006 but it has not progressed further. In 2013, however, two additional draft laws were proposed introducing class action into national legislation with regard to discrimination cases.

Judicial interpretation is required in four countries. As mentioned above the **Austrian** model does not clearly establish either *actio popularis* or class action,³⁴⁸ and the Federal Disability Equality Act needs further interpretation. Judicial interpretation is also required for the **Cypriot** Law on the Courts of Justice, the **Maltese** Equal Treatment of Persons Order and the **Polish** Act on Pursuing Claims in Collective Actions.

As regards countries where class action is not permitted, it is interesting to note that the **Hungarian** legal system does not prevent associations from obtaining authorisations from more than one victim and bringing a single case, but in such a case the claims of each victim will be examined individually.

Neither *actio popularis* nor class action is permitted in the following countries: **Belgium, the Czech Republic, Estonia, Finland, Greece, Ireland, Italy, Latvia, Lithuania, and Sweden.**

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'.³⁴⁹ 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 combating against discrimination or slavery to intervene in an action brought by any apprentice, trainee, job applicant or employee who alleges they have been a victim of discrimination. Any person with a legitimate interest in the dismissal or granting of a civil action has legal standing before the civil courts, and NGOs working to combat discrimination on the grounds of ethnic origin, race or religion may be civil parties in some criminal actions. Although there is no specific provision in the Code of Administrative Justice, NGO interventions are common practice before administrative courts, provided that the 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. As of 1 February 2012, the protected ground concerned by the legal action must be explicitly mentioned in the statutes. Judicial interpretation by the courts will be

³⁴⁷ The **Icelandic** Civil Procedure Article 19a provides for a form of class action. Three or more individuals with claims against a party stemming from the same incident or situation can establish an 'action association' which can bring the case on the plaintiffs' behalf.

³⁴⁸ The possibility of some sort of limited group litigation given to the Austrian National Council of Disabled Persons does not include the accumulation of interests of individuals.

³⁴⁹ Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, [2008] ECR I-5187.

needed to determine whether a restrictive or flexible interpretation will be adopted of this new provision, in particular with regard to cases of intersectional discrimination. 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 Inter-federal Centre for Equal Opportunities and Opposition to Racism and Discrimination, 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.³⁵⁰ 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/EC, standing to litigate – previously limited by Decree 216/2003 to trade unions – is now accorded on an *ad hoc* basis to other organisations and associations regarded as having a 'legitimate interest' in the enforcement of the relevant legislation. **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 proof³⁵¹

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 people 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.³⁵² The burden of proof will then shift to the respondent, who must prove that there has been no breach of the principle of equal treatment. This does not affect criminal cases (Article 8(3)/10(3)), and Member States can decide not to apply it to cases in which courts have an investigative role (Article 8(5)/10(5)). Thus, for example, in **France** the burden of proof is not shifted in administrative procedures which are inquisitorial in nature. Nevertheless, the Council of State (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 which 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 Netherlands Institute of Human Rights (previously the Equal Treatment Commission), although the NIHR nevertheless does apply the shift in the burden of proof on a voluntary basis. This rule applies for all forms of discrimination, including harassment. In contrast, in **Bulgaria**, the

³⁵⁰ Decree of the Ministry of Labour and Social Affairs of 13 March 2013, available at http://www.asgi.it/public/parser_download/save/decreto_min_lavoro_13032013.pdf.

³⁵¹ A thematic report on the shift of the burden of proof in discrimination cases is currently under preparation by Lilla Farkas: *Reversing the burden of proof: Practical dilemmas at the European and national level* (to be published 2015).

³⁵² 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).

shift of the burden of proof is applicable to both judicial proceedings and proceedings before the equality body, although the wording of the national provisions differs slightly from that of the Directives.³⁵³ Although the shift is uniformly applicable to all forms of discrimination, including harassment and victimisation, it is not always applied consistently in all cases. Further training for judges and staff of the equality body would be advisable.

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 mainly to employment, but also to natural persons who are economic operators, education and access to goods and services. The provision on the burden of proof in the **Austrian** federal Equal Treatment Act (applicable in the private sector) lowers the burden for the plaintiff but in a way that is not considered to comply satisfactorily 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 2013, the same provision contained in the Federal-Equal Treatment Act (applicable in the federal public sector) was amended to comply with the Directives.³⁵⁴ In **Poland**, before the adoption of the new Equal Treatment Act in 2010, the burden of proof only shifted in employment cases. Article 14 of the Act eventually introduced the shift of the burden of proof in all compensation proceedings dealing with the principle of equal treatment enshrined in the Act. In the **former Yugoslav Republic of Macedonia**, the Anti-discrimination Act places the burden to 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',³⁵⁵ contrasting with the Directives, which merely require the establishment of the facts. **Turkish** law provides for a shift in a limited number of cases, as does **Icelandic** law, where the shift applies to gender discrimination cases only. In **Liechtenstein**, the plaintiff must establish the discrimination claim as 'credible'. Moreover, against allegations of direct discrimination defendants must bring forward a 'crucial' reason justifying the difference in treatment. In **Norway**, the rule of shared burden of proof applies to all grounds of discrimination, as well as reasonable accommodation, harassment, victimisation and instructions to discriminate.

Provisions on burden of proof in Romania

Until 2013, the Romanian Anti-discrimination Ordinance stipulated that 'the person concerned has the obligation to prove the existence of facts which allow the presumption 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'.³⁵⁶ 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 Ordinance was submitted and adopted by the Senate in 2010, proposing a new definition of the burden of proof.

The proposed amendment was however heavily criticised, firstly because it only referred to the burden of proof before the national equality body and not before the courts; secondly and more importantly, the proposed wording maintained the duty of the plaintiff to provide evidence leading to a presumption of discrimination but removed the duty of the defendant, replacing it by an option. The draft was delayed

³⁵³ After the cut-off date of this report, on 16 January 2014, Parliament adopted at first reading an amendment to Article 9 of the Protection Against Discrimination Act, to bring the wording into line with the Directives regarding the shift of the burden of proof. The amendment is awaiting second reading.

³⁵⁴ BGBl. I No 81/2013 of 27 December 2013, amended §20a.

³⁵⁵ 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.

³⁵⁶ Previous Article 20(6) of Governmental Ordinance 137/2000.



and finally amended in 2013, to be adopted by the Chamber of Deputies on 26 February 2013. The provision finally adopted reads as follows:

'The person concerned shall present facts based on which it can be presumed that direct or indirect discrimination exists, and the person against whom the complaint was filed has the duty to prove that no infringement of the principle of equal treatment occurred.'³⁵⁷

The meaning of this phrase, 'facts from which it may be presumed that there has been direct or indirect discrimination' was one of several questions on the burden of proof put before the Court of Justice of the EU 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. Further guidance was also provided by the Court on this issue in case C-81/12 *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*, where it held that 'a defendant employer cannot deny the existence of facts from which it may be inferred that it has a discriminatory recruitment policy merely by asserting that statements suggestive of the existence of a homophobic recruitment policy come from a person who, while claiming and appearing to play an important role in the management of that employer, is not legally capable of binding it in recruitment matters.'³⁵⁸

There are different types of evidence for plaintiffs to establish facts from which it may be presumed that there has been direct or indirect discrimination, including statistics; situation testing (**Belgium, Hungary, the Netherlands, Romania and Sweden**); questionnaires; audio or video recording (**Slovakia**); expert opinions or inferences drawn from circumstantial evidence (such as in **France**, where the chronological order of relevant events, a foreign physical appearance or a foreign surname³⁵⁹ were accepted as means of proof in discrimination cases on grounds of racial or ethnic origin).

Belgian court accepts recording as means of establishing a prima facie case of discrimination

The complainant, who has syndactyly, a congenital hand malformation, was employed under a short term contract as a salesman in a computer hardware shop. The shop manager promised that he would be hired under a permanent contract on the condition that he immediately terminated his parallel employment as a car park attendant, which he did. However, the shop manager did not keep her promise. The complainant's parents visited the shop and recorded their discussion with the manager, who then revealed that the decision not to employ the complainant was based on his congenital hand deformities, as the manager was afraid of customers' reactions. As a consequence, the complainant and the (then) Centre for Equal Opportunities and Opposition to Racism each brought a case before the Labour Tribunal of Bruges in order to obtain an injunction imposing the cessation of the discriminatory practice, the publication of the judicial decision in several newspapers and its display on the premises where the discrimination occurred, as well as an award of damages.

On 10 December 2013, the President of the Labour Tribunal of Bruges ruled on both cases in emergency proceedings.³⁶⁰ Firstly, the injunction actions were declared inadmissible because there was no danger that the discriminatory practice would be repeated against the complainant. Secondly, the Tribunal held that the recording provided was admissible as a way to prove a *prima facie* case of discrimination,

³⁵⁷ Articles 20(6) and 27(4) of Governmental Ordinance 137/2000, as amended on 25 June 2013.

³⁵⁸ Case C-81/12, judgment of 25 April 2013, ECLI:EU:C:2013:275.

³⁵⁹ See *Airbus Operations SAS No K10-15873* where the Court of Cassation inferred discrimination from the list of surnames of company staff.

³⁶⁰ President of the Labour Tribunal of Bruges, Judgments No 12/2552/A and No 12/2596/A of 10 December 2013.

as there had been no violation of the manager's rights. In this regard, the Court considered that the manager's rights were not violated due to the absence of a confidential, personal or employment relationship between the complainant's parents and the manager. In addition, the Court found it relevant that the recorded conversation had the sole object of discussing the alleged discrimination against the complainant. Finally, the Labour Tribunal held that an employer cannot directly distinguish an employee based on a physical or genetic characteristic and/or an alleged disability in order to respond to the needs and preferences of colleagues and/or customers. This kind of direct distinction can neither be considered as a genuine and determining occupational requirement nor as a difference in treatment imposed by, or by virtue of, legislation. Furthermore, no reasonable accommodation was provided to make the function possible. Consequently, the President of the Labour Tribunal of Bruges ruled that the shop manager was guilty of direct discrimination and sentenced her to pay the equivalent of six months of salary as compensation, but did not order the publication and display of the judicial decision.

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 some 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 (**Luxembourg** and **Spain**). In **Malta**, amendments to national law adopted in 2012 extend protection against victimisation for complaints brought on the grounds of sexual orientation, age, religion or belief and gender identity to certain fields beyond employment, such as education and financial services.³⁶¹ In addition, the amended Equal Opportunities (Persons with Disability) Act now also prohibits victimisation of anyone having made a complaint or initiated or participated in proceedings for redress on the grounds of an alleged breach of the Act, or for having disclosed information, confidential or otherwise, to a designated public regulatory body, regarding alleged discriminatory behaviour, activities or practices.³⁶² 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 and the employee's request for equal treatment. In **Italy**, amendments to the Anti-discrimination Decrees were introduced to extend protection against victimisation to 'any other person' beyond the complainant.³⁶³ In both **Croatia** and the **former Yugoslav Republic 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. **Icelandic** law,³⁶⁴ as well as **Turkish** labour law, merely prohibits the dismissal of an employee who seeks judicial redress. In **Liechtenstein** a complainant or a witness is protected against reprisals for initiating a complaint or a legal action related to a violation of anti-discrimination law.

For example, in **Belgium**, protection against victimisation is limited to victims filing a complaint of discrimination and any formal witness in the procedure. This limitation seems to mean that not 'all persons' involved are protected, for instance persons who provided assistance or support to the victim as required by the Directives. In **Bulgaria**, protection

³⁶¹ Equality for Men and Women Act, Article 4.

³⁶² Equal Opportunities (Persons with Disability) Act, Article 5.

³⁶³ 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 7 June 2008.

³⁶⁴ Victimisation is only explicitly prohibited under the Gender Equality Act.

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. Since the adoption of the Equality Act 2010, the **United Kingdom** provision defining victimisation no longer requires the complainant to show less favourable treatment than a real or hypothetical comparator, bringing national law into line with the Directives, which do not require a comparator. However, protection against victimisation in the **United Kingdom** is retrospective only: the law does not require preventative measures as are implicitly required by the Directives. Finally, the Equality Act 2010 did not extend to post-employment acts of victimisation.

UK courts deliver contrasting decisions on post-employment victimisation

In the spring of 2013, two Employment Appeal Tribunals (EATs) adopted contrasting decisions regarding the scope of the prohibition of victimisation contained in the Equality Act 2010. The Equality Act explicitly excludes victimisation from the provision which ensures protection against discrimination after the termination of the employment contract (Section 108(7)), which is why the EAT in the first case found that the Act provides no remedy for post-employment victimisation, although it recognised that the gap in statutory protection was probably accidental.³⁶⁵ The EAT did not accept that it had the power to fill the statutory gap itself, which would have required extensive re-writing of primary legislation.

However, the EAT in the second case came to the conclusion that the drafters of the Equality Act must have been familiar with the earlier case law which extended protection against discrimination after the termination of the employment contract, and that their failure to explicitly exclude such victimisation from the Act must be interpreted to mean that it was implicitly included.³⁶⁶ In addition, a construction compatible with EU law would have achieved the same result.

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 who 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 organisation or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment. In **Romania**, protection against victimisation is not limited to the complainant but extends to witnesses. As the law does not distinguish, victimisation is prohibited not only in relation to complaints filed with the national equality body but also in relation to complaints submitted to any other public or private institution (labour inspectorate, consumer protection office etc.). In **Norway**, protection against discrimination is limited when the complainant acted with gross negligence. Otherwise, provisions on victimisation apply to the complainant, as well as to witnesses or anyone who assists the victim in bringing the claim, such as a workers' representative.

³⁶⁵ *Rowstock Ltd & Anor v Jessemeys*, 5 March 2013, Appeal No UKEAT/0112/12/DM.

³⁶⁶ *Onu v Akwivu & Anor*, 1 May 2013, Appeal No UKEAT/0283/12/RN & UKEAT/0022/12/RN.

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.

Prohibition of victimisation in national law (in the case of decentralised states only federal law is indicated)

AUSTRIA	Equal Treatment Act	§§ 27, 39
	Federal Equal Treatment Act ³⁶⁷	§ 20/b
	Employment of People with Disabilities Act	§ 7i
	Federal Disability Equality Act ³⁶⁸	§ 9(5)
BELGIUM	Racial Equality Federal Act ³⁶⁹	Arts 14 and 15
	General Anti-discrimination Federal Act	Arts 16 and 17
BULGARIA	Protection Against Discrimination Act	Arts 5 and § 1.3-4 Additional Provisions
CROATIA	Anti-discrimination Act	Art. 7 and 28
CYPRUS	Act on Equal Treatment in Employment and Occupation	Art. 10
	Act on Equal Treatment irrespective of Race or Ethnic Origin	Art. 11
	Act on Persons with Disabilities	Art. 7
CZECH REPUBLIC	Anti-discrimination Act	S. 4, para. 3
DENMARK	Act on Prohibition of Discrimination in the Labour Market etc.	Art. 7(2)
	Ethnic Equal Treatment Act	Art. 8
ESTONIA	Equal Treatment Act	Art. 3(6)
FINLAND	Non-Discrimination Act	S. 8
FRANCE	Act on the Adaptation of National Law to Community Law in Matters of Discrimination	Arts 2 and 3
FORMER YUGOSLAV REPUBLIC of MACEDONIA	Prevention and Protection against Discrimination Act	Art. 10
GERMANY	General Equal Treatment Act	Art. 16
GREECE	Equal Treatment Act	Art. 15
HUNGARY	Act on Equal Treatment and the Promotion of Equal Opportunities	Arts 10, para. 3
ICELAND	_370	-
IRELAND	Employment Equality Act	S. 74(2)
	Equal Status Act	S. 3(2)(j)
ITALY	Legislative Decree No 215/2003 on the Implementation of Directive 43/2000	Art. 4bis
	Legislative Decree no. 216/2003 on the Implementation of Directive 78/2000	Art. 4bis
LATVIA	Labour Law ³⁷¹	Arts 8(2) and 9
LIECHTENSTEIN	Act on Equality of People with Disabilities	Art. 23§4

³⁶⁷ The Federal Equal Treatment Act and the Employment of People with Disabilities Act include protection against victimisation in employment discrimination cases only.

³⁶⁸ The Federal Disability Equality Act includes protection against victimisation outside the employment field only.

³⁶⁹ **Belgian** law only protects victims, their representatives and witnesses against victimisation while the EU Directives cover 'all persons' involved.

³⁷⁰ Victimisation is only defined and prohibited in the Gender Law.

³⁷¹ Victimisation is also dealt with outside the employment field in the following laws: the 1995 Law on Social Security, Art. 34(2), the 1999 Law on Consumer Protection, Art. 3(1), and the 2012 Law on Prohibition of Discrimination against Natural Persons who are Economic Operators, Art. 6.

LITHUANIA	Equal Treatment Act	Art. 7, para. 8
LUXEMBOURG	Equal Treatment Act	Arts 4 and 18
MALTA	Employment and Industrial Relations Act	Art. 28
	Equal Treatment of Persons Order	Art. 7
	Equal Opportunities (Persons with Disability) Act	Art. 5
	Equality for Men and Women Act	Art. 4
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
NORWAY	Anti-discrimination Act on Prohibition of Discrimination based on Ethnicity, Religion, etc.	Art. 10
	Working Environment Act	Arts 2-5
	Anti-discrimination and Accessibility Act on Prohibition of Discrimination on the Basis of Disability	Art. 9
	Act relating to a Prohibition against Discrimination on the Basis of Sexual Orientation, Gender Identity and Gender Expression	Art. 9
POLAND	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment	Art. 17
PORTUGAL ³⁷²	Labour Code ³⁷³	Art. 129(1)(a)
ROMANIA	Act 324/2006 amending the Ordinance on the Prevention and Punishment of All Forms of Discrimination	Art. 2(7)
SLOVAKIA	Act on Equal Treatment in Certain Areas and Protection against Discrimination	S. 2a, paras 8 and 10
SLOVENIA	Act Implementing the Principle of Equal Treatment	Art. 3(2)
	Employment Relationship Act	Art. 6(8)
SPAIN	Act on Fiscal, Administrative and Social Measures	Art. 37
SWEDEN	Discrimination Act	Ch. 2, Ss. 18-19
TURKEY	_ ³⁷⁴	Art. 18
UNITED KINGDOM	(UK) Equality Act	S. 27
	(NI) Race Relations Order (RRO)	Art. 4
	(NI) Fair Employment and Treatment Order	Art. 3(4)
	(NI) Employment Equality (Sexual Orientation) Regulations ³⁷⁵	Reg. 4
	(NI) Disability Discrimination Act	S. 55
	(NI) Employment Equality (Age) Regulations	Reg. 4

E. Sanctions and remedies³⁷⁶

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 EU 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.

³⁷² Prohibition of acts of retaliation (both within and outside the employment field) is also granted by Art. 7 of the Principle of Racial Equality Act.

³⁷³ Only in relation to employment.

³⁷⁴ Protection against victimisation, although not comprehensive enough, is available in limited situations under the Labour Law.

³⁷⁵ The (NI) Equality Act (Sexual Orientation) Regulations, Reg. 4, provide for protection against victimisation outside employment.

³⁷⁶ 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.

CJEU ruling on sanctions in discrimination cases: Asociația ACCEPT

When ruling on the Asociația ACCEPT case, the Court of Justice of the EU was provided a rare opportunity to examine and provide guidance on the effectiveness, proportionality and dissuasiveness of sanctions available in discrimination cases.

The case concerned a shareholder of a football club who presented himself and was generally perceived as the 'patron' of that club, and who made a statement in the media criticising the recruitment by the club of homosexual players. The association ACCEPT lodged a complaint before the Romanian quasi-judicial equality body (National Council for Combating Discrimination, NCCD), claiming discrimination in recruitment matters on the ground of sexual orientation. The NCCD found that as the statements did not emanate from an employer or a person responsible for recruitment, they did not fall within the sphere of employment although they were found to constitute harassment. The claimant association brought an action against that decision, and the Bucharest Court of Appeal subsequently referred questions to the CJEU for a preliminary ruling, including questions related to the sanctions available in Romanian anti-discrimination law.

In its judgment of 25 April 2013, the Court observed that Directive 2000/78 applies to situations such as the present one, which involve statements concerning the conditions for access to employment, including recruitment conditions. The specificities of the recruitment of professional football players were found to be irrelevant in this regard, as was the fact that the statements were made by a person who was not legally capable of binding the employer in recruitment matters. Thus, statements made in relation to recruitment matters by a person who claims to play an important role in the management of an employer and who appears to do so, can constitute 'facts from which it may be presumed that there has been discrimination' in the sense of the Directive.

Finally, the Court examined the national regulation which provided that the only sanction available after the expiry of six months from the date on which the facts occurred was a 'warning'. In this regard, the Court found that the Directive precludes such a regulation, unless the specific remedy can be considered to be effective, proportionate and dissuasive. The Court underlined that symbolic sanctions are not compatible with the Directive. Thus, not only pecuniary sanctions are compatible with the Directive, but non-pecuniary sanctions should be accompanied by a sufficient degree of publicity. In addition, the Court noted that each remedy available in national legislation should individually fulfil the criteria of the Directive.

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

As a whole, no single national enforcement system appears to be truly all-encompassing. Essentially, they are all mostly based on an individualistic and remedial – rather than a preventative – approach. **Irish** law provides a broad range of remedies, including compensation awards, reinstatement and re-engagement, as well as orders requiring employers to take specific courses of action. In particular, there is case law relating to compliance with these orders: the creation of an equal opportunities policy; reviewing recruitment procedures; reviewing sexual harassment procedures; formal training of interview boards; review of customer service practices; and equality training for staff. In **Spain** penalties have been established in the employment field for all the grounds (Directive 2000/78/EC) and for the ground of disability in all fields (Act 49/2007), but not in the other fields covered by Directive 2000/43/EC 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.³⁷⁷ These sanctions are administrative fines and are not awarded to the victim as compensation but go to the state budget. The **British** Equality and Human Rights Commission 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. In addition, tribunals in the **United Kingdom** have the power to make broad recommendations as regards future steps to be taken by employers shown to have discriminated, thereby going beyond the respondent’s treatment of the claimant. However, the Deregulation Bill currently being debated in Parliament will, if adopted in its current form, repeal the provisions allowing for such broad recommendations.³⁷⁸

Lack of appropriate mechanisms to monitor compliance with decisions in Romania

Although Article 19 of Ordinance 137/2000 (the Romanian anti-discrimination law) lists the monitoring of discrimination among the tasks of the National Council for Combating Discrimination (NCCD), there is no mechanism which would permit adequate monitoring of compliance with the NCCD’s decisions. In principle, an individual who is ordered to pay a fine has the duty to send a proof of payment. However, there is no information related to effective compliance in practice or whether the NCCD compiles such information. Enforcement would, in practice, only be monitored if the member of the NCCD Steering Board who is responsible for the case in question takes an interest, or in the case of significant visibility provided by the media.

Interesting administrative remedies are found in Portugal. 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;

³⁷⁷ Article 78-80 of the Protection against Discrimination Act.

³⁷⁸ Deregulation Bill 2013-14 to 2014-15, available at: <http://services.parliament.uk/bills/2014-15/deregulation.html>.

- 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.

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. Furthermore, 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.

In **Finland**, the law specifies an upper limit of EUR 16,430,³⁷⁹ 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 apply in **Malta** for disability cases (EUR 2,500), although this upper limit was significantly raised in 2012.³⁸⁰

There appear to be no limits either in relation to pecuniary or non-pecuniary damages in the national laws of **Bulgaria, Croatia, the Czech Republic, Denmark, the former Yugoslav Republic of Macedonia, France, Iceland, Italy, Liechtenstein**,³⁸¹ **Luxembourg**, the **Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain** and the **United Kingdom**. 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 a discriminatory termination as specified in the Equal Treatment Act or the Gender Equality Act. Although there are no statutory limits on compensation for damages in **Croatia**, in 2002 the Supreme Court published guiding criteria for non-pecuniary damages which the courts are using as guidelines to determine levels of compensation, without necessarily taking into account the effectiveness, proportionality and dissuasiveness of the sanction.

Upper limit for unpaid salary damages under the Hungarian Labour Code

Under Article 82 of the Labour Code, if discrimination is manifested in the unlawful termination of employment, the employer must compensate the employee for the damage suffered. Paragraph (2), however, provides that, if the claimant demands lost income as an element of damages, no more than twelve months' salary may be claimed by the employee under this heading. The reason for this provision (which means a significant change to the previous situation as no such cap existed) was that protracted lawsuits put employers into very difficult situations if after several years they had to pay the unlawfully dismissed employee's unpaid salary in full if he/she did not find a new job during that time. The change has a very detrimental effect on employees, as it introduces a maximum 'penalty' that employers have to pay for an unlawful dismissal, which may dissuade them from trying to reach a friendly settlement instead of making the case as long as possible through appealing the subsequent judicial decisions (since delaying tactics will not have an impact on how much they have to pay in the end).

³⁷⁹ TyA 59/2010, Section 1.

³⁸⁰ Article 34 of the Equal Opportunities (Persons with Disability) Act, as amended by Act II of 2012.

³⁸¹ No upper limit for disability under the Act on Equality of People with Disabilities.

Judicial interpretation will be required to determine how this provision will be applied in correlation with Article 83 of the Labour Code, which allows an unlawfully dismissed employee to request the courts to order his/her reinstatement. Indeed, it remains unclear what happens if an employee is reinstated following a lawsuit which has lasted longer than one year. According to some practitioners, the employment has to be regarded as continuous, so that the employee receives his/her lost income as 'unpaid salary' and not as 'damages', and so the cap does not apply. According to others, even in such cases no more than 12 months' salary can be claimed retroactively. No judicial decisions are available yet on this matter, so it needs to be seen how jurisprudence will evolve in this respect.

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 damages for material harm at LVL 5,000 (approx. EUR 8,000), or LVL 7,000 (approx. EUR 10,000) in cases of grievous bodily harm, and LVL 20,000 (approx. EUR 24,000) if life has been endangered or grievous harm has been caused to health. The maximum amount of damages for non-pecuniary harm is set at LVL 3,000 (approx. EUR 4,800) or LVL 5,000 (approx. EUR 8,000) in cases of grave non-pecuniary harm and LVL 20,000 (approx. EUR 24,000) if life has been endangered or grievous harm has been caused to health. It is as yet unclear whether the courts would award damages for both material and non-pecuniary harm in cases of discrimination. The definitions of material and non-pecuniary 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 as non-pecuniary damages 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. Articles 5 and 21 of the **Turkish** Labour Law provide that an employee may ask compensation for the actual damage suffered, in addition to a compensation of up to four months' wages.

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 reluctant to award substantial amounts 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**, the Anti-discrimination Act (Section 9, paragraph 3) requires a finding of a 'considerable impairment of the dignity, social status or social achievement of the person injured' for financial compensation for non-pecuniary damage to be awarded. This provision may explain the inconsistent and varying approach taken to financial compensation in general and the often symbolic levels of non-pecuniary compensation when it is awarded. **Dutch** courts are generally reluctant to grant damages for non-pecuniary loss. In **Norway**, the fact that the Equality Ombud and the Equality Tribunal cannot award compensation to victims has been widely criticised and sanctions can hardly be considered as effective or dissuasive.

On initial examination, with the exception of the **United Kingdom** and **Ireland** for employment cases, the levels of compensation awarded in most countries seem relatively low. This, coupled with the length of time it can take to obtain a decision, 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** and **Portuguese** legislation provides criteria based on company turnover to determine the level of penalty in some cases. This approach presents an interesting option.

Martijn | 1987



Chapter 5

The role of equality bodies compared³⁸²

³⁸² Please also see the complete tables for the specialised bodies in the annex.

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.'

All EU Member States have now designated a specialised body for the promotion of equal treatment irrespective of racial or ethnic origin, as required by Article 13 of the Racial Equality Directive. However, in **Finland**, the Ombudsman for Minorities seems not to be in compliance with the Racial Equality Directive with regard to dealing with matters falling within the field of employment.³⁸³ In **Turkey**³⁸⁴ 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. There is no specialised body in **Iceland** either. As far as EEA countries are concerned, only **Norway** has a specialised body for the promotion of equal treatment irrespective of racial or ethnic origin, in accordance with Article 13 of the Racial Equality Directive.³⁸⁵ **Liechtenstein** has established the Office of Equal Opportunities to deal with gender equality, but it is also mandated to cover other grounds of discrimination including disability, sexual orientation, racial and ethnic origin.

Some Member States have set up completely new bodies such as **France**,³⁸⁶ **Germany**,³⁸⁷ **Greece**,³⁸⁸ **Hungary**,³⁸⁹ **Italy**,³⁹⁰ **Romania**,³⁹¹ **Slovenia**,³⁹² **Spain** and **Poland**. Bodies that already existed but which have been given the functions designated by Article 13 include the **Cypriot** Ombudsman,³⁹³ 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 number of organisations (e.g. **Greece**). A new trend has arisen with the merging of existing institutions into one single body to exercise different competences in a variety of areas. The **French** Equal Opportunities and Anti-discrimination Commission was merged in 2011 with several other statutory authorities to become the Defender of Rights. In the **Netherlands**, a new law created the Human Rights Institute in

³⁸³ The European Commission initiated infringement proceedings against Finland in June 2013 for failure to provide the equality body with the competences required by the Racial Equality Directive.

³⁸⁴ The draft law tabled in March 2010 foresees the creation of an equality body, and in September 2013 the Government announced its intention to establish an anti-discrimination and equality council.

³⁸⁵ Equality and Anti-discrimination Ombuds. Decisions may be appealed before the Equality Tribunal.

³⁸⁶ The **French** Equal Opportunities and Anti-discrimination Commission (HALDE) was set up by law on 30 December 2004. The HALDE was 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).

³⁸⁷ The Federal Anti-discrimination Agency.

³⁸⁸ The 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, the National Commission of Human Rights recommends the merger of all existing equality bodies into the Ombudsman.

³⁸⁹ Equal Treatment Authority.

³⁹⁰ National Office against Racial Discrimination.

³⁹¹ National Council for Combating Discrimination (NCCD).

³⁹² Advocate of the Principle of Equality. In April 2012, the Government Office for Equal Opportunities was abolished and incorporated into the Ministry of Labour, Family and Social Affairs.

³⁹³ The Ombudsman was appointed as the national specialised body and two separate authorities have been created: the Equality Authority that deals with employment issues and the Anti-discrimination Authority dealing with discrimination beyond employment.

November 2011,³⁹⁴ incorporating the Equal Treatment Commission. A bill was also introduced by the Minister for Justice, Equality and Defence in **Ireland** to merge the **Irish** Equality Authority and the Human Rights Commission. The **Swedish** Equality Ombudsman was created in 2009 through the merger of four pre-existing ombudsmen institutions working with different grounds of discrimination: sex, ethnic origin and religion; disability and sexual orientation.³⁹⁵

Belgian Inter-Federal Centre for Equal Opportunities and Opposition to Racism and Discrimination

On 12 June 2013, the Belgian Federal State, the Regions and the Communities signed a cooperation agreement to turn the pre-existing Centre for Equal Opportunities and Opposition to Racism, the national equality body, into the Inter-federal Centre for Equal Opportunities and Opposition to Racism and Discrimination (*Centre interfédéral pour l'égalité des chances et la lutte contre le racisme et les discriminations*).

According to the Cooperation Agreement, the new centre is competent to promote equal opportunities and to fight all forms of discrimination based on the prohibited grounds contained in various anti-discrimination instruments adopted at both regional and federal levels. Previously, the existing equality body was competent only to deal with issues at the federal level although some protocols of collaboration had already enlarged its scope of competence.

The collaboration agreement entered into force on 15 March 2014.

A. Grounds covered

The minimum requirement on Member States is to have one or more bodies for the promotion of equality irrespective of racial and ethnic origin. 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 bodies, 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.

	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 ones?
AUSTRIA	Equal Treatment Commission – ETC (Act on the Equal Treatment Commission and the Office for Equal Treatment, Art. §§ 1, 2, 8-23)	Gender, ethnic affiliation, religion, belief, age, sexual orientation
	National Equality Body – NEB (Act on the Equal Treatment Commission and the Office for Equal Treatment, §§ 3-7)	Gender, ethnic affiliation, religion, belief, age, sexual orientation

³⁹⁴ *Staatsblad* 2011, 573, entered into force on 1 October 2012.

³⁹⁵ Equality Ombudsman Act (2008:568).

	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 ones?
BELGIUM	Centre for Equal Opportunities and Opposition to Racism (Act establishing the Centre for Equal Opportunities and Opposition to Racism, ³⁹⁶ Art. 1) ³⁹⁷	Alleged race, colour, descent, 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 characteristics, political opinion, trade union opinion, genetic characteristics and social origin
BULGARIA	Protection Against Discrimination Commission , (Protection Against Discrimination Act, Art. 40)	Race, ethnicity, 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 to which the Republic of Bulgaria is a party
CROATIA	People's Ombudsman ³⁹⁸ (Anti-discrimination Act, Art. 12)	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
CYPRUS	Equality Authority and Anti-discrimination Authority (Act on the Combating of Racial and Other Forms of Discrimination (Commissioner), Arts 5 and 7)	Race/ethnic origin, religion or belief, age, sexual orientation, disability, community, race, language, sex, political or other beliefs, national or social descent, birth, colour, wealth, social class or any other ground ³⁹⁹
CZECH REPUBLIC	Public Defender of Rights (Act on Public Defender of Rights, Art. 21b)	Sex, race, ethnic origin, sexual orientation, age, disability, religion, belief or other conviction, 'national origin'
DENMARK	Danish Institute for Human Rights – The National Human Rights Institute of Denmark ⁴⁰⁰ (Act on the Institute for Human Rights – the National Human Rights Institute of Denmark, Art. 2.2)	Race, ethnic origin, gender and disability
ESTONIA	Commissioner for Gender Equality and Equal Treatment (Equal Treatment Act, Arts 15-22)	Sex, ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation.
	Chancellor of Justice (Chancellor of Justice Act, Art. 19-35 ¹⁶)	Public sector: grounds other than race and ethnic origin not specified; private 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

³⁹⁶ Further amended by the General Anti-discrimination Federal Act.

³⁹⁷ See p. 115. A cooperation agreement was approved on 12 June 2013 by the Federal State, the Regions and the Communities to turn the Centre for Equal Opportunities and Opposition to Racism into an inter-federal centre.

³⁹⁸ The People's Ombudsman is competent for all the grounds covered by the Anti-discrimination Act except those grounds that are the responsibility of a special ombudsman. The ground of disability is covered by the Ombudsman for Persons with Disabilities and the grounds of gender, gender identity and expression and sexual orientation are covered by the Gender Equality Ombudsman.

³⁹⁹ The Equality and Anti-discrimination Authority also covers the ground of nationality (although not expressly mentioned in its mandate) as included in the protected grounds under Protocol 12 to the European Convention of Human Rights, the Cypriot Constitution and in international conventions ratified by the Republic of Cyprus. The Authority also covers all rights guaranteed in the ECHR and all its protocols, the International Convention for the Elimination of All forms of Racial 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. The equality body itself has always considered nationality to be part of its mandate and refers to it repeatedly in its annual reports when it lists the grounds covered.

⁴⁰⁰ The Board of Equal Treatment is a quasi-judicial body (Act on the Board of Equal Treatment, Art. 1) competent to deal with individual complaints of discrimination in the labour market for the following grounds: gender, race, skin colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin and only for race, ethnic origin, gender and disability outside the labour market.

	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 ones?
FINLAND ⁴⁰¹	Ombudsman for Minorities ⁴⁰² (Act on the Ombudsman for Minorities and the National Discrimination Tribunal, Section 1-2) ⁴⁰³	Race and ethnicity ⁴⁰⁴
FRANCE	Defender of Rights (Institutional Act creating the Defender of Rights, Art. 4, para. 3)	Any ground protected by national ⁴⁰⁵ or European legislation and international conventions
FORMER YUGOSLAV REPUBLIC of MACEDONIA	Commission for Protection against Discrimination (Prevention and Protection against Discrimination Act, Arts 16-24 and 25-33) ⁴⁰⁶	Sex, race, colour, gender, belonging to 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
GERMANY	Federal Anti-discrimination Agency (General Equal Treatment Act, Art. 25)	Race or ethnic origin, sex, religion or belief (<i>Weltanschauung</i>), disability, age, sexual identity
GREECE	Ombudsman (Law 2477/1997, Art. 1 and Equal Treatment Act, Art. 19, para. 1) ⁴⁰⁷	Racial or ethnic origin, religion or other beliefs, disability, age or sexual orientation, gender and human rights in general
	Labour Inspectorate (Act 2639/1998, Art. 6 and Equal Treatment Act, Art.19, para. 3) ⁴⁰⁸	Racial or ethnic origin, religion or other beliefs, disability, age or sexual orientation
	Equal Treatment Committee (Equal Treatment Act, Art. 19, para. 2) ⁴⁰⁹	Racial or ethnic origin, religion or other beliefs, disability, age or sexual orientation
HUNGARY	Equal Treatment Authority (Act on Equal Treatment and the Promotion of Equal Opportunities, Art. 14-17B)	Sex, racial affiliation, colour of skin, nationality, belonging to a national or ethnic minority, mother tongue, disability, health condition, religion or belief, political or other opinion, family status, maternity (pregnancy) or paternity, sexual orientation, sexual identity, age, social origin, financial status, part-time nature of employment legal relationship or other legal relationship connected with labour, or the determined period thereof, belonging to an interest representation organisation, other situation, attribute or condition of a person or group
ICELAND	No specific body ⁴¹⁰	-

⁴⁰¹ The Office of the Ombudsman for Discrimination in the Åland Islands was established by the Provincial Act on the Ombudsman for Discrimination 67/2005.

⁴⁰² The Discrimination Tribunal may prohibit discriminatory conduct outside the employment field (Non-Discrimination Act, Section 13), its decisions are binding.

⁴⁰³ Role also limited to discrimination outside the employment field.

⁴⁰⁴ In practice the Ombudsman for Minorities also deals with nationality discrimination.

⁴⁰⁵ In French legislation the protected grounds are: sex, pregnancy, belonging (whether real or supposed) to an ethnic origin, a nation, a race or a certain religion, morals, sexual orientation, sexual identity, age, family situation; genetic characteristics, physical appearance, family name, health, disability, union activities and political convictions.

⁴⁰⁶ The Ombudsman also plays a role against discrimination on the grounds of sex, race, colour, national, ethnic and social origin, political affiliation, religious and cultural background, language, property, social background, disability and origin.

⁴⁰⁷ The Ombudsman covers discrimination by public sector bodies.

⁴⁰⁸ The Labour Inspectorate covers discrimination in the private sector and in the field of employment and occupation for the five grounds protected by the Directives.

⁴⁰⁹ The Equal Treatment Committee covers discrimination in any field with the exception of the public sector and does not deal with employment and occupation for the five grounds protected in the two Directives.

⁴¹⁰ The Parliamentary Ombudsman may deal with equality/discrimination in relation to administrative procedure. There is no human rights institution either in Iceland.

	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 ones?
IRELAND	Equality Authority (Employment Equality Act, S. 38 and Equal Status Act, S. 39)	Gender, age, racial or ethnic origin including membership of the Traveller community, religion, family status, disability, marital status, sexual orientation, membership of the Traveller community
	Equality Tribunal (Employment Equality Act, S. 75 and Equal Status Act, S. 39)	Gender, age, racial or ethnic origin including membership of the Traveller community, religion, family status, disability, marital status, sexual orientation, membership of the Traveller community
ITALY	National Office against Racial Discrimination – UNAR (Legislative Decree No 215 on the Implementation of Directive 2000/43/EC, Art. 7)	Race, ethnic origin, sex, religion or personal belief, disability, age, sexual orientation ⁴¹¹
LATVIA	Ombudsman , (Ombudsman Act, Art. 11.2)	Grounds not specified, hence any ground
LIECHTENSTEIN	Office for Equal Opportunities (Act on Equality between Women and Men, Art. 19)	Gender, migration and integration (including race and ethnicity), ⁴¹² sexual orientation, disability, social disadvantage
LITHUANIA	Equal Opportunities Ombudsperson (Act on Equal Opportunities for Women and Men, Chapter IV, Art. 10 - 17 and Equal Treatment Act, Art. 14)	Age, disability, sexual orientation, race, ethnicity, origin, religion, beliefs or convictions, language and social status
LUXEMBOURG	Centre for Equal Treatment (Equal Treatment Act, Art. 8)	Race, ethnic origin, religion or belief, disability, age, gender, sexual orientation
MALTA	National Commission for the Promotion of Equality for Men and Women ⁴¹³ (Equality for Men and Women Act, Art. 11)	Sex, family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, gender identity ,
NETHERLANDS	Netherlands Institute for Human Rights (the Netherlands Institute for Human Rights Act, Arts 9-13, originally the General Equal Treatment Act, Arts 11-21)	Race, religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality, civil or marital status, disability, age, working time and type of labour contract
	The NGO Art. 1 ⁴¹⁴ (Law on Local Anti-discrimination Bureaus, Art. 2a)	Race, religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality, civil or marital status, disability, age
NORWAY	Equality and Anti-discrimination Ombud ⁴¹⁵ and Anti-discrimination Tribunal (Act on the Equality and Anti-discrimination Ombud and the Equality and Anti-discrimination Tribunal, Art. 1)	Gender, ethnicity, disability, language, religion, sexual orientation and age ⁴¹⁶
POLAND	Commissioner for Civil Rights Protection ('Ombudsman') (Act on the Commissioner for Civil Rights Protection, Art. 1)	The Act on the Commissioner for Civil Rights Protection does not specify any protected grounds
PORTUGAL	ACIDI (High Commissioner for Immigration and Intercultural Dialogue) (Decree-Law 167/2007, Art. 1)	Nationality
ROMANIA	National Council for Combating Discrimination (Government Decision 1194/2001 establishing the National Council on Combating Discrimination, Art. 1)	Race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, age, disability, non-contagious chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion

⁴¹¹ UNAR's remit was extended through a ministerial directive in 2012. In practice the Italian body also deals with nationality.

⁴¹² Religion and age are not explicitly mentioned, but due to the general mission of the Office it can be assumed that these grounds would be covered by the Office for Equal Opportunities in Liechtenstein.

⁴¹³ The Commission is generally referred to as the National Commission for the Promotion of Equality.

⁴¹⁴ This NGO includes around 430 local anti-discrimination bureaus.

⁴¹⁵ The Equality and Anti-discrimination Tribunal is the appeal instance of the Gender and Anti-discrimination Ombud.

⁴¹⁶ The Ombud also implicitly covers national origin, descent, skin colour and language as these were formerly explicitly in the legislation, and the preparatory works to the new law in force since 1 January 2014 say that these grounds are to be covered under ethnicity. Discrimination because of political affiliation and membership in trade unions are handled by the courts only.

	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 ones?
SLOVAKIA	Slovak National Centre for Human Rights (Act No 308/1993 on the Establishment of the Slovak National Centre for Human Rights, Section 1, paras 2a, e, f, g, h and Section 1, paras 3 and 4)	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
SLOVENIA	Advocate of the Principle of Equality ⁴¹⁷ (Act Implementing the Principle of Equal Treatment, Art. 11-19a)	Gender, ethnicity, race or ethnic origin, religion or belief, disability, age, sexual orientation, or other personal circumstance
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, Art. 33)	No
SWEDEN	Equality Ombudsman (Discrimination Act, Ch. 4 and Ch. 6 S. 2 and the whole of the Equality Ombudsman Act)	Sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation, age
TURKEY	No specialised body	-
UNITED KINGDOM	Great Britain: Equality and Human Rights Commission (UK Equality Act 2006, SS. 1-43)	Ethnic origin, national origin, colour, nationality (including citizenship), sexual orientation, religion, belief, disability, age, sex (including gender reassignment, marriage/civil partnership status, pregnancy)
	Northern Ireland: Equality and Human Rights Commission for Northern Ireland (Northern Ireland Act, Part VII, SS. 73-74)	Ethnic origin, national origin, colour, nationality (including citizenship), sexual orientation, religion, belief, disability, age, sex (including gender reassignment, marriage/civil partnership status, pregnancy)

Out of the 33 countries included in this report, all but **Iceland** and **Turkey** have a specialised body which at least deals with race and ethnicity. Four countries have two specialised bodies: **Austria**, **Estonia**, the **Netherlands** and the **United Kingdom**. In **Denmark**, **Finland**, **Ireland** and **Norway**, the equality bodies are accompanied by another institution, namely the Board of Equal Treatment for **Denmark**, the Discrimination Tribunal in **Finland**, the Equality Tribunal for **Ireland** and the Anti-Discrimination Tribunal for **Norway**.⁴¹⁸ In **Cyprus** there is only one specialised body divided into two departments with distinct competences: the Anti-Discrimination Authority which deals with fields beyond employment and the Equality Authority which deals only with employment issues. **Greece** has three specialised bodies (the Ombudsman, the Labour Inspectorate and the Equal Treatment Committee). This makes a total of 37 bodies.

Of these 37 bodies, in one country (**Spain**) the specialised body only deals with race and ethnicity. In **Finland** and **Portugal**, the specialised bodies deal with race, ethnicity and nationality only. In **Greece** (the Labour Inspectorate and the Equal Treatment Committee) and **Luxembourg**, the specialised bodies only deal with the five grounds protected by both Anti-discrimination Directives. In **Austria**, **Denmark**, **Estonia** (the Chancellor of Justice), **Liechtenstein**, and **Malta** the grounds protected include race/ethnicity and one or more other grounds that are not necessarily identical to the other four protected by the Employment Equality Directive. In **Austria** for example both bodies (i.e. the Equal Treatment Commission and the National Equality Body) deal with gender, ethnic affiliation, religion, belief, age and sexual orientation, but the ground of disability is covered by a separate structure: the Ombud for Persons with Disabilities. In **Estonia**, the Chancellor of Justice deals with race and other grounds including 'other grounds of discrimination provided for in the law' in the private sector. It is interesting to note that some countries have chosen an open-ended list, for example in **Bulgaria**, the **former Yugoslav Republic of Macedonia**, **Hungary**, **Romania** and **Slovenia**, in addition

⁴¹⁷ The tasks performed by the Advocate might not be seen as independent as the Advocate is a civil servant working for the Ministry.

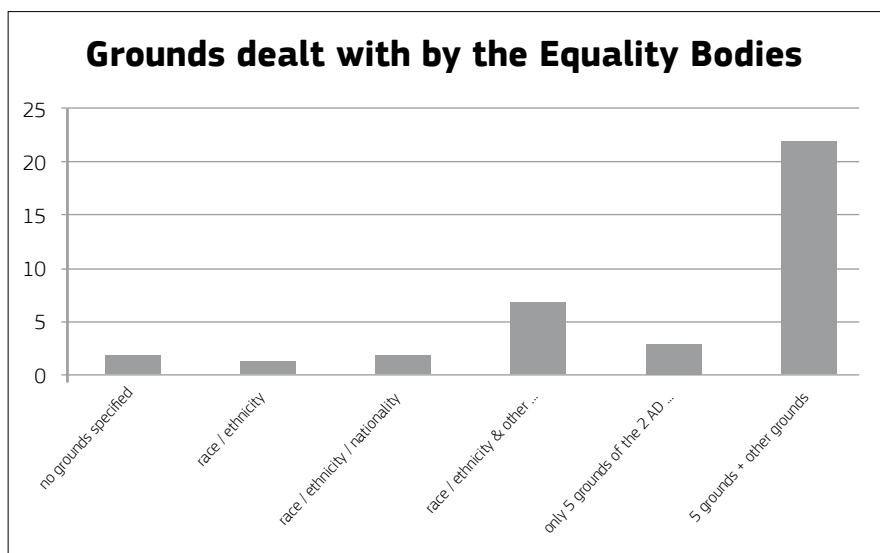
⁴¹⁸ For the purposes of this report, only one specialised body has been counted on the national level for these four countries.

Eline | 1984



to race and ethnicity and potential other enumerated grounds, the list of grounds includes ‘any other circumstances’, ‘any other criterion’ or ‘any other status’. In the **former Yugoslav Republic of Macedonia**, for example, there is a list of grounds that does not mention sexual orientation but does specify any other ground prescribed by law or ratified international treaty.

In 20 countries, 22 bodies deal with the five grounds protected by the two Anti-discrimination Directives and other grounds.⁴¹⁹ In **Latvia** and **Poland** no grounds are specified under the competencies of the body.



B. Competencies of equality bodies

Article 13, Racial Equality Directive:

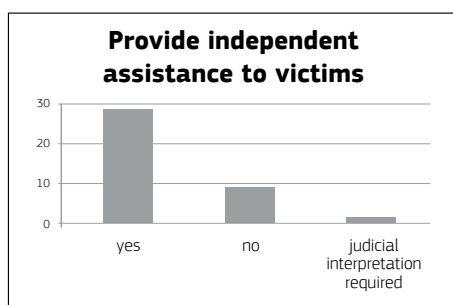
‘2. Member States shall ensure that the competences of these bodies include:

- 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.’*

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, Norwegian** and **Croatian** bodies can

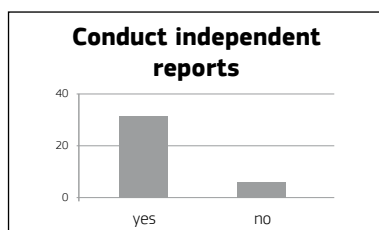
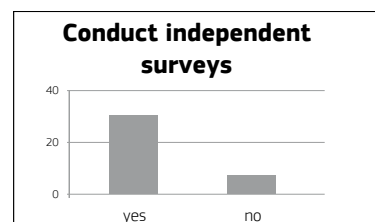
⁴¹⁹ These 22 bodies include **Belgium, Bulgaria, Croatia, Cyprus**, the **Czech Republic, Estonia** (the Commissioner for Gender Equality and Equal Treatment), **France, Germany, Greece** (the Ombudsman), **Hungary, Ireland** (both the Equality Authority and the Equality Tribunal), **Italy, Lithuania**, the **Netherlands** (both the Netherlands Institute for Human Rights and Article1), **Norway** (both the Equality and Anti-discrimination Ombud and the Equality and Anti-discrimination Tribunal), **Romania, Slovakia, Slovenia, Sweden** and the **United Kingdom** (the Equality and Human Rights Commission and the Equality and Human Rights Commission for Northern Ireland).

do this. Others give their – usually non-binding – opinion on complaints submitted to them, e.g. the **Austrian** and **Dutch** Equal Treatment Commissions, the **Danish** Board of Equal Treatment, the **Hungarian** Equal Treatment Authority, the **Latvian** Ombudsman's Office, the **Greek** Ombudsman and Equal Treatment Committee, and the **Slovenian** Advocate of the Principle of Equality.⁴²⁰ Such proceedings do not preclude the victim from subsequently taking legal action before the courts with a view to obtaining a binding remedy.



Out of the 37 specialised bodies, 28 provide independent assistance to victims,⁴²¹ eight do not⁴²² and one country requires judicial interpretation. In the following countries, the equality bodies provide independent assistance: **Austria** (the National Equality Body), **Belgium**, **Bulgaria**, **Croatia**, the **Czech Republic**, **Denmark** (the National Human Rights Institute of Denmark) **Estonia** (the Commissioner), **Finland**,⁴²³ the **former Yugoslav Republic of Macedonia**, **France**, the **Greek** Ombudsman, **Liechtenstein**, **Germany**, **Hungary**, **Italy**, **Ireland** (the Equality Authority), **Latvia**, **Luxembourg**, **Malta**, the **Netherlands** (the organisation Art.1), **Norway**, **Portugal**, **Romania**, **Slovakia**, **Slovenia**, **Sweden** and the **UK** (both in Great Britain and Northern Ireland). Judicial interpretation is required in **Poland**.⁴²⁴

Of the 37 specialised bodies, 30 conduct independent surveys and seven do not. The latter are: the **Austrian** Equal Treatment Commission, the **Estonian** Chancellor of Justice, the **Greek** Labour Inspectorate and Equal Treatment Committee⁴²⁵ and the **Liechtenstein**, **Slovenian** and **Spanish** bodies.



Some 32 specialised bodies publish independent reports; five bodies do not. The difference with the previous point lies in the fact that although only the **Austrian** National Equality Body can conduct independent surveys, both this body and the Equal Treatment Commission can publish independent reports, similarly the Liechtenstein body can conduct independent report but does not conduct independent surveys.

⁴²⁰ The Office for Equal Opportunities was abolished on 1 April 2012 and has been transferred, including the Advocate of the Principle of Equality, to the Ministry of Labour, Family and Social Affairs. New rules concerning the nomination and budget of the Advocate are not yet known.

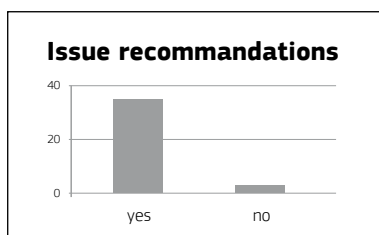
⁴²¹ Please note that although **Denmark**, **Finland**, **Ireland** and **Norway**, are counted as having only one equality body for the purposes of this report, only respectively the **Danish** Institute for Human Rights – The National Human Rights Institute of Denmark, the **Finnish** Ombudsman for Minorities outside the employment field, the **Irish** Equality Authority and the **Norwegian** Equality and Anti-discrimination Ombud can provide independent assistance to victims, conduct independent surveys, publish independent reports and issue recommendations on discrimination issues.

⁴²² These bodies are the **Austrian** Equal Treatment Commission, **Cyprus** (although in practice both the Equality Authority and the Anti-discrimination Authority do inform victims of their rights), the **Estonian** Chancellor of Justice (that nevertheless does so in practice) the **Greek** Labour Inspectorate and Equal Treatment Committee (although they both have the mandate to do so), **Lithuania**, the **Dutch** Institute for Human Rights and **Spain**.

⁴²³ The **Finnish** Ombudsman for Minorities can only provide independent assistance to victims, conduct independent surveys, publish independent reports and issue recommendations outside the employment field.

⁴²⁴ Under the **Polish** Constitution and the new law the Ombud's competencies are limited regarding conflicts between private parties.

⁴²⁵ Although the Greek Labour Inspectorate and Equal Treatment Committee both have the mandate to conduct independent surveys, they do not do so in practice.



Specialised bodies should also have the task of issuing recommendations on discrimination issues. This is the case for 34 specialised bodies, but not for the **Greek** Labour Inspectorate, the **Greek** Equal Treatment Committee, and the **Spanish** Council for the Promotion of Equal Treatment of all Persons without Discrimination on the Grounds of Racial or Ethnic Origin.

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 can usually compel compliance with their investigations from all persons involved. In **France**, the Defender of Rights concludes an investigation by adopting a decision which may propose recommendations, suggest mediation or decide to 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.

Whether the specialised bodies are quasi-judicial institutions or not (please see below), a large majority of them deal with complaints of discrimination brought to them by victims for attention or advice. As mentioned above they provide assistance to victims in 27 countries. A massive amount of information is consequently available to these bodies regarding who is or feels discriminated against and what are the grounds or the fields that are at issue. It is therefore of interest to know whether they record the number of complaints received and/or dealt with, or the decisions taken, whether they have data on at least the ground of discrimination concerned in these complaints/decisions and also whether these data are available to the public through their website or their annual report. Keeping such data and making it available to the public is extremely important for a better knowledge of the issues at stake in the field of fighting discrimination as a matter of societal information but also as a clear signal indicating what is or is not lawful according to national anti-discrimination legislation.

Some 30 bodies in 28 countries keep record officially of complaints/decisions. However, in addition to **Iceland** and **Turkey** where no specialised bodies exist, no such data are collected in **Lithuania, Spain** and the **United Kingdom**, by the **Austrian** National Equality Body (as opposed to the Equal Treatment Commission) or by either the **Greek** Labour Inspectorate or the Committee for Equal Treatment (as opposed to the Ombudsman). The information provided by these 30 bodies regarding the number of complaints/decisions is broken down at least by grounds of discrimination. For the majority of them the information also indicates the field of discrimination.

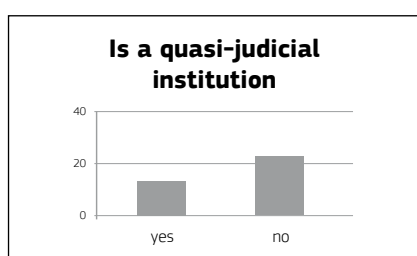
Among the 30 bodies mentioned, only the **Macedonian** Commission for Protection against Discrimination does not provide information on complaints or decisions on their website and/or in their annual report. The **Macedonian** Commission does keep a registry for its own purposes and use, but the registry is not yet available to the public. In **Germany**, although the equality body keeps record of the complaints and decisions by ground, field and type of discrimination, these data are only partially and not systematically available to the public. In **Malta**, data are not published on a regular basis even though information on the complaints received each year and their division by ground is included in the equality body's annual report. In most of the countries, such as **Romania** and **Slovakia** for example, the information is available through the bodies' website, in annual reports and also upon request by individuals.

Abolition of the Slovenian Office for Equal Opportunities⁴²⁶

On 1 April 2012 the Government Office for Equal Opportunities was closed down, pursuant to the entering into force of the newly adopted Act amending the Public Administration Act. Its staff of twelve people, including the Advocate of the Principle of Equality (the Slovenian equality body), was transferred to the Ministry of Labour, Family and Social Affairs. Consequently, the Advocate is now a civil servant employed by the Ministry who can be dismissed before the end of his mandate.

The Office for Equal Opportunities, established in 2001, was primarily responsible for promoting equal opportunities and gender equality, in addition to the preparation of legislative proposals for the purpose of transposing EU directives in the field of non-discrimination. This responsibility is now transferred to the Ministry of Labour, Family and Social Affairs. The duties of equality body under Directive 2000/43/EC will continue to be performed by the Advocate of the Principle of Equality, now under the authority of the Ministry of Labour, Family and Social Affairs.

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

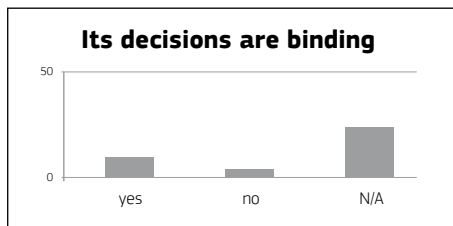


Although this is not required by the Racial Equality Directive, some specialised bodies are also quasi-judicial institutions, the decisions of which are ultimately binding. Only in 13 countries are these bodies quasi-judicial institutions: **Austria** (the Equal Treatment Commission), **Bulgaria** (the Protection against Discrimination Commission), **Cyprus** (the Equality Authority and Anti-Discrimination Authority), **Denmark** (the Board of Equal Treatment), **Estonia** (the Chancellor of Justice),⁴²⁷ **Finland** (the

Discrimination Tribunal), the **former Yugoslav Republic of Macedonia** (the Commission for Protection against Discrimination), **Hungary** (the Equal Treatment Authority), **Ireland** (the Equality Tribunal), **Lithuania** (the Equal Opportunities Ombudsperson), the **Netherlands** (the Equal Treatment Commission), **Norway** (the Equality and Anti-Discrimination Ombud) and **Romania** (the National Council for Combating Discrimination). Some bodies, such as the **Macedonian** Commission for Protection against Discrimination, can issue opinions or recommendations regarding the complaints it receives.

⁴²⁶ Article 15 of the Act Amending the Public Administration Act (*Zakon o spremembah in dopolnitvah Zakona o državni upravi*), Official Journal of the Republic of Slovenia No 21.2012.

⁴²⁷ Only in conciliation procedures.



Among these 13 bodies, only nine issue binding decisions. This is the case for the **Bulgarian**, **Cypriot**,⁴²⁸ **Danish**,⁴²⁹ **Estonian**,⁴³⁰ **Finnish**, **Hungarian**, **Irish**,⁴³¹ **Lithuanian**⁴³² and **Romanian** bodies. Nevertheless, in some countries, such as the **Netherlands**, due to the long experience, expertise and practice of the Equal Treatment Commission, its decisions are very much respected by both parties.

Some specialised bodies do include specific competencies or powers that are not necessarily listed in Article 13.2.

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

The French Defender of Rights 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 Defender of Rights 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, 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-

⁴²⁸ In practice the **Cypriot** equality body does not issue decisions but prefers recommendations or mediation. Its recommendations are generally taken seriously into consideration by the private and public sector with the exception of the police and immigration authorities, which have the lowest rate of compliance.

⁴²⁹ The Board of Equal Treatment.

⁴³⁰ The Chancellor of Justice only in conciliation procedures.

⁴³¹ The Equality Tribunal.

⁴³² The decisions from the Equal Opportunities Ombudsperson are binding when they relate to administrative sanctions but not when they are recommendations.

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).⁴³³

Finally, some concerns in relation to particular countries may be highlighted. There is concern that some specialised bodies are too close to government, thereby jeopardising the independence of their work. For instance, the **Italian** National Office against Racial Discrimination operates as a department of the Ministry for Immigration and Integration. The **Slovenian** Advocate of the Principle of Equal Treatment does not have its own budget, but is actually funded through the Ministry of Labour, Family and Social Affairs, and irregularities in the appointment mechanism established in 2009 as well as the Advocate's position as a civil servant of the Ministry cast doubts on the Advocate's independence. Some members of the Commission for Protection against Discrimination also work in the executive and legislative branches of the Government of the **former Yugoslav Republic of Macedonia**. Finally, 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.⁴³⁴ 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.

Official report casts doubts on independence and effective functioning of the Slovak equality body⁴³⁵

On 1 June 2011 the Slovak Government approved the *Analytical report on the functioning and status of the Slovak National Centre for Human Rights in the context of institutional protection of human rights in the Slovak Republic*. The report, drafted by the Human Rights and Equal Treatment Section of the Office of the Government constitutes the first attempt of its kind to monitor and assess the national equality body, which also undertakes tasks of the national human rights institution.

The report stressed the lack of powers or the lack of clarity with regard to powers. This has placed the equality body in a weak position, for instance as to its competences to initiate new laws or to modify existing legislation and to comment on legislative measures. The duty to secure legal aid for victims remains unclear in terms of definition and content and the equality body cannot impose sanctions on third organisations in cases where they fail to facilitate the good conduct of duties and tasks, such as investigations concerning discrimination. The report also highlighted the lack of professional and personal capacities of the equality body and the inefficient management of public resources allocated. In addition, the bodies established in order to govern and monitor the equality body were deemed inappropriate and inefficient.

⁴³³ For the first *actio popularis* case filed in Slovakia, see page 65.

⁴³⁴ Royal Decree 1262/2007 (modified by Royal Decree 1044/2009) details the composition of the Council.

⁴³⁵ See http://www.rokovania.sk/File.aspx/ViewDocumentHtml/Mater-Dokum-133077?prefixFile=m_.

The report reproached the lack of a preventative approach and of strategic planning. In addition, activities and the impact on human rights and equal treatment lack visibility. A very small number of discrimination cases have been brought to the courts by the Centre for Human Rights (and only one succeeded in court) or been solved by the equality body itself.

In terms of independence, the equality body generally lacks mechanisms for protection against abuse from particular interests, including political.

The Human Rights and Equal Treatment Section recommended changes with regard to governing and monitoring bodies and financing. It also suggested defining powers of the equality body. Concretely, it proposes to install the Centre for Human Rights as the equality body and to transfer all powers related to the national human rights institution to the Public Defender of Rights.

Independence, but also effectiveness, is greatly affected by the recent budgetary cuts faced by many equality bodies due to the economic crisis. In 2011 this concerned, for instance, **Ireland, Hungary** (which also faced difficulties in the past in carrying out tasks other than its quasi-judicial functions⁴³⁶) and the **United Kingdom**. Financial cuts in previous years had already affected **Ireland, Latvia, Romania** and the **UK**, while the Commission for the Protection against Discrimination in the **former Yugoslav Republic of Macedonia** has consistently been allocated a very limited budget since its creation. In addition, new problems have arisen due to the fact that the national equality body is severely under-equipped and understaffed, such as in **Austria** or **Cyprus**. In **Poland**, anti-discrimination legislation recently adopted did not envisage any extra resources for the Ombudsman in spite of the allocation of additional competences related to discrimination. In **Bulgaria**, the Government tabled a bill to reduce the members of the equality body from nine to five, and then to seven after many protests were made. At time of writing, the bill introduced in April 2010 was still waiting for a second hearing before the parliament.

⁴³⁶ As also highlighted in the fifth **Hungarian** Country Report under the International Covenant for Civil and Political Rights published in October 2010 by the UN Human Rights Committee.

Joran | 1991



Chapter 6

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 [these Directives], 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, religion or belief, disability, age or sexual orientation] 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, the former Yugoslav Republic of Macedonia, Greece, Latvia, Luxembourg, Slovenia, Spain** 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.

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 in Budapest. It organises research and conferences, produces and disseminates information materials, maintains contacts with civil society and establishes networks of civil society organisations. In **Romania**, the National Council for 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, medical doctors and healthcare workers. In addition, a draft Strategy for Promoting Equal Opportunities and Non-discrimination on the Labour Market for Vulnerable Groups was presented by the Ministry of Labour, Family and Social Protection for public consultations in June 2012.⁴³⁷ The strategy aims at proposing new policies and improving existing policies in order to promote equal opportunities in the labour market. In **Croatia**, noteworthy initiatives have included research on citizens' attitudes to discrimination and their knowledge of the Anti-discrimination Act, which was conducted by the Ombudsman's Office in cooperation with the Centre for Peace Studies (an NGO). The **Lithuanian** Government has adopted an Inter-institutional Action Plan for Promotion of Non-discrimination 2012-2014,⁴³⁸ appointing the Ombudsperson as one of the main institutions responsible for its implementation. During the first year of implementation the Ombudsman organised training and other educational activities for trade unions, municipalities and state institutions, informational meetings, lectures and seminars targeting specific audiences such as university students or journalists. In 2012 the Ministry of Labour and Social Policy of the **former Yugoslav Republic of Macedonia** started in collaboration with the British Council a cycle of training on various topics related to non-discrimination and equality for 600 representatives of the judiciary, bodies working on social policy as well as education, health services, trade unions and other organisations. In 2012, the **Luxembourg** Government adopted a five-year action plan for the implementation of the CRPD, focusing on a number of key points. The field of 'information, awareness and accessible communications' was identified as the focus for the year 2013.

Enhancing the Equal Treatment Authority's effectiveness and accessibility in Hungary

The Social Renewal Operative Programme 5.5.5 (TÁMOP project) is financed by the European Social Fund and the Hungarian State for a duration of 46 months, starting in 2009.⁴³⁹ The total TÁMOP project budget is HUF 911 million (EUR 3,141,000).

As the first element of the project, an equal treatment referee system was established in September 2009. The 20 referees (attorneys-at-law) are based in 'Houses of Opportunities' (regional equal opportunities networks) in every county and in the capital. They forward discrimination complaints, provide assistance to the complainants in formulating their petitions and operate as a kind of filtering system.

The TÁMOP project consists of three further elements. The first element is a series of campaigns, aimed at sensitising the general public.

⁴³⁷ 'Împuternicirea femeilor rome pe piața muncii' / POSDRU/97/6.3/S/52040, activitatea 5 - Crearea unei rețele interprofesionale care să lucreze cu și pentru femeile rome.

⁴³⁸ Lithuania / Lietuvos Respublikos Vyriausybės nutarimas 'Nediskriminavimo skatinimo 2012–2014 metų tarpinstitucinio veiklos plano patvirtinimo', 2011-11-02, Valstybės žinios, 2011-11-10, Nr. 134-6362, Available in Lithuanian at http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_p?p_id=410523.

⁴³⁹ For the project grant see http://www.nfu.hu/megjelent_a_tamop_5_5_5_kiemelt_projekt.

The second element consists of training held by the specialised body for teachers, social workers and the media, combined with workshops with NGOs and public administration staff members. A training module has been developed, combining sensitisation and the transfer of legal knowledge.

Seven research studies and a final study constitute the third element of the project: four studies dealt with discrimination in the field of employment, one analysed clients' awareness of their rights and the remaining two have looked into discriminatory practices within the system of public administration. In the framework of the project surveys have been and will be conducted testing social attitudes towards non-discrimination and diversity.

The project also contains a travelling exhibition of works of young people related to the issue of non-discrimination. The exhibition's aim is to raise the awareness of youth about this problem.⁴⁴⁰

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,⁴⁴¹ and made available in sign language and in Braille as well as both in print and on the internet in Finnish, Swedish, English, Sami, Russian, Arabic, French 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**.⁴⁴²

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.⁴⁴³ 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. For example, 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.⁴⁴⁴ In **Croatia**, the Government 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.

⁴⁴⁰ <http://www.egyenlobanasmod.hu/tamop/#vandorkiallitas>.

⁴⁴¹ 'STOP – Finland Forward without Discrimination', funded by the Community Action Programme to Combat Discrimination.

⁴⁴² 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.

⁴⁴³ See for example the European Commission information campaign For Diversity Against Discrimination launched in 2003 that aimed at raising awareness of discrimination, increasing understanding of the EU anti-discrimination laws and promoting the benefits of diversity. This campaign was followed in 2012 by an advertising campaign. http://ec.europa.eu/justice/discrimination/awareness/information/index_en.htm.

⁴⁴⁴ The five grounds included in the two Anti-discrimination Directives and gender.

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.⁴⁴⁵ 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 **former Yugoslav Republic of Macedonia** and **Turkey**. Individuals are often not informed of their rights to protection against discrimination and protection mechanisms. Reports from the **former Yugoslav Republic 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 also 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 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. In 2012, the **Croatian** Ombudsman's Office signed cooperation agreements with five independent NGOs, making them the contact points of the Ombudsman's Office at regional level.

Some countries 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.

⁴⁴⁵ Regulation 12 of Legal Notice 461 of 2004.

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 the Netherlands, the proposal for a 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.

In **Turkey** civil society organisations representing groups such as national and religious minorities as well as the LGBT community were invited to participate directly in the process of drafting a new constitution. Alongside experts, academics and political parties a number of NGOs were invited to present their suggestions before the parliamentary commission tasked with drafting the new constitution, while anyone (whether a natural or legal person) was invited to provide suggestions or ideas in writing. **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 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 **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. There is, however, increasing criticism from NGOs regarding the difficulties in engaging in a dialogue on amending the anti-discrimination law or on the assessment of the equality body's national strategy. In **Spain** a Strategic Plan for Citizenship and Integration designed to promote the integration of immigrants was adopted in February 2007 and renewed for 2010-2014. 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. 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 for the promotion of equality, addressing all grounds of discrimination.

There appear to be more instances of structured dialogue for disability than for 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 people 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 disabled people's associations of various kinds. Its functions include issuing reports on draft regulations on equal opportunities, non-discrimination and universal accessibility. The **French** 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 people with disabilities. The same law creates an obligation on the social partners to hold annual negotiations on measures necessary for the professional integration of people 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.

General structures for social dialogue may be used for dialogue on equality issues in the **Czech Republic, Denmark, Lithuania, Malta, Norway, 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.

Specific structures dealing with Roma have emerged over the past few years. For instance, in the framework of the National Implementation Strategy coordinated by the **Portuguese** equality body, an advisory group for the integration of Roma communities, composed of public entities, NGOs and Roma community representatives is planned to be set up. In **France**, the National Consultative Commission on the Travellers was set up in 2009 to discuss draft legislation and policy which concern Travellers. **Spanish** Royal Decree 891/200550 set up a collegiate participatory and advisory body (the National Roma Council) the overriding purpose of which is to promote the participation and cooperation of Roma associations in the development of general policy and the promotion of equal opportunities and treatment for the Roma population. Of its 40 members, half come from the central government and the other half are representatives of Roma associations. In **Norway**, the Roma National Association is used as a dialogue point for organised interaction with the Equality Ombud and key ministries such as the Ministry for Children, Equality and Social Inclusion, the Ministry of Education and the Ministry of Labour. In the context of the development of a National Strategy for Roma Integration, the **Austrian** Federal Chancellery set up a National Contact Point for Roma Integration in 2012. This contact point mainly coordinates governmental activities regarding the Roma strategy and supports a corresponding 'dialogue platform' which also maintains contacts with NGOs. The **Swedish** Government has adopted a Roma strategy for inclusion in society 2012-2032, with the aim of eliminating the differences in living standards between the Roma minority and the majority with regard to housing, education, and employment etc., by the end of the 20-year period. One of the elements of this strategy is to establish documentation of all the violations committed by the State in the last 100 years and to correct them where possible.⁴⁴⁶ In contrast to this trend, in **Slovenia** the Government Office for Ethnic Minorities which was the competent authority for Roma issues was abolished in 2012. The **Hungarian** Government established a Consultation Council for Roma Affairs in 2013, chaired by the Prime Minister and co-chaired by the President of the National Roma Self-Government.⁴⁴⁷

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 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.

⁴⁴⁶ After the cut-off date of this report, on 25 March 2014, the Swedish Government presented its 'White Book' on Roma discrimination throughout the 20th century (Official Inquiry DS2014:8).

⁴⁴⁷ Resolution 1048/2013 of 12 February 2013.

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 Directives' principles of equal treatment in relation to disability, religion or belief and sexual orientation, and most recently age, was repealed or amended. However, independent experts in other countries have 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), which does not violate the above-mentioned principle. In 2012, a new provision was introduced in the **Bulgarian** Protection against Discrimination Act, requiring all public authorities, including local governments, to respect the aim of not allowing any direct or indirect discrimination when drafting legislation, as well as when applying it.⁴⁴⁸ This general mainstreaming duty complements the original duty under the Act for all public authorities to take all possible and necessary measures to achieve the aims of the Act.⁴⁴⁹

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 Ordinance as *lex specialis*. Following the decisions of the **Romanian** Constitutional Court which limited both the mandate of the NCCD⁴⁵⁰ and of the civil courts in relation to discrimination generated by legislative rules,⁴⁵¹ 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 states: '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. 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 procedure that will lead to the repeal of discriminatory laws, but this does not necessarily always happen. In **Ireland**,

⁴⁴⁸ Article 6(2).

⁴⁴⁹ Article 10.

⁴⁵⁰ **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.

⁴⁵¹ **Romania** / *Curtea Constituțională* / Decision 818 (3 July 2008) published in the Official Gazette 537 of 16 July 2008.

there is concern that the Equal Status Act 2000-2011 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**,⁴⁵² where Article 27 of the Labour Code provides that an agreement (individual or collective) that violates labour law regulations is void. If annulled or successfully contested the agreement is invalid (Article 28) and, if invalidity results in loss, compensation must be paid (Article 30). Similar general labour law provisions are found in **Latvia** (Article 6 of the Labour Act), **Poland** (Article 9.2 of the Labour Code)⁴⁵³ and **Estonia** (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).

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. Section 10 of 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. 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 1998-2011 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 opt 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.

⁴⁵² Article 200 of the **Hungarian** Civil Code also contains a similar provision applicable outside of the employment field.

⁴⁵³ Since 2011 a similar provision has been applicable outside of the employment field, by application of Articles 58.1 and 58.3 of the Civil Code.

Maryse | 1997



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. It is encouraging to note that a majority of Member States provide further protection compared to the requirements of EU law and that the levelling up of protection across grounds continues in a number of countries. However, this ninth comparative overview⁴⁵⁴ has revealed that, although huge progress has been made and significant gaps have been plugged, a small number of shortcomings still appear to remain in the legislation of some Member States and candidate countries and it is now imperative that any remaining problems are resolved, especially more than 10 years after the adoption of the Directives.

Ultimately it is up to the courts to decide whether or not national law is consistent with EU law and to ensure effective implementation. Case law at national level is 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 court 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 discrimination 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 delegated the responsibilities as regards dissemination of information regarding anti-discrimination legislation and awareness-raising to national specialised bodies without necessarily granting them the adequate resources.

As already expressed in previous editions of this publication, the detail added to the law in many countries, and in particular specific procedural rights in the remedies and enforcement rules, could possibly change this situation. Although much of this machinery has been put in place by many states, it may be held that there is 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 or inferences drawn from circumstances. In addition, effective access to justice could be solved through class action, which would constitute an adequate solution to redress situations where ridiculously low compensation sums are awarded to victims; to address issues related to the fact that victims have to bear all the costs; and to counter the problem of limited access to free legal aid. Along the same lines, *actio*

⁴⁵⁴ Eight previous issues of this publication compared the situation in the (now) 28 Member States (and, since 2011, the EU membership candidate countries and the EEA countries). They were completed in September 2005, November 2006, July 2007, November 2009, November 2010, November 2011, July 2013 and May 2014.

popularis, if and when generally permitted, could constitute an ideal vehicle for bringing legal action to court in cases of, for instance, hate speech against a particular vulnerable group when there is no specific victim identified but where the public interest is nevertheless harmed. Finally, 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.

As a final point, the economic downturn has led to budget cuts that have greatly affected equality bodies and NGOs in many Member States. Even more worrisome, the crisis has had a grave impact on the prospects for future developments in many Member States. Generally speaking, complementary policy measures adopted by the states and allocation of resources to specialised bodies or other organisations are also likely to be seriously impeded or brought to a standstill.

Tobias | 1992



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	International Covenant on Civil and Political Rights	Framework Convention on the Protection of National Minorities	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	ILO Convention No 111 on Discrimination	Convention on the Rights of the Child	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	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	X
FINLAND	X	X	X	X	X	X	X	X	X	X	/
FRANCE	X	/	X	X	-	X	X	X	X	X	X
FORMER YUGOSLAV REPUBLIC of MACEDONIA	X	X	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	X
HUNGARY	X	/	X	X	X	X	X	X	X	X	X
ICELAND	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
LIECHTENSTEIN	X	/	-	X	X	X	X	X	⁴⁵⁵	X	-
LITHUANIA	X	-	X	X	X	X	X	X	X	X	X
LUXEMBOURG	X	X	/	X	/	X	X	X	X	X	X
MALTA	X	-	X	X	X	X	X	X	X	X	X
NETHERLANDS	X	X	X	X	X	X	X	X	X	X	/
NORWAY	X	-	X	X	X	X	X	X	X	X	X
POLAND	X	-	/	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
TURKEY	X	/	X	X	-	X	X	X	X	X	X
UNITED KINGDOM	X	-	/	X	X	X	X	X	X	X	X

⁴⁵⁵ Liechtenstein is not an ILO member. Liechtenstein is not an ILO member.

Luisna | 1995



Annex 2

Main national specific 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 which contain information valid as at 1 January 2012. 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/EC and 2000/78/EC.⁴⁵⁶

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
AUSTRIA	Article 7 Federal Constitutional Act (B-VG), Article 2 Basic Law	Federal Equal Treatment Act of 23 June 2004, as last amended by Federal Law Gazette I 2010/2013	Gender, ethnic affiliation, religion, belief, age, sexual orientation
		Equal Treatment Act of 23 June 2004, as last amended by Federal Law Gazette I 107/2013	Gender, ethnic affiliation, religion, belief, age, sexual orientation
		Equal Treatment Commission and Office for Equal Treatment Act of 23 June 2004, as last amended by Federal Law Gazette I 107/2013	Gender, ethnic affiliation, religion, belief, age, sexual orientation
		Federal Disability Equality Act of 10 August 2005, as last amended by Federal Law Gazette I 138/2013	Disability
		Employment of People with Disabilities Act of 10 August 2005, as last amended by Federal Law Gazette I 138/2013	Disability
		Styrian Equal Treatment Act of 28 October 2004, as last amended by Styrian Provincial Law Gazette 165/2013	Gender, race or ethnic origin, religion or belief, disability, disability of a relative, age, sexual orientation
		Viennese Service Order of 22 September 2006, as last amended by Viennese Provincial Law Gazette 49/2013	Gender, race, ethnic origin, religion, belief, disability, age, sexual orientation
		Viennese Anti-discrimination Act of 8 September 2004, as last amended by Viennese Provincial Law Gazette 88/2012	Race, ethnic origin, religion, belief, age, sexual orientation, sexual identity, gender, pregnancy, maternity, disability
		Lower Austrian Anti-discrimination Act of 29 April 2005, as last amended by the Lower Austrian Provincial Law Gazette 113/2011	Gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
		Lower Austrian Equal Treatment Act of 11 July 1997, as last amended by Lower Austrian Provincial Law Gazette 109/2011	Gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
		Carinthian Anti-discrimination Act of 28 December 2004, as last amended by the Carinthian Provincial Law Gazette 18/2013	Gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
		Vorarlberg Anti-discrimination Act of 19 May 2005, as last amended by the Vorarlberg Provincial Law Gazette 91/2012	Gender, ethnic affiliation, religion, belief, disability age, sexual orientation
		Upper Austrian Anti-discrimination Act of 6 May 2005, as last amended by the Upper Austrian Provincial Law Gazette 90/2013	Gender, ethnic affiliation, religion, belief, disability age, sexual orientation
		Burgenland Anti-discrimination Act of 5 October 2005, as last amended by the Burgenland Provincial Law Gazette 79/2013	Gender, ethnic affiliation, religion, belief, disability, age, sexual orientation
		Tyrolian Equal Treatment Act of 11 January 2005, as last amended by the Tyrolian Provincial Law Gazette 40/2013	Gender, ethnic affiliation, religion, belief, disability, age, sexual orientation

⁴⁵⁶ Please note that in most countries protection against discrimination is also granted in the Labour and Penal Codes. These have not been indicated unless there is no other protection in national law. Regarding disability and age, specific legislation has been indicated in the tables where specific anti-discrimination law did not include these two grounds, and has been included in footnotes where anti-discrimination law also covered them.

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
		Tyrolian Anti-discrimination Act of 31 March 2005, as last amended by the Tyrolian Provincial Law Gazette 114/2013	Gender, ethnic affiliation, religion, belief, disability, age, sexual orientation
		Salzburg Equal Treatment Act of 31 March 2006, as last amended by the Salzburg Provincial Law Gazette 41/2013	Gender, ethnic affiliation, religion, belief, disability, age, sexual orientation
BELGIUM	Articles 10 and 11 of the Constitution	Racial Equality Federal Act, ⁴⁵⁷ as last amended by Act of 10 May 2007	Alleged race, colour, descent, ethnic and national origin and nationality
		General Anti-discrimination Federal Act, ⁴⁵⁸ as last amended by the Act of 30 December 2009	Age, sexual orientation, civil status, birth, property, religious or philosophical belief, actual of future state of health, disability, physical characteristics, political opinion, trade union opinion, language, genetic characteristics and social origin
		Flemish Region / Community: Decree establishing a Framework Decree for a Flemish Equal Opportunities and Equal Treatment Policy of 10 July 2008	All grounds in the two Directives and additional grounds
		Wallonia-Brussels Federation: Decree on the Fight Against Certain Forms of Discrimination of 12 December 2008	All grounds in the two Directives and additional grounds
		Walloon Region: Decree on the Fight Against Certain Forms of Discrimination, including discrimination between Women and Men, in the fields of Economy, Employment and Vocational Training of 6 November 2008 as last amended in 2012	All grounds in the two Directives and additional grounds
		German-speaking Community: Decree aimed at Fighting Certain Forms of Discrimination of 19 March 2012	All grounds in the two Directives and additional grounds
		Region of Brussels-Capital: Ordinance related to the Fight Against Discrimination and Equal Treatment in the Employment field of 4 September 2008 as last amended in 2010	All grounds in the two Directives and additional grounds
		Region of Brussels-Capital: Ordinance related to the Promotion of Diversity and the Fight Against Discrimination in the Civil Service of the Region of Brussels-Capital of 4 September 2008	All grounds in the two Directives and additional grounds
		<i>Commission communautaire française</i> (COCOF): Decree on the Fight Against certain forms of discrimination and on the implementation of the principle of equal treatment of 9 July 2010	All grounds in the two Directives and additional grounds
		<i>Commission communautaire française</i> (COCOF): Decree on Equal Treatment between Persons in Vocational Training of 22 March 2007, as last amended in 2012	All grounds in the two Directives (open list of prohibited criteria)
BULGARIA	Article 6(2) of the Constitution	Protection against Discrimination Act of 16 September 2003, as last amended in 2013	All grounds in the two Directives and additional grounds
		Integration of Persons with Disabilities Act of 02 September 2004, as last amended in 2010	Disability
CROATIA	Article 14 of the Constitution	Anti-discrimination Act of 9 July 2008, as last amended in 2012	All grounds in the two Directives and additional grounds

⁴⁵⁷ Initially Federal Act Criminalising Certain Acts inspired by Racism or Xenophobia of 30 July 1981.

⁴⁵⁸ Initially the Act on the Fight against Certain Forms of Discrimination of 10 May 2007.

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
CYPRUS	Article 28 of the Constitution	Act on Equal Treatment Irrespective of Race or Ethnic Origin 59(I)/2004 of 31 March 2004, as last amended in 2006	Racial and ethnic origin
		Act on Equal Treatment in Employment and Occupation 58(1)/2004 of 31 March 2004, as last amended in 2009	Racial and ethnic origin, religion or belief, age, sexual orientation
		Act on Persons with Disabilities 127(I)/2000 of 31 March 2004, as amended by Act 57(I)/2004 in 2004 and last amended in 2007	Disability
CZECH REPUBLIC	Article 3.1 of the Charter of Fundamental Rights and Freedoms (part of the Constitutional order)	Anti-discrimination Act 198/2009 of 23 April 2009, as last amended in 2012	All grounds in the two Directives, national origin and sex
DENMARK	None ⁴⁵⁹	Act on Prohibition of Discrimination due to Race etc., Act 289 of 9 June 1971, as last amended in 2000	Race, skin colour, national or ethnic origin, religion/belief, sexual orientation
		Act on Prohibition of Discrimination in the Labour Market etc., Act 31 of 1 July 1996, as last amended in 2008	All grounds in the two Directives and additional grounds
		Ethnic Equal Treatment Act of 28 May 2003, as last amended in 2012	Race and ethnic origin
ESTONIA	Article 12(1) of the Constitution	Chancellor of Justice Act of 25 February 2002, as last amended in 2005	All grounds in the two Directives and additional grounds
		Equal Treatment Act of 11 December 2008, as last amended in 2012	All grounds in the two Directives and colour
FINLAND	Art. 6 of the Constitution	Non-Discrimination Act 21/2004 of 20 January 2004, as last amended in 2009	All grounds in the two Directives and additional grounds
		Province of Åland: Provincial Prevention of Discrimination Act 66/2005,	All grounds in the two Directives
FRANCE	Preamble to the Constitution, Article 1 of the Constitution	Act on the Fight Against Discrimination, Act 2001-1066 of 16 November 2001 as last amended in 2012	All grounds in the two Directives and additional grounds
		Act on the Adaptation of National Law to Community Law in Matters of Discrimination, Act 2008-496 of 27 May 2012	All grounds in the two Directives
		Act for the Equal Opportunities and Integration of Persons with Disabilities, Act 2005-102 of 11 February 2005	Disability
FORMER YUGOSLAV REPUBLIC of MACEDONIA	Article 9 of the Constitution	Prevention and Protection against Discrimination Act of 8 April 2010	Sex, race, colour, gender, belonging to 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

⁴⁵⁹ Articles 70 and 71 are both special clauses respectively dealing with the right to civil and political rights, and deprivation of liberty on the basis of political or religious convictions and descent.

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
GERMANY	Article 3, German Basic Law	Act Implementing European Directives Putting into Effect the Principle of Equal Treatment including the General Equal Treatment Act (General Equal Treatment Act) of 14 August 2006, as last amended in 2013	All grounds in the two Directives and additional grounds (belief not in civil law)
		Act Promoting the Equality of the Disabled of 27 April 2002 as last amended in 2007	Disability
GREECE	Article 5.2 of the Constitution	Act on Punishing Actions or Activities Aiming at Racial Discrimination, Act 927/1979 of 25 June 1979, as last amended in 1984	Race 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 (Equal Treatment Act), Act 3304/2005 of 27 January 2005	All grounds in the two Directives
HUNGARY	Article XV of the Constitution	Act on Equal Treatment and the Promotion of Equal Opportunities No CXXXV of 28 December 2003, as last amended in 2013	All grounds in the two Directives ⁴⁶⁰ and additional grounds
		Act on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities No XXVI of 1 April 1998 as last amended in 2013 ⁴⁶¹	Disability
ICELAND ⁴⁶²	Article 65 of the Constitution	-	
IRELAND	Article 40.1 of the Constitution	Employment Equality Act 1998-2011 of 18 June 1998, as last amended in 2013	All grounds in the two Directives and additional grounds
		Equal Status Act 2000-2012 of 26 April 2000, as last amended in 2012	All grounds in the two Directives and additional grounds
ITALY	Article 3 of the Constitution	Legislative Decree No 215/2003 transposing Directive 2000/43/EC of 9 July 2003, as last amended in 2011	Racial and ethnic origin
		Legislative Decree No 216/2003 transposing Directive 2000/78/EC of 9 July 2003, as last amended in 2013	Religion or belief, age, disability and sexual orientation
		Law 67/2006, Provisions on the Judicial Protection of Persons with Disabilities who are Victims of Discrimination of 1 March 2006 as last amended in 2011	Disability
LATVIA	Article 91 of the Constitution	Labour Law of 20 June 2001, as last amended in 2012	All grounds in the two Directives and additional grounds
		Law on Prohibition of Discrimination against Natural Persons who are Economic Operators of 19 December 2012	All grounds in the two Directives and gender
LIECHTENSTEIN	— ⁴⁶³	Act on Equality of People with Disabilities of 25 October 2006, as last amended in 2011 ⁴⁶⁴	Disability

⁴⁶⁰ Please note that there is also specific legislation on disability: the Act on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities, Act XXVI of 16 March 1998.

⁴⁶¹ After the cut-off date of this report, the Act on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities was amended (1 January 2014).

⁴⁶² There is no comprehensive anti-discrimination law in **Iceland**, protection may be granted through diverse pieces of specific legislation including: the Act on the Affairs of Persons with Disabilities No 59/1992 of 2 June 1992 as last amended in 2012, the Act on the Affairs of the Elderly No 125/1999 of 31 December 1999 as last amended in 2012, and the Act Amending Laws relating to the Legal Status of Homosexual Persons No 65/2006 of 14 June 2006.

⁴⁶³ The only anti-discrimination clause that exists in the Constitution of **Liechtenstein** (Art. 31) regards women and men.

⁴⁶⁴ Please note that the Penal Code also includes provisions regarding all the grounds in the two directives and additional grounds.

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
LITHUANIA	Article 29 of the Constitution	Equal Treatment Act of 18 November 2003, as last amended in 2013	All grounds in the two Directives and additional grounds
		Social Integration of the Persons with Disabilities Act of 28 November 1991 as last amended in 2013	Disability
LUXEMBOURG	Article 10bis of the Constitution (for nationals only)	Equal Treatment Act of 28 November 2006, as last amended in 2008	All grounds in the two Directives
		Disabled Persons Act of 12 September 2003 as last amended in 2008	Disability
MALTA	Article 45 of the Constitution	Employment and Industrial Relations Act of 2 December 2002, as last amended in 2014 ⁴⁶⁵	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 of 5 November 2004 (issued under the Employment and Industrial Relations Act), as last amended in 2011	All grounds in the two Directives and additional grounds
		Equality for Men and Women Act of 9 December 2003 as last amended in 2012 ⁴⁶⁶	Sex, family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin and gender identity
		Equal Opportunities (Persons with Disabilities) Act of 10 February 2000, as last amended in 2012	Disability
		Equal Treatment of Persons Order, Legal Notice 85 of 3 April 2007	Racial and ethnic origin
NETHERLANDS	Article 1 of the Constitution	General Equal Treatment Act of 2 March 1994, as last amended in 2011	Race, religion and belief, political opinion, hetero or homosexual orientation, sex, nationality and civil (or marital) status
		Disability Discrimination Act of 3 April 2003 as last amended in 2011	Disability
		Age Discrimination Act of 17 December 2003 as last amended in 2011	Age
NORWAY	None	Anti-discrimination Act on Prohibition of Discrimination based on Ethnicity, Religion, etc. of 21 June 2013 replacing the previous Anti-discrimination Act of 3 June 2005, as last amended in 2008	Ethnicity, religion and belief ⁴⁶⁷
		Working Environment Act of 12 June 2005, as last amended in 2012	Age, political affiliation, membership of a trade union, part-time/temporary work
		Anti-discrimination and Accessibility Act on Prohibition of Discrimination on the Basis of Disability of 24 June 2008, as last amended in 2011	Disability
		Act relating to a Prohibition against Discrimination on the Basis of Sexual Orientation, Gender Identity and Gender Expression of 21 June 2013	Sexual orientation, gender identity and gender expression

⁴⁶⁵ After the cut-off date of this report, Legal Notice 274 of 2014 amended the Employment and Industrial Relations Act. The amendments came into force on 12 August 2014.

⁴⁶⁶ After the cut-off date of this report, the Equality for Men and Women Act was amended by Act XVIII of 2014, adopted on 26 May 2014.

⁴⁶⁷ Until 1 January 2014, national origin, descent, skin colour and language were explicitly covered in the legislation. The preparatory works to the new Anti-discrimination Act in force from 1 January 2014 indicate that these grounds are still to be covered under the ADA.

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
POLAND	Article 32 of the Constitution	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment of 3 December 2010 ⁴⁶⁸	All grounds in the two Directives and additional grounds
PORTUGAL	Article 13. 2 and 26.1 of the Constitution	Law 18/2004 transposing the Council Directives 2000/43 of 29 June 2000 into Portuguese Law, and Establishing the Principle of Equality of Treatment between Persons Irrespective of Racial or Ethnic Origin, and a Legal Framework to Combat Discrimination on the Grounds of Racial or Ethnic origin of 11 May 2004 ⁴⁶⁹	Race, ethnic origin, colour and nationality
		Act 134/99 on Prohibition of Discrimination based on Race, Colour, Nationality or Ethnic Origin of 28 August 1999 ⁴⁷⁰	Race, colour, nationality, ethnic origin
		Decree-Law 86/2005 transposing the Racial Equality Directive into National Law of 2 May 2005	Racial and ethnic origin
		Act 46/2006 Prohibiting and Punishing Discrimination based on Disability and on a Pre-existing Risk to Health	Disability and pre-existing risk to health
ROMANIA	Articles 4 and 16 of the Constitution	Act 324/2006 amending Government Ordinance 137/2000 on the Prevention and Punishment of All Forms of Discrimination of 31 August 2000, as last amended in 2006 ⁴⁷¹	All grounds in the two Directives ⁴⁷² and additional grounds
		Act 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap of 6 December 2006 as last amended in 2012	Disability
SLOVAKIA	Article 12 of the Constitution	Act on Equal Treatment in Certain Areas and Protection against Discrimination No 365/2004 of 20 May 2004, as last amended in 2013	All grounds in the two Directives and additional grounds
SLOVENIA	Article 14 of the Constitution	Implementing the Principle of Equal Treatment Act of 22 April 2004, as last amended in 2007	All grounds in the two Directives ⁴⁷³ and additional grounds
		Employment Relationship Act of 5 March 2013 ⁴⁷⁴	All grounds in the two Directives and additional grounds
		Act on Equal Opportunities of People with Disabilities of 16 November 2010, as last amended in 2010	Disability
SPAIN	Arts 14 of the Constitution	Fiscal, Administrative and Social Measures Act No 62/2003, of 30 December 2003	All grounds in the two Directives
		General Law on the Rights of Persons with Disabilities and their Social Inclusion of 29 November 2013	Disability

⁴⁶⁸ Referred to in this report as the 'Equal Treatment Act'.

⁴⁶⁹ Referred to in this report as the 'Principle of Racial Equal Treatment Act'.

⁴⁷⁰ Referred to in this report as the 'Prohibition of Racial Discrimination Act'.

⁴⁷¹ In March 2013 Law 61/2013 and in June 2013 Law 189/2013 for the Ratification of Emergency Ordinance 19/2013 both further amended Governmental Ordinance 137/2000.

⁴⁷² Please note that there is specific legislation on disability: Act 448/2006 on the Promotion and Protection of the Rights of Persons with Disabilities.

⁴⁷³ Please note that there is specific legislation on disability: the Act on Equal Opportunities of People with Disabilities of 16 November 2010.

⁴⁷⁴ The Employment Relationship Act of 5 March 2013 replaces the same Act from 24 April 2002.

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
SWEDEN	Chapter 1, S. 2 and Chapter 2, S. 12 of the Constitution	Discrimination Act (2008:567) of 5 June 2008, as last amended in 2011	All grounds in the two Directives and additional grounds
TURKEY⁴⁷⁵	Art. 10 of the Constitution	Law on Persons with Disabilities No 5378 of 1 July 2005 as last amended in 2013	Disability
UNITED KINGDOM	No written constitution	UK: Equality Act of 16 February 2006 as last amended in 2010 ⁴⁷⁶	All grounds in the two Directives and additional grounds
		Northern Ireland: Race Relations Order of 19 March 1997, as last amended in 2012	Racial grounds including ethnic origin, colour, nationality, national origin, membership of the Irish Traveller Community
		Northern Ireland: Disability Discrimination Act of 8 November 1995, as last amended in 2006	Disability
		Northern Ireland: Employment Equality (Sexual Orientation) Regulations of 1 December 2003	Sexual orientation
		Northern Ireland: Fair Employment and Treatment Order of 16 December 1998, as last amended by Fair Employment and Treatment Regulations in 2013	Religion belief, political opinion and belief
		Northern Ireland: Employment Equality (Age) Regulations of 1 October 2006 as last amended in 2011	Age
		Northern Ireland Equality Act (Sexual Orientation) 2006	Sexual orientation

⁴⁷⁵ Please note that anti-discrimination provisions can be found in the Labour Code for the grounds of language, race, gender, political opinion, philosophical belief, religion and sect or any such considerations and in the Criminal Code for the grounds of language, race, colour, gender, disability, political opinion, philosophical belief, religion and sect or any such considerations.

⁴⁷⁶ The 2006 Equality Act created the Equality and Human Rights Commission in Great Britain, and in the UK prohibited religious discrimination outside employment and created a basis for secondary legislation to do the same in relation to sexual orientation. The 2010 Act for Great Britain only consolidates all the grounds and amends the 2006 provisions in relation to sexual orientation, religion and belief beyond employment in Great Britain.

Martin | 1994



Annex 3

National specialised bodies (only federal law/bodies are indicated)

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 ones?	Provides independent assistance to victims	Provides independent surveys	Provides independent reports	Issues recommendations	Is a quasi-judicial body	Its decisions are binding
AUSTRIA	Equal Treatment Commission –ETC (Act on the Equal Treatment Commission and the Office for Equal Treatment, §§ 1, 2, 8-23)	Gender, ethnic affiliation, religion, belief, age, sexual orientation	No	No	Yes	Yes	Yes	No
	National Equality Body –NEB (Act on the Equal Treatment Commission and the office for Equal Treatment, §§ 3-7)	Gender, ethnic affiliation, religion, belief, age, sexual orientation	Yes	Yes	Yes	Yes	No	N/A
BELGIUM	Centre for Equal Opportunities and Opposition to Racism (Act establishing the Centre for Equal Opportunities and Opposition to Racism, ⁴⁷⁷ Art. 1) ⁴⁷⁸	Alleged race, colour, descent, 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 characteristics, political opinion, trade union opinion, genetic characteristics, social origin	Yes	Yes	Yes	Yes	No	N/A
BULGARIA	Protection Against Discrimination Commission (Protection Against Discrimination Act, Art. 40)	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 to which the Republic of Bulgaria is a party	Yes	Yes	Yes	Yes	Yes	Yes
CROATIA	People's Ombudsman ⁴⁷⁹ (Anti-discrimination Act, Art. 12)	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,	Yes	Yes	Yes	Yes	No	N/A

⁴⁷⁷ Further amended by the General Anti-discrimination Federal Act.

⁴⁷⁸ See p. 115. A cooperation agreement was approved on 12 June 2013 by the Federal State, the Regions and the Communities to turn the Centre for Equal Opportunities and Opposition to Racism into an inter-federal centre.

⁴⁷⁹ The People's Ombudsman is competent for all the grounds covered by the Anti-discrimination Act except those grounds that are the responsibility of a special Ombudsman. The ground of disability is covered by the Ombudsman for Persons with Disabilities and the grounds of gender, gender identity and expression and sexual orientation are covered by the Gender Equality Ombudsman.

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 ones?	Provides independent assistance to victims	Provides independent surveys	Provides independent reports	Issues recommendations	Is a quasi-judicial body	Its decisions are binding
CYPRUS	Equality Authority and Anti-discrimination Authority (Act on the Combating of Racial and Other Forms of Discrimination (Commissioner), Arts 5 and 7)	Race/ethnic origin, religion or belief, age, sexual orientation, disability, community, race, language, sex, political or other beliefs, national or social descent, birth, colour, wealth, social class or any other ground ⁴⁸⁰	No ⁴⁸¹	Yes	Yes	Yes	Yes	Yes ⁴⁸²
CZECH REPUBLIC	Public Defender of Rights (Act on Public Defender of Rights, Art. 21b)	Sex, race, ethnic origin, sexual orientation, age, disability, religion, belief or other conviction, national origin	Yes	Yes	Yes	Yes	No	N/A
DENMARK	Institute for Human Rights – The National Human Rights Institute of Denmark (Act on the Institute for Human Rights – the National Human Rights Institute of Denmark, Art. 2.2)	Race, ethnic origin, gender, disability	Yes	Yes	Yes	Yes	No	No
	Board of Equal Treatment ⁴⁸³ (Act on the Board of Equal Treatment, Art. 1)	Gender, race, skin colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin	No	No	No	No	Yes	Yes
ESTONIA	Commissioner for Gender Equality and Equal Treatment (Equal Treatment Act, Arts 15-22)	Sex, ethnic origin, race, colour, religion or other beliefs, age, disability and sexual orientation	Yes	Yes	Yes	Yes	No	N/A
	Chancellor of Justice (Chancellor of Justice Act, Art. 19-35 ⁴⁸⁴)	Public sector: other grounds than race and ethnic origin are not specified. Private 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	No ⁴⁸⁴	No	No	Yes	Yes ⁴⁸⁵	Yes ⁴⁸⁶

⁴⁸⁰ The Equality and Anti-discrimination Authority also covers the ground of nationality (although not expressly mentioned in its mandate) as included in the protected grounds under Protocol 12 to the European Convention of Human Rights, the Cypriot Constitution and in international conventions ratified by the Republic of Cyprus. The Authority also covers all rights guaranteed in the ECHR and all its protocols, the International Convention for the Elimination of All forms of Racial 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. The equality body itself has always considered nationality to be part of its mandate and refers to it repeatedly in its annual reports when it lists the grounds covered.

⁴⁸¹ In practice, the Equality Authority and the Anti-discrimination Authority do inform victims of their rights.

⁴⁸² Although the law entitles it to issue binding decisions, the sanctions foreseen are marginal and the equality body chooses to use its mediation function instead.

⁴⁸³ The Board of Equal Treatment adjudicates individual complaints of discrimination in the labour market regarding all the grounds mentioned above. For complaints outside the labour market, the Board of Equal Treatment only deals with the grounds of race, ethnic origin or gender.

⁴⁸⁴ In practice, the Chancellor informs victims of their rights.

⁴⁸⁵ In conciliation procedures.

⁴⁸⁶ In conciliation procedures.

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 ones?	Provides independent assistance to victims	Provides independent surveys	Provides independent reports	Issues recommendations	Is a quasi-judicial body	Its decisions are binding
FINLAND	Ombudsman for Minorities ⁴⁸⁷ (Act on the Ombudsman for Minorities and the National Discrimination Tribunal, Section 1-2 ⁴⁸⁸)	No ⁴⁸⁹	Yes ⁴⁹⁰	Yes ⁴⁹¹	Yes ⁴⁹²	Yes ⁴⁹³	No	N/A
FRANCE	Defender of Rights (Institutional Act creating the Defender of Rights, Art. 4, para. 3)	Any ground protected by national ⁴⁹⁴ or European legislation and international conventions	Yes	Yes	Yes	Yes	No	N/A
FORMER YUGOSLAV REPUBLIC of MACEDONIA	Commission for Protection against Discrimination (Prevention and Protection against Discrimination Act, Arts 16-24 and 25-33) ⁴⁹⁵	Sex, race, colour, gender, belonging to 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	yes	No
GERMANY	Federal Anti-discrimination Agency (General Equal Treatment Act, Art. 25)	Race or ethnic origin, sex, religion or belief (<i>Weltanschauung</i>), disability, age, sexual identity	Yes	Yes	Yes	Yes	No	N/A

⁴⁸⁷ Its role is limited to discrimination outside the employment field. Responsibility for the supervision of the prohibition of discrimination in employment is given to the occupational safety and health authorities (Section 11 of the Non-Discrimination Act). Please note that as mentioned on p. 114 the European Commission has initiated infringement proceedings against Finland in relation to the lack of adequate competencies of the Ombudsman for Minorities.

⁴⁸⁸ The Discrimination Tribunal, which is a judicial body, was also created by the Act on the Ombudsman for Minorities and the National Discrimination Tribunal, but it is not considered to be an equality body.

⁴⁸⁹ The Finnish body does deal in practice with nationality.

⁴⁹⁰ Only outside the employment field.

⁴⁹¹ Only outside the employment field.

⁴⁹² Only outside the employment field.

⁴⁹³ Only outside the employment field.

⁴⁹⁴ In French legislation the protected grounds are: sex, pregnancy, belonging (whether real or supposed) to an ethnic origin, a nation, a race or a certain religion, morals, sexual orientation, sexual identity, age, family situation; genetic characteristics, physical appearance, family name, health, disability, union activities and political convictions.

⁴⁹⁵ The Ombudsman also plays a role against discrimination on the grounds of sex, race, colour, national, ethnic and social origin, political affiliation, religious and cultural background, language, property, social background, disability and origin.

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 ones?	Provides independent assistance to victims	Provides independent surveys	Provides independent reports	Issues recommendations	Is a quasi-judicial body	Its decisions are binding
GREECE	Greek Ombudsman ⁴⁹⁶ (Law 2477/1997, Art. 1 and Equal Treatment Act, Art. 19, para. 1)	Racial or ethnic origin, religion or other beliefs, disability, age, sexual orientation, gender, human rights in general	Yes	No	Yes	Yes	No	N/A
	Labour Inspectorate Body ⁴⁹⁷ (Act 2639/1998, Art. 6 and Equal Treatment Act, Art. 19, para. 3)	Racial or ethnic origin, religion or other beliefs, disability, age, sexual orientation	No	No	No	No	No	N/A
	Equal Treatment Committee ⁴⁹⁸ (Anti-discrimination Act, Art. 19, para. 2)	Racial or ethnic origin, religion or other beliefs, disability, age, sexual orientation	No	No	No	No	No	N/A
HUNGARY	Equal Treatment Authority (Act on Equal Treatment and the Promotion of Equal Opportunities; Art. 14-17B)	Sex, racial affiliation, colour of skin, nationality, belonging to a national or ethnic minority, mother tongue, disability, health condition, religion or belief, political or other opinion, family status, maternity (pregnancy) or paternity, sexual orientation, sexual identity, age, social origin, financial status, part-time nature of employment legal relationship or other legal relationship connected with labour, or determined period thereof, belonging to an interest representation organisation, other situation, attribute or condition of a person or group	Yes ⁴⁹⁹	Yes	Yes	Yes	Yes	Yes
ICELAND	No specific body ⁵⁰⁰	-	-	-	-	-	-	-
IRELAND	Equality Authority (Employment Equality Act, S. 38 and Equal Status Act, S. 39)	Gender, age, race, religion, family status, disability, marital status, sexual orientation, membership of the Traveller community	Yes	Yes	Yes	Yes	No	N/A
	Equality Tribunal (Employment Equality Act, S. 75 and Equal Status Act, 39)	Gender, age, racial or ethnic origin including membership of the Traveller community, religion, family status, disability, marital status, sexual orientation	Yes	Yes	Yes	Yes	Yes	Yes

⁴⁹⁶ The Ombudsman covers discrimination by public sector bodies.

⁴⁹⁷ The Labour Inspectorate covers discrimination in the private sector and in the field of employment and occupation for the five grounds protected by the Directives. Although the Labour inspectorate has the mandate to provide independent assistance to victims and to publish independent reports, in practice it does not do so.

⁴⁹⁸ The Equal Treatment Committee covers discrimination in the private sector in any field other than employment and occupation for the five grounds protected in the two Directives. Although the Equal Treatment Committee has the mandate to provide independent assistance to victims and to publish independent reports, in practice it does not do so.

⁴⁹⁹ However, the Equal Treatment Authority focuses on its quasi-judicial function.

⁵⁰⁰ The Parliamentary Ombudsman may deal with equality/discrimination in relation to administrative procedure.

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 ones?	Provides independent assistance to victims	Provides independent surveys	Provides independent reports	Issues recommendations	Is a quasi-judicial body	Its decisions are binding
ITALY	National Office against Racial Discrimination –UNAR (Legislative Decree No 215/2003 on the Implementation of Directive 2000/43/EC, Art. 7)	Race, ethnic origin, sex, religion or personal belief, disability, age and sexual orientation ⁵⁰¹	Yes ⁵⁰²	Yes	Yes	Yes	No	N/A
LATVIA	Ombudsman , (Ombudsman Act, Art. 11.2)	Grounds not specified, hence any ground	Yes	Yes	Yes	Yes	No	N/A
LIECHTENSTEIN	Office for Equal Opportunities (Act on Equality between Women and Men, Art. 19)	Gender, migration and integration (including race and ethnicity), ⁵⁰³ sexual orientation, disability, social disadvantage	Yes	No	Yes	Yes	No	N/A
LITHUANIA	Equal Opportunities Ombudsman (Equal Opportunities for Women and Men Act, Chapter IV, Articles 10-17 and Equal Treatment Act, Articles 14)	Age, disability, sexual orientation, race, ethnicity, origin, religion, beliefs or convictions, language, social status	No ⁵⁰⁴	Yes	Yes	Yes	Yes	Yes ⁵⁰⁵
LUXEMBOURG	Centre for Equal Treatment (Equal Treatment Act, Art. 8)	Race, ethnic origin, religion or belief, disability, age, gender, sexual orientation	Yes	Yes	Yes	Yes	No	N/A
MALTA	National Commission for the Promotion of Equality for Men and Women ⁵⁰⁶ (Equality for Men and Women Act, Art. 11)	Sex, family responsibilities, sexual orientation, age, religion or belief, racial and ethnic origin, gender identity	Yes	Yes	Yes	Yes	No	N/A
NETHERLANDS	The Netherlands Institute for Human Rights (the Netherlands Institute for Human Rights Act, Arts 9-13, originally General Equal Treatment Act, Arts 11-21)	Race, religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality, civil (or marital) status, disability, age, working time and type of labour contract	No	Yes	Yes	Yes	Yes	No
	The NGO 'Art. 1' ⁵⁰⁷ (Law on Local Anti-discrimination Bureaus, Art. 2a)	Race, religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality, civil (or marital) status, disability, age	Yes	Yes	Yes	Yes	No	N/A

⁵⁰¹ UNAR's remit has been extended through a ministerial directive in 2012. In practice, the **Italian** body also deals with nationality.

⁵⁰² There have been serious concerns in 2013 regarding the interference of the state in UNAR's activities and therefore its independence in dealing with its tasks (such as providing independent assistance to victims, surveys and reports and issuing recommendations).

⁵⁰³ Religion and age are not explicitly mentioned, but due to the general mission of the Office for Equal Opportunities, it can be assumed that these grounds would be covered in **Liechtenstein**.

⁵⁰⁴ In practice, the Ombudsman tries to act as mediator and to reach a settlement between the victim and the perpetrator.

⁵⁰⁵ The Ombudsperson's administrative sanctions are binding but not her/his recommendations.

⁵⁰⁶ In practice the Commission is generally referred to as the National Commission for the Promotion of Equality.

⁵⁰⁷ This organisation includes around 430 local anti-discrimination bureaus.

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 ones?	Provides independent assistance to victims	Provides independent surveys	Provides independent reports	Issues recommendations	Is a quasi-judicial body	Its decisions are binding
NORWAY	Equality and Anti-discrimination Ombud ⁵⁰⁸ (Act on the Equality and Anti-discrimination Ombud and the Equality and Anti-discrimination Tribunal, Art. 1).	Gender, ethnicity, disability, language, religion, sexual orientation and age ⁵⁰⁹	Yes ⁵¹⁰	Yes	Yes	Yes	Yes	No
POLAND	Commissioner for Civil Rights Protection ('Ombudsman') (Act on the Commissioner for Civil Rights Protection, Art. 1)	The Act on the Commissioner for Civil Rights Protection does not specify any protected grounds	Yes ⁵¹¹	Yes	Yes	Yes	No	N/A
PORTUGAL	ACIDI (High Commissioner for Immigration and Intercultural Dialogue) (Decree-Law 167/2007, Art. 1)	Nationality	Yes	Yes	Yes	Yes	No	N/A
ROMANIA	National Council on Combating Discrimination (Government Decision 1194/2001 establishing the National Council on Combating Discrimination, Art)	Race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, age, disability, non-contagious chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion	Yes	Yes	Yes	Yes/No ⁵¹²	Yes	Yes
SLOVAKIA	Slovak National Centre for Human Rights (Act No 308/1993 on the Establishment of the Slovak National Centre for Human Rights, S. 1, paras 2a, e, f, g, h and S. 1, paras 3 and 4)	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	No	N/A
SLOVENIA ⁵¹³	Advocate of the Principle of Equality (Act Implementing the Principle of Equal Treatment, Art. 11.19a)	Gender, ethnicity, race or ethnic origin, religion or belief, disability, age, sexual orientation, other personal circumstance	Yes	No	No	Yes	No	N/A

⁵⁰⁸ The Equality and Anti-discrimination Tribunal is the appeal instance of the Equality and Anti-discrimination Ombud.

⁵⁰⁹ The Ombud also implicitly covers national origin, descent, skin colour and language as these were formerly explicitly in the legislation, and the preparatory works to the new law in force as of 1 January 2014 say that these grounds are to be covered under ethnicity. Discrimination because of political affiliation and membership in trade unions are handled by the courts only.

⁵¹⁰ The Ombud's role is to provide guidance to victims of discrimination on the content of the law and not to give assistance in the form of legal counselling or legal aid.

⁵¹¹ Judicial interpretation is required as under the **Polish** Constitution and the new law, the competences of the Ombudsman are limited regarding conflicts between private parties.

⁵¹² Issuing recommendations is not specifically provided for in the law, but the national equality body does so in practice.

⁵¹³ The tasks performed by the Advocate might not be seen as independent as the Advocate is a civil servant working for the Ministry.

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 ones?	Provides independent assistance to victims	Provides independent surveys	Provides independent reports	Issues recommendations	Is a quasi-judicial body	Its decisions are binding
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, Art. 33)	No	No	No	No	No	No	N/A
SWEDEN	Equality Ombudsman (Discrimination Act, Ch. 4 and Ch. 6, S. 2, and the whole of the Equality Ombudsman Act)	Sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation, age	Yes	Yes	Yes	Yes	No	N/A
TURKEY	No	-	-	-	-	-	-	-
UNITED KINGDOM	Great Britain: Equality and Human Rights Commission (UK Equality Act 2006, SS. 1-43)	Ethnic origin, national origin, colour, nationality (including citizenship), sexual orientation, religion, belief, disability, age, sex (including gender reassignment, marriage/civil partnership status, pregnancy)	Yes	Yes	Yes	Yes	No	N/A
	Northern Ireland: Equality Commission for Northern Ireland , (Northern Ireland Act, Part VII, SS. 73-74)	Ethnic origin, national origin, colour, nationality (including citizenship), sexual orientation, religion, belief, disability, age, sex (including gender reassignment, marriage/civil partnership status, pregnancy)	Yes	Yes	Yes	Yes	No	N/A

European Commission

Developing Anti-Discrimination Law in Europe

The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared

Luxembourg: Publications Office of the European Union

2015 — 166 pp. — 21 x 29.7 cm

ISSN 2314-9663

ISBN 978-92-79-46193-4

Doi 10.2838/94057

The Comparative Analysis provides a detailed comparison of the anti-discrimination legislation in the 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway 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.

HOW TO OBTAIN EU PUBLICATIONS

Free publications:

- one copy:
via EU Bookshop (<http://bookshop.europa.eu>);
- more than one copy or posters/maps:
from the European Union's representations (http://ec.europa.eu/represent_en.htm);
from the delegations in non-EU countries
(http://eeas.europa.eu/delegations/index_en.htm);
by contacting the Europe Direct service (http://europa.eu/europedirect/index_en.htm)
or calling 00 800 6 7 8 9 10 11 (freephone number from anywhere in the EU) (*).

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

Priced publications:

- via EU Bookshop (<http://bookshop.europa.eu>).

