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# Country report

## Non-discrimination

Spain

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including summary



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# **Country report**

## **Non-discrimination**

Transposition and implementation at national level of  
Council Directives 2000/43 and 2000/78

### **Spain**

Lorenzo Cachón

Reporting period 1 January 2018 – 31 December 2018

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## EXECUTIVE SUMMARY

### 1. Introduction

There have been great social and political changes in Spain in the last 43 years. Major transformations have taken place in the country's social structure, forming a much more diverse society in ethnic and religious (and other) terms. One of the greatest changes has been Spain's transformation into a country of immigration. Up to the mid-1980s, the only notable differentiated ethnic group was that formed by the 600 000 Roma living in the country. In the late 1990s, immigration underwent a very sharp acceleration, and by 31 December 2018, the number of foreigners with legal residence in Spain was 5 424 781, which represents 11.6 % of the total population. The largest groups are from Morocco, Romania, the United Kingdom, China and Bulgaria<sup>1</sup> The rapid rise in immigration poses new challenges to Spanish society, including increased risks related to discriminatory practices. Some 80 % of Spaniards are Catholics (mostly non-practising), 4 % are members of other religious groups (chiefly Islam and Protestantism) and 16 % are non-believers or atheists.

The Spanish Constitution of 1978 laid down the legal framework of a coexistence governed by democratic principles, making equal treatment and non-discrimination one of the basic pillars of a non-confessional state. Although few actions are brought before the courts, discriminatory practices occur relatively often, on various grounds. These discriminatory practices chiefly affect certain migrant groups and Roma.

There are several specific social and employment programmes for combating discrimination on various grounds. There are also positive action programmes to combat discrimination in gender and disability. All these programmes are of value, although they are not very effective in their overall impact.

In recent years there have been numerous conflicts between the rights of organisations with an ethos based on religion or belief (the Catholic Church, with which Spain signed an agreement in 1976 that is still in force) and other rights to non-discrimination. This has generated a significant amount of jurisprudence in Spain<sup>2</sup> and the ECtHR.<sup>3</sup>

The great recession suffered by Spain between 2008 and 2014 and the policies that Governments have been implementing to address it have led to a marked change in policy priorities. In June 2018, the socialist party came back into the Government after winning the motion of censure against the conservative Government in Parliament. One of the priorities of the new Government has been the strengthening of equality policies, as could be seen from the very beginning by the restructuring of the ministerial departments, with the creation of a Secretary of Equality directly dependent on the Vice-presidency of the Government. The new Government also promoted the Comprehensive Bill for Equal Treatment and Non-discrimination, which was presented by the socialist group in March 2017.<sup>4</sup>

### 2. Main legislation

Equality is one of the highest values of the legal system established by the Spanish Constitution of 1978. The most notable international instruments combating

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<sup>1</sup> Statistics on foreigners residing in Spain, 31 December 2018 (*Estadística de extranjeros residentes en España*). <http://extranjerios.mitramiss.gob.es/es/Estadisticas/operaciones/con-certificado/index.html>.

<sup>2</sup> Constitutional Court Decisions of 13 February 1981, 5/1981; 27 March 1985, 47/1985; 12 June 1996, 106/1996; and 14 April 2011, 51/2011.

<sup>3</sup> Court decision of ECtHR, 12 June 2014, *Fernández Martínez v. Spain* (Application no. 5603/07).

<sup>4</sup> After the cut-off date of this report, on 13.02.2019, Parliament rejected the draft General State Budget presented by the Government and as a result, the President of the Government dissolved the Parliament. All bills, including the Comprehensive Bill for Equal Treatment and Non-Discrimination, were withdrawn.

discrimination have been ratified during Spain's democratic period since 1976, and these instruments have informed the Constitution and the laws passed since then:

- the International Convention on the Elimination of All Forms of Racial Discrimination;
- the International Covenant on Civil and Political Rights;
- the International Covenant on Economic, Social and Cultural Rights;
- the Convention on the Elimination of All Forms of Discrimination against Women;
- the Convention on the Rights of Persons with Disabilities and its Optional Protocol;
- ILO Convention 97 on Migration for Employment;
- ILO Convention 111 on Discrimination (Employment and Occupation);
- the Convention for the Protection of Human Rights and Fundamental Freedoms;
- Protocol No. 12 to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms.

Spanish law has developed the principle of equal treatment in various legal fields, mainly labour and criminal law. Under labour law, discriminatory legislative provisions, clauses of collective agreements, individual agreements and unilateral managerial decisions are considered as null and void; and discriminatory acts by employers are specified as very serious offences. Under the criminal law, racism or xenophobia is an aggravating circumstance in the commission of a crime, and a number of provisions specify racist offences and consider serious discrimination in employment as an offence. There are also anti-discriminatory measures in the administrative, civil and educational spheres.

The transposition of Directives 2000/43 and 2000/78 was made in Chapter III of Title II of Law 62/2003,<sup>5</sup> on fiscal, administrative and social measures. Articles 27-28 contain a general transposition of the definitions of direct and indirect discrimination, harassment and instructions to discriminate. Law 62/2003 was amended in 2014 in relation to the independent body, the Council for the Elimination of Racial or Ethnic Discrimination.<sup>6</sup> Following Law 62/2003, EU directives have been implemented in various other laws and have influenced policy changes in Spain on anti-discrimination legislation for different grounds and in different fields.

Various other laws are relevant: Law 27/2007,<sup>7</sup> of 23 October 2007, on recognising sign language and speech aid systems; and RDL 1/2013<sup>8</sup> of 29 November 2013, approving the General Law on the Rights of Persons with Disabilities and their Social Inclusion, which regulates all aspects of disability and replaces the three pieces of disability legislation that were in force up to that date.

### **3. Main principles and definitions**

The Spanish Constitution states that Spaniards are equal before the law and that they may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other condition or personal or social circumstance (Article 14). Moreover, it enjoins the public authorities to promote conditions that ensure that the freedom and equality of individuals and of the groups that they form are real and effective; to remove obstacles that impede or hamper the fulfilment of such freedom and equality; and to facilitate the participation of all citizens in political, economic, cultural and social life (Article 9). The Spanish Constitutional Court<sup>9</sup> has ruled that the principle of equality is not breached by action on the part of the public authorities to counter the disadvantages

<sup>5</sup> Spain, Law 62/2003, 30 December 2003, on fiscal, administrative and social measures (BOE, 31 December 2003).

<sup>6</sup> Spain, Law 15/2014, 16 September 2014, on rationalisation of the public sector and other measures of administrative reform (BOE, 17 September 2014).

<sup>7</sup> Spain, Law 27/2007, (BOE, 24 October 2007).

<sup>8</sup> Spain, RDL 1/2013, General Law on the Rights of Persons with Disabilities and their Social Inclusion (BOE, 3 December 2013).

<sup>9</sup> See Constitutional Court Decision, 1 July 1987, 128/1987.



experienced by certain social groups even when they are given more favourable treatment, as the aim is to give different treatment to effectively different situations.

Prohibition of discrimination on various grounds is addressed in the Spanish legal system, and the grounds of unlawful discrimination specified are a person's origin, including racial or ethnic origin, sex, age, marital status, religion or beliefs, political opinion, sexual orientation, trade union membership, social status or disability.

National law has implemented the duty to provide reasonable accommodation for disabled people, both in general terms and specifically in the field of employment.

The Criminal Code<sup>10</sup> specifies racial or ethnic motives as aggravating circumstances in various offences and misdemeanours. Organic Law 7/1980,<sup>11</sup> of 7 July 1980, on religious freedom, proclaims the principle of non-discrimination, establishing that religious beliefs shall not constitute a reason for inequality or discrimination before the law. Religious reasons may not be a ground for preventing anyone from performing any work, activity, responsibility or public office.

Law 62/2003 contains a rather minimal – and sometimes not exactly literal – transposition of Directives 2000/43 and 2000/78, covering all grounds of discrimination. The definitions of both direct and indirect discrimination are included, although in the definition of direct discrimination there is no reference to the situation where a person 'has been or would be treated' less favourably, but only to 'present situations of unfavourable treatment'. Harassment is defined and prohibited. Instructions to discriminate are prohibited but not defined in national law. There are legal measures of protection against victimisation, but only in the field of employment: Law 62/2003 introduces a modification in the Workers' Statute, annulling employers' decisions which constitute adverse treatment of employees as a reaction to a complaint within the company or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination.

There is no explicit mention in Spanish legislation of discrimination based on assumed characteristics. RDL 1/2013 addresses disability discrimination based on association. For other grounds, discrimination by association may be regarded as implicitly covered by the law, and judicial interpretation might be required.

The exceptions to the principle of equal treatment provided for in Spanish legislation are along the lines of those in Article 4 of Directives 2000/43 and 2000/78. As for churches and organisations with a specific ethos, Organic Law 7/1980 on religious freedom sets out the right of registered churches and religious communities to lay down their own organisational rules and internal and staff regulations, which may include clauses on the safeguarding of their religious identity and personality, as well as due respect for their beliefs, without prejudice to the rights and freedoms recognised by the Constitution and in particular those of freedom, equality and non-discrimination. In private organisations with a specific ethos, the exemptions apply at three stages of the employment relationship: access to employment; performance of activities in the organisation; and dismissal as a consequence of those activities.

There are no specific national rules about multiple discrimination.

#### **4. Material scope**

The material scope of the prohibition of discrimination is of a general nature. All the fields mentioned by Directives 2000/43 and 2000/78 are covered by the general principle of equality laid down in Article 14 of the Spanish Constitution. Besides gender, racial or

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<sup>10</sup> Spain, Organic Law 10/1995, 23 November 1995, on the Criminal Code (BOE, 24 November 1995), modified by Organic Law 1/2015, 30 March 2015 (BOE, 31 March 2015).

<sup>11</sup> Spain, Organic Law 7/1980, 7 July 1980, on religious freedom (BOE, 6 July 1980).

ethnic origin, religion or beliefs, disability, age and sexual orientation, other grounds are expressly mentioned in Spanish laws: marital status; place of origin; social status; political ideas; ideology; affiliation to a trade union; language within the State of Spain; and family ties with other workers in the same enterprise. In some fields, especially employment, discrimination is expressly prohibited by current legislation, in both the public and private sectors.

In fields such as social protection and social advantages, education and access to it, and the supply of goods and services available to the public, including housing, the applicable regulations do not usually contain explicit anti-discrimination clauses, but they are subject to the general principle stated in the Constitution. Law 62/2003 establishes anti-discrimination measures in these fields, but only for discrimination on the grounds of racial or ethnic origin.

## **5. Enforcing the law**

The Spanish Constitution provides that all fundamental rights are protected by the ordinary courts of law. Moreover, appeals for protection in respect of such rights may be lodged at the Constitutional Court once ordinary proceedings have been exhausted. As well as having recourse to administrative proceedings (through the Labour Inspectorate and the Education Inspectorate), the conciliation procedures for civil and social matters, the ordinary courts and the Constitutional Court, victims of discrimination may appeal to the ombudsmen if the issue concerns acts by the public administration.

The Spanish Constitution entitles any physical or legal person invoking a legitimate interest to be a party to proceedings relating to the violation of fundamental rights and freedoms. Organisations and trade unions are entitled to act on behalf of (but not in support of) victims of discrimination. This general rule (Law 1/2000<sup>12</sup> of 7 January 2000, regulating civil procedure, and Law 29/1998<sup>13</sup> of 13 June 1998, regulating administrative jurisdiction) also relates to anti-discrimination legislation: in Law 62/2003 (in cases of discrimination on the ground of racial or ethnic origin and only in fields other than employment); in Law 36/2011 on Social Jurisdiction (on grounds of racial or ethnic origin, religion or beliefs, disability, age or sexual orientation in the field of employment); and in the General Law on the Rights of Persons with Disabilities (RDL 1/2013) (on the ground of disability in the fields of access to and supply of goods and services and employment).

Law 36/2011<sup>14</sup> of 10 October 2011, the Law on Social Jurisdiction, in its regulation of capacity and procedural legitimisation, mentions workers or their legitimate representatives if the former are incompetent or if the claimant is a legal entity. Furthermore, this law provides that trade unions may appear in court for and on behalf of their members who authorise them to do so, in order to defend their individual rights.

The Criminal Code includes racist motives as an aggravating circumstance in any offence and penalises, among other acts, incitement to discriminate, dissemination of abusive material, discrimination in public services and professional or corporate discrimination, along with associations promoting discrimination. Racial discrimination is also penalised in the context of offences against employees.

The Civil Procedure Law (Law 1/2000) regulates the burden of proof in court and shifts the burden of proof in certain cases. In the field of anti-discrimination law, Law 62/2003 establishes the possibility of a shift in the burden of proof on the ground of discrimination by racial or ethnic origin (in all fields) (Article 32), and in the field of employment on the ground of discrimination by racial or ethnic origin, religion or belief, disability, age or

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<sup>12</sup> Spain, Law 1/2000, 7 January 2000, regulating civil procedure (BOE, 8 January 2000).

<sup>13</sup> Spain, Law 29/1998, 13 June 1998, regulating administrative jurisdiction (BOE, 14 June 1998).

<sup>14</sup> Spain, Law 26/2011, 10 October 2011, Law on Social Jurisdiction (BOE, 11 October 2011).

sexual orientation (Article 36). The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RDL 1/2013) establishes a shift in the burden of proof on the ground of disability (Article 77).

Sanctions have been established in the field of employment for all grounds and for the ground of disability in all fields. In the field of employment, Law 5/2000<sup>15</sup> of 4 August 2000, on offences and penalties in social matters, was amended by Law 62/2003. Any unilateral decisions by an employer involving unfavourable direct or indirect discrimination on the grounds of age or disability or unfavourable or adverse treatment relating to remuneration and other working conditions, on the grounds of gender, racial or ethnic origin, civil or social status, religion or belief, political ideas, sexual orientation, membership or non-membership of a trade union, adherence to trade union agreements, family ties with other employees or language within the Spanish State, as well as decisions of the employer entailing unfavourable treatment of workers as a reaction to a complaint within the company or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination, are very serious offences. On the ground of disability, the General Law on the Rights of Persons with Disabilities and their Social Inclusion (RDL 1/2013) establishes a system of sanctions. Legislation establishes a maximum amount for the fines (EUR 187 515 in the field of employment and EUR 1 million in the field of disability discrimination), but does not establish any ceiling for compensation.

There are generally few rulings on racial discrimination in the courts, which usually treat cases as violations of other types of legal right, such as aggression and damage to property, without taking account of racist motivation. A further complication is that those concerned do not bring many actions, owing to bureaucracy and to the small number of convictions. However, court actions have been brought on account of discrimination – against Roma, immigrants or black Spaniards – that have attracted a degree of public interest.

Situation testing is not expressly provided for in Spanish law, but it is not forbidden either. It might therefore be used as a form of evidence in discrimination cases. Statistical evidence has been used in some judgments, especially in cases of sex discrimination in the employment field.

The main positive action measures in place on a national level are 1) broad social policy measures (such as positive action for Roma or the use of sign language and speech aid systems for people with disabilities); 2) quotas for persons with disabilities; and 3) some preferential treatment for persons with disabilities (such as special employment centres and occupational centres or a preferential right to geographical mobility).

The directives were transposed in Spain in 2003 with no formal social dialogue, either with the social partners or with NGOs.

## **6. Equality bodies**

Law 62/2003 (as amended by Law 15/2014, on the rationalisation of the public sector and other measures of administrative reform) established the Council for the Elimination of Racial or Ethnic Discrimination (Consejo para la eliminación de la discriminación racial o étnica). This council was set up on 28 October 2009 and became operational on that date.

Royal Decree 1262/2007 (modified by RD 1044/2009) regulates the composition, competences and regulations of the council. The council is attached to the Ministry of Health, Social Services and Equality, is a collegiate Spanish governmental body and its

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<sup>15</sup> Spain, Law 5/2000, 4 August 2000, on offences and penalties in social matters (BOE, 5 August 2000).

functions include the three functions described in Article 13(2) of Directive 2000/43: providing independent assistance to victims; conducting independent surveys; and making recommendations and publishing independent reports. Since the enactment of Law 15/2014, the council has formally developed its functions 'with independence'.

The council's make-up is of a fundamentally governmental nature, as the law states that it is to be formed by all the ministries with responsibilities in the areas referred to in Article 3(1) of Directive 2000/43, with the participation of the autonomous regions, the local authorities, the employers' organisations and trade unions, and other organisations representing interests related to the racial or ethnic origin of persons. The council consists of a chair and 28 members, 14 of whom are members of the public administration and 14 of whom are social partners and stakeholders. They are distributed as follows: a) seven members representing central Government, all with the rank of director general; b) seven members from other tiers of government; c) four members from the social partners; and d) 10 members representing organisations and associations whose activities are linked to the promotion of equal treatment and non-discrimination on grounds of racial or ethnic origin.

In June 2010, the council launched the Network of Centres of Assistance for Victims of Racial or Ethnic Discrimination, involving seven major NGOs. In 2013, the contract of provision of services was signed with the Fundación Secretariado Gitano (FSG). To achieve the best service, FSG has outsourced services with six other organisations that specialise in assisting victims of discrimination: ACCEM, Cruz Roja Española, Fundación CEPAIM, Movimiento contra la Intolerancia, Movimiento por la Paz and Red Acoge. In 2018 (January-October) it assisted with 561 cases: 315 individual and 246 collective.

The council is not yet well known by the public, and its scope for anti-discrimination action is limited, but the formal recognition of its independence by Law 15/2014 and the launch of the network could improve the understanding of its roles and improve its efficiency. The council was without a chair between September 2015 and October 2018.

Currently, in addition to the Council for the Elimination of Racial or Ethnic Discrimination, there are other organisations that can facilitate social dialogue: the National Disability Council (which formalises collaboration between associations of persons with disabilities and national Government; this council started its work in 2005), the National Roma Council (a participatory and advisory body on general and specific public policy affecting the integral development of the Roma population in Spain), the Advisory Commission on Religious Freedom (created in 1980, the commission aims to review, report on and present proposals with respect to issues relating to the enforcement of the law, religious discrimination being one of these issues), and the Forum for the Social Integration of Immigrants (a collegiate consultative, informative and advisory body on the integration of immigrants).

## **7. Key issues**

Potential breaches of the directives include the following:

- The provision prohibiting direct discrimination does not provide for past and hypothetical discrimination.
- There are two differences in relation to Article 2.2.b of the directives: the directives refer to a 'provision, criterion or practice' but the words 'criterion or practice' are not included in the Spanish law; and the directives say 'persons' in the plural, whereas the Spanish transposition says 'person' in the singular. Judicial intervention can correct those legislative shortcomings.
- The words 'hostile' and 'degrading' are not included in the definitions of harassment. Judicial intervention can correct this legislative shortcoming.

- Sanctions have been established only in the field of labour (for all grounds) and disability (in all fields).
- It could be said that the requirement to establish a degree of impairment (of 33 % or greater) in order to be protected from disability discrimination and to claim a reasonable accommodation (under General Law on the Rights of Persons with Disabilities and their Social Inclusion, RLD 1/2013) is a potential breach of Directive 2000/78, as the directive does not specify that certain degrees of impairment must be established in order for persons to be recognised as such.

Other issues of concern are:

- The effectiveness of the Council for the Elimination of Racial or Ethnic Discrimination is questionable, because it is made up primarily of Government representatives. This could jeopardise the independence of the council.
- The legislation based on the directives is not well known or understood by the main players in the legal system. This is one of the main reasons why there have so far been hardly any proceedings in Spain in which these provisions have been applied.
- Given the legislative dispersal of the norms on (shifting) the burden of proof, the differences in their definitions and the jurisprudence of the Constitutional Court, it would be appropriate to merge the definitions into one legal text.
- In the last 10 years, notable progress has been made in the fields of disability and sexual orientation, with highly significant legal innovations. However, this notable legal progress has not been accompanied by actual changes in behaviour in society.
- The situation of teachers of religion in state schools is difficult to resolve because of the international agreement between the Holy See and Spain signed in 1976.

Current best practice in Spain includes:

- Positive actions for Roma (racial or ethnic origin in all fields), that alleviate some of the problems suffered by the Roma population.
- Sign languages and speech aid systems (positive action measures on the ground of disability), a pioneering law in its time that has allowed an extensive use of sign language.
- The National Disability Council (disability in all fields), in which organised disability can be heard and defend their interests before the administration.
- The Integral Law on the rights of gay and lesbian persons in Catalonia (sexual orientation), a pioneering law that responds to the demands of Catalan society.

## INTRODUCTION

### The national legal system

The public administration, as defined in the Spanish Constitution (SC) of 1978, is structured on three levels: central Government; autonomous communities (regional Governments); and local authorities. Central Government has a series of exclusive powers (SC, Article 149) that include criminal and procedural law, civil legislation, labour and social security law, the basic structure and coordination of healthcare, the basic structure of education and the basic legal system for public administration. The autonomous communities manage some of these fields, such as health and education, and also have the power to adopt legal regulations developing or complementing central Government legislation in some fields. In some of the fields mentioned in Directive 2000/43, such as social advantages, and access to and supply of goods and services that are available to the public, including housing, all three tiers of government – central, regional and local – have jurisdiction. Conflicts of power between central Government and the autonomous communities are resolved by the Constitutional Court (SC, Article 161).

International treaties signed by Spain are included in the domestic legal system (SC, Article 96). Spain has ratified practically all the international instruments combating discrimination, including Protocol 12 to the ECHR. These instruments can be relied upon before national courts.

Spain is a non-confessional state: the Spanish Constitution of 1978 clearly proclaims a separation between church and state. In practice, religions are treated in different ways. Catholicism is the dominant religion; it is expressly mentioned in the Constitution and enjoys the closest official relationship with the Government, as well as financial support.

### List of main legislation transposing and implementing the directives

The main pieces of legislation transposing and implementing the two anti-discrimination directives are the following two laws:

Law 62/2003 of 30 December 2003 on Fiscal, Administrative and Social Measures (*Ley 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y de orden social*)<sup>16</sup>

Date of adoption: 30 December 2003

Grounds covered: Racial or ethnic origin, religion or beliefs, disability, age, sexual orientation

Material scope: Employment, social protection, social advantages, education, access to goods and services.

General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013, 29 November 2013) (*Ley General de derechos de las personas con discapacidad y de su inclusión social*)<sup>17</sup>

Date of adoption: 29 November 2013

Grounds covered: Disability

Material scope: Equal opportunities, non-discrimination, and universal access for persons with disability in all fields (employment, social protection, social advantages, education, access to goods and services).

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<sup>16</sup> Spain, Law 62/2003 of 30 December 2003 on Fiscal, Administrative and Social Measures (BOE, 31 December 2003), <http://www.boe.es/boe/dias/2003/12/31/pdfs/A46874-46992.pdf>.

<sup>17</sup> Spain, RLD 1/2013, 29 November 2013, General Law on the Rights of Persons with Disabilities and their Social Inclusion (BOE, 3 December 2013), <http://www.boe.es/boe/dias/2013/12/03/pdfs/BOE-A-2013-12632.pdf>.

## 1 GENERAL LEGAL FRAMEWORK

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

The Constitution of Spain includes the following articles dealing with non-discrimination:

Article 14: 'Spaniards are equal before the law and may not in any way be discriminated against on the grounds of birth, race, sex, religion, opinion or any other condition or personal or social circumstance'.

Age, disability and sexual orientation are not expressly included in Article 14 of the Spanish Constitution, but case law tends to include them under 'any other condition or personal or social circumstance'. The Constitutional Court ruled that age (Judgment no. 31/1984 of 7 March 1984),<sup>18</sup> disability (Judgment no. 269/1994 of October 1994)<sup>19</sup> and sexual orientation (Judgment no. 41/2006 of February 2006)<sup>20</sup> are included in the generic phrase 'any other personal or social circumstance'.<sup>21</sup>

Article 16: 'Freedom of ideology, religion and worship of individuals and communities is guaranteed, with no other restriction on their expression than that necessary to maintain public order according to the law'.

Article 49: 'The public authorities shall carry out a policy of preventive care, treatment, rehabilitation and integration of the physically, sensorially and mentally handicapped by giving them the specialized care they require, and affording them special protection for the enjoyment of the rights granted by this Part to all citizens.'<sup>22</sup>

Article 53 introduces guarantees of fundamental rights and freedoms and also of the principle of equality and non-discrimination.

Article 9 provides a positive obligation on the part of public authorities to promote equality, since they have to 'promote conditions that ensure that the freedom and equality of individuals and of the groups that they form are real and effective; to remove

<sup>18</sup> See Constitutional Court Decision 31/1984, 7 March 1984, <http://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-T-1984-8175.pdf>.

<sup>19</sup> See Constitutional Court Decision 269/1994, 3 October 1994, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/2786>.

<sup>20</sup> See Constitutional Court Decision 41/2006, 13 February 2006, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/5643>. (Also Constitutional Court Decisions 92/2014 of 10 June 2014 and 157/2014 of 6 October 2014).

<sup>21</sup> The doctrine of the Constitutional Court on the principle of equality and the prohibition of discrimination (Article 14 CE) was summarised in Constitutional Court Decision 200/2001, 4 October 2001, <http://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-T-2001-20621.pdf>.

<sup>22</sup> The Spanish Constitution approved in 1978 included Article 49 to protect people with disabilities, but the last 40 years have caused the constitutional text to 'age', among other factors due to the approval of the Convention on the Rights of Persons with Disabilities of 2006. On 7 December 2018, the Spanish Government adopted a draft text to reform this article of the Constitution to adapt it to the 2006 convention. The wording proposed by the Government for Article 49 is based on the work carried out in the commission for comprehensive disability policies of the Congress of Deputies. Furthermore, the Spanish Committee of Representatives of People with Disabilities (CERMI), which had been demanding this change of orientation in the constitutional text for several years, participated in the drafting. In the Government draft, Article 49 of the Spanish Constitution is worded as follows:

1. 'Persons with disabilities are holders of the rights and duties set forth in this Title in conditions of real and effective freedom and equality, without discrimination.'
2. The public authorities shall carry out the necessary policies to guarantee full personal autonomy and social inclusion of persons with disabilities. These policies will respect their freedom of choice and preferences and will be adopted with the participation of organizations representing persons with disabilities. The specific needs of women and girls with disabilities will be particularly addressed.
3. The reinforced protection of persons with disabilities will be regulated for the full exercise of their rights and duties.
4. Persons with disabilities enjoy the protection provided in international agreements that ensure their rights.'

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

The Constitutional Court<sup>23</sup> has ruled that the principle of equality is not breached by action on the part of the public authorities to counter the disadvantages experienced by certain social groups 'even when they are given more favourable treatment, for the aim is to give different treatment to effectively different situations'.

Article 10(2) recognises the role of the international treaties on human rights in construing domestic provisions: 'provisions relating to fundamental rights and freedoms recognised by the Constitution shall be interpreted pursuant to the Universal Declaration on Human Rights and the international treaties and agreements ratified by Spain'.<sup>24</sup>

These provisions apply to all areas covered by the directives. Their material scope is broader than those of the directives.

These provisions are directly applicable.

These provisions can be enforced against private actors (as well as against the state).

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<sup>23</sup> See Constitutional Court Decision 128/1987, 1 July 1987, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/860>.

<sup>24</sup> For example, Constitutional Court Decision 41/2006 on sexual orientation discrimination cites international law such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 14), the International Covenant on Civil and Political Rights (Art. 26) and numerous examples of international jurisprudence.



## 2 THE DEFINITION OF DISCRIMINATION

### 2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in the main legislation transposing the two EU anti-discrimination directives:

- racial or ethnic origin;
- religion or beliefs;
- disability;
- age;
- sexual orientation.

#### 2.1.1 Definition of the grounds of unlawful discrimination within the directives

##### a) Racial or ethnic origin

National law on discrimination (in particular, the Workers' Statute and the Criminal Code) does not define the terms 'racial origin' or 'ethnic origin'.

Neither of the two judgments of the Constitutional Court (STC 13/2001, *Williams*,<sup>25</sup> and STC 69/2007, *Muñoz Díaz*)<sup>26</sup> which have addressed the issue of racial or ethnic origin provides a definition of 'racial origin' or 'ethnic origin'. The court refers to 'Romani ethnic origin' (*étnia gitana*) but without defining traits that might characterise it.

##### b) Religion or belief

Religion is not defined in Spanish legislation. There is, however, a *negative* definition of religion, i.e. the legislator specifies only what religion is not, not what it is. Article 3(2) of the Organic Law on Religious Freedom<sup>27</sup> states that 'activities, intentions and entities relating to or engaging in the study of and experimentation on psychic or parapsychological phenomena or the dissemination of humanistic or spiritual values or other similar non-religious aims do not qualify for the protection provided in this Act'.

The Directorate General for Religious Affairs, under the authority of the Ministry of Justice, used a definition of 'religious organisation': in order for a group or organisation to be properly described as religious, the following prerequisites must be met: 1) belief in the existence of a higher being, transcendent or otherwise, with whom communication is possible; 2) belief in a body of doctrine (dogma) and rules of behaviour (moral rules), somehow derived from this higher being; 3) ritual practice, whether individual or collective (worship), constituting the adherents' institutional means of communication with the higher being.

As a consequence, for a long time the practice of the Directorate was to refuse to register religious denominations on the Register of Religious Entities on the ground of these denominations' lack of religious aims. Based on this criterion, the Directorate denied the registration of the Unification Church (Iglesia de la Unificación) in the register of religious organizations, because the Unification Church lacked a true religious nature, and was beyond the scope of protection under the Law on Religious Freedom (according to Article 3(2)). The Unification Church challenged the resolution of the Director-General for Religious Affairs of 22 December 1992 and the judgments of the National High Court

<sup>25</sup> See Constitutional Court Decision 13/2001, 29 January 2001, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/4309>.

<sup>26</sup> See Constitutional Court Decision 69/2007, 16 April 2007, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/6036>.

<sup>27</sup> Spain, Organic Law 7/1980, Organic Law on Religious Freedom (*Ley Orgánica de Libertad religiosa*), (BOE, 6 July 1980), <http://www.boe.es/boe/dias/1980/07/24/pdfs/A16804-16805.pdf>.

(Audiencia Nacional) (30 September 1992) and of the Supreme Court (14 June 1996), refusing to include this church in the register.

However, the situation has changed since Constitutional Court judgment 46/2001 of 15 February 2001.<sup>28</sup> The Court asserted that the administrative resolution violated the right to collective religious freedom because the state, in the activity of registration, can only check that the entity is not excluded by Article 3(2) of the Organic Law on Religious Freedom. Following this judgment, the Government cannot judge the religious character of entities wishing to join the register, and must confine itself to verifying that, in view of their statutes, goals and aims, these entities are not excluded by Article 3(2).

Article 3(2) of the Law on Religious Freedom allows 'sects' to be excluded from the Register of Religious Associations. Registration on the register is voluntary for religious organisations, but it gives them a religious legal personality, which gives their places of worship the right of inviolability and provides some tax benefits. Religious freedom is protected regardless of whether a religious organisation is inscribed on the register. There is no special legislation or specific register for sects.

#### c) Disability

The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013), which prohibits disability discrimination, provides (Article 4) that they: 'Are persons with disabilities who have physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others (Article 4(1)) (...) For the purposes of this law, persons with a disability shall be deemed to be those with a recognised degree of impairment equal to or greater than 33 %'. In any event, those (under the general system) with a recognised entitlement to social security pensions for permanent disability rated as total, absolute or severe 'shall be deemed to be affected by an impairment equal to or greater than 33 % (...) with a recognised entitlement to a retirement pension or a pension for retirement due to permanent incapacity' (Article 4(2)). This provision affects the existing material scope of the law on the social integration of disabled persons and covers social benefits, social security, education, work and housing, and access to goods and services.

This definition has two parts, with very different orientations and implications. The first part (Article 4(1)), inspired by the CRPD, is based on the social model of disability and is coherent with the concept of 'disability' established by the Court of Justice of the European Union in joined cases C-335/11 and C-337/11.<sup>29</sup> The second part (Article 4(2)) retains the medical perspective of disability and has an administrative utility: individuals need to have this degree of impairment in order to claim some rights. It could be said that the need to establish a degree of impairment (of 33 % or greater) is potentially in breach of Directive 2000/78, as the directive does not specify that certain degrees of impairment must be established for a person to be recognised as having a disability (see CJEU joined cases C-335/11 and C-337/11).

The jurisprudence, which was well established in Spain, did not accept that an incapacity for work could be considered as a disability (and, therefore, dismissal could not be considered null because it did not amount to discrimination by disability). For that reason, a Spanish judge decided to submit a preliminary ruling before the CJEU. Among other questions, the judge raised the interpretation of the concept of disability in

<sup>28</sup> See Constitutional Court Decision 46/2001, 15 February 2001, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/4342>.

<sup>29</sup> CJEU, Joined cases C-335/11 HK, *HK Denmark (Ring)*, and C-337/11, *HK Denmark (Skouboe Werge)*, 6 December 2012, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CA0335>.

Directive 2000/78/EC. On 1 December 2016, the CJEU delivered judgment on the *Daouidi* case (C-395/15).<sup>30</sup>

In the synthesis of the answer to the question of the Spanish judge, the Court established 'that Directive 2000/78 must be interpreted as meaning that:

- the fact that the person concerned finds himself or herself in a situation of temporary incapacity for work for an indeterminate amount of time, as the result of an accident at work, does not mean, in itself, that the limitation of that person's capacity can be classified as being 'long-term', within the meaning of the definition of 'disability' laid down by that directive;
- the evidence which makes it possible to find that such a limitation is 'long-term' includes the fact that the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress or the fact that that incapacity is likely to be significantly prolonged before that person has recovered; and
- in the context of the verification of that 'long-term' nature, the referring court must base its decision on all of the objective evidence in its possession' (paragraph 59).

Regarding the sentence that the Spanish judge should issue, the CJEU clarifies three questions. First, the Court noted that it is necessary to determine whether the claimant's limitation is 'long-term'. Second, the 'long-term' nature of the limitation must be assessed in relation to the claimant's condition of incapacity at the time of the allegedly discriminatory act. Finally, if the limitation is found to be 'long-term' the Court recalled that unfavourable treatment on grounds of disability undermines the protection provided for by the Directive only in so far as it constitutes discrimination within the meaning of Article 2(1) of that Directive.

After the decision of the CJEU, Social Court 33 of Barcelona issued a judgment on 23 December 2016 (case 1219/2014) and declared the claimant's dismissal null and void for discrimination on the ground of disability. The judge ruled that: 1) at the time of the allegedly discriminatory act the claimant's incapacity did not display a clearly defined prognosis as regards short-term progress and thus constituted a long-term limitation. Therefore, his 'temporal incapacity' must be regarded as a disability. 2) The judge considered that the claimant's dismissal occurred due to his condition as a person with disability and, therefore, must be declared null by discrimination: 'The dismissal of the injured worker, almost two months after the accident, when he was still on sick leave and had reported that his reinstatement would not be in the short term, constitutes direct discrimination on the grounds of disability' (para.XI.10).

In 2016, Social Court No 1 of Cuenca (Spain) referred another issue to the CJEU concerning the interpretation of the concept of disability in Directive 2000/78. Under Spanish legislation (Workers Statute, Article 52.d), an employer is entitled to dismiss an employee on objective grounds for intermittent absences from work, even if justified, if this amounts to 20 % of the employee's working hours in two consecutive months or 25 % of their working hours over four non-consecutive months within a 12-month period. Given that workers with disabilities are more likely to have work absences, the judge asked the CJEU whether the Spanish legislation was in line with the provisions of Directive 2000/78. On 18 January 2018 the CJEU passed judgment,<sup>31</sup> declaring that Article 2(2)(b)(i) of Directive 2000/78 (indirect discrimination) 'must be interpreted as precluding national legislation under which an employer may dismiss a worker on the grounds of his intermittent absences from work, even if justified, in a situation where those absences are the consequence of sickness attributable to a disability suffered by

<sup>30</sup> CJEU, C-395/15, *Daouidi*, 1 December 2016, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-395/15>.

<sup>31</sup> CJEU, C-270/16, *Ruiz Conejero v. Ferroser*, 18 January 2018, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-270/16>.

that worker, unless that legislation, while pursuing the legitimate aim of combating absenteeism, does not go beyond what is necessary in order to achieve that aim, which is a matter for the referring court to assess'.<sup>32</sup>

d) Age

The national law on discrimination does not define the term 'age', and neither does the Workers' Statute or the Criminal Code. The courts do not give a definition of 'age'. However, 'age' is commonly understood to mean the number of years attained by an individual, and 'age discrimination' to mean discrimination on the ground of young age or older age.<sup>33</sup>

e) Sexual orientation

The national law on discrimination does not define the term 'sexual orientation', and neither does the Workers' Statute or the Criminal Code. The Judgment of the Constitutional Court (STC 41/2006, *PC v. Alitalia Italian Airlines*)<sup>34</sup> recognises that 'sexual orientation' is a protected ground under Article 14 of the Spanish Constitution. However, the Constitutional Court does not define 'sexual orientation'.<sup>35</sup>

### 2.1.2 Multiple discrimination

In Spain, multiple discrimination is not prohibited in law.

However, Organic Law 3/2007 on the Effective Equality of Women and Men (*Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres*) contains the first reference to multiple discrimination in Spanish law. Article 20 provides that 'the public authorities shall, in the preparation of studies and statistics, devise and introduce the necessary mechanisms and indicators to show the incidence of other variables whose recurrence generates situations of multiple discrimination in the various spheres of action.'

In Spain, there is no case law dealing with multiple discrimination. Although neither the Constitutional Court nor the Supreme Court has used the term 'multiple discrimination', the High Court of Justice of Galicia, in its judgment 3041/2008, confirmed the invalidity of a dismissal of an employee because the company had infringed her right to equal treatment 'without discrimination on grounds of gender, (...) opinion or any personal or social circumstance' (Article 14 of the Spanish Constitution), and her right to 'ideological freedom' (Article 16 of the Spanish Constitution). The court declared dismissal by discrimination to be null on various grounds, but without being able to specify one of

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<sup>32</sup> On 7 March 2018, Social Court No 1 of Cuenca (Spain) ruled in Judgment 171/2018 that the dismissal of the worker was null and void because there had been 'indirect discrimination' by disability. The ruling of the Cuenca court cites both Directive 2000/78 and CJEU judgment C-270/16.

<sup>33</sup> For example, Constitutional Court Decision 66/2015, of April 13 2015, accepts that the criterion of an age over 55 years is used as a criterion for the selection of workers affected by a collective dismissal and that this does not constitute age discrimination because of rigorous demands of justification and proportionality. <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/24413>.

<sup>34</sup> See Constitutional Court Decision 41/2006, 13 February 2006, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/5643>.

<sup>35</sup> In 2014, the region of Catalonia approved the first comprehensive law in Spain on the rights of gay and lesbian persons (the law is only for the region of Catalonia): Law 11/2014 of 10 October 2014 for Guaranteeing the Rights of Lesbian, Gay, Bisexual, Transgender and Intersex People and Eradicating Homophobia, Biphobia and Transphobia (BOE, 20 November 2014). The law was designed as a comprehensive law inspired by Directive 2000/78 and, to achieve its aim, it goes beyond the directive. The law begins by defining direct discrimination, indirect discrimination, discrimination by association, discrimination by error and multiple discrimination. Further, it defines the instruction to discriminate, harassment on grounds of sexual orientation, gender identity or gender expression, victimisation and secondary victimisation. However, the law does not define 'sexual orientation'. See <http://www.boe.es/boe/dias/2014/11/20/pdfs/BOE-A-2014-11990.pdf>.

them as more important than the other: the court noted that there was discrimination on several grounds, but at no time used the concept of 'multiple discrimination'.

### **2.1.3 Assumed and associated discrimination**

#### **a) Discrimination by assumption**

In Spain, discrimination based on a perception or assumption of a person's characteristics, is not explicitly prohibited in national law.

Workers' Statute, Article 28 of Law 62/2003 (transposing Directives 2000/43 and 2000/78) and the Criminal Code speak only of personal characteristics and not of 'assumed characteristics'. However, discrimination on the ground of 'assumed characteristics' may be regarded as implicitly included in these laws.

#### **b) Discrimination by association**

In Spain, discrimination based on association with persons with particular characteristics, is prohibited in national law, but only in the field of disability:

The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013) formally introduced into Spanish legislation the concept of discrimination by association in the field of disability. RLD 1/2013 defines discrimination by association (Article 2(e)): 'Discrimination by association exists when a person or group to which they belong is subjected to discriminatory treatment due to their relationship with another by reason of disability'. Article 63 of RLD 1/2013 notes that the principle of equal opportunities for persons with disabilities is infringed when 'direct or indirect discrimination, discrimination by association', etc. occur.

Although not explicitly covered by anti-discrimination legislation (except for disability), this principle may be assumed to be implicitly covered by Law 62/2003 (Article 28). However, this is a matter to be decided on by judges, considering the judgment in *Coleman v. Attridge Law and Steve Law*.<sup>36</sup>

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

#### **a) Prohibition and definition of direct discrimination**

In Spain, direct discrimination is prohibited in national law. It is defined. However, the prohibition is not in full compliance with the directives, because it does not explicitly provide for past and hypothetical comparisons.

Law 62/2003 on Fiscal, Administrative and Social Measures (Article 28(1)(b)) defines direct discrimination as 'where a person is treated less favourably than another in a comparable situation on grounds of racial or ethnic origin, religion or beliefs, disability, age or sexual orientation'.

The expression 'has been or would be treated' (Directive 2000/43 and Directive 2000/78, Article 2(2)(a)) is not included in the Spanish definitions of direct discrimination.

Article 2(c) of the General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013) states that direct discrimination 'shall be taken to occur where a person is treated less favourably than another in a comparable situation on the grounds of his or her disability'.

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<sup>36</sup> CJEU, case 303/06, *Coleman v. Attridge Law and Steve Law*, 17 July 2008, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-303/06>.

b) Justification for direct discrimination

The law does not permit justification of direct discrimination generally, or in relation to particular grounds (excluding specific exceptions stipulated by the directives, for which see Chapter 4).

### **2.2.1 Situation testing**

a) Legal framework

In Spain, situation testing is permitted in national law. It is neither expressly provided for in Spanish law, nor is it forbidden. It might therefore be used as a form of evidence in discrimination cases, for example in protecting rights under Article 14 of the Spanish Constitution. Procedural law in Spain (for example Law 36/2011 of 10 October 2011, on Social Jurisdiction) is flexible and considers all possible evidence as valid.

b) Practice

In Spain, situation testing is used in practice, although not frequently. The method was used for the first time in sociological research conducted by the ILO in 1995, in the framework of comparative research between European countries (IOE, 1996). However, it has not been used by equality bodies or NGOs to combat discrimination.

It cannot be said that there is reluctance to use situational testing as evidence in court. It is therefore possible and probable that developments in other countries will influence developments, both in the law and in the courts, in this field. European practices have influenced the acceptance of situation testing and so are mentioned in some judgments.

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

a) Prohibition and definition of indirect discrimination

In Spain, indirect discrimination is prohibited in national law. It is defined. However the prohibition is not in full compliance with the directives.

Law 62/2003 defines indirect discrimination as 'where a legal or administrative provision, a clause of a collective agreement or contract, an individual agreement or a unilateral decision, although apparently neutral, would put a person of a certain racial or ethnic origin, religion or belief, disability, age or sexual orientation at a particular disadvantage in relation to others, provided that such provision is not objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary' (Article 28(1)(c)).

In the field of disability, the General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013) also defines indirect discrimination: 'where a legal or administrative provision, a clause of a collective agreement or contract, an individual agreement or a unilateral decision, or a criterion or practice, or an environment, product or service, though apparently neutral, may put a person at a particular disadvantage in relation to others owing to a disability, provided that such provision is not objectively justified by a legitimate aim and means of achieving that aim, are not appropriate and necessary' (Article 2(d)).

There are two differences in relation to Article 2(2)(b) of Directive 2000/43 (also included in Directive 2000/78). The first is that the directive refers to a 'provision, criterion or practice', whereas the Spanish law transposing the directives (62/2003) refers to a 'legal or administrative provision, a clause of a collective agreement or contract, an individual



agreement or a unilateral decision'. All these situations are referred to as 'provision', and the words 'criterion or practice' are not included. The second difference is that the directive says 'persons' in the plural, whereas the Spanish transposition says 'person' in the singular. This use of the singular generates a certain ambiguity in both Law 62/2003 and RLD 1/2013 as to whether a group of persons is covered as such. However, the jurisprudence interprets indirect discrimination in the same sense as the European directives.<sup>37</sup> This need for ordinary courts to take into account EU law when applying Spanish rules has been reiterated by the Constitutional Court (STC 64/1991, of 22 March 1991; 58/2004, of 19 April 2004; and 329/2005, of 15 December 2005).

In 2015, a worker with disability (Ruiz Conejero), following several periods of sickness absences from work, was dismissed by his employer. The Spanish Workers' Statute (Article 52(d)), which concerns termination of the contract on objective grounds, provides that the labour contract may be terminated 'for absences from work, albeit justified but intermittent, that amount to 20 % of working hours in two consecutive months provided that total absences in the previous 12 months amount to 5 % of working hours, or 25 % of working hours in four non-continuous months within a 12-month period'. Social Court 1, Cuenca, Spain (Juzgado de lo Social No. 1 de Cuenca), decided to submit a preliminary ruling to the CJEU. The question was:

'Does Directive 2000/78 preclude the application of a provision of national law under which an employer is entitled to dismiss an employee on objective grounds for intermittent absences from work, even if justified, which amount to 20 % of the employee's working hours in two consecutive months, provided that the total absences in the previous 12 months amount to 5 % of working hours or 25 % of working hours in four non-consecutive months within a 12-month period, in the case of an employee who must be treated as disabled within the meaning of the directive when his absence from work was caused by his disability?.'

Social Court 1 of Cuenca said that workers with disabilities are more exposed to the risk of being dismissed under Article 52(d) of the Workers' Statute than other workers, whether the employer has knowledge of the disability or not. There is a difference in treatment involving indirect discrimination based on disability within the meaning of Article 2(2)(b) of Directive 2000/78 and that difference in treatment cannot be objectively justified by a legitimate aim (unlike the interpretation given by the CJEU in cases C-335/11 and C-337/11, *HK Danmark*, in 2013, where the Danish legislation formed part of a policy for the integration of workers with disabilities). The referring court therefore considers that Article 52(d) of the Spanish Workers' Statute is contrary to Directive 2000/78 and that this provision should, therefore, be amended in order to take account of disabilities.

The Judgment of the CJEU C-270/16, *Ruiz Conejero v. Ferroser*, of 18 January 2018<sup>38</sup> has answered the question raised by the Court of the Social 1 of Cuenca and upheld the approach of the Spanish judge. The Court (Third Chamber) has established:

'Article 2(2)(b)(i) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding national legislation under which an employer may dismiss a worker on the grounds of his intermittent absences from work, even if justified, in a situation where those absences are the consequence of sickness attributable to a disability suffered by that worker, unless that legislation, while pursuing the legitimate aim of combating absenteeism, does not go beyond what is necessary in order to achieve that aim, which is a matter for the referring court to assess'.

<sup>37</sup> See, for example, Constitutional Court Decision 61/2013, 14 March 2013 <http://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-A-2013-3797.pdf>.

<sup>38</sup> <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-270/16>.

After the decision of the CJEU, the Social Court 1 of Cuenca issued a judgment on 7 March 2018 (case 171/2018)<sup>39</sup> and declared the claimant's dismissal null and void for discrimination on the ground of disability. The judge considers that, in this case, there is indirect discrimination against the claimant, as an apparently neutral business decision - such as the use of the Article 52(d) of the Workers' Statute that allows the dismissal of a worker due to absences from work- causes a situation of particular disadvantage to a person with disability with respect to other workers, because the absences from work are due to illnesses derived from his officially recognized disability. The fundamental argumentation of the judge is that the labour absences that have caused the dismissal of the claimant have occurred, 'exclusively and precisely, for diseases attributable to his disability', even if the employer was not aware of it.

In addition, the Spanish judge, following the Judgment of the CJEU, 'considers that there is an evident collision between the Spanish norm and the EU norm, and that, unlike the Danish case, there is no legislative integration element or objective, so a response from the Spanish legislator would be necessary to include in national law (...) and, specifically, in article 52.d) of the Workers' Statute (...), the exception of its application, for the purposes of computing the days of absences from work, to workers who have a recognized disability status, when said temporary disability processes derive from or are linked to the diseases causing the recognition of their disability.'<sup>40</sup>

#### b) Justification test for indirect discrimination

Law 62/2003 (neither RLD 1/2013) does not specify how indirect discrimination is to be justified. The general provision in Article 2(2)(b) includes the phrase: 'unless [the indirect discrimination] is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'. The courts must analyse whether the measure is appropriate and necessary to pursue a legitimate aim and whether there is any case law on this issue. In most cases of indirect discrimination, statistics are used as circumstantial evidence.

### 2.3.1 Statistical evidence

#### a) Legal framework

In Spain, there is legislation regulating the collection of personal data. Since 25 May 2018, the European Regulation on Data Protection (Regulation (EU) 2016/679) has been directly applicable.

According to these rules, age and disability are treated very differently from ethnic or racial origin, religion or belief or sexual orientation. Article 9(1) of Regulation (EU) 2016/679 provides that 'Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited'. Spanish legislation provides that this prohibition cannot be lifted by the data subject. Article 9 of Organic Law 3/2018, of 3 December 2018, on the Protection of Personal Data establish that 'for the purposes of Article 9.2.a) of Regulation (EU) 2016/679, in order to avoid discriminatory situations, the consent of the affected party alone will not suffice to lift the prohibition of the processing of data whose main purpose is to identify their ideology, union affiliation, religion, sexual orientation, beliefs or racial or ethnic origin'.

<sup>39</sup> <http://ignasibeltran.com/wp-content/uploads/2018/03/SJS-1-Cuenca-7.3.18-Ruiz-Conejero..pdf>.

<sup>40</sup> The text of Article 52.d of the Workers' Statute has not yet been modified. It should also be noted that on 16 July 2019, the Spanish Constitutional Court accepted a petition for unconstitutionality raised by a social court of Barcelona against Article 52.d of the Workers' Statute.



As a result, employers may not gather data on the ethnic or racial origin, religion or beliefs or sexual orientation of their workers. However, there are some exceptions to this general rule, such as those arising from Article 4(2) of Directive 2000/78 for 'churches and other public or private organisations the ethos of which is based on religion or belief'. But these exceptions are only for positions linked to spreading the religious ethos, and not for positions of purely technical expertise or restricted to the pure transmission of (neutral) knowledge in religious schools (see section 4.2, below).

In March 2011,<sup>41</sup> the Committee on the Elimination of Racial Discrimination (CERD) reiterated its recommendation to Spain 'on the collection of statistical information on the ethnic and racial composition of its population and urges it to conduct a census of their population', to include information on people's ethnic and racial origin; in 2016<sup>42</sup> the CERD noted the progress in gathering statistical data and information on racist and xenophobic incidents in previous years, although deficiencies remain.

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

Data relating to age may be collected with no legal impediments. Such data are compiled from Government files, which is secondary data, or from surveys, which is primary data. Some of the data that provide statistical evidence of social inequality in various fields are used as evidence to justify positive action, but they have never been used in the courts to make a case of possible indirect discrimination.

In Spain, statistical evidence is permitted by national law in order to establish indirect discrimination.

Although this is not expressly provided for in law, complainants have a right to require or request that respondents provide data that may be necessary for them to determine whether there has been a prima facie case of discrimination.

#### b) Practice

In Spain, statistical evidence in order to establish indirect discrimination is used in practice. It is not very common, but it is spreading in the Spanish courts. In the civil and administrative fields (the spheres of application of Directives 2000/43 and 2000/78) there are no agencies or authorities that can conduct formal investigations. In criminal cases, the Public Prosecution Service can conduct all investigations that are deemed necessary. Statistical evidence has been used in some judgments, especially in cases of sex discrimination in the employment field, and there is no reluctance to use statistical data as evidence in court.

Constitutional Court Decision 240/1999<sup>43</sup> used statistical evidence to qualify the failure to grant maternity leave to a female doctor working in Castilla y León as sex discrimination. According to the judgment, the fact that those permissions are granted only to public

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<sup>41</sup> UN Committee on the Elimination of Racial Discrimination (CERD) (2011), CERD/C/ESP/CO/18-20 (Paragraph 8): [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD/C/ESP/CO/18-20&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD/C/ESP/CO/18-20&Lang=En).

<sup>42</sup> UN CERD (2016), CERD/C/ESP/CO/21-23 (Paragraphs 4 and 6): [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2FESP%2F21-23&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2FESP%2F21-23&Lang=en).

<sup>43</sup> See Constitutional Court Decision 240/1999, 20 December 1999, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/3982>.

service doctors and not to temporary doctors can be considered discriminatory, because the former group are almost exclusively men and the latter group are generally women. The ruling upheld the use of situation testing.

As regards access to employment, Judgment 1161/2005 of the Superior Court of Cantabria, of 14 November 2005, notes the existence of indirect sex discrimination in the selection process of a chemical company. The court concluded that the selection criteria used by the company (regarding the holders of a vocational qualification in a technical branch) generated an adverse impact on women, because they are underrepresented in this field. The court considered a report from expert advisors to be acceptable as evidence and cited the example of reports by the Institute for Women (as this public body was known at the time).

The evolution of the situation in other countries and the jurisprudence of the Court of Justice of the European Union have played an important role in the presentation of data collection in the Spanish courts.

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

### **a) Prohibition and definition of harassment**

In Spain, harassment is prohibited in national law. It is defined.

Law 62/2003 (Article 28(1)(d)) defines harassment as 'all unwanted conduct related to racial or ethnic origin, religion or convictions, disability, age or sexual orientation that takes place with the purpose or effect of violating the dignity of a person and creating an intimidating, humiliating or offensive environment'. This law is applicable to all persons, in both the public sector and the private sector (Article 27). The full material scope of both directives is covered. On the ground of racial or ethnic origin, it expressly covers education, health, social services and social protection, housing and access to any goods and services, as well as access to employment, self-employment and professional practice, membership and participation in trade union and business organisations, working conditions, vocational promotion and vocational training (Article 29). On grounds of religion or belief, disability, age or sexual orientation, the law expressly covers access to employment, membership and participation in trade union and business organisations, working conditions, professional advancement and vocational training, as well as access to self-employment and professional activity (Article 34).

The Workers' Statute (RLD 2/2015), applicable to salaried workers on all grounds, states (in Article 4(2)(e)) that workers are entitled 'to their privacy and to due respect of their dignity, including protection against harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, and sexual harassment and harassment based on sex'. Besides this, Article 54(2)(g) of the Workers' Statute considers 'harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, towards the employer or the people that work in the enterprise' to be an offence meriting disciplinary dismissal.

In Spain, harassment explicitly constitutes a form of discrimination.

Law 62/2003 (Article 28(2)) and the General Law on the Rights of Persons with Disabilities and their Social Inclusion (Article 2) specify harassment as a form of discrimination.

The words 'hostile' and 'degrading' (Directive 2000/43 and Directive 2000/78, Article 2(3)) are not included in the Spanish definition of harassment.

b) Scope of liability for harassment

Where harassment is perpetrated by an employee, it is the employee who is liable in Spain, not the employer.

Liability for discrimination is personal and only affects individuals or organisations that have committed acts of discrimination, both in civil and criminal law. For example, employers or, in the case of racial or ethnic origin, service-providers such as landlords, schools and hospitals, cannot be held liable for the actions of employees or for the actions of third parties (e.g. tenants, clients or customers). Likewise, trade unions or other professional associations cannot be held liable for the actions of their members.

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

a) Prohibition of instructions to discriminate

In Spain, instructions to discriminate are prohibited in national law. Instructions are not defined.

In Spain, instructions explicitly constitute a form of discrimination.

Law 62/2003 (Article 28(2)) provides that 'any instruction to discriminate against persons on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, will be considered discrimination'.

Instructions to discriminate may also be considered to be covered by Article 314 of the Criminal Code, which specifies 'causing discrimination' as an infringement against workers' rights. Article 18 of the Criminal Code includes incitement as a crime, and this may be applied to cases of incitement to discrimination.

b) Scope of liability for instructions to discriminate

In Spain, the instructor and the discriminator are liable. The jurisdictional body must determine the responsibility of each one of them. However, RDL 1/2013 (Article 79), states that, 'The liability shall be joint and several when there are several responsible and it is not possible to determine the degree of participation of each of them in the commission of the offense.' The person acting under instruction could, through civil law, seek indemnity against the person who has ordered them to discriminate for the damages that that person has caused to them.

Liability for discrimination is personal and only applies to natural or legal persons who cause discrimination or harassment or who make instructions to discriminate, but we should remember that the instruction to discriminate is a discriminatory act (as expressly noted in Article 28(2) of the Law 62/2003 on Fiscal, Administrative and Social Measures).

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

a) Implementation of the duty to provide reasonable accommodation for people with disabilities in the area of employment

In Spain, the duty on employers to provide reasonable accommodation for people with disabilities is included in the law. It is defined.

The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013) sets out a duty to provide reasonable accommodation for persons with

disabilities (Articles 2(m), 40(2) and 63). Article 2(m) defines reasonable accommodation as:

'necessary and appropriate modifications and adaptations of the physical, social and attitudinal environment to the specific needs of persons with disabilities not imposing a disproportionate or undue burden, where needed in a particular case effectively, and practice to facilitate accessibility and participation and to ensure to persons with disabilities the enjoyment or exercise, on an equal basis with others, of all human rights'.

Article 40(2) states that 'Employers are obliged to take appropriate measures to adapt the job and the accessibility of the company, according to the needs of each specific situation, in order to allow people with disabilities to access employment, perform their work, progress professionally and have access to training, unless these measures place an excessive burden on the employer.' Article 63 states that 'It is understood that the right to equality of opportunity for persons with disabilities is violated (...) when by reason of disability, (...) [a] breach [occurs] of the requirements of accessibility and of reasonable accommodation'.<sup>44</sup>

The Spanish law therefore establishes a multilevel obligation of a general nature, but has not fixed how that obligation might be carried out.

Law 3/2012 of 6 July 2012 on Urgent Measures to Reform the Labour Market has established some new positive action measures in favour of persons with disabilities that could be regarded as specific kinds of reasonable accommodation measures. Among them is a preferential right to geographical mobility to protect the health of persons with disabilities: to exercise their right to health protection, workers with disabilities evidencing a need for rehabilitation treatment in another city have a prior right to take another job in the same professional group if the company has another vacancy in a locality where such treatment is more accessible (Article 11(3)). This law also establishes the possibility of making priorities in collective agreements for people with disabilities, as well as the possibility for them to stay in jobs in cases of redundancy or in relation to measures of geographical mobility (Article 11(4)).

Law 31/1995 of 8 November 1995 on Prevention of Occupational Risks<sup>45</sup> (Articles 14, 15 and 25) and Royal Decree 39/1997 of 17 January 1997 on the Regulation of Prevention Services<sup>46</sup> include a duty to provide reasonable accommodation in the specific context of risks to health and safety in the workplace.

The reasonable accommodation duty is imposed on both private and public employers and arises if the employer knows of the existence of the disability. In Spain, persons with disabilities do not have a general obligation to inform their employer about their disability; however, if they request a reasonable accommodation, they must notify their employer of their disability (RLD 1/2013, Article 68(2)). When a person with disabilities requests an accommodation, the employer should consider whether it is necessary and 'reasonable'.

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<sup>44</sup> The Workers' Statute does not provide for a reasonable accommodation duty. Article 38(2) of Law 62/2003 modified an article in Law 13/1982, of April 7, on Social Integration of the Handicapped (new Article 37) in which it introduced the reasonable accommodation duty. However, this law 13/1982 was superseded by the approval of the General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013).

<sup>45</sup> Spain, Law 31/1995 of 8 November 1995 on Prevention of Occupational Risks (*Ley 31/1995, de 8 de noviembre, de Prevención de Riesgos Laborales*), (BOE, 10 November 1995), <http://www.boe.es/boe/dias/1995/11/10/pdfs/A32590-32611.pdf>.

<sup>46</sup> Spain, Royal Decree 39/1997 of 17 January 1997 on the Regulation of Prevention Services (*Real Decreto 39/1997, de 17 de enero, por el que se aprueba el Reglamento de Servicios de Prevención*), (BOE, 31 January 1997), <http://www.boe.es/boe/dias/1997/01/31/pdfs/A03031-03045.pdf>.

The law states that,

'In order to determine whether an accommodation is reasonable (...), the costs of the measure, the relevant discriminatory effects for people with disabilities of the non-adoption of the accommodation, the structure and characteristics of the person, entity or organisation which must implement the accommodation and the possibility of obtaining official funding or other assistance shall be considered. To this end, the competent public authorities [the Regions of Spain] may establish a system of public subsidies to help cover the costs of the obligation to provide reasonable accommodation' (RLD 1/2013, Article 66(2)).

For the purpose of determining whether a burden is disproportionate in normal employment, Article 40(2) of RLD 1/2013 states: 'It will be considered whether the burden is excessive if it is sufficiently remedied by measures, aids or subsidies for persons with disabilities, as well as financial costs and other measures involved and the size and volume of total business of the organisation or company'.

Employers are required to consult the person with disabilities in question and may consult other accredited entities specialised in occupational risk prevention services (RD 39/1997, Articles 23-28) about what accommodations would be helpful or appropriate. The need for consultation is deduced from the reference in the law to possible 'discrepancies' between the two parties. The law makes it clear that these possible discrepancies between the worker with disabilities and the employer 'can be resolved through the arbitration system' (RLD 1/2013, Article 66(2)). However, recourse to the arbitration system is voluntary (RLD 1/2013, Article 74(2)).

The need for consultation is deduced also from Law 31/1995 of 8 November 1995 on Prevention of Occupational Risks, which establishes 'the participation of employers and workers, through the most representative employers and labour organisations, in the planning, programming, organisation and management control related to the improvement of working conditions and the protection of the health and safety of workers at work' (Article 12).

Employers will be eligible for subsidies or other state funding to help with the costs of accommodation needed by workers with disabilities (RLD 1/2013, Article 40). However, the various regional Governments in Spain (including, in some cases, municipalities, which can provide some subsidies) set different conditions.

#### b) Practice and case law

Although the regulations that establish the obligation of reasonable accommodation are state regulations (RLD 1/2013 and Law 31/1995), subsidies to facilitate their actual implementation depend on the 17 regional Governments.

National law does not provide clearly for a shift in the burden of proof for claims relating to reasonable accommodation. However, Article 77 of Law RLD 1/2013 could allow a judge to shift the burden of proof if a person with disabilities is claiming the right to reasonable accommodation.

#### c) Definition of disability and non-discrimination protection

The definition of disability for the purposes of claiming reasonable accommodation (both with regard to employment and more generally) is the same as for claiming protection from discrimination in general. This means that only those meeting the threshold of 33 % disability are entitled to reasonable accommodation. The person with disability (someone who is officially recognised as a person with disabilities) must inform the employer of his or her disability status in order to request a reasonable accommodation (RLD 1/2013,

Article 68(2)). This requirement could potentially be in breach of Directive 2000/78 and is not in line with CJEU joined cases C-335/11 and C-337-11.

d) Failure to meet the duty of reasonable accommodation for people with disabilities

In Spain, failure to meet the duty of reasonable accommodation for people with disabilities counts as discrimination (RLD 1/2013, Article 63). Failure on the part of a company to comply with its obligation to provide reasonable accommodation (with regard to employment) constitutes indirect discrimination. As established in Articles 2(d) and 2(m) of the General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013), this may be justified only if such accommodation would constitute a disproportionate burden.

The breach of reasonable accommodation duties is considered a serious offence (RLD 1/2013, Article 81(3)). Therefore, the public administration may punish the perpetrator with a penalty of up to EUR 90 000 (RLD 1/2013, Article 83(3)). Furthermore, it may impose additional penalties on companies, such as prohibiting access to official benefits (like economic subsidies or any other public aid). If the company persists with its breach of duties on reasonable accommodation, the infringement may be regarded as very serious (RLD 1/2013, Article 81(4)). Consequently, the sanctions may be higher (to a maximum of EUR 1 million).

If the demand reaches a court, it may approve compensation for the claimant (the person with disability). The law does not impose any ceiling for this potential compensation: 'Any payment or compensation to which the corresponding claim may give rise shall not be limited by a previously established ceiling. Compensation for moral damage shall be payable even where there are no damages of a pecuniary nature and shall be set according to the circumstances of the infringement and the seriousness of the injury' (RLD 1/2013, Article 75.2).

e) Duties to provide reasonable accommodation in areas other than employment for people with disabilities

In Spain, there is a duty to provide reasonable accommodation for people with disabilities outside the area of employment.

The material scope of Law RLD 1/2013, which sets out a duty to provide reasonable accommodation for persons with disabilities, is: social protection; healthcare; education; employment; telecommunications and the information society; urbanised public spaces, infrastructure and construction; transport; goods and services to the public; relations with public administrations; the administration of justice; cultural heritage; and employment.

As regards social housing, RLD 1/2013 establishes the reservation of social housing for people with disabilities and ensures its accessibility (Article 32), as well as the refurbishment of housing for people with disabilities (support for the adaptation of housing to make it accessible for a person with a disability) (Article 33).

On 2 November 2009, the National Court<sup>47</sup> resolved an interesting case of disability discrimination in the field of education. Leoncio X, a person with physical and intellectual disabilities of 75 %, applied for a scholarship to study law during the academic year 2005-06. The ministry denied the scholarship, using the same standards as applied to other students. The National Court began its judgment by recalling that, 'on 21 April 2008 the Spanish Official Gazette published the Instrument of Ratification of the CRPD, made in New York on December 13, 2006' (although the CRPD was not yet transposed

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<sup>47</sup> See National Court (*Audiencia Nacional*), Appeal 160/2007, 2 November 2009.

into positive law in Spain, and this did not occur until 2011, with Law 26/2011). The court went on to recall that the CRPD required the introduction of 'reasonable accommodation' in education, and it concluded that it is a reasonable accommodation to modify some scholarship requirements for certain people with disabilities (for example, the requirement to have obtained an average rating of 5 out of 10 in the previous academic year; this means that the requirements for obtaining the scholarship were set at a lower level). The court therefore ordered the scholarship that Leoncio X requested to be recognised. This was a highly innovative judgment, because it pointed directly to the CRPD and provided for reasonable accommodation that was not formally established in Spanish law at the time.

The definition of 'disproportionate burden' in this context is the same definition that is used with regard to employment.

f) Duties to provide reasonable accommodation in respect of other grounds

In Spain, there is a legal duty to provide reasonable accommodation in respect of other grounds in the public sector and the private sector, but only on the ground of religion or belief.

Cooperation agreements with three religious communities (Evangelical, Jewish and Islamic) contain specific regulations to ensure reasonable accommodation for employees of these religions. The three agreements contain provisions in the field of employment (religious holidays) and in areas outside employment (special diets).

The weekly day of rest of the Seventh Day Adventist and Jewish communities (Friday evening and all of Saturday) can be granted instead of the day provided by Article 37(1) of the Workers' Statute as the general rule (Saturday afternoon or Monday morning and all of Sunday), but only with the agreement of all the parties, which case law has interpreted as being possible only if this is requested by the employee before the contract is signed.

Moreover, members of the Islamic communities affiliated with the Islamic Commission may request to stop work every Friday from 13.30 to 16.30 and one hour before sunset during Ramadan. This right is also subject to an agreement with the employer, and the hours not worked must be made up. There is some interesting doctrine on this subject in the Madrid High Court's judgment of 27 October 1997. In this case, pursuant to a request for adaptation of working hours, the court – not once referring to the cooperation agreement – stated that, although the courts of first instance should make employers adapt working hours, thus allowing their employees to meet their religious obligations properly, as well as not making them behave in a way incompatible with their beliefs, the worker must show honesty and good faith by indicating his or her religious faith and the special working hours arising from it when applying for the job (Rossell 2008: 104-107).

In the case of the Islamic Commission and the Jewish community, there is a list of religious holidays that can replace those established in Article 37 of the Workers' Statute, again with the agreement of both parties. As for special diet (adaptation of food to Islamic religious precepts and mealtimes during the Ramadan fast), this possibility is provided only for Muslims interned in public establishments (prisons and other centres) and on military premises, as well as in public and subsidised private schools, where requested, and not as an obligation, since Article 14(4) of the agreement clearly states only that, in such cases, 'attempts shall be made'. In the field of employment, therefore, there are no provisions on this issue.

Following the decision of Social Court No 1 of Palma de Mallorca, Spain (judgment 31/2017 of 5 February 2017: see section 3.2.3 of this report), the use of the hijab in

employment may, under certain conditions, be considered as coming under a reasonable accommodation duty based on religion.



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

#### **3.1 Personal scope**

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

In Spain, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives. The personal scope of protection against discrimination is general for all residents.

The seventh additional provision of Law 62/2003, entitled 'Non-applicability to immigration law', states that the articles transposing the directives do not affect the regulations provided 'in respect of the entry, stay, work and establishment of aliens in Spain under Organic Law 4/2000'. The justification for this provision is based on Article 3(2) of Directives 2000/43 and 2000/78. However, it should not be forgotten that Law 4/2000 regulates the issues of 'work and establishment', which are liable to be affected by the directives and are not covered by the exclusion outlined in Article 3(2) of the directives. That also applies to undocumented workers, because Article 3 of Law 4/2000 establishes that all foreigners (regular or undocumented) in Spain are covered by Article 14 of the Spanish Constitution, which establishes the principle of equality and non-discrimination (and other fundamental rights).

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

###### **a) Protection against discrimination**

In Spain, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of protection against discrimination.

The prohibition of discrimination in the Constitution (Article 14), in Law 62/2003 (Article 27(1)) and in the Workers' Statute applies to both natural and legal persons. Article 27(2) of Law 62/2003 provides that measures for the application of the principle of equal treatment under it apply to every person (both natural and legal), in both the public and private sectors.

###### **b) Liability for discrimination**

In Spain, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of liability for discrimination.

The situation in respect of liability is the same as that for protection (Law 62/2003, Article 27(2)), in that liability for discrimination is personal and affects individuals or organisations who have committed acts of discrimination. As Rubio-Marín (2004) indicates, for the private sector, the prohibition on discrimination and the violation of workers' fundamental rights is mainly addressed to the employer, but this can also be made applicable to managers, and presumably to co-workers or the relevant labour union.

##### **3.1.3 Private and public sector including public bodies (Article 3(1))**

###### **a) Protection against discrimination**

In Spain, the personal scope of national law covers the private sector and the public sector including public bodies for the purpose of protection against discrimination.

The prohibition of discrimination in the Constitution (Article 14) and in the Workers' Statute applies to both private and public bodies. Article 27(2) of Law 62/2003 provides that measures for the application of the principle of equal treatment under it apply to every person (both natural and legal), in both the public and private sectors.

b) Liability for discrimination

In Spain, the personal scope of anti-discrimination law covers the private sector and the public sector including public bodies for the purpose of liability for discrimination.

Law 62/2003 (Article 27(2)) establishes that liability for discrimination is personal and affects individuals or organisations who have committed acts of discrimination.

## **3.2 Material scope**

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

In Spain, national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, military service and holding statutory office, for the five grounds mentioned in the directives.

The material scope of the prohibition of discrimination is of a general nature. All the fields mentioned by Article 3 of Directive 2000/43 on racial or ethnic origin are covered by the general principle of equality laid down in Article 14 of the Spanish Constitution.

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

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

The Constitution (Article 23(2)) explicitly grants the fundamental right of access in equal conditions to public office and functions, which includes public sector employment, and makes reference to the guiding principles of the civil service, including those of merit and ability (Article 103).

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

Article 4(2)(c) of the Workers' Statute (RLD 2/2015) recognises that workers are entitled in their working relationship 'not to be subjected to direct or indirect discrimination in employment nor, once occupied, on the grounds of sex, civil status, age within the limits set in the present law, racial or ethnic origin, social condition, religion or belief, political ideas, sexual orientation, membership or non-membership of a trade union, or for

language reasons within Spain. They may not be discriminated against on grounds of disability, provided that they are able to perform the work or job in question’.

General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013) establishes that the employment must avoid discrimination, direct or indirect, on the ground of disability (Articles 35-47) and establishes a system of sanctions that means that the prohibition can be said to be real and effective (Articles 80-88).

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

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

In Spain, national legislation prohibits discrimination in the following areas: conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy, for the five grounds, in both private and public sectors, as described in the directives (Law 62/2003, Article 34).

Moreover, Article 2 of Law 56/2003 of 16 December 2003 on Employment specifies the foremost general objective of employment as being: ‘To guarantee real equality of opportunities and non-discrimination, considering the provisions of Article 9.2 of the Spanish Constitution, in access to employment and in actions aimed at providing such access, along with a free choice of profession or trade without discrimination, on the terms provided in Article 17 of the Workers’ Statute’.

The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013) establishes that conditions for access to employment must avoid discrimination, direct or indirect, on the ground of disability (Articles 35-47) and establishes a system of sanctions that mean that the prohibition can be said to be real and effective (Articles 80-88).

All labour regulations affect labour relations in both the private and public sectors.

The employment of civil servants is regulated by the Civil Service Statute, which establishes special standards in the public sector, but all employees are equally subject to the principle of equal treatment.

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

In Spain, national legislation prohibits discrimination in working conditions including pay and dismissals, for all five grounds and for both private and public employment.

Non-discrimination in employment and working conditions, including pay and dismissals, is expressly recognised in Article 17(1) of the Workers’ Statute (RLD 2/2015), which is entitled ‘Non-discrimination in working relations’. It states:

‘all legislative provisions, clauses of collective agreements, individual agreements and unilateral managerial decisions which provide for unfavourable direct or indirect discrimination on the grounds of age or disability, or which provide for unfavourable or adverse discrimination in employment, whether in relation to remuneration, working time, or other working conditions, on the grounds of sex, origin, including

racial or ethnic origin, civil status, social condition, religion or belief, political ideas, sexual orientation, membership or non-membership of a trade union, adherence to trade union agreements, or family ties to other workers in the enterprise, or by reference to the languages of the Spanish state, shall be regarded as void and without effect’.

With the distinction between ‘unfavourable direct or indirect discrimination on the grounds of age or disability’ and ‘unfavourable or adverse discrimination in employment’ in relation to other grounds, the provision facilitates positive action in the fields of age and disability. Article 8(12) of RLD 2/2000 on violations and sanctions of labour laws (modified by Law 62/2003, Article 41) considers ‘unilateral decisions by the employer which involve unfavourable direct or indirect discrimination for reasons of age or disability or which contain positive or adverse discrimination relating to remuneration, working time, training, promotion, and other employment conditions, on the grounds of sex, origin, including racial or ethnic origin, civil status, social condition, religion or belief, political ideas, sexual orientation, membership or non-membership of a trade union, adherence to trade union agreements, family ties with other workers in the enterprise, or language within the Spanish State’ to be very serious infringements.

The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013) establishes that employment and working conditions must avoid discrimination, direct or indirect, on the ground of disability (Articles 35-47) and establishes a system of sanctions that mean that the prohibition can be said to be real and effective (Articles 80-88).

Two cases are relevant here. The first is the case of a homosexual worker dismissed by Aerolíneas Argentinas in 2008. The worker’s complaint was accepted by Madrid Social Court no. 35, which declared the dismissal void and therefore obliged the airline to take the worker back and pay all wage arrears. The judgment ruled that it was proven in the proceedings that the worker’s sexual orientation had given rise to various forms of unfavourable treatment, culminating in his dismissal. In his judgment, the judge stated that unfavourable treatment based on sexual orientation was discriminatory, and therefore the worker’s dismissal was declared void.<sup>48</sup>

The second is the case of a Muslim woman hired by ACCIONA Airport Services to provide customer service at Palma de Mallorca airport, starting in 2007. When she came to work on 21 December 2015, the claimant informed the company of her intention to wear the Islamic veil (hijab) during the working day as an expression of her religious sentiment. The employer imposed seven increasingly serious labour sanctions for using the hijab. In June 2016, the claimant brought an action against the company before Social Court no. 1 in Palma de Mallorca. The claimant maintained that she was being discriminated against since other workers could exhibit necklaces with Christian religious symbols, yet she was not allowed to wear the hijab. The court issued its judgment on 5 February 2017 and declared ‘the existence of violation of the fundamental right to religious freedom (of the claimant), and consequently the nullity of the sanctions imposed by the company’. The ruling recognised that the company had the right ‘to impose on its employees the use of a uniform’, but that ‘there are no unlimited rights’ and that this right ceases, if it clashes with a fundamental right, such as that to religious freedom.

Occupational pensions in Spain are governed by RLD 1/2002 of November 29 2002, which regulates pension plans and funds. Occupational pensions constituting part of pay are designated as ‘pension plans by system of employment’ (*Planes de pensiones por sistema de empleo*). These are plans, whose promoter is an entity or company and whose partners are its employees. The RLD only contains a general anti-discrimination clause that establishes that the pension plan ‘must guarantee access as a participant to

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<sup>48</sup> Social Court no. 35 of Madrid, Judgment 84/2009, 23 February 2009.

any natural person who meets the conditions of relationship with the promoter' (Article 5(1)).

In general, pension plans by 'employment system' (sector-specific occupational pension schemes) are established through collective agreements, and they are covered by the anti-discrimination clauses for employment and working conditions laid down in Article 17.1 of the Workers' Statute (RLD 2/2015) and Article 8(12) of RLD 2/2000 on violations and sanctions in labour laws.

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

In Spain, national legislation prohibits prohibit discrimination in vocational training outside the employment relationship, such as adult lifelong learning courses or vocational training provided by technical schools or universities.

The Workers' Statute (Article 4(2)) recognises promotion and professional training as rights. These are protected against discrimination on all of the grounds included in the directives.

Article 34 of Law 62/2003 includes this subject in relation to all the grounds of Directives 2000/43 and 2000/78: 'measures are aimed at the real and effective realisation of the principle of equal treatment and non-discrimination in relation to access to (...) professional promotion and vocational and continuous professional training'. Given the structure of the education and training system in Spain, this text includes all the aspects covered by Article 3(1)(b) of Directive 2000/43.

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

The Organic Law on Universities (6/2001 of 21 December 2001) provides that students are entitled to 'freedom of opportunities and the absence of discrimination on personal or social grounds, including disability, in access to universities and admission to university faculties, during university courses and in the exercise of their academic rights' (Article 46(2)).

The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013) establishes that vocational guidance must avoid discrimination, direct or indirect, on the ground of disability (Article 17) and establishes a system of sanctions that mean that the prohibition can be said to be real and effective (Articles 80-88).

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

In Spain, national legislation prohibits discrimination in membership of and involvement in workers' or employers' organisations as formulated in the directives for all five grounds and for both private and public employment.

Article 34 of Law 62/2003 includes this subject in relation to all the grounds of Directives 2000/43 and 2000/78: 'measures are aimed at the real and effective accomplishment of the principle of equal treatment and non-discrimination in relation to (...) membership of or involvement in organisations of workers or employers (...) or to occupation and

membership of and involvement in any organisation whose members carry on a particular profession’.

Article 17(1) of the Workers’ Statute and Article 8(12) of the Law on Offences and Penalties in Social Matters also include this aspect of equal treatment.

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

In Spain, national legislation prohibits discrimination in social protection, including social security and healthcare as formulated in the Racial Equality Directive.

The social security system is based on four principles: universality, unity, solidarity and equality (RLD 8/2015 of the General Social Security Act, Article 2). Furthermore, Article 29(1) of Law 62/2003 states that its purpose is to ‘establish measures to ensure that the principle of equal treatment and non-discrimination on the grounds of racial or ethnic origin is real and effective in education, health, social benefits and services, housing and, in general, the supply of and access to goods and services’.

Therefore, there is a general recognition of the principle of non-discrimination on the grounds of racial or ethnic origin in these areas in line with Article 3(1) of Directive 2000/43, and discrimination in these fields is unlawful.

Law 62/2003 does not provide any measure to make the principle of equal treatment ‘real and effective’, because it does not establish any sanctions if the law is breached.

However, judges must consider whether Article 512 of the Criminal Code (Organic Law 10/1995) is applicable. Article 512 states: ‘Those who, in the exercise of their professional or business activities, deny a person a benefit to which they are entitled by virtue of their (...) religion or beliefs, their belonging to an ethnic or race (...) their sexual orientation (...) or, for reasons of (...) disability, incur the penalty of special disqualification for the exercise of profession, trade, industry or commerce and special disqualification for educational profession or trade, in the field of teaching, sports and leisure for a period of one to four years.’ The key is whether social protection, social security and healthcare should come under the concept of ‘a benefit’ (*una prestación*) mentioned in the Criminal Code.

The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013) establishes that the social protection must avoid discrimination, direct or indirect, on the ground of disability (Articles 48-52) and establishes a system of sanctions that mean that the prohibition can be said to be real and effective (Articles 80-88).

#### **a) Article 3(3) exception (Directive 2000/78)**

Law 62/2003 does not contain any specific provisions in relation to the exception in Article 3(3) of Directive 2000/78 on the grounds of religion or belief, age, disability and sexual orientation. Various social security and social protection provisions establish differences on grounds of age, and of other conditions, but not religion or beliefs, disability, sexual orientation or racial or ethnic origin.

The ECtHR held on 3 April 2012, in the case of *Manzanas v. Spain*,<sup>49</sup> that there had been a violation of Article 14 (prohibition of discrimination) of the ECHR. The case concerned a difference in treatment between priests of the Catholic Church and Evangelical ministers

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<sup>49</sup> ECtHR, case of *Manzanas v. Spain*, no 17966/10, 3 April 2012, <http://hudoc.echr.coe.int/eng?i=001-110180>.

regarding the calculation of their pension rights before 1999. The court agreed with the Government that there had been objective and non-discriminatory reasons for integrating religious ministers into the general social security scheme at different times. However, the refusal to recognise Mr Manzanás's right to receive a retirement pension amounted to a different treatment, the only difference here being one of religious faith. Although the reasons for the delay in bringing religious ministers into the general social security scheme fell within the state's margin of appreciation, the court considered that the Government had failed to justify the reasons why a difference of treatment between similar situations, based solely on grounds of religious belief, had been maintained.

In 2015 there was a judgment that recognised the right to public assisted human reproduction on the part of a female couple, regardless of their sexual orientation. Law 14/2006 of 26 May 2006 on Assisted Human Reproduction Techniques (AHR) and Royal Decree 1030/2006 of 15 September 2006 expressly exclude any discrimination based on sexual orientation. However, an order of Ministry of Health (SSI/2065/2014 of 31 October 2014), states that AHR 'are facilitated for persons who have been subject to a fertility investigation (...)'. For female couples, this last clause was discriminatory based on sexual orientation. Tania and Veronica (fictitious names) are two women united in marriage. In April 2014, one of them began AHR treatment at a private clinic that receives public funds. When Ministerial Order SSI/2065/2014 was published, the clinic suspended the treatment. Social Court no. 18 ruled on 15 September 2015 (Auto 672/2015), condemning the clinic for discrimination on the ground of sexual orientation and noting that the applicant was entitled to AHR treatment by direct application of Law 14/2006. It further ruled that, by not being provided this treatment, the couple were discriminated against based on their sexual orientation.

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

In Spain, national legislation prohibits discrimination when it comes to social advantages as formulated in the Racial Equality Directive.

The social security system is based on four principles: universality, unity, solidarity and equality (RLD 8/2015 of the General Social Security Act, Article 2). Article 29(1) of Law 62/2003 recognises the principle of non-discrimination on the grounds of racial or ethnic origin in social benefits, in line with Directive 2000/43.

However, this law does not provide any measure to make the principle of equal treatment 'real and effective', because it does not establish any sanctions. However, judges must consider whether Article 512 of the Criminal Code (Organic Law 10/1995) could be applied and must decide whether social advantages should be included under the concept of 'a benefit' (*una prestación*) mentioned in the Criminal Code.

The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013) establishes that the social advantages must avoid discrimination, direct or indirect, on the ground of disability (Articles 48-52) and establishes a system of sanctions that mean that the prohibition can be said to be real and effective (Articles 80-88).

Any clauses introducing differences of treatment in 'social advantages' on the grounds of racial or ethnic origin, religion or beliefs, disability or sexual orientation would be discriminatory (Spanish Constitution, Article 14), but not on the grounds of age if the differences are 'objectively and reasonably justified by a legitimate aim'. For example, it is common practice for there to be special discount rates for young people and the elderly for public transport and some private transport.

Beyond the measures established by Law RLD 1/2013, there are some social advantages for persons with disabilities, such as special discounts for transport or in accessing some

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

Law RLD 1/2013 establishes that services available to the public, buildings and infrastructure should be designed and built in a disability-accessible way.

In Spain, the lack of a definition of social advantages does not raise problems.

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

In Spain, national legislation prohibits discrimination in education as formulated in the Racial Equality Directive.

Article 29(1) of Law 62/2003 recognises the principle of non-discrimination on the grounds of racial or ethnic origin in education in line with Directive 2000/43. But this law does not provide any measure to make the principle of equal treatment 'real and effective', because it does not establish sanctions. To be 'real and effective', judicial interpretation is required and judges must consider whether Article 512 of the Criminal Code (Organic Law 10/1995) could be applied and whether education should be included under the concept of 'a benefit' (*una prestación*) mentioned in the Criminal Code.

The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013) establishes that the education system must avoid discrimination, direct or indirect, on the ground of disability (Articles 16 and 18-21) and establishes a system of sanctions that mean that the prohibition can be said to be real and effective (Articles 80-88).

Equal treatment and non-discrimination have been consolidated as basic principles of education in Spain. For example, the first three principles of quality as listed in Organic Law 2/2006 on Education (OLE),<sup>50</sup> modified by Organic Law 8/2013 on Improving the Quality of Education (OLCE),<sup>51</sup> refer to equal treatment and equal opportunities in Article 1, as follows: a) Quality in education for all pupils, regardless of their social condition and circumstances; b) Fairness, guaranteeing equality of opportunities, educational inclusion and non-discrimination, and acting to offset personal, cultural, economic and social inequalities, especially those due to disability; c) Transmission and implementation of values that foster personal freedom, responsibility, democratic citizenship, solidarity, tolerance, equality, respect and justice, and helping to overcome discrimination of any kind.

Although the law establishes the general principle of non-discrimination, it could be considered that there is a violation of the directive, because it is not 'real and effective', given that it does not provide for any sanctions (except in respect of disability).

The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013) establishes that education must avoid discrimination, direct or indirect, on the ground of disability (Articles 18-21) and establishes a system of sanctions that mean that the prohibition can be said to be real and effective (Articles 80-88).

The debate on school 'segregation' has become high profile in Spain, with a large rise in the number of immigrants and foreigners of school age over the past years. Foreign

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<sup>50</sup> Spain, Organic Law on Education, Law 2/2006, 3 May 2006 (*Ley Orgánica 2/2006, de 3 de mayo, de Educación*), (BOE, 4 May 2006) <http://www.boe.es/boe/dias/2006/05/04/pdfs/A17158-17207.pdf>.

<sup>51</sup> Spain, Organic Law on Improving the Quality of Education, Law 8/2013, 9 December 2013 (*Ley Orgánica 8/2013, de 9 de diciembre, para la mejora de la calidad educativa*), (BOE, 10 December 2013), <http://www.boe.es/boe/dias/2013/12/10/pdfs/BOE-A-2013-12886.pdf>.



children are mostly concentrated in state schools (as opposed to private schools). There is a consensus in Spanish social research that this concentration cannot be described as 'segregation' (there is no coercion because the parents can choose the school), although the concentration is high due to the fact that most of the parents choose schools close to their home and, therefore, in each school there are people of the same social condition). Public schools are of good quality compared with private schools, and according to several scholars the fact that the school performance of immigrant and Roma pupils is somewhat lower than the rest of the general population is due mainly to the socioeconomic and cultural characteristics of families, rather than the schools.<sup>52</sup>

The OLE provides that 'in no event shall there be discrimination on the grounds of birth, race, sex, religion, opinion or any other personal or social condition or circumstance' (Article 84(3) – this article of the OLE guarantees the non-discrimination of migrants in Spain in the field of education.) The same protection and equality among Spanish nationals is established by Organic Law 4/2000, which establishes the rights and freedoms of foreigners in Spain. Article 8 of OL 4/2000 establishes a right to education for foreigners (both legal and undocumented) in Spain under the same conditions as for Spanish nationals.

The OLE also provides that the various tiers of government must develop compensatory measures in relation to persons, groups and regions in adverse situations and provide the necessary economic resources and support. 'Groups' refers in particular to Roma people and immigrants.

a) Pupils with disabilities

In Spain, the general approach to education for pupils with disabilities does not raise (legal) problems.

The Organic Law on Education (OLE) provides (under Article 74) that schooling for pupils with special educational needs, including those resulting from disability 'shall be governed by the principles of standardisation and integration and shall guarantee non-discrimination and effective equality in access to and continuance in the [mainstream] education system', but it adds that 'measures may be introduced to make the various stages of education more flexible, when considered necessary. Schooling for such pupils in special educational units or centres, which may continue up to the age of 21, shall be provided only when their needs cannot be met in the framework of measures catering for diversity in ordinary centres'. The OLE also provides a measure for positive action (Article 75), stating that 'The educational authorities shall establish a reserve quota of places in vocational training for pupils with disabilities.' A special education system is provided that can be either temporary or permanent for those disabled persons for whom attendance is impossible within the ordinary educational system, one of the aims of which is professional training.

The passage of the OLE through Parliament in 2005 was marked by a fierce campaign against it by conservative organisations because, among other measures, the law seeks to establish a more even distribution of pupils with special needs between state schools (*centros públicos*) and state-subsidised private schools (*centros privados concertados*). One of the key points of the political debate was the clash between the so-called right of parents to freely choose a school for their children, and the right to education and access thereto on equal terms. The OLCE introduces 'freedom of education' as a principle of the education system, and it defines 'freedom of education' as 'the right of parents, mothers and legal tutors to choose for their children the kind of education and the school, within

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<sup>52</sup> See: Garreta, J. (2003) *La integración socioeconómica de las minorías: gitanos e inmigrantes* (The socioeconomic integration of minorities: gypsies and immigrants), Barcelona, Anthropos; and Cebolla, H. (2015) 'Las trayectorias educativas de los hijos de los inmigrantes en España' (Educational trajectories of the children of immigrants in Spain), AAVV, *España 2015. Situación social*, Madrid, CIS: 225-233.

the framework of constitutional principles' (Article 1(g)). The law strikes a balance between these principles, stating that 'families may apply for admission at the schools to which they wish to send their children' (Article 86(3)), but it also provides for the possibility of setting up 'committees or other bodies to guarantee admission'. It further provides that: 'The various tiers of government shall ensure that pupils with special needs for educational support are distributed evenly between schools (...) To this end, they shall establish the proportion of pupils with these characteristics to be admitted into each state school and subsidised private school, and shall ensure that schools have the staffing and funding required for such support' (Article 87). In summary, parents may choose to send their disabled child to a certain school but, if that school already has a high number of children with special educational needs, the school authorities can decide that the child must go to another school where there are fewer children with special educational needs, thereby overruling the choice of the parents.

In conclusion, the law sets out guarantees of the right to education for pupils with disabilities. The general criterion is that persons with disabilities should be integrated – and they are – in the mainstream educational system, if necessary, with special support; special systems are provided only when their educational needs cannot be met in the mainstream system.<sup>53</sup>

In the academic year 2016-2017 (last data) there were 217 416 students with disabilities in Spain (representing 2.7 % of the total number of non-university students); 181 530 of them were enrolled in ordinary educational centres, and 35 886 in special centres.

Following UN recommendations and the requests of the CERMI (Spanish Committee of Representatives of Persons with Disabilities), in the preliminary draft of a new educational law prepared by the current Government, it is proposed that most students with disabilities who are in special centres should move to ordinary centres, increasing the support staff in the field of disability. This has raised some social controversy. The problem is not the quality of education that is provided in one or another subsystem, but the presumption in favour of the inclusion of students with disabilities in the general education system.<sup>54</sup>

#### b) Trends and patterns regarding Roma pupils

In Spain, there are no specific trends and/or patterns (whether legal or societal) in education regarding Roma pupils (including immigrant Roma pupils), such as segregation.

The Organic Law on Education (OLE) provides (under Article 74) that schooling for pupils with special educational needs 'shall be governed by the principles of standardisation and integration and shall guarantee non-discrimination and effective equality in access to and continuance in the [mainstream] education system'. The law also provides that the various tiers of government shall develop compensatory actions in relation to persons, groups and regions in adverse situations and shall provide the necessary economic resources and support. 'Groups' refers in particular to Roma people (and immigrants).

For the academic year 2016-2017 (according to the latest data released by the Ministry of Education), 567 339 non-university students in Spain (equivalent to 7.1 % of the student population) have had some kind of 'educational support'. Of those students: 38.3 % (217 416) received support for special educational needs associated with disability or serious disorder; 54.1 % (306 765) received support for other specific needs

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<sup>53</sup> See Constitutional Court Decision 10/2014, 27 January 2014, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/23770>.

<sup>54</sup> After the cut-off date of this report, on 13.02.2019, Parliament rejected the draft General State Budget presented by the Government and as a result, the President of the Government dissolved the Parliament. As a consequence, this draft law has not come to be discussed in Parliament.

(students with developmental language or learning disorders, with severe lack of knowledge of the language of instruction or in a situation of socio-educational disadvantage — Roma represent a significant proportion of those with socio-educational disadvantages); 2.8 % (16 025) received support for late integration into the Spanish educational system (in almost all cases, these were immigrants who were incorporated into classes after the school year had already started); and the remaining 4.8 % (27 133) received support for high intellectual capacity.<sup>55</sup>

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

In Spain, national legislation prohibits discrimination in access to and supply of goods and services as formulated in the Racial Equality Directive.

Article 29(1) of Law 62/2003 recognises the principle of non-discrimination on the grounds of racial or ethnic origin in access to and supply of goods and services that are available to the public, in line with Directive 2000/43. However, this law does not provide any measures to make the principle of equal treatment 'real and effective', because it does not establish sanctions.

The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013) establishes that the goods or services available to the public, public or private, must avoid discrimination, direct or indirect, on the ground of disability (Articles 5 and 29) and establishes a system of sanctions that mean that the prohibition can be said to be real and effective (Articles 80-88). A failure to adapt goods or a service to meet the needs of a person with a disability is a form of discrimination (RDL 1/2013, Article 29(1)). Article 29(3) establishes that differences of treatment in access to goods and services 'will be admissible when justified by a legitimate purpose and the means to achieve it are adequate, proportionate and necessary.'

For its part, Article 511 of the Criminal Code (Organic Law 10/1995) establishes jail sentences, fines and disqualification from holding public office 'to the individual in charge of a service open to the general public that denies a person a benefit to the who is entitled by reason of his (...), religion or beliefs, his / her belonging to an ethnic group or race, (...) his / her sexual orientation, (...), for reasons of disability.' It can be considered that this provision introduces measures that make the prohibition of discrimination in access to services open to the public 'real and effective'.

However, that does not apply in the access to goods. Although the law establishes the general principle of non-discrimination in access to and supply of goods, it could be considered that there is a violation of the directive, because the prohibition is not 'real and effective', given that it does not provide for any sanctions (except in relation to disability).

An interesting ruling was made in relation to access to services which are available to the public. Air Nostrum, a subsidiary airline of Iberia Líneas Aéreas de España, refused to allow three deaf people on board, on the grounds that they were unaccompanied. It claimed that, according to its flight operation manual, the safety of these persons could be at risk in an emergency. A court of first instance ruled in Iberia's favour, but the Madrid Provincial Court, in judgment 211/2009 of 6 May 2009, ruled in favour of the three deaf people, who were represented by the National Confederation of the Deaf and the Spanish Committee of Disabled Persons Representatives. The Madrid Provincial Court deemed this a case of 'indirect discrimination' and noted that Law 51/2003 of

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<sup>55</sup> Source: Ministerio de Educación (2017), Enseñanzas no universitarias. Alumnado matriculado. Curso 2016-2017.  
<http://www.educacionyfp.gob.es/servicios-al-ciudadano-mecd/estadisticas/educacion/no-universitaria/alumnado/necesidades-apoyo/2016-17.html>.

2 December 2003 on Equal Opportunities, Non-discrimination and Universal Accessibility for Persons with Disabilities (The content of this law was incorporated into the General Law on the Rights of Persons with Disabilities and their Social Inclusion with the approval of RDL 1/2013) prevails over Iberia's flight operation manual, and that not allowing these three deaf persons on board may be regarded as 'indirect discrimination' pursuant to Article 6(2) of that law, which transposes Article 2(2)(b) of Directive 2000/78/EC. Although the directive only addresses employment discrimination, Law 51/2003 (now in RDL 1/2013) also covers discrimination with regard to access to goods and services. The provincial court ordered Iberia to take steps to ensure that 'the infringement of rights of disabled persons ceases and that deaf persons are not discriminated against in its flights'. This was the first court ruling to apply the concept of 'indirect discrimination' in access to goods and services in Spain. The judgment included the EU directives' definition of indirect discrimination and noted that the internal company regulation that the company wanted to apply to prevent access to the flight to the three deaf people was 'an apparently neutral provision (...) but could cause a particular disadvantage to these persons because of their disability'.

a) Distinction between goods and services available publicly or privately

In Spain, national law does not distinguish between goods and services that are available to the public (e.g. in shops, restaurants, banks) and those that are only available privately (e.g. limited to members of a private association).

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

In Spain, national legislation prohibits discrimination in the area of housing as formulated in the Racial Equality Directive.

Law 62/2003 recognises the principle of non-discrimination on the grounds of racial or ethnic origin in housing (Article 29(1)), in line with Directive 2000/43. However, this law does not provide any measures to make the principle of equal treatment 'real and effective'.

The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013) establishes that housing must avoid discrimination, direct or indirect, on the ground of disability (Articles 48-52) and establishes a system of sanctions that mean that the prohibition can be said to be real and effective (Articles 80-88).

Furthermore, Article 32 of RDL 1/2013 establishes a housing stock for people with disabilities and establishes that at least 4 % of homes built in public programmes (*viviendas protegidas*) will be built with a design suitable for people with disabilities.

Although the law establishes the general principle of non-discrimination, it could be considered that there is a violation of the directive, because it is not 'real and effective', given that it does not provide for any sanctions (except in relation to disability).

Article 13 of Organic Law 4/2000, which establishes the rights and freedoms of foreigners in Spain, establishes 'housing rights' for immigrants in Spain: 'Resident foreigners have the right to access public aid systems in the matter of housing (...) In any case, long-term resident aliens are entitled to such aid under the same conditions as Spanish nationals.' In other words, all legal immigrants can access social housing and long-term legal immigrants can access public housing aid under the same conditions as the Spanish.

Legal migrants are treated in the same way as Spaniards and nationals of other Member States under anti-discrimination legislation, and they benefit from anti-discrimination law enforcement and implementation in the field of housing on an equal basis with nationals.

However, the practical application of the relevant legal provisions could be improved. Immigrants of certain national origins and the Roma tend to congregate in certain districts, which leads to a significant concentration of the population. This situation becomes a problem when it is compounded by poor living conditions, sometimes involving illegal construction or the growth of slum districts. Undocumented migrants do not have the same access to social housing as legal migrants.

a) Trends and patterns regarding housing segregation for Roma

In Spain, there are no patterns of housing segregation and discrimination against the Roma (although the reality is that many Roma live in very concentrated conditions in certain urban and rural areas). Policies that aim to facilitate the accommodation of the Roma are general policies, and integration is now favoured, especially in mixed working-class neighbourhoods. At the end of the Franco dictatorship, most Spanish Roma lived in substandard housing, much of it illegal and self-constructed (*chabolas*) in the slum suburbs of cities or towns (Cortés 1995). In the democratic period, numerous actions of relocation (national, regional and local) have radically changed this residential situation, and most of the Roma now live in homes in working-class neighbourhoods of cities and towns, some in areas with high concentrations of Roma and others in more diverse neighbourhoods (Rio 2014). However, due to the economic crisis of 2008 and the social policies that have been implemented, many Roma (like other parts of the population that have suffered the consequences of the crisis more seriously), face eviction and have had to leave their homes because they cannot pay their mortgages. As a result, there has been an increase in substandard housing among the Roma, not because they are Roma, but because, as summarised by the Fundación Secretariado Gitano (FSG 2013), 'the crisis affects earlier, harder, during more time and with more harmful and lasting effects the people and groups that were already in situations of vulnerability, poverty or social exclusion, as is the case with more than two thirds of the Roma community'. Despite the social gravity of these evictions, for the population in general and for the Roma in particular, there is no violation of the right to respect for private and family life nor a problem of discrimination.

Many Spanish local government authorities have carried out successful relocation programmes for Roma in towns (moving from the marginal and segregated dwellings that previously occupied new areas to better housing conditions that are more integrated and socially diverse). In some cases, these relocation programmes have encountered opposition from other residents, but in general the administrations succeed in carrying out such rehousing.

## **4 EXCEPTIONS**

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

In Spain, national legislation provides for an exception for genuine and determining occupational requirements.

Law 62/2003 (Article 34(2)) reproduces the occupational requirement exception of Article 4(1) of the directive, which provides that: 'Differences based on a characteristic related to any of the causes referred to in the previous paragraph [all the grounds of Directives 2000/43 and 2000/78] do not amount to discrimination when, owing to the nature of the specific professional activity concerned or the context in which it is carried out, such a characteristic constitutes an essential and determinant professional requirement, provided that the objective is legitimate and the requirement is proportionate'.

Prior to the transposition of the directives into domestic Spanish law, Article 17(2) of the Workers' Statute stated that 'exclusions, reservations and preferences in respect of unrestricted employment may be established by law'.

### **4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)**

In Spain, national law provides for an exception for employers with an ethos based on religion or belief.

Article 34 of Law 62/2003 provides for non-discrimination in employment on the ground of religion or beliefs and amends other laws, such as the Workers' Statute, in this respect, but makes no reference to organisations with an ethos based on religion or beliefs.

For organisations with a specific ethos, Article 6 of the Organic Law on Religious Freedom states: 'Registered churches, faiths and religious communities shall be fully independent and may lay down their own organisational rules, internal and staff byelaws. Such rules, as well as those governing the institutions that they create to accomplish their purposes, may include clauses safeguarding their religious identity and own personality as well as due respect for their beliefs, without prejudice to the rights and freedoms recognised by the Constitution and in particular those of freedom, equality and non-discrimination'. The third additional provision of Organic Law 2/2006 on Education regulates the situation of teachers of religion at private (religious) centres.

In the opinion of the author of this report, taking into consideration CJEU C-414/16 and C-68/17, these provisions are in keeping with Article 4(2) of Directive 2000/78.

As Puente (2004) points out, the scope of these clauses is the regulation of employment relationships in institutions with a specific ethos. In practice, the exemptions operate at three stages of the employment relationship: first, access to employment; secondly, during the performance of an activity within the organisation; and thirdly, dismissal from that activity. At the first stage, before the signature of the labour contract, the general rule is that religious reasons cannot be claimed for preventing anyone from exercising their right to work. Moreover, according to Article 16(2) of the Constitution, nobody may be compelled to make statements regarding his/her religion, belief or ideology, which means that there is a prohibition against asking about the ideology or beliefs of the worker. However, in these organisations, questions about religion and belief, and the requirement that workers accommodate their private lives to the ethos of the enterprise, seem genuine and legitimate if the activity to be performed is linked to the ideological orientation pursued by the organisation. This relates to the situation of religious education teachers in state schools. At the second stage, during the employment

relationship, the employees have to show respect for the ideology of the enterprise. This respect for the ideology also includes out-of-work activities, if they affect this ethos. At the third stage, although the general rule says that a discriminatory dismissal is void, in those organisations with a specific ethos it will not be discriminatory if there has been behaviour hostile to that ethos.

- Conflicts between rights of organisations with an ethos based on religion or belief and other rights to non-discrimination

In Spain, there are specific provisions and case law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination.

According to general constitutional doctrine, since the principle of good faith should govern employment relationships (Article 5(a) of the Workers' Statute, RLD 2/2015), employees in ideological or ethos-based organisations can be asked to conform to a minimal extent with the organisation's ethos.<sup>56</sup>

Both doctrine and the courts have made it explicit that, even within ideological institutions, one has to distinguish between ideological and neutral employment positions. Only the former are about transmitting the ideology of the institution and thus those in which ideological affinity can be expected.<sup>57</sup> This brings up interesting issues given Catholicism's longstanding rejection of homosexuality, for example. In this respect, especially in relation to private religious schools, the Constitutional Court has considered that, once again, the most relevant factor to be taken into consideration is what the job itself consists of. If the job is strictly linked to spreading the school's ethos, constraints will be more justifiable than if the job consists of developing purely technical expertise or is restricted to the pure transmission of knowledge.<sup>58</sup> According to some academic doctrine, this would allow employers in this kind of institution to inquire about the worker's sexual orientation if the occupational activity is linked to spreading the school's ethos (Vicente 1998). On the other hand, some scholars have pointed out that it is a worker's conduct and not his sexual preferences *per se* that could be seen as violating the institution's ethos, so that it is only when the conduct is notorious and has the capacity to discredit the institution's ethos that measures can be taken (Fernández 1985).<sup>59</sup> (See Constitutional Court Decisions 38/2007 and 51/2011, discussed below).

- Religious institutions affecting employment in state-funded entities

In Spain, religious institutions are permitted to select people (on the basis of their religion) to be hired or dismissed from a job when that job is in a state school, or in a school financed by the state. (Organic Law 2/2006 on Education, third additional provision). In the author's view, this provision of the OLE is in conformity with the Article 4(2) exception.

On 26 February 1999, the Spanish Ministers of Education and Justice and the chairman of the Conference of Catholic Bishops signed an agreement on the financial and employment arrangements for teachers of religion. As a result, the bishop of each diocese decides on the hiring proposal, activities and non-renewal or dismissal of teachers, and the state hires them, pays their wages and compensates them in the event of dismissal, if appropriate. This situation has given rise to many conflicts in recent years,

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<sup>56</sup> See Constitutional Court Decision 47/1985, 27 March 1985, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/427>.

<sup>57</sup> See Constitutional Court Decision 106/1996, 12 June 1996, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/3158>.

<sup>58</sup> See Constitutional Court Decision 5/1981, 13 February 1981, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/5>.

<sup>59</sup> A general analysis of jurisprudence in Spain can be seen in Salas 2014.

and various court rulings have been given against the dismissals of religious education teachers. These dismissals have generally resulted from arbitrary decisions of the diocese – it having been deemed that teachers have become unsuitable for their work as a result of getting divorced, drinking in bars, belonging to a trade union, etc – and have therefore been declared unfair or void. The Organic Law on Education (OLE) resolves this problem satisfactorily. Its third additional provision, relating to teachers of religion, provides that:

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

The case of *Fernández Martínez (FM) v. Spain* at the ECtHR<sup>60</sup> reveals some important issues in this field, even though it upheld the non-renewal of the contract of FM as a teacher of Catholic religion. The ECtHR held that the reason for the non-renewal of the employment contract of FM was strictly of a religious nature and found that the decision not to renew did not breach the ECHR. FM was a married priest and then a secularised priest, and non-renewal of his contract occurred after he appeared in a newspaper expressing support for optional celibacy for priests. For the ECtHR, the fact that FM was 'a secularised priest' made the case different from other court precedents (*Siebenhaar v. Germany* (in 2011), *Schüth v. Germany* (in 2010) and *Obst v. Germany* (in 2010)). It was also considered that, 'by not renewing the applicant's contract, the ecclesiastical authorities were merely discharging their obligations that stemmed from the principle of religious autonomy'.

The decision of the Court was taken by nine votes to eight, and the eight judges (among them, a Spanish judge) developed a joint dissenting opinion. For these eight judges, the basis of the non-renewal of the applicant's appointment lay in the publicity given to his situation as a married priest and his membership of the Movement for Optional Celibacy for priests. They wrote: 'we [the eight judges] can now say that some of these factors appear to be particularly relevant. First, it was not the applicant's situation as such – which had been tolerated for many years by the Church – but the publicity given to it, that led to the non-renewal of his contract. While such publicity could be problematic for the Church, it is difficult to conceive how it could be so for the State. Second, as far as the applicant's teaching ability was concerned, there is no evidence that he had taught religion in a manner that contradicted the doctrine of the Church (...). Third (...), the State's reaction was a drastic one: the applicant was not reappointed, and no other measure was taken, with the result that he was in fact dismissed'. The joint dissenting opinion concluded: 'we find that the reasons put forward by the domestic authorities to justify the non-renewal of the applicant's employment (...) are not sufficient for it to be established that the interference with his right to respect for his private and family life was proportionate.

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<sup>60</sup> ECtHR Grand Chamber Court, *Fernández Martínez v. Spain*, no. 5603/07, decision of 12 June 2014, <http://hudoc.echr.coe.int/eng?i=001-145068>.



On 15 February 2007, the Constitutional Court made a judgment on the constitutionality of the agreement between Spain and the Vatican regarding teachers of religion.<sup>61</sup> By virtue of the 1979 Agreement on education and cultural affairs between the Kingdom of Spain and the Vatican (and its development in the second additional provision of Organic Law 1/1990 on the Education System), teachers of religion in Spanish state schools are hired by means of employment contracts drawn up by the public authorities (regional Governments), but in order to be so employed they require an ecclesiastical declaration of suitability, which is granted by the diocesan bishop according to the Canonical Code and must be proposed by the bishop to the competent public authority. In October 2000, a teacher of religion in the Canary Islands, Ms Galayo, was notified that she would not be given a new contract because she was carrying on a romantic relationship with a man other than her spouse, from whom she had separated. This teacher had been working with an employment contract at various state schools since the academic year 1990/91, on the bishop's proposal. She filed an action for protection of fundamental rights to Social Court 4 of Las Palmas de Gran Canaria.

The judgment dismissing the action (127/2001) stated that 'if the bishop [withdraws] his proposal of the claimant for the post, deeming that she is living in sin and is unsuitable to teach the Catholic religion, he is acting within the scope of his spiritual ministry and pursuant to the rules of the Agreement with the Vatican, with the value conferred thereon by Article 96 of the Constitution, exercising the discretionary power bestowed on him by Article 3 and other related provisions of that Agreement, and cannot be subjected to judicial review except negatively (...) and unless fundamental rights are infringed, but with the special conditions, distinctions and peculiarities of the sphere of education in the Catholic religion'.

The teacher lodged an appeal with the High Court of the Canary Islands. Before making its decision, the court submitted a request to the Constitutional Court for a ruling on the constitutionality of certain articles of the agreement between Spain and the Vatican.

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

1. Regarding bishops' power to assess the conduct of teachers of religion and their 'testimony of Christian life' (as stated in Article 804 of the Canonical Code) before granting an 'ecclesiastical declaration of suitability' and, therefore, proposing the hiring or firing of such teachers, the Constitutional Court stated that 'the religious creed being taught must, therefore, be that defined by each church, community or denomination (...). It follows that the power to judge the suitability of the persons who are to teach their respective creeds rests with these denominations. According to the Constitution, it is permissible for this judgment not to be confined to a strict consideration of the teaching staff's knowledge of dogma or teaching ability, but also to cover aspects of personal behaviour in so far as personal testimony is a defining component of the religious community's creed, to the point of being vital to an aptitude or qualification for teaching, regarded ultimately and above all as a channel and instrument for the transmission of certain values, a transmission in which example and personal testimony are instruments that churches may legitimately regard as essential'.
2. Regarding the right of teachers of religion to effective judicial protection, the Constitutional Court first recalled that, in an earlier judgment (STC 1/1981), it had laid down the exclusive jurisdiction of judges and courts in the civil sphere, and that, in cases such as that of teachers of religion, this judicial protection entails, in the first place, that 'the courts should review whether the administrative decision

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<sup>61</sup> See Constitutional Court Decision 38/2007, 15 February 2007, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/6005>.

was taken in accordance with the provisions of the law'; but, further to this review, the competent courts should also consider if the refusal of the diocesan bishop to propose the person was due to religious or moral criteria determining his/her unsuitability to teach religious education, which criteria are to be defined by the religious authorities according to the right of religious freedom and the principle of religious neutrality of the state, or, on the other hand, if the decision was based on grounds other than the fundamental right of religious freedom and was therefore not covered by this right. Moreover, once the strictly 'religious' grounds of the decision have been established, 'the court should weigh up the conflicting fundamental rights so as to determine what impact the right of religious freedom exercised in the teaching of religion in schools may have on the fundamental rights of workers in their employment relationship'.

This judgment, drawn up by the Constitutional Court President, makes no reference to EU Directive 2000/78, as might have been expected.<sup>62</sup>

The Decision of the Constitutional Court 51/2011 (*Galera v. Ministry of Education and Bishop of Almeria*)<sup>63</sup> adds two new aspects with respect to this doctrine: first, it obliges judges to provide effective judicial protection by finding 'practicable criteria' and the 'proper and required weighting between fundamental rights on conflict' in the case of teachers of the Catholic religion; and secondly, it provides that the civil marriage of a Catholic teacher 'is unrelated with the educational activity.' Therefore, such a factor cannot be justification for laying off such a teacher.<sup>64</sup>

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

In Spain, national legislation provides for an exception for the armed forces in relation to age discrimination (Article 3(4), Directive 2000/78).

The law regulating access to the armed forces (Law 17/1999 of 18 May 1999, on Armed Forces Personnel Regulations) provides (Article 63): 'Entry into military training centres shall be by public competition, [guaranteeing] the constitutional principles of equality, merit and ability (...). Applicants must (among other conditions) (...) be 18 or older, and not have passed the age limits provided in the regulations<sup>65</sup> (...). The tests to be passed

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<sup>62</sup> This was a highly complex judgment that addressed aspects of the right of religious freedom, the principle of the religious neutrality of the state, and effective judicial protection. It was a much-anticipated judgment (as there were 15 other constitutionality issues before the Constitutional Court in very similar cases), and it was highly controversial. It was politically controversial, in that there were favourable statements from the (socialist) Government and the (conservative) Popular Party, and highly critical ones from the United Left party; it was controversial in society (the bishops and Catholic authorities expressed themselves in favour and the trade unions strongly against); and it was legally controversial (with some highly critical statements to the effect that a sphere of religious precedence incompatible with the constitutional state was being permitted, and that teachers of religion could find themselves in a situation of discrimination). The judgment will have notable consequences, as the ordinary courts will now have to decide upon many complaints where teachers of religion have been dismissed. The grounds for such dismissals are normally that the teachers are separated or divorced and are living with another partner or have remarried (as in the case of the complainant whose case gave rise to this judgment), or are not believers, or that they have taken part in strikes or are affiliated to a trade union or a left-wing party. In the former cases, the courts are likely to judge, in keeping with this Constitutional Court doctrine, that the dismissals are fair, but in the latter cases the dismissals should be declared void, <http://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-T-2007-5344.pdf>.

<sup>63</sup> See Constitutional Court Decision 51/2011, 14 April 2011, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/6833>.

<sup>64</sup> The particular situation of teachers of Catholic religion arises because of a difference of treatment between the Catholic religion and other religions in this context. The same problems do not arise for teachers of other religions, because they are subject to the common rules for workers in Spain (the Workers' Statute). This anomaly between religions is a consequence of the agreement between Spain and the Catholic Church (Holy See) of 1979.

<sup>65</sup> Royal Decree 1735/2000 of 20 October 2000, adopting the general regulations on entry and promotion in the armed forces (*Real Decreto 1735/2000, de 20 de octubre, por el que se aprueba el Reglamento General*

in the recruitment systems (...) shall serve to demonstrate the applicants' necessary psychophysical aptitudes'.

In Spain, national legislation does not provide for an explicit exception for the armed forces in relation to disability discrimination.

#### **4.4 Nationality discrimination (Article 3(2))**

##### **a) Discrimination on the ground of nationality**

In Spain, national law includes exceptions relating to difference of treatment based on nationality.

The seventh additional provision of Law 62/2003, entitled 'Non-applicability to immigration law', states that the articles transposing the directives do not affect the regulations provided 'in respect of the entry, stay, work and establishment of aliens in Spain in Organic Law 4/2000'. The apparent justification for this provision is based on Article 3(2) of Directives 2000/43 and 2000/78, but the directives only indicate the exclusion on nationality 'relating to the entry into and residence of third country nationals'. Law 4/2000 establishes the rights and freedoms of foreigners in Spain and regulates the issues of 'work and establishment' that are liable to be affected by the directives.

Law 17/1999 on Armed Forces Personnel Regulations was amended by Law 32/2002 of 5 July in order to allow foreigners to become professional soldiers. This law provides that: 'Foreigners who are nationals of countries legally identified as having special and traditional historical, cultural and linguistic ties with Spain may become professional soldiers'. No complaints have been lodged against this differentiation between Latin Americans and other foreign nationals. Royal Decree 2266/2004 of 3 December 2004 increased the maximum quota of foreign nationals in the professional army and navy to 7 % of the total.

Royal Decree-Law 8/2004 of 5 November 2004, on allowances for those taking part in international peace and security operations, introduced a differentiation on the grounds of nationality that may be discriminatory. This RLD (Articles 1 and 2) recognises the right of 'Spanish' soldiers taking part in such operations to receive allowances. Although an instruction from the Under-Secretariat of the Ministry of Defence issued on 23 December 2004 recognises the right of foreign soldiers in the Spanish army to receive allowances of the same amount as those established for Spaniards, the RLD may be considered to infringe the principle of equal treatment on the grounds of origin or nationality.

In Spain, nationality (as in citizenship) is mentioned as a protected ground in national anti-discrimination law.

The Organic Law on the Rights and Freedoms of Foreigners in Spain and their Social Integration (OL 4/2000) establishes the principle of non-discrimination (Article 2bis), and covers direct (Article 23(1)) and indirect (Article 23(2)) discrimination by nationality (as in citizenship), but with definitions that are not similar to those used in Directives 2000/43 and 2000/78. Moreover, the provision on indirect discrimination refers only to alien 'workers', not to 'persons' as in Directive 2000/43. OL 4/2000 explicitly covers the following fields: education, health, housing, social services and social security, employment (and self-employment) and union membership. The definition of harassment

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*de Ingreso y Promoción en las Fuerzas Armadas*), (BOE, 21 October 2000), sets a minimum age of 23 for entry into the general forces, but the age limit is different for the various corps and scales in the army, and exceptions are provided for those joining the army from other armed corps such as the Civil Guard (Article 16). <http://www.boe.es/boe/dias/2000/10/21/pdfs/A36290-36301.pdf>.

by nationality is not included. OL 4/2000 establishes sanctions for discrimination on the basis of nationality (Article 54).

b) Relationship between nationality and 'racial or ethnic origin'

The Organic Law on the Rights and Freedoms of Foreigners in Spain and their Social Integration (OL 4/2000) (Article 23(2)) treats 'nationality' and 'racial or ethnic origin' as equivalent when prohibiting discriminatory acts 'against a foreign citizen merely because of his condition as such or because he belongs to a particular race, religion, ethnic group or nationality.'

In 2009, the UN Human Rights Committee (UN HRC) published its views, in which it considered that there had been a violation of the International Covenant on Civil and Political Rights by Spain in the case of Rosalind Williams.<sup>66</sup> Mrs Williams, an Afro-American originally from the United States, acquired Spanish nationality in 1969. On 6 December 1992, at Valladolid railway station, a National Police officer asked to see her national identity card. The complainant asked the officer to explain the reasons for the identity check; the officer replied that he was obliged to check the identity of people 'like her', since many of them were illegal immigrants. He added that the National Police were under orders from the Ministry of the Interior to carry out identity checks on 'coloured people' in particular.

The Spanish Constitutional Court, in a judgment of 29 January 2001,<sup>67</sup> justified the police action because it 'applied the racial criterion merely as indicating a greater likelihood that the person concerned was not Spanish', and because 'what might have been discriminatory would have been the use of a criterion [in this case a racial one] with no relation to the identification of persons for whom the law stipulates this administrative measure, in this case foreign citizens'.

On 11 September 2006, Mrs Williams submitted a complaint to the UN HRC. In the examination of the merits of the case, the committee recalled its jurisprudence that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant, but in this case 'the criteria of reasonableness and objectivity were not met'. Accordingly, the UN HRC was 'of the view that the facts before it shows a violation of Article 26, read in conjunction with Article 2, paragraph 3, of the Covenant.' The committee deemed that Spain: 1) was under an obligation to provide the complainant with an effective remedy, including a public apology; 2) was also under an obligation to take all necessary steps to ensure that its officials did not repeat the kind of acts observed in this case; 3) the UN HRC wishes to receive from Spain information about the measures taken; and 4) requested Spain to publish the Committee's views.

Apart from their significance to the parties, the UN Human Rights Committee's views are also very significant in that they call into question the doctrine established by the Spanish Constitutional Court in its judgment of 2001, legitimising the use of the racial criterion as a valid indicator of nationality and as reason to assume that a foreigner's presence in Spain is more likely to be irregular. This judgment from the Spanish Constitutional Court had also been strongly criticised by human rights organisations and prominent jurists in Spain.

In March 2011, the Committee on the Elimination of Racial Discrimination (CERD/C/ESP/CO/18-20, paragraph 10), urged Spain to take effective measures to eradicate the practice of identification checks based on ethnic and racial profiles. Also,

<sup>66</sup> UN HRC Communication No. 1493/2009, *Mrs Rosalind Williams Lecraf v. Spain*, 27 July 2009, [https://www.opensocietyfoundations.org/sites/default/files/decision-en\\_20090812.pdf](https://www.opensocietyfoundations.org/sites/default/files/decision-en_20090812.pdf).

<sup>67</sup> See Constitutional Court Decision 13/2001, 29 January 2001, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/4309>.

the committee recommended that Spain review those provisions that gave rise to interpretations that could be translated into discriminatory arrests and restrictions of the rights of foreign citizens. There has been no follow-up to this CERD view.

#### **4.5 Work-related family benefits (Recital 22 Directive 2000/78)**

##### **a) Benefits for married employees**

In Spain, it does not constitute unlawful discrimination in national law if an employer provides benefits only to those employees who are married.

Collective agreements or employment contracts may establish benefits for married employees, which can expand those established in the General Social Security Act and the Workers' Statute, or they may establish other benefits.

Same-sex couples are entitled to marry with the same rights and duties as opposite-sex couples, including the same work-related benefits (Law 13/2005 amended the Civil Code regarding the right to enter into a contract of matrimony).

In Spain, there is a significant Roma community. Some Roma are married according to their community's own rites. The marriage is solemnised in accordance with Roma customs and cultural traditions and is recognised by that community. Normally, they have the family record book issued to the couple by the Spanish civil registration authorities (*Registro civil*). However, there is no official recognition of Roma marriage. The decision of the ECtHR of 8 December 2009 (case of *Muñoz v. Spain*)<sup>68</sup> highlighted the existence of discrimination against Roma couples in accessing some work-related family benefits, as well as the need for the Spanish Constitutional Court to change its doctrine in this field and to recognise the formal validity of Roma marriage.

##### **b) Benefits for employees with opposite-sex partners**

In Spain, it constitutes unlawful discrimination in national law if an employer provides benefits only to those employees with opposite-sex partners. National law allows an employer to provide benefits that are limited to employees who are married, and this is current practice in some companies. However, it is illegal to limit these benefits to opposite-sex partners or to same-sex partners.

#### **4.6 Health and safety (Article 7(2) Directive 2000/78)**

In Spain, there are exceptions in relation to disability and health and safety, as provided for under Article 7(2) of the Employment Equality Directive.

Law 31/1995 of 8 November 1995 on the Prevention of Occupational Risks provides regulations for the protection of workers such as disabled workers, who are at particular risk from certain hazards. Article 25 of the law states: 'Employers shall specially guarantee the protection of workers who, owing to their personal characteristics or known biological condition, including those with a recognised physical, mental or sensorial disability (i.e. people who have been officially recognised as disabled, with 33 % disability or more), are especially at risk from the hazards involved in their work. To this end, employers must take these aspects into account in hazard assessments and, pursuant thereto, shall take the necessary preventive and protective measures'. The law further states: 'Workers shall not be employed in posts in which, in view of their personal characteristics or known biological condition, or duly recognised physical, mental or sensorial disability, they may put themselves, other workers or other persons connected

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<sup>68</sup> ECtHR, *Muñoz v. Spain* (Application no. 49151/07), 8 December 2009, <http://hudoc.echr.coe.int/eng?i=001-96100>.

to the company in a dangerous situation, or, generally, where they are patently in a temporary condition unsuited to the psychophysical requirements of their respective posts of employment’.

#### **4.7 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)**

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

In Spain, national law provides for a specific exception for direct discrimination on the ground of age. Spanish legislation does not permit general direct discrimination on the ground of age, but the legislation permits differences of treatment based on age for some activities within the material scope of Directive 2000/78. These exceptions must be ‘objectively and reasonably justified by a legitimate aim’ (Directive 2000/78, Article 6). To this effect, each difference of treatment on the ground of age must be expressly stated in a law and must be justified by ‘a legitimate aim’.

##### **a) Justification of direct discrimination on the ground of age**

In Spain, it is possible, in specified circumstances, to justify direct discrimination on the ground of age. The Constitutional Court (STC 78/2004)<sup>69</sup> recognises that the social security system may set an age limit for the modification of the invalidity condition linked to the retirement age.

In the field of social security and employment, there are issues that need to be examined from the perspective of possible discrimination on the ground of age. For some social benefits, age is integral to the benefit itself. For others, age is a factor limiting protection and, as such, benefits cannot be granted fully to all citizens. This second situation may give rise to discrimination. In any event, enough justification is required. The justification cited by the law is normally the difficulty experienced by older workers in re-entering the labour market<sup>70</sup> (Blázquez, 2005).

Some differences of treatment based on age have been annulled by the courts. For example, the Supreme Court<sup>71</sup> annulled the age limit contained in Royal Decree 614/1995 for entering the National Police (which was between 18 and 29 years).

##### **b) Permitted differences of treatment based on age**

In Spain, national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78. However, as pointed out above, these exceptions must be ‘objectively and reasonably justified by a legitimate aim’.

Some of the differences of treatment based on age are linked to the protection against child labour: children under 18 cannot work at night or work overtime, and they are subject to special regulations regarding weekly rest periods (Workers Statute, Articles 6 and 37). Other differences are linked to measures to promote employment: job-training contracts can be agreed with workers aged between 16 and 25 years (Workers Statute, Article 11); and the Youth Guarantee plan provides job-training contracts for people with disabilities under 30 (Law 18/2014, Article 88). Other age differences arise regarding access to some benefits, such as unemployment benefit (to which workers over the age

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<sup>69</sup> See Constitutional Court Decision 78/2004, 29 April 2004, <http://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-T-2004-9909.pdf>.

<sup>70</sup> For example, Royal Decree-Law 5/2013, of March 15 2013, on measures to favour the continuity of working life and promote active aging, <https://www.boe.es/buscar/pdf/2013/BOE-A-2013-2874-consolidado.pdf>.

<sup>71</sup> See Supreme Court Judgment 629/2009, 21 March 2011, <https://www.boe.es/boe/dias/2011/06/06/pdfs/BOE-A-2011-9789.pdf>.



of 55, among others, have access in some circumstances) (General Social Security Act, Article 274).

- c) Fixing of ages for admission or entitlement to benefits of occupational pension schemes

In Spain, national law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by Article 6(2).

National legislation (Article 205 of the General Social Security Act – RLD 8/2015 of 30 October 2015) allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits under it, thus taking up the possibility provided for by Article 6(2).

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

In Spain, there are special conditions set by law for older or younger workers in order to promote their vocational integration, and for persons with caring responsibilities to ensure their protection.

There are many employment policy programmes, detailed in the national employment plans and on occasion funded by the European Social Fund, with participant age limits, normally designed to favour young people under 25 and older workers. For both groups, there are measures to support training and employment in the form of partially subsidised contracts. In the case of young people, the employment measures are work experience contracts, job-training contracts and subsidised contracts of indefinite duration (Royal Decree-Law 6/2016).<sup>72</sup> In the case of older workers, there are subsidised contracts of indefinite duration for people aged 45 to 55 in some cases, and for those aged over 52 in others. There is also a jobseeker's allowance programme for older workers who are at a particular disadvantage in the labour market (Royal Decree-Law 8/2015).<sup>73</sup>

The unemployment benefit system also makes age distinctions. For example, those aged over 52 who have used up their contributory unemployment benefit are entitled to an unemployment allowance until they reach retirement age, and those aged over 45 with family responsibilities (caring responsibilities) who have used up their contributory unemployment benefit are entitled to a variable allowance depending on certain circumstances. 'Active job-seeking income' is granted to those aged over 45 who satisfy certain conditions (Royal Decree-Law 8/2015).

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

In Spain, there are exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training.

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

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<sup>72</sup> Spain, Royal Decree-Law 6/2016, of December 23, on urgent measures to boost the National Youth Guarantee System (*Real Decreto-ley 6/2016, de 23 de diciembre, de medidas urgentes para el impulso del Sistema Nacional de Garantía Juvenil*), <https://www.boe.es/boe/dias/2016/12/24/pdfs/BOE-A-2016-12266.pdf>.

<sup>73</sup> Spain, Royal Legislative Decree 8/2015, of October 30, approving the revised text of the General Law of Social Security (*Real Decreto Legislativo 8/2015, de 30 de octubre, Ley General de la Seguridad Social*), <https://www.boe.es/buscar/pdf/2015/BOE-A-2015-11724-consolidado.pdf>.

There is no general rule establishing a maximum working age, since the provision of the Workers' Statute in 1980, setting a maximum age of 69, was declared unconstitutional by the Constitutional Court in 1981.<sup>74</sup> There is also no maximum age for taking part in vocational training.

The Workers' Statute (RLD 2/2015, Articles 49-56), which regulates dismissal proceedings, applies equally to all workers without distinction of age.

Retirement at 65 is compulsory in the civil service, but civil servants can request an extension to 70 years (RLD 5/2015 of 30 October 2015, on the Civil Service Basic Statute, Article 67).<sup>75</sup> Some public professions, such as judges, prosecutors, bailiffs, notaries or university professors, have special regulations, with compulsory retirement at 70 (For example, Organic Law 6/1985 on the Judiciary of July 1 1985, Article 492).

A Constitutional Court decision (78/2012)<sup>76</sup> has ruled that it is unconstitutional to give preference to applicants under the age of 65 years for the opportunity to open a new pharmacy (was provided for by Basque Parliament Law 11/1994 of 17 June 1994 on Pharmaceutical Management in the Basque Autonomous Community). The Constitutional Court, first, ruled that it was not constitutionally permissible to justify the prohibition contained in the provision concerned by the fact that turning 65 produces a decreased capacity to perform pharmaceutical care; secondly, it could not be determined that the measure met planning and service organisation requirements; and, thirdly, it could not be ascertained that refusal of a licence to pharmacists over 65 years of age constituted a positive action measure aimed at balancing the unfavourable position of people starting out in the profession.

The Supreme Court (Judgment of 21 March 2011)<sup>77</sup> declared Article 7(b) of the rules for the selection process and training of the National Police (approved by Royal Decree 614/1995, of 21 April 1995) to be null. This article provided for a lower limit (18 years) and an upper limit (30 years) to be applied to police selection tests.

In 2015, the High Court of Justice of the Autonomous Community of the Basque Country (Spain) made a request to the CJEU for a preliminary ruling (C-258/15). The request was made in proceedings between Mr Salaberria and the Basque Police and Emergency Services Academy on the latter's decision to issue a notice of competition containing the requirement that candidates for police officer posts should be under 35 years old. Unlike case C-416/13 (*Vital Pérez*), in this case the CJEU judgment of 15 November 2016<sup>78</sup> considered that legislation which provides that candidates for posts of police officers must be under 35 years of age, 'may, subject to the qualification that the referring court should satisfy itself that the information to be obtained from the observations and documents submitted to the Court by the Academy (...) is accurate, be regarded, first, as being appropriate to the objective of ensuring the operational capacity and proper functioning of the police service concerned and, second, as not going beyond what is necessary for the attainment of that objective' (Paragraph 48). Furthermore, 'Since the difference of treatment based on age stemming from that legislation does not constitute discrimination under Article 4(1) of Directive 2000/78, there is no need to examine

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<sup>74</sup> See Constitutional Court Decision 22/1981, 2 July 1981, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/22>.

<sup>75</sup> Spain, Royal Legislative Decree 5/2015 of 30 October 2015, approving the revised text of the Basic Statute of Public Employees (*Real Decreto Legislativo 5/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto Básico del Empleado Público*), (BOE 31 October 2015), <http://www.boe.es/boe/dias/2015/10/31/pdfs/BOE-A-2015-11719.pdf>.

<sup>76</sup> See Constitutional Court Decision 78/2012, 16 April 2012, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/22845>.

<sup>77</sup> See Supreme Court Judgment 2185/2011, 21 March 2011 <http://www.boe.es/boe/dias/2011/06/06/pdfs/BOE-A-2011-9788.pdf>.

<sup>78</sup> CJEU, case C-258/15, *Salaberria Sorondo v. Academia Vasca de Policía y Emergencias*, 16 November 2016, <http://curia.europa.eu/juris/liste.jsf?language=es&td=ALL&num=C-258/15>.



whether it might be justified in the light of Article 6(1)(c) of that directive' (Paragraph 49).

#### **4.7.4 Retirement**

##### **a) State pension age**

In Spain, there is a state pension age, at which individuals must begin to collect their state pensions.

Workers may begin to receive a public contributory pension at the age of 67, provided that the other requirements set out by the law are met (General Social Security Act, Article 205). However, there is a transitional period from a pensionable age of 65, which applied until 2013, to the age of 67, which will apply from 2027. In 2018, the retirement age was 65 (if the worker had contributed for at least 36 years and 6 months) or 65 years and 6 months (if the worker had contributed for less than that period) (General Social Security Act, Seventh Transitional Provision). For non-contributory pensions, the retirement age is 65, and other requirements require to be fulfilled (General Social Security Act, Article 369).

This pension age may be lowered by the Government for those groups or professional activities where the work is of an exceptionally strenuous, toxic, dangerous or unhealthy nature, and where there are high levels of disease or mortality, or in the case of 'disabled persons with a degree of disability equal to or greater than 65 per cent' (General Social Security Act, Article 206). Furthermore, early retirement may be taken from the age of 61, provided that certain requirements specified in the General Social Security Act (Article 207) are met.

If an individual wish to work longer, the pension can be deferred. In this case, the economic value of the worker's pension may be increased up to a maximum of 4 % (General Social Security Act, Article 210).

It is also possible to retire voluntarily before retirement age. People must be at least two years short of retirement age and meet certain requirements established by the General Social Security Act (Article 208). Early retirement leads to a reduction in the economic value of the pension.

An individual can collect a pension and still work. It is possible for someone to have a retirement pension and to keep working part-time or on a self-employed basis if their income is below the official minimum wage (14 payments of EUR 735.90 in 2018)<sup>79</sup> (General Social Security Act, Articles 213, 214 and 215).

The conditions are the same for women and men.

##### **b) Occupational pension schemes**

In Spain, there is a normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements. In 2018 this was 65 (if the worker had contributed for at least 36 years and 6 months) or 65 years and 6 months (if the worker had contributed for less than that period) (General Social Security Act, Seventh Transitional Provision).

If a person wishes to work longer, payments from such occupational pension schemes can be deferred.

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<sup>79</sup> Spain, Royal Decree 1077/2017 of 29 December 2017, setting the minimum wage for 2018 (*Real Decreto 1077/2017, de 29 de diciembre, por el que se fija el salario mínimo interprofesional para 2018*), (BOE, 30 December 2017), <https://www.boe.es/buscar/pdf/2017/BOE-A-2017-15848-consolidado.pdf>.

An individual can collect a pension and still work.

The conditions are the same for women and men.

c) State imposed mandatory retirement ages

In Spain, there are state-imposed mandatory retirement ages for the public sector, but not for the private sector.

The retirement age is voluntary in the private sector. The rule requiring people to retire no later than 69 was declared unconstitutional on the ground of age.<sup>80</sup> Retirement at 65 is compulsory in the civil service, although civil servants may request an extension to 70 (RLD 5/2015, of 30 October, on the Civil Service Basic Statute, Article 67(3)). Some public professions, such as judges, prosecutors, notaries, bailiffs or university professors, have special regulations, with compulsory retirement at 70. Some public civil servants are included in the General System of Social Security. For them, the retirement age is the same as the age of access to the social security retirement pension (RLD 5/2015, Article 67(4)).

The conditions are the same for women and men.

d) Retirement ages imposed by employers

In Spain, national law does not permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally.

After various regulatory changes on this question, the 10th additional provision of the Workers' Statute (RLD 2/2015) states that 'clauses in collective agreements providing for the termination of the employment contract when the worker reaches the normal retirement age specified in the rules of social security are deemed null and void, whatever the extent and scope of these terms'.

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights apply to all workers, irrespective of age, even if they remain in employment after attaining pensionable age or any another age (RLD 2/2015, Workers' Statute).

f) Compliance of national law with CJEU case law

In Spain, national legislation is in line with the CJEU case law on age regarding mandatory retirement.

The CJEU judgment in *Palacios de la Villa v. Cortefiel*,<sup>81</sup> for example, explicitly accepted that Spanish legislation in this field is in compliance with Directive 2000/78/EC (López 2013).

#### 4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

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<sup>80</sup> See Constitutional Court Decision 22/1981, 2 July 1981, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/22>.

<sup>81</sup> CJEU, C-411/05, *Palacios de la Villa v. Cortefiel Servicios*, 16 October 2007, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-411/05>.

In Spain, national law does not permit age, in general terms, to be taken into account in selecting workers for redundancy (RLD 2/2015, Workers' Statute, Article 4(2)). However, in the case of collective dismissals, the Workers' Statute allows for differences between collectives, if it is agreed between the social agents. Article 51(5) establishes that 'Through a collective agreement or agreement reached during the consultation period (which are mandatory and prior to collective dismissal), permanence priorities may be established in favour of groups, such as workers with family responsibilities, older than a certain age or people with disabilities'.<sup>82</sup> These exceptions are reasonable and are justified by the objective characteristics of these groups.

In Spain, national law permits seniority to be considered in selecting workers for redundancy. Collective bargaining agreements may include clauses (agreed between social agents) that recognise seniority for different issues within the company: salary bonus for seniority or in promotions or dismissals, for example.<sup>83</sup> Although not expressly included in Article 51(5) of the Workers' Statute, seniority can be taken into consideration because the list is not exhaustive.

#### b) Age taken into account for redundancy compensation

In Spain, national law provides compensation for redundancy (Workers' Statute, Articles 49-56). Theoretically, such compensation payments are not affected by the age of the worker, but in practice they are, because their level is linked to the length of time that the worker has worked for the company. For example, in case of dismissal for objective reasons, the worker is entitled to a 'compensation of twenty days per year of service' (Workers' Statute, Article 53(1)), or in case of unfair dismissal, the worker is entitled to a 'compensation equivalent to thirty-three days of salary per year of service' (Workers' Statute, Article 56(1)). Years of service must be understood, following the consolidated doctrine of the Social Chamber of the Supreme Court,<sup>84</sup> to mean 'the entire duration of the contractual employment relationship' even in different types of labour contracts.

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

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

In Spain, national law does not include exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

### **4.9 Any other exceptions**

In Spain, there are no other exceptions to the prohibition of discrimination (on any ground) provided in national law.

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<sup>82</sup> These legal provisions do not guarantee that these groups have no-dismissal preferences, since it is necessary that they have been included in the agreements of the social agents.

<sup>83</sup> For example, Collective agreement of Liberty Seguros, Compañía de Seguros y Reaseguros, SA, published in the BOE, 23 January 2019, <https://www.boe.es/boe/dias/2019/01/23/pdfs/BOE-A-2019-777.pdf>.

<sup>84</sup> Supreme Court, Social Chamber, Sentence no. 494/2018, 10 May 2018, <https://www.iberley.es/jurisprudencia/sentencia-social-n-494-2018-ts-sala-social-sec-1-rec-2005-2016-10-05-2018-47818776>.

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

### **a) Scope for positive action measures**

In Spain, positive action is permitted in national law in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation.

The principle of 'positive action' is rooted in the Spanish Constitution: Article 14 formally recognises equality before the law without discrimination on any of the grounds listed in the Constitution, while Article 9(2) requires the public authorities to promote 'the conditions to ensure that the freedom and equality of individuals and of the groups that they form are real and effective'. The positive action required by Article 9(2) should not be regarded only as a 'legitimate exception', but as a guarantee that the principle of equality is to be made effective. In this respect, the Constitutional Court has repeatedly held that affirmative action is not to be seen as discriminatory. Rather, the court has interpreted that actions by public authorities to remedy the employment disadvantage of certain socially marginalised groups are required by a properly understood commitment to equality.

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

In relation to employment, the Workers' Statute (Article 17(2)) stipulates that the Parliament may specify 'exclusions, reservations and preference' in employment for certain groups who are at a disadvantage in the labour market. Article 17(3) states that the Government 'may specify measures of reservation, duration or preference in employment'.

In the educational field, the Organic Law on Education of 2006 stipulates: 'In order to render effective the principle of equality in the exercise of the right to education, the authorities shall develop compensatory actions aimed at persons, groups and territorial regions with unfavourable situations, and provide the necessary economic resources' (Article 80).

In Law 62/2003, which transposes the directives, Articles 30, 35 and 42 regulate positive action. Article 35 deals with discrimination in employment and in relation to occupation, and provides that, 'with a view to ensuring full equality on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, the principle of equality shall not prevent maintaining or adopting specific measures in favour of certain groups in order to prevent or compensate for disadvantages that they may encounter'. Article 42 provides that 'collective agreements may include measures intended to fight against every form of employment discrimination, to encourage equality of opportunity and to prevent harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

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

In the field of disability, there has been a wide range of positive measures since the implementation, in 1982, of Law 13/1982 on the Social Integration of Persons with Disabilities (now replaced by Law RLD 1/2013). The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013) includes such positive action

measures in Articles 67 and 68. The aim of positive action is to grant the necessary assistance and protection to people with disabilities who are more vulnerable,<sup>85</sup> to provide a quota system and other actions in favour of promoting the integration of disabled people into employment, and to promote equality in order to allow the complete personal fulfilment of disabled people and their total social integration (Article 42 of Law RLD 1/2013). The Constitutional Court has recognised the legality of establishing a quota for disabled persons when selecting employees.<sup>86</sup>

The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013) provides a series of positive measures to combat the discrimination suffered by disabled persons. The law defines positive action measures as: 'those specific measures oriented to prevent or compensate for disadvantages caused by disability and to accelerate or achieve *de facto* equality of persons with disabilities and their full participation in the areas of political, economic, social, educational, and cultural work, in response to different types and degrees of disability' (Article 2(g)). Article 67 establishes that:

'1) The public authorities shall take positive action measures to benefit persons with disabilities where there is likely to be a greater degree of discrimination, including multiple discrimination, or a lesser degree of equal opportunity discrimination, such as for women, for children who require more support for the exercise of autonomy or decision making and who suffer more acute social exclusion, and for disabled persons who usually live in rural areas.

2) Also, as part of the official policy of family protection, public authorities shall take positive action measures with respect to families when one of their members is a person with disabilities'.

Article 68 of RLD 1/2013 specifies the content of measures for positive action on the ground of disability; these measures may consist of additional support (economic support, technical support, personal assistance, specialised services, special support and services for communication) or rules, criteria or more favourable practices.

#### b) Quotas in employment for people with disabilities

In Spain, national law provides for quotas for people with disabilities in employment.

The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013) lays out different systems for workplace integration for persons with disabilities. One of them is integration into the ordinary work system by a quota system: at least 2 % of the workforces of public and private companies with 50 or more employees must be persons with disabilities (who have been officially recognised as having at least a 33 % impairment) (Article 42). For the public administration, RLD 5/2015 of 30 October 2015 establishes that 'In offers of public employment a quota will be applied of not less than 7 % of vacancies to be filled by persons with a disability (...) by which 2 % of the staff employed by the state administration will be reached progressively, provided that they pass selection' (Article 59).

Companies have the possibility of avoiding the requirement to reserve quotas for workers with disabilities (by performing various actions specifically provided for in Law RLD 1/2013, Article 42, and Royal Decree 364/2005, of April 8, which regulates the

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<sup>85</sup> Such people with disabilities who are more vulnerable are defined in RDL 1/2013 (Article 67(1)): 'persons with disabilities susceptible to being subjected to a greater degree of discrimination, including multiple discrimination, or to a lesser degree of equal opportunities, such as women, children, who need more support for the exercise of their autonomy or for free decision-making and those who suffer from a greater social exclusion, as well as people with disabilities who habitually live in the environment rural.'

<sup>86</sup> See Constitutional Court Decision 269/1994, 3 October 1994, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/2786>.

alternative exceptional compliance of the reserve quota in favour of workers with disabilities - these measures do not include paying a fee per unfilled quota place) but, if they violate the legal obligation, they can be sanctioned by the Labour Inspectorate with fines of up to EUR 6 250 in total (RLD 5/2000 on Offences and Penalties in Social Matters, Articles 15 and 40). The annual report of the Inspectorate of Labour and Social Security does not provide inspection results in this area. There is no publicly available information regarding the enforcement of the quota in practice.

## 6 REMEDIES AND ENFORCEMENT

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

- a) Available procedures for enforcing the principle of equal treatment

In Spain, the following procedures exist for enforcing the principle of equal treatment: judicial, administrative and alternative dispute resolution such as mediation.

#### Judicial procedure

The Spanish Constitution provides that all fundamental rights are protected by the ordinary courts of law (Article 53). This protection will be made effective, in the first place, by a special preferential and summary procedure that is regulated by the main procedural laws for all types of jurisdiction: civil (Law 1/2000 of 7 January 2000 on Civil Procedure),<sup>87</sup> criminal (Criminal Procedure Law of 14 September 1882, modified by Law 8/2002 of 24 October 2002), labour (Law 36/2011 of 10 October 2011 regulating Social Jurisdiction) or administrative (Law 29/1998 of 13 July 1998 regulating the administrative courts).<sup>88</sup> Moreover, appeals for protection in respect of such rights may be lodged at the Constitutional Court once ordinary proceedings have been exhausted (Organic Law 2/1979 of 3 October 1979 on the Constitutional Court, modified by Organic Law 6/2007 of 24 May 2007). The Organic Law on the Rights and Freedoms of Foreigners in Spain and their Social Integration (OL 4/2000) stipulates that foreigners are entitled to legal aid on the same conditions as Spaniards.

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

When the conflicts are due to an action by the administration that is subject to administrative and not labour law, the jurisdictional branch that is competent is the administrative jurisdiction (*jurisdicción contencioso-administrativa*), which requires the prior exhaustion of whatever administrative procedures there may be, and which is formed by the first-instance and appellate administrative courts (*juzgados y tribunales contenciosos administrativos, en primera y segunda instancia*), and by the administrative chamber of the Supreme Court (*sala de lo contencioso-administrativo del Tribunal Supremo*).

The Supreme Court (*Tribunal Supremo*), the highest instance within the ordinary judiciary, is responsible for judging appeals in order to reconcile contradictory decisions by lower courts. Its decisions are binding and thus constitute a source of law; therefore, its judgments should be followed by the lower courts.

All the cited judicial procedures are binding but are subject to possible appeals to higher courts.

<sup>87</sup> Spain, Law 1/2000 of 7 January 2000 on Civil Procedure (*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*), (BOE, 8 January 2000), <http://www.boe.es/boe/dias/2000/01/08/pdfs/A00575-00728.pdf>.

<sup>88</sup> Spain, Law 29/1998 of 13 July 1998 regulating the administrative courts (*Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso administrativa*), (BOE, 14 July 1998), <http://www.boe.es/boe/dias/1998/07/14/pdfs/A23516-23551.pdf>.

## **Administrative procedure**

There are administrative procedures for civil and social matters that can be used by all victims of discrimination, irrespective of the ground concerned. Victims of discrimination may also appeal to the ombudsmen, at both national and regional level, when the issue concerns acts by public bodies.

In matters of employment and social security, victims of discrimination may appeal to the Employment Inspectorate (Law 42/1997 of 14 November 1997 on the Inspectorate of Labour and Social Security) and in matters of education to the Education Inspectorate (Organic Law 2/2006 of 3 May 2006 on Education). This applies to both employment and education with regard to both the private and public sectors.

The administrative procedures are binding, but can be appealed to the courts.

## **Conciliation procedure**

There are also conciliation procedures for civil and social matters.

As regards employment, Articles 63 to 68 of Law 36/2011 of 10 October 2011 regulating Social Jurisdiction provide a compulsory conciliation procedure, which is to be followed before any judicial appeal is lodged.

The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013) establishes a voluntary system of arbitration to solve conflicts that may arise in matters of equal opportunities and discrimination (Article 74).

Conciliation procedures are not binding.

### **b) Barriers and other deterrents faced by litigants seeking redress**

There are costs and other barriers that may act as deterrents to litigants seeking redress.

In Spain, it is mandatory in a lawsuit (although not in conciliation procedure) to use a lawyer (who defends the individual claimant or defendant) and a solicitor (who represents them and is responsible for all formal issues in court), which significantly complicates the process. Indeed, court proceedings are often long and complex. If the litigants win the action, the judge, following the guidelines established in Article 394 of Law 1/2000 on Civil Procedure, may require the respondent to pay their lawyer's costs.

If the litigants cannot afford a lawyer, they may request a duty lawyer free of charge, as the Spanish Constitution (Article 119) guarantees legal aid for those who 'have insufficient means to litigate.' Legal aid is governed by Law 1/1996 of 10 January 1996 on Free Legal Aid. However, Royal Decree-Law 3/2013 of 22 February 2013, amending the fees regime for the administration of justice and the legal aid system, amended Law 1/1996 and tightened the income and wealth conditions for entitlement to free legal assistance. In addition, this law raised fees significantly for appeals before the courts, which could pose difficulties in securing adequate access to justice, especially in the case of resources for the higher courts.

The costs of legal aid are assumed mainly by the regional Governments (not by the national Government).

In Spanish law, the time period for pursuing proceedings is equivalent to the time limit for submitting legal actions in the different jurisdictions. Therefore, personal actions in civil proceedings must be started within 15 years, unless there is a provision regarding a special time limit (Article 1964, Civil Code). No personal action may be started in civil



proceedings once the aforementioned time limit has expired. In proceedings relating to employment and occupations, time limits for legal actions expire within 20 days, one year or three years, depending on the type of action being taken (Articles 59 and 60 of the Worker's Statute). In administrative court proceedings, the appeal in front of the court must be lodged within two months in all cases, except in cases of implicit (agency) action (*silencio administrativo*) (i.e. when the public administration fails to take action) where the term is of six months, or in cases of irregular material intervention by the administration (*vía de hecho*), where the term expires within 10 or 20 days if there has not been a request from the administration. The day on which these terms start depends on the action in question (see Article 46 of Law 29/1998 Regulating the Administrative Courts). In administrative matters, the terms and conditions are provided by specific laws.

c) Number of discrimination cases brought to justice

In Spain, there are no available statistics on the number of cases related to discrimination brought to justice.

Following the recommendation made by the European Commission against Racism and Intolerance (ECRI) in 2011 on the collection and publication of data on discrimination in Spain, the Spanish Government approved its 'Comprehensive strategy against racism, discrimination, xenophobia and related intolerance' (November 2011), and the Ministry of the Interior approved a 'Protocol of action for the Security Forces for hate crimes and convicts that violate the legal norms of discrimination' (2014). The Ministry of the Interior publishes data on hate crimes and discrimination (the source of the data does not allow differentiation between hate crimes and discriminatory acts); these data cover complaints reported to the police and indicate whether they have been resolved by the police (when the police have been able to identify those responsible, that does not necessarily mean that the individuals were prosecuted and convicted of a hate crime). In 2015, 1 328 complaints were made to the police, 1 272 complaints in 2016, and 1 419 in 2017, of which 859 were resolved. The grounds for the complaints were as follows:

Reason for making a complaint	Complaints			Complaints resolved by police		
	2015	2016	2017	2015	2016	2017
Religion	70	47	103	33	33	62
Disability	226	262	23	168	200	19
Sexual orientation	169	230	271	113	166	204
Racism/Xenophobia	505	416	524	223	254	323
Others	358	317	498	150	164	251
Total	1 328	1 272	1 419	687	817	859

Source: Author's elaboration from statistical yearbooks of the Ministry of the Interior (2015, 2016 and 2017)

In June 2010, the Council for the Elimination of Racial or Ethnic Discrimination launched the Network of Centres of Assistance for Victims of Racial or Ethnic Discrimination, involving seven NGOs. Between March 2013 and December 2013, the network assisted with 376 cases; between March 2014 and March 2015 it assisted with 676 cases; in 2015 it assisted with 222 cases between January and March and between October and December; it assisted with 631 cases in 2016; and with 646 cases in 2017 (see section 7, below).

d) Registration of discrimination cases by national courts

In Spain, discrimination cases are not registered as such by national courts. Consequently, data are not available (apart from the data held by the Ministry of the Interior and by the Council: see previous paragraphs)

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

### **a) Engaging on behalf of victims of discrimination (representing them)**

In Spain, associations/organisations/trade unions are entitled to act on behalf of victims of discrimination.

On racial or ethnic origin, Law 62/2003 (Article 31) provides that 'legal entities legally authorised to defend legitimate collective rights and interests may engage on behalf of the claimant, with his or her approval, in any judicial proceedings in order to make effective the principle of equal treatment based on racial or ethnic origin'. This article means, therefore, the legitimisation of legal entities to engage in civil proceedings and in administrative court proceedings, but not in labour proceedings or in pre-judicial administrative matters. This legitimisation may be interpreted as widening the provisions regulating the procedural defence in Law 1/2000 of 7 January 2000 on Civil Procedure (Articles 11 and 11bis) and in Law 29/1998 of 13 June 1998 Regulating the Administrative Courts (Articles 18 and 19). The legitimisation (in Law 62/2003) only applies, however, in cases of discrimination on the grounds of racial or ethnic origin and only in fields other than employment.

On Disability, the General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013), which applies to access to and the supply of goods and services (telecommunications and the information society, urbanised public spaces, infrastructure and construction, transport, goods and services to the public, relations with public administrations, the administration of justice, cultural heritage) and to employment, provides, in Article 76, that legal entities that are legally authorised to defend legitimate collective rights and interests may engage on behalf of and in the interests of the person who authorises them to do so in proceedings in order to make effective the principle of equal treatment, defending the individual rights of those persons to whom the effects of this engagement will apply. This engagement does not affect the individual standing of victims of discrimination and may be interpreted with respect to its inclusion in pre-judicial administrative proceedings.

Articles 22 and 64 of RLD 1/2013 provide that the law's provisions regarding the safeguard and effectiveness of the measures contained within it have a supplementary character in respect of the provisions that are contained in other specific laws regarding equal treatment in the field of employment and occupation.

In the field of employment, the provisions of the Law on Social Jurisdiction remain in force for the defence of victims of discrimination on all the grounds contained in the directives. Article 20 of Law 36/2011 of 10 October 2011, the Law on Social Jurisdiction, in its regulation of representation and procedural defence, stipulates that trade unions may appear in court on behalf of and in the interests of member workers who authorise them to do so in order to defend their individual rights. However, this only applies to trade unions. Workers who are not members of any trade union may be parties to proceedings by themselves or may confer their representation to the solicitor's agent, to a social worker member of a professional organisation or to any person who is fully able to exercise his/her civil rights – or, if they wish, to a solicitor. The assistance of a lawyer is not mandatory during the pre-judicial proceedings (Article 21(1)).

Legal entities may also act on behalf of victims of discrimination in criminal proceedings. The Criminal Code of 1995 (modified by Organic Law 1/2015), under Articles 314, 510, 511 and 512, provides that crimes of discrimination are punishable by imprisonment and fines (Articles 314 and 510) or by special disqualification from the exercise of public service, a profession etc. (Articles 511 and 512). Article 510 also punishes hate crimes.

Claims in respect of discrimination are normally processed on behalf of and with the authorisation of the victim by an organisation, such as NGOs working with Roma or immigrants, in cases of discrimination on the grounds of racial or ethnic origin, or by organisations working with other groups that may have been discriminated against on the grounds of disability, sexual orientation, age or religion or beliefs. Spanish human rights NGOs are very active in litigating in discrimination cases; most of the cases that arise, both before the courts and before intermediary bodies, are brought through NGOs.

Under national law, the terms and conditions that are required in order for associations to engage in proceedings on behalf of claimants are regular ones. That means that there are no special terms and conditions that must be met for associations to engage in these proceedings.

In order to acquire legal status, trade unions must, according to Article 4 of Organic Law 11/1985 of 2 August 1985 on Trade Union Freedom, be registered with the corresponding public office. According to Article 35 of the Civil Code, public legal entities of public interest and private legal entities do not need to be registered to be considered as constituted legally or in a valid way. With regard to private legal entities, Chapter II of Organic Law 1/2002 of 22 March 2002, which regulates the rights of associations, contains the conditions that such associations must meet in order to be legally constituted. Associations that have been legally constituted have legal status and have the right to register, but they are not obligated to register in the register of associations.

Law 62/2003 and RLD 1/2013 only provide that legal entities must be legally authorised to defend legitimate collective rights and interests in order to be able to engage in proceedings on behalf of the claimant(s) with his/her/their approval. The proof of the authorisation is in their valid constitution according to OL 1/2002. The legitimate interest relates to the victim on whose behalf the association may engage in any judicial procedure (see section d, below, regarding class actions to understand the difference between the legitimisation of associations under Law 62/2003 and Law RLD 1/2013 in order to act on behalf of victims of discrimination and the provisions relating to consumers and users associations under Article 11 of the Law on Civil Procedure).

According to the jurisprudence of the Constitutional Court and the Supreme Court, a legitimate interest may be held by those who find themselves in an individualised legal situation that is different from the legal situation of other citizens with respect to the same matter. 'Legitimate interest' means the capacity of being a party in the proceedings, and it focuses on the existence of a qualified and specific interest that relates to obtaining an advantage or avoiding or eliminating potential harm if the lawsuit filed by the party is upheld by a judgment.<sup>89</sup> Therefore, the upholding of the lawsuit must have legal utility for the claimant.<sup>90</sup> The legitimate interest may be individual or collective, direct or indirect, present or future (if the harm to be avoided or eliminated, and against which the lawsuit has been filed, is imminent), but it must be concrete and true (real). This means that the legitimate interest of a party in the proceedings presupposes that the judgment has had or may have a direct or indirect impact on their legal situation. This impact must be real and not just hypothetical.<sup>91</sup>

Law 62/2003 and Law RLD 1/2013 say only that the entities would need the authorisation of the victims to act on their behalf, but they do not specify the form of the authorisation.

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<sup>89</sup> Supreme Court Judgment, 2733/2003, 4 March 2003.

<sup>90</sup> Constitutional Court Decisions 60/1982 of 11 October 1982 and 7/2001 of 7 January 2001, among others, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/102>; <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/4303>.

<sup>91</sup> Supreme Court Judgment, 873/2003, 11 February 2003.

The same happens in Article 20 of Law 36/2011 on Social Jurisdiction. It appears that the general regulations for all jurisdictions regarding the authorisation of the solicitor's agent and the solicitor to engage in proceedings on behalf of the victim of discrimination may apply to the authorisation of the entities acting to this end, given that such an entity engages in proceedings through a solicitor member of the association, who will act only with the approval of the claimant (see Articles 24 and 25 of Law 1/2000 on Civil Procedure). However, Article 20(2) of the Law on Social Jurisdiction provides that, in the lawsuit, the trade union must prove the membership of the worker and must prove that it has communicated to the member worker its intention to open the proceedings. The authorisation of the worker member will then be presumed, except when there is a statement by the worker denying it.

In cases where obtaining formal authorisation is problematic because the victim lacks the capacity to sue – for example, in the case of minors or persons under guardianship - the general regulations settled in Articles 7 and 8 of Law 1/2000 on Civil Procedure may apply in all jurisdictions (Article 16(4) of the Law on Social Jurisdiction, Article 18(1) of Law 29/1998 Regulating the Administrative Courts). Article 7 of Law 1/2000 on Civil Procedure provides that natural persons who lack capacity to sue must appear at the trial by means of a representative or with the assistance, authorisation or defence required by law. If nobody represents or assists the natural person in appearing at the trial, the court, by judicial order, will designate a defence lawyer to assume representation and defence until there is another person who can assume representation or assistance (Article 8 of Law 1/2000 on Civil Procedure). The authorisation to engage in proceedings on behalf of a victim who lacks capacity to sue will be given by his/her representative or by the person who must assist, authorise or defend him/her in compliance with the law. Only individuals holding a law degree can defend a person in court.

Some civil society organisations are active in this field, are visible and stimulate public discourse on equality, but the number of litigations on discrimination cases is small.

b) Engaging in support of victims of discrimination (joining existing proceedings)

In Spain, associations, organisations and trade unions are not entitled to act in support of victims of discrimination. Article 31 of Law 62/2003 includes the words 'on behalf' ('on behalf of the claimant, with his or her approval'), but not 'or in support', as stated in Article 7(2) of Directive 2000/43. Neither may associations intervene in support of the claimant in civil cases (Law 1/2000, Articles 11 and 11bis).

c) *Actio popularis*

In Spain, national law allows associations, organisations and trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*).

Under Spanish law, *actio popularis* is a constitutional right – not a fundamental right - that must be developed by a law that may limit it. Under Spanish law, *actio popularis* is only possible in criminal proceedings. Nevertheless, there are already many voices in this area who defend the thesis of the exercise of *actio popularis* in administrative court proceedings, and also constitutional jurisprudence, in which this possibility has been recognised. At the moment, outside the criminal law, *actio popularis* in administrative court matters has only been recognised in the case of the Zoning Act of 20 June 2008. However, for the purpose of this report, we shall concentrate only on *actio popularis* in criminal law.

*Actio popularis* in criminal proceedings is provided for under Article 101 of the Law regulating Criminal Procedure. *Actio popularis* may only be exercised against public crimes and, under Spanish law, most crimes, including discrimination crimes, are public.

The Constitutional Court has stated<sup>92</sup> that not only private but also public legal entities may be considered as citizens in order to interpret the possibility of exercising *actio popularis*. Legal entities may therefore exercise *actio popularis* in cases in which discrimination or a hate crime (see above) has been committed.

d) Class action

In Spain, national law does not allow associations, organisations and trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event.

It is not possible for associations to act through a class action in the interest of more than one individual victim of discrimination for claims arising from the same event. Apart from under the provision in Article 11 of Law 1/2000 on Civil Procedure, which allows consumers' and users' associations to take action in the form of a quasi-class action to protect the rights and interests of consumers and users who are members of these associations, as well as to protect the general interests of consumers and users, class actions or other forms of lawsuit similar to them are not allowed in civil proceedings under Spanish law (Carrasco and González 2001).

Although the texts of Article 76 of RLD 1/2013 and Article 31 of Law 62/2003 deal with the defence of legitimate collective rights and interests, and Article 17 of the Law on Social Jurisdiction mentions the possibility of trade unions and employers being authorised to defend their own financial and social interests, this should not be misinterpreted as allowing for the possibility of class actions in civil proceedings as, in all these cases, the wording is very different from the provisions of Article 11 of the Law on Civil Procedure.

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

In Spain, national law requires a shift of the burden of proof from the complainant to the respondent.

The basic law of reference in this field is the Law on Civil Procedure (Law 1/2000). This law regulates the burden of proof in court and provides, as a general rule, that the burden of proof is for the claimant (Article 217(2)) but sets the shift in the burden of proof in certain cases (Articles 217(3), 217(4) and 217(5)). The law also establishes that 'the court shall consider the availability and ease of proof corresponding to each of the parties to the dispute' (Article 217(6)). The reversal of the burden of proof under Law 1/2000 has been qualified by the court, which has stated that this fails to be a real reversal of the burden of proof, as both parties have obligations. That is, once the claimant proves 'the existence of discrimination-founded indications' (i.e. the probability), it is for the defendant to prove 'the justification of the measures adopted and their proportionality'.<sup>93</sup>

In the field of anti-discrimination law, the most important provisions are contained in law 62/2003 and RLD 1/2013:

- General burden of proof on ground of discrimination by racial or ethnic origin: Law 62/2003, which transposes EU Directives 2000/43 and 2000/78 in Spain: 'In those civil and administrative proceedings in which from the facts alleged by the claimant one may conclude the existence of well-founded evidence of discrimination on the ground of racial or ethnic origin, it shall be for the respondent to give an objective

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<sup>92</sup> See Constitutional Court Decision 175/2001, 26 July 2001, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/4471>.

<sup>93</sup> See, for example, the judgment of the Superior Court of Justice of Galicia of 23 November 2012.

- and reasonable and sufficiently proven justification of the measures adopted and their proportionality' (Article 32).
- Burden of proof in the field of employment on ground of discrimination by racial or ethnic origin, religion or belief, disability, age or sexual orientation: Law 62/2003 provides that: 'In those civil and administrative proceedings in which from the facts alleged by the claimant one may conclude the existence of well-founded evidence of discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation (in the employment field), it shall be for the respondent to give an objective and reasonable and sufficiently proven justification of the measures adopted and their proportionality' (Article 36).
  - General burden of proof on ground of discrimination by disability: the General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013) establishes a shift in the burden of proof when there is evidence of discrimination based on disability: 'In those proceedings in which from the facts alleged by the claimant one may conclude the existence of well-founded evidence of discrimination on the ground of disability, it shall be for the respondent to give an objective and reasonable and sufficiently proven justification of the conduct and the measures adopted and their proportionality' (Article 77).
  - National law does not provide clearly for a shift in the burden of proof for claims relating to reasonable accommodation. However, Article 77 of Law RLD 1/2013 could allow a judge to shift the burden of proof if a person with disabilities is claiming the right to reasonable accommodation.

Article 40 of Law 62/2003 amended the existing labour standard procedure at the time, and the current law on social litigation procedure (Law 36/2011) also established a shift in the burden of proof. Article 96 of Law 36/2011 states that: 'In those proceedings in which allegations exist, on the part of the claimant, of indications which are founded in discrimination for reason of sex, racial or ethnic origin, religion or beliefs, disability, age or sexual orientation, it shall rest with the respondent to provide sufficient proof of the objective and reasonable justification of the measures taken and of their proportional nature'. This article is used increasingly widely in employment cases. For example, it began being applied in cases of sexual harassment and bullying when bullying was related to gender; but it now also applies in cases of bullying in general.

There is an important difference in the rules on the burden of proof on different grounds. In the case of discrimination on the grounds of sex, in order for a shift in the burden of proof to be produced, the standard requires only that the claimant's claims are based on discriminatory actions (or omissions/the failure to act, that can be considered discriminatory 'actions') based on sex: '(...) In proceedings in which the plaintiff's claims are based on discriminatory actions based on sex, it is for the defendant to prove the absence of discrimination in the measures adopted and their proportionality' (Article 13 of Organic Law 3/2007 and Article 217(5) of Law 1/2000). However, for all other grounds, anti-discrimination laws require that one may conclude from the facts alleged by the claimant that well-founded evidence of discrimination exists. That is, in cases of discrimination on grounds other than sex, there is a requirement for the claimant to present facts, whereas in the case of discrimination on the ground of sex, it appears from the literality of the law that the courts should always apply a shift in the burden of proof.

The Constitutional Court (CC) has established case law on the burden of proof, which should avoid this potential difference between discrimination based on sex and other grounds of discrimination. The most recent judgment on this matter by the CC (STC 31/2014)<sup>94</sup> recalled its consistent doctrine, and did so on a case of sex discrimination (after the coming into force of OL 3/2007). The CC noted that, in order for a reversal of the burden of proof to occur, it 'is not enough simply for the actor to qualify the measure

<sup>94</sup> See Constitutional Court Decision 31/2014, 24 February 2014, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/23819>.

as a discriminatory measure'; it is also necessary 'to establish the existence of evidence that generates reasonable suspicion, an appearance or a presumption in favour of its claim'. Only then, when the latter happens, the defendant assumes 'the burden of proving the existence of sufficient real and serious reasons to qualify the decision as reasonable' (STC 98/2003).<sup>95</sup>

We should briefly recall what the CC stated in STC 144/2006<sup>96</sup> (and repeated in STC 31/2014): 'Any facts that are clearly indicative of the likelihood of injury of a substantive right, and those that have sufficient entity to reasonably open the hypothesis of an infringement of a fundamental right, will have probative aptitude (...). But they must unavoidably exceed the minimum threshold of that necessary connection, because the claim cannot be based on purely rhetorical arguments or lack of accreditation of core elements for the connection itself with the claim'.

Therefore, it would appear that a literal interpretation of the rules in Spain gives a greater facility for the shift in the burden of proof in sex discrimination (Article 13 of Law 3/2007 and Article 217(5) of Law 1/2000). However, the Constitutional Court (and the Supreme Court) have established a common doctrine as to the rules that should govern the shift in the burden of proof in cases of discrimination on any grounds, and if there has been a violation of fundamental rights.

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

In Spain, there are legal measures of protection against victimisation, but only in the field of employment.

Before the transposition was carried out, the Workers' Statute (Article 55(5)) declared those dismissals that were related to any of the grounds of discrimination that are covered by the Constitution or by the legal system, or which entailed the violation of workers' fundamental rights and freedoms, to be invalid.

Law 62/2003 (Article 37) introduced changes to the Workers' Statute and to Law 5/2000 on Offences and Penalties in Social Matters. The new version of Article 17(1) of the Workers' Statute stipulates the nullity of administrative regulatory provisions, clauses in collective agreements or contracts, agreements or unilateral decisions of an employer that has discriminated on all the grounds of the directives. Furthermore, a new paragraph has been added to Article 17(1), which states that 'the decisions of an employer that amount to adverse treatment of workers as a reaction to a complaint within the enterprise or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination shall likewise be void of effect.'

Similarly, Law 62/2003 (Article 41) introduced modifications to Law 5/2000 on Offences and Penalties in Social Matters. Article 8 of Law 5/2000 contains a list of very serious infractions in the area of employment. With the revision introduced by Law 62/2003, Article 8(12) now covers, in addition to discriminatory decisions, decisions that 'amount to adverse treatment of workers as a reaction to a complaint within the enterprise or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination.'

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

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<sup>95</sup> See Constitutional Court Decision 98/2003, 2 June 2003, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/4873>.

<sup>96</sup> See Constitutional Court Decision 144/2006, 8 May 2006, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/5746>.



There is a full reversal of the burden of proof when victimisation is directed towards a trade union representative if the worker claims 'anti-union conduct' by the employer (STC 2/2009).<sup>97</sup>

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

### **a) Applicable sanctions in cases of discrimination – in law and in practice**

Sanctions have been established in Spain only in the field of employment for all the grounds (RLD 5/2000) and for the ground of disability in all fields (RLD 1/2013), but not in the other fields covered by Directive 2000/43 on grounds of racial or ethnic origin, except in the Criminal Code (Organic Law 10/1995, Article 512, that judges must consider whether can be applied in some cases of discrimination).<sup>98</sup>

Spanish legislation complies only partially with the obligation to establish sanctions against discriminatory acts because it does not do so for all grounds and in all fields. In addition, compensations for victims in the field of disability have been established, but this is not the case for the other fields.

#### *Field of employment in all grounds*

The Law on Offences and Penalties in Social Matters (RLD 5/2000, of 4 August 2000) establishes financial sanctions for offences in employment and social matters by natural or legal persons or by private and public sector employers (when these infractions affect employees in the service of the various tiers of public administration), for employment relations (Articles 5-10) and for employment (Articles 14-17), and it also establishes responsibilities and further sanctions (Articles 39-41). In view of the duty regarding those whose rights are infringed or affected, the RLD sets out three types of seriousness of an offence: 'minor', 'serious' or 'very serious'. The penalties for these three types of seriousness of an offence can be imposed to three different degrees: minimum, average and maximum. The amounts of the sanctions range from a minimum of EUR 60 to a maximum of EUR 187 515. The level of the fine is set in consideration of factors such as negligence and the intention of the offender, fraud or collusion, failure to abide by previous warnings and requests by the inspectorate, business turnover, the number of workers or other persons concerned, harm caused, and quantity defrauded. Additionally, some very serious sanctions are made public.

RLD 5/2000 includes discrimination under all grounds of the directives in employment relations among the 'very serious' infringements: 'unilateral decisions of the employer leading to unfavourable direct or indirect discrimination on the ground of age or disability, or unfavourable or adverse treatment relating to remuneration, working time, training, promotion, and other working conditions, on the grounds of sex, origin, including racial or ethnic origin, marital status, social condition, religion or belief, political ideas, sexual orientation, membership or non-membership of a trade union, adherence to trade union agreements, family ties with other employees, or language of the Spanish State, as well as decisions of the employer leading to unfavourable treatment of the workers as a reaction to a complaint within the enterprise or to any legal proceeding aimed at enforcing compliance with the principle of equal treatment and non-discrimination' (Article 8(12)).

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<sup>97</sup> See Constitutional Court Decision 2/2009, 12 January 2009 <http://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-A-2009-2491.pdf>. The shift in the burden of proof is not applied in all types of victimisation cases.

<sup>98</sup> Spain, Law 62/2003, which transposed the directives, modified Law 5/2000 and the disability law in force at the time (Law 13/1982; replaced by RLD 1/2013) to better comply with the directives, mostly by making it more evident that discrimination on the grounds specified by the directives, including harassment and victimisation, is a very serious infraction.



RLD 5/2000 includes discrimination in employment among the 'very serious' infringements: 'to establish employment conditions, be it through advertisements, broadcasting or in any other way, that amount to unfavourable or adverse discrimination in access to employment on the grounds of sex, origin, including racial or ethnic origin, age, marital status, disability, religion or belief, political ideas, sexual orientation, trade union membership, social condition or language of the Spanish State' (Article 16(2)).

RLD 5/2000 also includes sanctions for harassment as a very serious infringement in the context of employment relations: 'harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation when it takes place within the scope of management authority, whoever the agent may be, provided that, when the employer is aware of it, the latter does not undertake the necessary measures to prevent such infractions.' (Article 8(13bis)).

The sanctions for all these 'very serious' discrimination infringements are fines ranging from EUR 6 251 to EUR 187 515, as qualified in the minimum, average or maximum grade.

The Law on Social Jurisdiction (Law 36/2011) sets out a special procedure for violations of the fundamental rights and civil liberties that are enshrined in the Constitution (Title II, Chapter XI). This procedure covers the acts of discrimination or harassment that are specified in the directives. If the court judgment rules in favour of the claimant in respect of an act of discrimination or discriminatory harassment, the court will declare that act void, will require the previous state of affairs to be restored and will provide for 'reparation of the consequences of the act, including any appropriate compensation' (Article 183). That is, the law requires compensation (reparation and monetary damages) for victims of discriminatory acts, the amount of which is to be set by the court. If the court finds a breach of the reasonable accommodation duty, the court will require the employer to comply with reasonable accommodation and will impose a penalty within the limits set by law.

Moreover, the Criminal Code is applicable. Article 314 provides for 'imprisonment from six months to two years or a fine of 12 to 24 months' (with a daily fee that can range from EUR 2 to EUR 400) for those 'that do not restore a situation of equality in accordance with the law when required to do so or following an administrative penalty, making good any corresponding financial loss' when employers have been convicted for 'serious discrimination in a public or private workplace, against a person for reason of their ideology, religion, beliefs, ethnicity, race or nationality, gender, sexual orientation, family situation, illness or disability, maintenance of legal or workers' union representation, relationship with other company workers, or for use of any official languages of the state of Spain'.

### *Disability*

In addition to the sanctions established on the ground of disability in the field of employment by RLD 5/2000, Title III (Articles 78-88) of the General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013) establishes a system of sanctions for discrimination on the ground of disability in other fields. RDL 1/2013 establishes that 'the right to equal opportunities of persons with disabilities is violated (...) when, due to disability, there are direct or indirect discrimination, discrimination by association, harassment, non-compliance with the requirements of accessibility and of making reasonable adjustments, as well as non-compliance with positive action measures legally established' (Article 63). Consequently, the law defines any infringements of the rights of persons with disabilities as 'administrative offences'. These offences may be 'minor', 'serious' or 'very serious'. The penalties for these three types of offence can be imposed to three different degrees: minimum, average and maximum. Offences are punished with fines ranging from a minimum of EUR 301 to a maximum of EUR 1 million.

The criteria taken into account when setting the level of fine are the offender's intention, negligence, fraud, non-compliance with prior warnings, business turnover and the number of people affected.

RLD 1/2013 states, in general terms, that 'discriminatory acts or omissions that directly or indirectly involve less favourable treatment of the person with a disability in relation to another person who is in a similar or comparable situation' are serious offences (Article 81(3)(a)), and that 'all conduct of harassment related to the disability' is a very serious offence (Article 81(4)(a)).

Failure to comply with quotas or alternative measures for promoting the employment of persons with disabilities is sanctioned with a fine of EUR 626 to EUR 6 250. For any employer that fails to observe the quota of places for disabled workers, the fine increases in line with the number of workers for whom the quota is not met; it can be increased by up to 50 % in cases where five or more disabled workers are affected (RLD 5/2000, Articles 15 and 40). Unlike other labour sanctions, the sanction for breach of the quota for persons with disabilities is not graded, although it can be aggravated by repeated non-compliance.

Since 2015, penalties included in the Criminal Code for various offences are now more serious when they are committed against persons with disabilities: illegal detention (Article 166 of the Criminal Code), prostitution (Article 188), child pornography (Article 189) and abandonment of a child (Article 619).

### *Criminal Code*

Criminal Code (Organic Law 10/1995, 23 November 1995) specifies, as a general aggravating circumstance, the commission of any offence 'motivated by racism, anti-Semitism or any other kind of discrimination relating to the victim's ideology, religion or beliefs, the ethnic group, race or nation to which he belongs, his gender or sexual orientation, or any illness or disability from which he suffers' (Article 22).

The Criminal Code expressly punishes offences against fundamental rights and civil liberties. To accommodate (and transpose) Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OL 1/2015<sup>99</sup> has amended the Criminal Code, in particular Articles 510, 511 and 512, which provide for imprisonment for racist crimes and xenophobia. In line with the Council framework decision, Law 10/1995 on the Criminal Code (reformed by OL 1/2015) defines two different groups of conduct:

- Actions of incitement to hatred or violence against certain groups or individuals because of their membership of a group on racist, anti-Semitic or other grounds related to ideology, religion or belief, family status, membership of an ethnic group, race or nation, national origin, sex, sexual orientation or gender identity, gender, illness or disability; this also includes the development or production of writings that incite racism or discrimination; and acts of denial or glorification of crimes of genocide.
- Acts of humiliation or contempt against such groups or individuals and glorification or justification of crimes committed against them or their members with a discriminatory motivation.

Article 510 of the Criminal Code provides for prison sentences of one to four years and a fine (the fine is calculated as a number of days, which can range from 6 to 12 months,

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<sup>99</sup> Spain, Organic Law 1/2015 of 30 March 2015 amending Organic Law 10/1995 of 23 November on the Criminal Code (*Ley Orgánica 1/2015, de 30 de marzo, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*) (BOE, 31 March 2015), <http://www.boe.es/buscar/pdf/2015/BOE-A-2015-3439-consolidado.pdf>.

with a daily fee ranging from EUR 2 to EUR 400) for any person who publicly encourages, promotes or incites, directly or indirectly, hatred, hostility, discrimination or violence against a group or part of it or against a person because of their membership in it on racist, anti-Semitic or other grounds relating to ideology, religion or beliefs, family situation, its members forming part of an ethnic group or race, their national origin, sex, sexual orientation, gender identity, illness or disability, or for any person 'disseminating defamatory information' about groups with these same characteristics. A person who injures the dignity of people through actions involving the humiliation of, contempt for or the discrediting of any such groups will be punished with imprisonment from six months to two years and a fine of 6 to 12 months. Article 511 provides prison sentences of six months to two years, a daily fine of 12 to 24 months (with a daily fee that can range from EUR 2 to EUR 400) and disqualification from public office or employment for a period of one to three years for 'any individual responsible for a public service who denies the provision of a service to a person entitled thereto on the grounds of his ideology, religion or beliefs, national origin, gender, sexual orientation or family situation or any illness or disability from which he suffers', or where these acts are committed on the same grounds against an association or the members thereof.

If any of these acts are committed by a public servant, they will be disqualified from public office or employment for a period of two to four years. Article 512 stipulates disqualification from the exercise of a profession, trade, industry or business, for a period of one to four years, for 'those who, in the exercise of their professional or business activity, deny the provision of a service to a person entitled thereto on the grounds of his ideology, religion or beliefs, his forming part of an ethnic group, race or nation, his gender, sexual orientation or family situation or any illness or disability from which he suffers'.

b) Ceiling and amount of compensation

Legislation establishes a maximum amount for the fines (EUR 187 515 in the field of employment and EUR 1 million in the field of disability) but does not establish any ceiling for compensation. RLD 1/2013 expressly states that 'compensation or reparation which may give rise to the corresponding claim shall not be limited by a ceiling set a priori' (Article 75(2)).

There is no information available regarding the average amount of compensation awarded to victims of discrimination.

c) Assessment of the sanctions

National law does not comply with the directives because sanctions have been established in the field of employment for all the grounds and for the ground of disability in all fields but have not been established in the other fields covered by Directive 2000/43.

There is no information concerning the extent to which the available sanctions have been shown to be effective, proportionate and dissuasive, as is required by the directives. In the author's opinion, the penalties provided by law are proportionate, but they are neither effective, nor dissuasive. They are proportionate because the laws establish a ranking of offences (minor, serious and very serious) and penalties (minimum, medium and high grade), but they are not effective or dissuasive, because many cases of discrimination and violation of the law still occur, although not all of them reach the courts.

## **7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)**

- a) Body designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

The Spanish body designated for the promotion of equal treatment irrespective of racial or ethnic origin is the Council for the Elimination of Racial or Ethnic Discrimination (*Consejo para la eliminación de la discriminación racial o étnica*) ('the council').

Law 62/2003 of 30 December 2003 on Fiscal, Administrative and Social Measures<sup>100</sup> (Article 33) (as amended by Article 18 of Law 15/2014 of 16 September 2014)<sup>101</sup> established the council. Royal Decree 1262/2007 of 21 September 2007<sup>102</sup> (modified by Royal Decree 1044/2009 of 29 June 2009)<sup>103</sup> regulates its composition, competencies and regulations.

The council is the only body that corresponds to the requirements of Article 13 of Directive 2000/43 (as is explicitly recognised in Law 15/2014). Although it was formally created by Law 62/2003, which came into force on 1 January 2004, it was set up on 28 October 2009 and became operational on that date.

At the end of 2018, the Spanish Parliament discussed the Comprehensive Bill for Equal Treatment and Non-discrimination. The bill set out provisions for the creation of an 'Authority for equal treatment and non-discrimination' (*Autoridad para la igualdad de trato y no discriminación*) ('the Authority'). The Authority would fulfil the requirements of the equality body provided for in the directives. It would be an independent body and the law sets the legal basis for the effective performance of its duties. This includes the functions required by the directives, as well as others, such as mediation, investigation of cases of discrimination on its own initiative, intervention in litigation, training, etc. It is intended that the Authority will have jurisdiction on gender, racial or ethnic, religion or belief, disability, sexual orientation, and age.<sup>104</sup>

In addition to the council (and the Institute for Women and Equal Opportunities, which is recognised as the equality body for matters of gender discrimination), there are two other bodies worth noting:

- 1) Regarding Roma people, Royal Decree 891/2005<sup>105</sup> set up the National Roma Council (*Consejo Estatal del Pueblo Gitano*) 'as a collegiate participatory and

<sup>100</sup> Spain, Law 62/2003, of 30 December 2003, on Fiscal, Administrative and Social Measures (*Ley 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y de orden social*) (BOE, 31 December 2003), <http://www.boe.es/boe/dias/1978/12/29/pdfs/A29313-29424.pdf>.

<sup>101</sup> Spain, Law 15/2014 of 16 September 2014 on rationalisation of the public sector and other measures of administrative reform (*Ley 15/2014, de 16 de septiembre, de racionalización del Sector público y otras medidas de reforma administrativa*) (BOE, 17 September 2014), <https://www.boe.es/boe/dias/2014/09/17/pdfs/BOE-A-2014-9467.pdf>.

<sup>102</sup> Spain, Royal Decree 1262/2007 of 21 September 2007, which regulates the composition, competencies and regulations of the Council for the Elimination of Racial or Ethnic Discrimination (*Real Decreto 1262/2007, de 21 de septiembre, por el que se regula la composición, competencias y régimen de funcionamiento del Consejo para la Promoción de la Igualdad de Trato y no Discriminación de las Personas por el Origen Racial o Étnico*), (BOE, 3 October 2007), <http://www.boe.es/boe/dias/2007/10/03/pdfs/A40190-40195.pdf>.

<sup>103</sup> Spain, Royal Decree 1044/2009 of 29 June 2009 (*Real Decreto 1044/2009, de 29 de junio, por el que se modifica el Real Decreto 1262/2007, de 21 de septiembre*), (BOE, 23 July 2009), <http://www.boe.es/boe/dias/2009/07/23/pdfs/BOE-A-2009-12210.pdf>.

<sup>104</sup> After the cut-off date of this report, on 13.02.2019, the President of the Spanish Government dissolved the Parliament. All bills, including the Comprehensive Bill for Equal Treatment and Non-Discrimination, were withdrawn.

<sup>105</sup> Spain, Royal Decree 891/2005 of 27 July 2005 setting up the National Roma Council (*Real Decreto 891/2005, de 22 de julio, por el que se crea y regula el Consejo Estatal del Pueblo Gitano*), (BOE, 26 August 2005), <http://www.boe.es/boe/dias/2005/08/26/pdfs/A29622-29625.pdf>.

advisory body on general and specific public policy affecting the integral development of the Roma population in Spain' (Article 1). Its overriding purpose is 'to promote participation and cooperation by Roma associations in the development of general policy and the promotion of equal opportunities and treatment for the Roma population' (Article 2). Its functions therefore include 'drawing up opinions and reports on draft legislation and other initiatives related to the council's purposes (...) and that affect the Roma population, and, in particular, the development of regulations on equal opportunities and equal treatment' (Article 3). Of the 40 members forming this council, half are from central Government and the other half are representatives of Roma associations. The council was set up and has been running since 2006. It has no specific budget, as it is an official advisory body. The measures it recommends are to be implemented by other bodies.

- 2) The Forum for the Social Integration of Immigrants (*Foro para la Integración Social de los Inmigrantes*), created by Law 4/2000,<sup>106</sup> is a collegiate consultative, informative and advisory body concerned with the integration of immigrants. It consists of 10 representatives of the public administration, 10 representatives from immigrants' associations and 10 representatives of social support organisations, including trade unions and employers' organisations with an interest and involvement in the field of immigration.<sup>107</sup>

b) Political, economic and social context for the designated body

In June 2018, the socialist party came back into the Government after winning the motion of censure against the conservative Government in Parliament. One of the priorities of the new Government has been to strengthen equality policies and provide political support to the council. The council was without a chair from September 2015 until October 2018 and did not hold any meetings in 2016, 2017, and almost all of 2018. Following the appointment of the new president of the council, two meetings of the full council were held in 2018 (October and December).

The following table shows the cuts to the council's budget between 2014 (EUR 723 000) and 2018 (EUR 483 510). Note, however, that these cutbacks cannot be considered disproportionate given the overall restrictions on the budget of the public administration over these years.

The budget of the council 2014-2018 (current euros):

Items	2014	2015	2016	2017	2018
Assistance service for victims	550 000	500 000	500 000	500 000	482 369
Studies and Reports	100 000	100 000	--	--	--
Personnel	18 000	18 000	18 000	18 000	1 141
Training, meetings and conferences	55 000	55 000	--	--	--
Total	723 000	673 000	518 000	518 000	483 510

It cannot be said that there is any real popular, political, or even academic debate in Spain on equality and diversity, or on the role of the council in the fight against discrimination based on racial or ethnic origin. Only the discussion of the Comprehensive Bill for Equal Treatment and Non-discrimination in the Parliament in the second semester

<sup>106</sup> Spain, Organic Law 4/2000 of 11 January 2000 on the Rights and Freedoms of Foreigners in Spain and their Social Integration (*Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*), (BOE, 12 January 2000), <http://www.boe.es/buscar/pdf/2000/BOE-A-2000-544-consolidado.pdf>.

<sup>107</sup> Spain, Royal Decree 3/2006 of 16 January 2006 on the make-up, competences and procedural rules of the Forum for the Social Integration of Immigrants (*Real Decreto 3/2006, de 16 de enero, por el que se regula la composición, competencias y régimen de funcionamiento del Foro para la integración social de los inmigrantes*), (BOE, 17 January 2006), <http://www.boe.es/buscar/pdf/2006/BOE-A-2006-625-consolidado.pdf>.

of 2018 has made the role of the council and the need to create an Authority for equal treatment and non-discrimination part of the political debate.

c) Institutional architecture

In Spain, the designated body does not form part of a body with multiple mandates. The Spanish council has the sole mandate of combating discrimination on grounds of racial or ethnic origin.

d) Status of the designated body – general independence

i) Status of the body

- As regards its legal status and personality, the council has the following characteristics:
  - it is a collegiate Spanish governmental body;
  - the council is attached to the Ministry of the Presidency, Relations with the Parliament and Equality, but is not part of the ministry's hierarchical structure;
  - its make-up is of a fundamentally governmental nature, as the law states that the council is to be formed by all ministries with responsibilities in the areas referred to by Article 3(1) of Directive 2000/43, with the participation of autonomous regions, local authorities, employers' organisations and trade unions, and other organisations representing interests related to people's racial or ethnic origins. Royal Decree 1262/2007 (modified by Royal Decree 1044/2009) specifies its composition.
- Currently, the council consists of a chair and 28 members. The only person who is appointed specifically to the council as such is the chair, who, as specified in Royal Decree 1044/2009 (Article 4), is appointed by the Ministry of the Presidency, Relations with the Parliament and Equality 'from among persons of widely recognised prestige in the field of promoting equal treatment and combating discrimination on the grounds of racial or ethnic origin. He/she shall be appointed for a term of three years'.

Of the 28 seats on the council, 14 are members of the public administration and 14 are social partners and stakeholders. They are distributed as follows:

- a) Seven members representing central Government, all with the rank of director-general, from the following ministries:
  - 1) Directorate General for Equality of Treatment and Diversity (which is to hold the council's second vice-chair);
  - 2) Ministry of Justice;
  - 3) Ministry of the Interior;
  - 4) Ministry of Education;
  - 5) Ministry of Labour, Migrations and Social Security;
  - 6) Ministry of Health, Consumption and Social Welfare; and
  - 7) Ministry of Development (Secretary of Housing).
- b) Seven members from other tiers of government: four from the autonomous regions and three from local authorities;
- c) Four members from among the social partners: two representing employers' organisations and two representing trade unions;
- d) Ten members representing organisations and associations whose activities are linked to the promotion of equal treatment and non-discrimination on grounds of racial or ethnic origin.

These last two groups of members (social partners and stakeholders) elect the person holding the council's first vice-chair.

The council chair and members' posts are unpaid positions: they receive no remuneration or compensation for the meetings that they take part in. Only travel expenses are paid.

Royal Decree 1267/2007 (Article 9) specifies the reasons for cessation of membership of the council. This article does not affect the chair. It is necessary to distinguish three positions: 1) chair, 2) representatives of the administration and 3) representatives of organisations.

1. Chair: He/she is the only person appointed as such to the council by the Ministry of the Presidency, Relations with the Parliament and Equality. The royal decree does not establish any causes for the removal of the chair of the council. Therefore, the chair may be freely removed by the minister who appointed them with no requirement for any motivation. That is, the Government can dismiss the chair of the council if he/she is not in line with its policies, in particular if he/she specifically expresses dissent over the Government's actions.

2. Representatives of the administration can be members of the council, depending on the positions they hold in the public administration with the rank of director-general. The director-generals are appointed by royal decree by the Council of Ministers on the proposal of the minister of the department. They can be freely removed by the same procedure (Article 18 of Law 6/1997, of 14 April 1997, on the Organisation and Functioning of Central Government). This law does not establish any causes for the removal of a director-general: they may be freely removed by the Government with no requirement for any motivation. That is, the Government can dismiss members of the council who are general directors if they are not in line with its policies.

3. Representatives of organisations can only be dismissed for the reasons expressly provided for in Article 9 of Royal Decree 1267/2007. They cannot be dismissed on the ground of dissent over the Government's actions.

The council cannot be said to have a board or commission, as it is a body in which decisions are taken by a plenary session with the participation of all its members. The council has a non-executive standing committee, which deals with formalities and prepares the council's plenary sessions. It is made up of the chair, the two vice-chairs and a member from each of the four groups of members.

With this set-up, the council cannot be said to be in line with the ECRI general recommendation 2, on specialised bodies to combat racism, xenophobia, anti-Semitism and intolerance at national level of 13 June 1997, and the European Commission Recommendation on Standards for Equality Bodies of 22 June 2018.

- Funding: the resources for the functioning of the council come exclusively from the general budget of the public administration.
- Its power to recruit and manage staff: the council has no capacity to recruit and manage personnel. The council has a secretary's post for a civil servant, held by the head of the Sub-Directorate General for equal treatment and anti-discrimination at the Directorate General for Equality of Treatment and Diversity (Ministry of the Presidency, Relations with the Parliament and Equality). In addition, when necessary, other civil servants belonging to this sub-directorate provide part-time services to the council (secretariat,

coordination of working groups, management outsourcing, technical assistance, preparation of minutes, etc).

- Accountability: the council is accountable before the Ministry of the Presidency, Relations with the Parliament and Equality.

ii) Independence of the body

The set-up provided by Law 62/2003 (Article 33) was very similar to that of some existing governmental consultative bodies. However, Law 15/2014 (Article 18) recognises that the council exercises its functions 'with independence'. Therefore, it may be said that the council can be regarded as independent *de jure*, because it is established as such by a Law (Law 15/2014 amending Law 62/2003).

The council cannot be regarded as independent *de facto*, among other reasons because of the presence of Government representatives among its members: half of its members are formally representatives of the public administration; the seven representing central Government are of the rank of director-general (appointed by the Council of Ministers); these Government representatives are full members of the council with full speaking and voting rights in all areas.

In addition, the council cannot be seen as an independent body in structural terms, for various reasons: it cannot choose its own staff (because the council secretariat is a part of the public administration itself, being a department of the Ministry of the Presidency, Relations with the Parliament and Equality), and it has no infrastructure of its own. It cannot be said that the council conforms to the provisions established in the UN Paris principles (Principles relating to the Status of National Institutions, adopted by General Assembly Resolution 48/134 of 20 December 1993), especially due to two requirements in the 'Composition and guarantees of independence and pluralism': its composition and its lack of infrastructure. Furthermore, the council also does not conform to the European Commission Recommendation on Standards for Equality Bodies of 22 June 2018.

e) Grounds covered by the designated body/bodies

The council has competence only in relation to the ground of racial or ethnic origin. In practice this means that the equality body deals with discrimination against migrants. The council, however, does not treat migrants as a priority issue.

The areas covered by the council are: education, health, benefits and social services, housing, the offer of and access to any goods and services—including access to employment, self-employment and professional practice—affiliation to union or business organisations, working conditions, and the promotion of professional and vocational training (Law 62/2003, Article 33).

f) Competences of the designated body/bodies – and their independent exercise

i) Independent assistance to victims

In Spain, the designated body formally has the competence to provide independent assistance to victims on ground of racial or ethnic origin (Law 62/2003, Article 33, as modified by Law 15/2014, Article 18).



To fulfil this competence, the council has the Network of Centres of Assistance for Victims of Racial or Ethnic Discrimination, under the coordination of Fundación Secretariado Gitano (FSG) and involving seven NGOs (FSG, ACCEM, Cruz Roja Española, Fundación CEPAIM, Movimiento contra la Intolerancia, Movimiento por la Paz, el Desarme y la Libertad and Red Acoge). These NGOs work independently but follow a formal protocol established by the council, handling cases for possible victims of discrimination on request or dealing with situations that have been identified by the NGOs themselves. The next step is assessment of whether there are any 'clear indications' of direct or indirect discrimination (when it has been found that a person or people have been effectively treated 'differently and worse' because of their racial or ethnic origin). If there are any such indications, the recommendations may be 1) negotiation, 2) mediation, 3) legal support, 4) psychological support, or 5) complaint. The performance of the NGOs is not under scrutiny by the council in matters of substance. The NGOs draw funding from the council for these interventions.

The network works on a two-year contract with the Spanish public administration (currently for October 2017-October 2019) and received funding of EUR 482 369 for the period October 2017-October 2018. The network's financial resources and staffing levels appear to be adequate.

The council has a free helpline for victims (900 203 041), and a website is also available: [www.asistenciavictimasdiscriminacion.org](http://www.asistenciavictimasdiscriminacion.org).

*De jure*, the council has the competence to provide independent assistance to victims, but it is difficult to assess to what extent the council is actually exercising this function independently, given the factors mentioned in previous paragraphs (half of its members are Government representatives, and the staff of the council themselves form part of the public administration). The possibility of providing independent legal assistance to victims has been addressed via the Network of Centres of Assistance for Victims of Racial or Ethnic Discrimination.<sup>108</sup>

It is difficult to assess the effectiveness of the council in relation to the 'independent assistance to victims'. The network provides an important service of advising and accompanying victims. The 2018 (January-October) report shows that 280 of a total of 689 cases<sup>109</sup> (41 %) had a 'favourable resolution' (although it is not known what the resolution consists of), and 14 cases (2 %) were settled through a 'resolution' or a 'judicial ruling'.

One indicator that the council is not in fact providing effective assistance to victims is the fact that the vast majority of registered cases do not reach the network at the initiative of the victims but are picked up by experts from the organisations that make up the network. This allows us to make a positive judgment of these organisations (which seek to identify cases of discrimination), while highlighting the ineffectiveness of the council itself.

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<sup>108</sup> This possibility was suggested by Cachón (2009) as a way for the council to provide assistance to victims, as long as the service is suitably managed. If this assistance is provided by these organisations in a way that is not dependent on the public administration, then it can be described as independent.

<sup>109</sup> Of these cases, 561 are new cases of January-October 2018, and 128 are cases pending cases from the previous year.

ii) Independent surveys and reports

In Spain, the designated body has the competence to conduct independent surveys and publish independent reports (Law 62/2003, Article 33 as modified by Law 15/2014, Article 18).

The most recently published study is 'Mapping and Profiling Discrimination in Spain' (December 2014). In it, the perception of discrimination in Spain is analysed using the results of a survey. In the last three years (2016-2018), there have not been any resources to make reports.

It is difficult to assess to what extent the council is actually exercising this function independently. The council can produce analyses and reports with contributions from the various organisations involved. They may be proposed by NGOs or experts independently, but they must be formally approved by the council (and half of whose members are Government representatives).

iii) Recommendations

In Spain, the designated body has competence to issue recommendations on discrimination issues (Law 62/2003, Article 33 as modified by Law 15/2014, Article 18). In addition, Royal Decree 1262/2007 assigns other competences that can also be interpreted as the possibility of making recommendations:

- a) Analyse the regulations in relation to equality of treatment and non-discrimination on ground of racial or ethnic origin, proposing initiatives for their adoption or modification;
- b) Present initiatives and formulate recommendations in relation to plans or programmes to promote equality of treatment and non-discrimination by racial or ethnic origin

The only recommendation to be approved by the council arose in 2015, on the eve of an election campaign. The council approved the recommendation 'Avoid the use of discriminatory, racist or xenophobic discourse in electoral campaigns' (*Evitar el uso de discursos discriminatorios, racistas o xenófobos en las campañas electorales*). This recommendation has not had a major impact.

iv) Other competences

In its definition of the council's functions, Royal Decree 1262/2007 assigns other competences that are not included in the directive. It provides that the council may:

- a) Advise and report on indirect anti-discrimination practices in its various spheres of action;
- b) Promote informative, awareness-raising and training activities and any others that may be required to promote equal treatment and non-discrimination;
- c) Establish information exchange and cooperation relationships with similar international, national, regional or local bodies or institutions; and
- d) Establish cooperation and partnership mechanisms with other bodies, entities and high-level institutions working to defend fundamental rights.

All these functions could be of great interest to the council and could significantly enrich its sphere of action.

Although the launch of the Network of Centres of Assistance for Victims of Racial or Ethnic Discrimination in 2010 and the formal recognition of its independence by Law 15/2014 may have improved the public's understanding of its roles as well as boosting its effectiveness, it appears that the council remains unknown by the general public. According to a report of 2017 of the FRA,<sup>110</sup> Spain's anti-discrimination body is the least well known in the entire EU; as such, its potential for anti-discrimination action is limited.

g) Legal standing of the designated body

In Spain, the designated body does not have legal standing to:

- bring discrimination complaints (on behalf of identified victims) to court;
- bring discrimination complaints (on behalf of non-identified victims) to court;
- bring discrimination complaints ex officio to court;
- intervene in legal cases concerning discrimination, such as *amicus curiae*.

h) Quasi-judicial competences

In Spain, the body is not a quasi-judicial institution.

i) Registration by the body of complaints and decisions

In Spain, the body does not register the number of complaints and decisions (by ground, field, type of discrimination, etc). However, the body does register the number of complaints relating to racial or ethnic origin that have been addressed by the network of assistance centres, which was created by the council in 2010. These data concern 'inquiries received' by the network, both formal and informal (phone calls, emails with questions, items in the newspapers, etc). The data record complaints filed as a 'racist incident' as defined in Recommendation 11 of the ECRI (Paragraph 14): 'any incident which is perceived to be racist by the victim or any other person'.

The data on complaints addressed by the network are available to the public because they are published in the network's annual reports. Cases may be individual (incidents in which a person has felt discriminated against) or collective (incidents in which a group or collective has felt discriminated against). The disaggregation of the data for the last three years can be seen in the following table.

	2016 (January- December)	2017 (January- December)	2018 (January- October)
<i>Total</i>	631	646	561
Individual	381	370	315
Collective	250	276	246

Source: Annual reports of the Network of Assistance Centres of the Spanish Council.

The ethnic group most affected by the complaints addressed by the network in 2018 is the Spanish Roma, followed by immigrants from the Maghreb. There were higher numbers of discriminatory acts in the fields of employment and access to goods and services among individuals, with discriminatory acts via the internet and other media highest among collective complaints (see following table).

<sup>110</sup> FRA (2017), *Second European Union Minorities and Discrimination Survey, Main results*.

Complaints addressed by the network in 2018 (January-October) (last published data) by ethnic or racial origin of the victim and by field of discrimination

	Individual	Collective
Total	315	246
<i>Ethnic or racial origin of the victim</i>		
Spanish Roma	135	156
Maghreb	50	35
Sub-Saharan Africa	40	17
Latin America	48	7
Others	41	31
<i>Field of discrimination</i>		
Access to goods/services	82	36
Education	29	8
Employment	76	33
Media & internet	3	119
Housing	43	26
Health	33	3
Others	49	21

Source: Report of the Network of Assistance Centres of the Spanish Council, 2018 (January-October).

#### j) Stakeholder engagement

The stakeholders are part of the council (Royal Decree 1267/2007)

- Civil society associations: the council is made up of 10 organisations and associations whose activity is related to the promotion of equal treatment and non-discrimination on grounds of racial or ethnic origin: Asociación Comisión Católica Española de Migración; Asociación Rumiñahui Hispano-Ecuatoriana; Comisión Española de Ayuda al Refugiado; Fundación CEPAIM Acción Integral con Migrantes; Cruz Roja Española; Fundación Secretariado Gitano; Movimiento contra la Intolerancia; Movimiento por la Paz, el Desarme y la Libertad; Red Acoge; and Unión Romaní.
- Public bodies: Directorate General for Equality of Treatment and Diversity; Ministry of Justice; Ministry of the Interior; Ministry of Education; Ministry of Labour, Migrations and Social Security; Ministry of Health, Consumption and Social Welfare; and Secretary of Housing.
- Local government entities: Four regional governments are represented at the council: Andalucía; Cantabria; Castilla-La Mancha and Extremadura. The Spanish Federation of Municipalities and Provinces appoints three representatives (from La Solana, the Provincial Council of Valladolid and Alcorcón).
- Trade unions and employee associations: Two trade unions (Unión General de Trabajadores and Comisiones Obreras) and two employee associations (Confederación Española de Organizaciones Empresariales and Confederación Empresarial de la Pequeña y Mediana Empresa) take part in the council.

Membership of the council is formally set out in Royal Decree 1262/2007. Every three years, the civil society organisations, local government entities, trade unions and employee associations that make up the council are renewed. The six organisations that voluntarily take part in the network of assistance centres are especially active: the Fundación Secretariado Gitano, ACCEM, Cruz Roja Española, Fundación CEPAIM, Movimiento contra la Intolerancia, Movimiento por la Paz and Red Acoge.

k) Roma and Travellers

The council may conduct formal general investigations into discrimination against the Roma, but this is not necessarily a priority issue. Among the members of the council, there are two Spanish Roma organisations: the Fundación Secretariado Gitano and the Unión Romaní, which are very active associations in this field. It is noteworthy that the Fundación Secretariado Gitano coordinates the council's Network of Centres of Assistance for Victims of Racial or Ethnic Discrimination.

## **8 IMPLEMENTATION ISSUES**

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

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

Spain has undertaken some campaigns to disseminate anti-discrimination rules. It cannot be said that there have been major campaigns to spread awareness of the anti-discrimination rules that have had significant effects. However, there has been a marked improvement in anti-discrimination awareness, especially in areas such as gender, disability and sexual orientation.

- b) Measures to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78)
  - In the field of disability, the National Disability Council (Consejo Nacional sobre la Discapacidad) was established by the General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013). The council has 15 members representing various bodies within national Government, 15 members representing associations of persons with disabilities of various kinds and four expert advisors. Its functions include the issuing of reports, of a mandatory, non-binding nature, on draft regulations affecting equal opportunities, non-discrimination and universal accessibility. It is therefore a body with powers in the field of equal treatment in employment and occupations in line with Directive 2000/78, implementing the provisions of the directive's Articles 13 and 14. Despite this council's major role in relation to disability in Spain, it does not meet the criterion of being an 'independent mechanism' as provided by Article 33 of the UN Convention on the Rights of Persons with Disabilities.
  - The Forum for the Social Integration of Immigrants, created by Law 4/2000, is a collegiate, consultative, informative and advisory body in the field of immigrant integration. It consists of 10 representatives of the public administration, 10 representatives of immigrants associations and 10 representatives of social support organisations, including trade unions and employers' organisations with an interest and involvement in the field of immigration.<sup>111</sup>
  - The Advisory Commission on Religious Freedom, created by the Organic Law on Religious Freedom (OL 7/1980), aims to review, report on and present proposals with respect to issues relating to the enforcement of the law, religious discrimination being one of these issues. Representatives of churches, denominations and religious communities or federations, appointed by the Ministry of Justice, participate in this body.
- c) Measures to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

Collective agreements between representatives of employers' organisations and trade unions are used to implement the principles of the directives.

On 30 January 2003, representatives of the Spanish Confederation of Employers' Organisations (CEOE), the Spanish Confederation of Small and Medium-Sized Companies

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<sup>111</sup> This body is regulated by Royal Decree 3/2006 of 16 January 2006 on the make-up, competences and procedural rules of the Forum for the Social Integration of Immigrants.

(CEPYME) and the trade unions, Comisiones Obreras (CCOO) and the Unión General de Trabajadores (UGT), signed the Multi-industry Agreement for Collective Bargaining 2003 (ANC 2003). This agreement set out the criteria to serve as guidelines at the various levels of collective bargaining in Spain in 2003, and it was renewed for subsequent years until the agreement for 2018-2020. Chapter V (entitled 'Criteria relating to employment, internal flexibility, professional qualification and equal treatment in employment') contains sections on 'Equal treatment in employment', as 'The situation in employment and unemployment is uneven. Certain groups of workers have greater difficulty in finding work, either because of socio-cultural factors or prejudices or because of labour market conditions'.

Collective bargaining should help to remedy any inequality through the application of the principle of equal treatment as expressly provided for in employment law, and through the promotion of specific actions aimed at eliminating direct or indirect discrimination. The general clauses on equal treatment in collective agreements are appropriate instruments for helping to combat possible discrimination.

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

Although it would be necessary to analyse collective negotiations in various sectors and companies to see how the ANC is being implemented, the inclusion in the ANC of the anti-discrimination clause in line with Article 11(2) of Directive 2000/43 must be described as positive.

For the period 2018-2020, the social partners have signed the Fourth Agreement for Employment and Collective Bargaining.<sup>112</sup> The agreement includes among the objectives of collective agreements 'compliance with the principle of equal treatment and non-discrimination in employment and working conditions, as well as the promotion of equal opportunities between women and men'. Although the only explicit reference relates to discrimination on the ground of sex, the clause can be applied to other grounds of discrimination.

#### d) Addressing the situation of Roma and Travellers

The National Roma Council has been appointed at a national level specifically to address Roma issues (see section 7 of this report).

The Roma Development Plan, which was adopted each year from 1989 to 2013, was a programme of action for social development and for the improvement of the quality of life of Roma in Spain. The 'National Roma Integration Strategy in Spain 2012-2020' derives from COM(2011)173. The strategy relates to four key areas for social inclusion: education, employment, housing and health. In each of these, targets have been set. In addition, the strategy provides complementary lines of action in social action, participation, improving knowledge about the group, women's equality, non-discrimination, promotion of culture and special attention to Roma who have come from other countries. Since the adoption of the 'National Roma Integration Strategy in Spain 2012-2020', the Government has approved two operative plans: for 2014-2016, and for

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<sup>112</sup> Spain, Resolution of 17 July 2018 on the Directorate General of Employment, for the recording and publishing of the IV Agreement for Employment and Collective Negotiation (*Resolución de 17 de julio de 2018, de la Dirección General de Trabajo, por la que se registra y publica el IV Acuerdo para el Empleo y la Negociación Colectiva* (BOE, 20 June 2015), <https://www.boe.es/eli/es/res/2018/07/17/1>).

2018-2020.<sup>113</sup> This operational plan also had four key areas of action: education, employment and economic activity, housing, and health.

There is neither an official report on the situation of Roma in Spain in recent years, nor has there been an evaluation of policies to improve their living and working conditions or to combat discrimination affecting them in different areas of social life (work, home, etc). However, two very important aspects can be noted. First, there has been increasing poverty and unemployment among the Roma during the great recession, due to the implementation of austerity policies in the European Union and Spain (FSG, 2013), although the situation has probably improved slightly since 2013. Secondly, a significant number of Roma from Romania have arrived in Spain.<sup>114</sup> This group of recent Roma immigrants has settled in Spain under the intra-EU human mobility framework. Even if they are included in the measures of the triannual Roma operative plan, in general, this recent group of Roma immigrants face worse living and working conditions than Spanish Roma. Although there have not been any social tensions associated with the Roma of Romania in Spain, as has been the case in other EU countries, there have been some cases of discriminatory acts.

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

### **a) Mechanisms**

In Spain, there has been no explicit transposition of Article 14 of Directive 2000/43 and Article 16 of Directive 2000/78, because Law 62/2003, which transposed the directives into Spanish legislation in 2003, did not explicitly include the transposition of these two articles. However, Article 14 of the Spanish Constitution and its sustained interpretation by the Constitutional Court are sufficient to guarantee the legal protection required by the two directives.

Article 14 of the Spanish Constitution declares the general principle of equality and non-discrimination: 'Spaniards are equal before the law and may not in any way be discriminated against on the grounds of birth, race, sex, religion, opinion or any other condition or personal or social circumstance'. The doctrine of the Constitutional Court on equal treatment and non-discrimination has been forcefully reiterated (STC 41/2006; 144/2006; 31/2014). In addition, the Constitutional Court has reiterated that ordinary courts must take EU law into account when applying Spanish rules (STC 64/1991; 58/2004; 329/2005).

In the field of employment, the Workers' Statute establishes the principle of equal treatment and non-discrimination in relation to all grounds of Directive 2000/78 (as well as on the grounds of racial or ethnic origin). Article 4(2.c) of the Workers' Statute provides that workers have the right

'not to be directly or indirectly discriminated against for employment, or once employed, for reasons of sex, marital status, age (...), racial or ethnic origin, social status, religion or convictions, political ideas, sexual orientation, affiliation or not to a union, as well as by reason of language, within the Spanish State. Nor can they be discriminated against because of disability, provided they are in a position to perform the job or employment in question.'

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<sup>113</sup> Ministry of Health, Social Services and Equality, 'National Strategy for the Social Inclusion of the Roma Population 2012-2020 Operational Plan 2018-2020' (*Ministerio de Sanidad, Servicios Sociales e Igualdad, 'Estrategia Nacional para la Inclusión Social de la Población Gitana 2012-2020 Plan Operativo 2018-2020'*), [https://www.mscbs.gob.es/ssi/familiasInfancia/PoblacionGitana/docs/PlanOperativo2018\\_20PG.pdf](https://www.mscbs.gob.es/ssi/familiasInfancia/PoblacionGitana/docs/PlanOperativo2018_20PG.pdf).

<sup>114</sup> On 31 December 2018, 1 054 458 Romanian citizens resided in Spain; a significant proportion of them are Roma, but it is impossible to specify the amount because there is no official record that reflects the population's ethnicity; only nationality is registered.



The text of this article of the Workers' Statute can be considered to respond to the requirements of Article 16(1) of Directive 2000/78 regarding laws, regulation and administrative provisions (and Article 14(1) of Directive 2000/43, but only in relation to employment).

Article 17(1) of the Workers' Statute declares the regulation precepts, clauses of collective agreements, individual pacts, and unilateral decisions of discriminatory employers to be 'null and void'. This article can be considered to comply with the requirements of Article 16(2) of Directive 2000/78 in relation to contractual clauses in employment.

b) Rules contrary to the principle of equality

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

## **9 COORDINATION AT NATIONAL LEVEL**

Although the transposition of European directives is the responsibility of the Ministry of Justice under the coordination of the Ministry of Foreign Affairs, the department that drew up the texts transposing Directives 2000/43 and 2000/78 was the Ministry of Labour and Social Affairs (Directorate General for Labour).

The department responsible for implementing anti-discrimination policies is the Directorate General for Equality of Treatment and Diversity, a directorate general of the Secretary of Equality in the Ministry Presidency, Relations with the Parliament and Equality. This department has a general duty to monitor the implementation of the two directives (independently of the duties of other ministerial departments in their respective fields). The directorate general is also responsible for developing regulations applicable to the Council for the Elimination of Racial or Ethnic Discrimination.

The department responsible for implementing policies to support persons with disabilities is the State Secretariat for Social Policy, in the Ministry of Health, Consumption and Social Welfare. Most of the anti-discrimination issues covered by this report come under this department's remit. However, we should note that there are other departments with responsibilities in matters of racial or ethnic discrimination, both in ministries and in other tiers of government, such as the autonomous communities and town councils.

### **Anti-racism and anti-discrimination National Action Plan**

On 4 November 2011, the Spanish Government approved the 'Comprehensive strategy against racism, discrimination, xenophobia and related intolerance' (still in force in 2018). In addition to drawing together various actions already included under Government plans, the strategy contains some compromises sought by ECRI (but not others). The strategy includes four blocks of activities: analysis, information systems and criminal legal action on racism, racial discrimination, xenophobia and related intolerance; promotion of institutional coordination and cooperation with civil society; prevention and protection for the victims of racism, racial discrimination, xenophobia and related intolerance; and specific areas (including education, employment, health, housing, media, internet, sports, and awareness) (see Cachón 2012). In 2015, the Government published its 'Report on the evaluation and monitoring of the comprehensive strategy against racism, racial discrimination, xenophobia and related intolerance'. There are no more recent evaluation reports of the plan.

## 10 CURRENT BEST PRACTICES

### 1. Public support plans for Roma (racial or ethnic origin in all fields)

The National Roma Council (Consejo Estatal del Pueblo Gitano) is a participatory and advisory body on general and specific public policy affecting the integral development of the Roma population in Spain. Its overriding purpose is to promote participation and cooperation by Roma associations in the development of general policy and the promotion of equal opportunities and treatment for the Roma population. Of the 40 members forming the council, half are from central Government and the other half are representatives of Roma associations. The council has been running since 2006, and has reported on various Government projects, such as the annual Roma development plan (from 1989 to 2013) and the 'Roma Operative Plan 2018-2020'.

The Roma development plan (until 2013) and the Roma operative plans for 2014-2016 and 2018-2020 have put in place a programme of action for social development and for the improvement of the quality of life of Spanish Roma. The objectives are: to improve the quality of life of the Roma population and implement the principle of equal opportunities in their access to systems of social protection; to encourage Roma participation in public and community life; to promote better coexistence among different social and cultural groups; to strengthen Roma associations; and to combat discrimination and racism towards the Roma (see sections 5(b), 7(a), and 8.1 of this report).

### 2. Sign languages and speech aid systems

Law 27/2007 Recognising Sign Languages and Speech Aid Systems recognises Spanish Sign Language as the language of those deaf persons in Spain who freely decide to use it, along with the learning, knowledge and use thereof. It also provides and guarantees support for communication by deaf, hearing-impaired and deaf-blind persons. This law, apparently the first of its kind in Europe, responds to a long-standing demand from Spanish associations representing deaf, hearing-impaired and deaf-blind persons. Its aim is to facilitate access to information and communication by deaf persons, taking into account their heterogeneity and their specific needs (see section 5(a) above).

### 3. National Disability Council (disability in all fields)

The National Disability Council (Consejo Nacional sobre la Discapacidad) was established by the General Law on the Rights of Persons with Disabilities and their Social Inclusion (RLD 1/2013). The council has 15 members representing various bodies within national Government, 15 members representing associations of persons with disabilities of various kinds and four expert advisors. Its functions include the issuing of reports, of a mandatory, non-binding nature, on draft regulations affecting equal opportunities, non-discrimination and universal accessibility. The council has played an important role in the formulation of the Spanish legislation on disability (see section 7(a) above).

### 4. The Comprehensive Law on the rights of gay and lesbian persons in the Region of Catalonia, Spain (sexual orientation)

Law 11/2014 of 10 October 2014 for Guaranteeing the Rights of Lesbian, Gay, Bisexual, Transgender and Intersex People and Eradicating Homophobia, Biphobia and Transphobia is a Catalan Law that establishes the conditions under which their rights are real and effective; facilitates their participation in 'all areas of social life' (the law establishes specific intervention measures in the following areas: education, culture, free time and sport, media, health, social action, public order and deprivation of liberty, participation and solidarity, and labour market); and contributes to overcoming stereotypes that negatively affect the social perception of these persons. The law has been designed as a

comprehensive law, inspired by Directive 2000/78, but going it. The law has been prepared with significant collaboration and consensus between associations in this field, and it has contributed considerably to raising the level of awareness of rights within the LGBTI community in Spain (see section 2.1.1 above).

## 11 SENSITIVE OR CONTROVERSIAL ISSUES

### 11.1 Potential breaches of the directives

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

- The provision prohibiting direct discrimination does not provide for past and hypothetical discrimination.
- There are two differences in relation to Article 2(2)(b) of the directives. The first is that the directives refer to a 'provision, criterion or practice', whereas the Spanish law (Law 62/2003) refers to a 'legal or administrative provision, a clause of a collective agreement or contract, an individual agreement or a unilateral decision'. All these situations are referred to as a 'provision', and the words 'criterion or practice' are not included. The second difference is that the directives say 'persons' in the plural, whereas the Spanish transposition says 'person' in the singular. Judicial intervention can correct those two legislative shortcomings.
- The words 'hostile' and 'degrading' are not included in the Spanish definitions of harassment. Judicial intervention can correct this legislative shortcoming.
- Law 62/2003 does not specify how indirect discrimination is to be justified.
- The seventh additional provision of Law 62/2003, entitled 'Non-applicability to immigration law', states that the articles transposing the directives do not affect the regulations provided 'in respect of the entry, stay, work and establishment of aliens in Spain in Organic Law 4/2000'. The apparent justification for this provision is based on Article 3(2) of Directives 2000/43 and 2000/78, but the directives only indicate the exclusion on nationality 'relating to the entry into and residence of third country nationals'. Law 4/2000 establishes the rights and freedoms of foreigners in Spain and regulates the issues of 'work and establishment' that are liable to be affected by the directives.
- Although Section 2 of Chapter III of Title II of Law 62/2003 states that 'the aim of this section is to establish measures to ensure that the principle of equal treatment and non-discrimination on the grounds of racial or ethnic origin is real and effective in education, health, social benefits and services, housing and, in general, the supply of and access to goods and services', neither this section of Law 62/2003 nor any other part of it provides any such measures to make the principle of equal treatment 'real and effective' because they do not establish any system of sanctions.
- The principle of protection against victimisation is transposed, but only in the field of employment.
- Sanctions have been established only in the field of employment (Directive 2000/78), but not in the other fields covered by Directive 2000/43 for discrimination on the grounds of racial or ethnic origin. Law 47/2007 on Offences and Sanctions in the Field of Equality for Persons with Disabilities establishes sanctions in all fields for discrimination on the ground of disability. Judges must consider whether Article 512 of the Criminal Code (Organic Law 10/1995) could be applied and must decide whether some fields should be included in the concept of 'a benefit' (*una prestación*), mentioned in the Criminal Code.
- Law RLD 1/2013 (Article 4(2)) provides that 'Persons who have been recognised as having a degree of disability equal to or greater than 33 % shall be considered as persons with disabilities'. This state of affairs must be recognised by an official body, and it could be argued that this point is in breach of Directive 2000/78, which makes no such provisions. This restricted definition of 'persons with disabilities' applies to all common legislation, and also applied for the purposes of recognising the right to reasonable accommodation.

## 11.2 Other issues of concern

- The directives were transposed into national law with no dialogue either with the social partners or with the NGOs. This led to a formal transposition with shortcomings and difficulties of application in some cases, due to a lack of sanctions (except in the field of employment and on the ground of disability, in which there are sanctions). This legislation based on the directives is not well known or understood by the main players in the legal system. This is one of the main reasons why there have been hardly any proceedings in Spain in which these provisions have been applied. The author of this report has previously described the process as a 'hidden transposition' (Cachón 2004).
- The effectiveness of the Council for the Elimination of Racial or Ethnic Discrimination is questionable, because it is made up primarily of Government representatives. This could jeopardise the independence of the council (although this is formally recognised by the law). The council lacks a strategy.
- Given the dispersion of the norms on (shifting) the burden of proof, the differences in their definitions and the jurisprudence of the Constitutional Court, it would be appropriate to merge the definitions into a single legal text.
- In the last few years, notable progress has been made with significant legal innovations in the fields of disability (RDL 1/2013 to incorporate the International Convention on the Rights of Persons with Disabilities) and sexual orientation (the incorporation of homosexual, lesbian and bisexual people within the general laws of non-discrimination and the law of homosexual marriage have made these persons enjoy better rights of equality; in addition, some regions have approved specific standards of support for the population LGBTI). However, this legal progress has not been accompanied by actual changes in behaviour in society or in discriminatory practices, although there has been progress.
- The situation of teachers of religion in state schools. This issue is difficult to resolve because the international agreement between the Holy See and Spain signed in 1976, just before approval of the present Spanish Constitution, is still in force.

At the beginning of 2011, the Spanish Socialist Government presented a general equality bill that sought to fill the existing gaps in anti-discrimination law in Spain. But the decision of the Prime Minister to hold early elections suspended the work of the Parliament and the bill could not be approved. On 10 March 2017 the socialist parliamentary group presented a bill<sup>115</sup> similar to the bill of 2011. In June 2018, the socialist party came back into the Government after winning the motion of censure against the conservative Government in Parliament. One of the priorities of the new Government has been the strengthening of equality policies-

The Comprehensive Bill for Equal Treatment and Non-discrimination has three main features: it provides guarantees for individuals, by introducing mechanisms to ensure the exercise of rights; the law is general and redresses deficiencies and imbalances between various fields; and it is comprehensive because it covers all grounds and fields.

The preliminary title of the bill covers all grounds set out in Article 14 of the Spanish Constitution (SC). More specifically, it lists the grounds covered by European directives (gender, race or ethnic origin, age, disability, religion or belief and sexual orientation), and also adds disease and gender identity and 'any other personal or social condition or circumstance'. The bill explicitly refers to all fields of Directives 2000/43 and 2000/78.

Title I of the bill contains two chapters. The first chapter provides definitions of all the discrimination concepts in a manner consistent with the directives (including direct and indirect discrimination, harassment, discrimination by association). The bill includes and

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<sup>115</sup> Comprehensive Bill for Equal Treatment and Non-discrimination (*Proposición de Ley integral para la igualdad de trato y la no discriminación*) [http://www.congreso.es/public\\_oficiales/L12/CONG/BOCG/B/BOCG-12-B-97-1.PDF#page=1](http://www.congreso.es/public_oficiales/L12/CONG/BOCG/B/BOCG-12-B-97-1.PDF#page=1).

defines multiple discrimination ('when various causes of those provided in this law are combined or interact, generating a specific form of discrimination') and discrimination by mistake ('discrimination by mistake is founded on an incorrect assessment of the characteristics of the discriminated person'). The second chapter regulates the prohibition of discrimination in various areas: employment and work, education, health, social services, housing, and access to goods and services offered to the public. It also governs equal treatment in the field of media and advertising.

Chapter I of Title II establishes measures relating to judicial protection and administrative action against discrimination, offering the possibility for declaration of invalidity, termination, repair, prevention, compensation of material and moral damage. Rules regarding burden of proof are also provided in accordance with the directives. The bill legitimates the participation of anti-discrimination organisations in civil, administrative and social procedures. Public authorities are under the obligation to act when they have knowledge of an act of discrimination. Chapter II establishes the authorities' mandate to promote the right to equal treatment and non-discrimination by establishing, for example, the obligation to develop a 'National Strategy for Equal Treatment and Non-discrimination' and to develop affirmative action. In addition, it sets out the duty for public authorities to collect and systematise statistical data.

Title III creates the Authority for equal treatment and non-discrimination (Autoridad para la igualdad de trato y no discriminación) ('the Authority'). The Authority fulfils the requirements of the equality body provided for in the directives. It would be an independent body and the law sets the legal basis for the effective performance of its duties. These include the functions provided for by the directives but also others, such as mediation, investigation of cases of discrimination on its own initiative, intervention in litigation, training, etc. It would have jurisdiction on all grounds of discrimination. This implies that the two existing bodies (regarding racial and gender discrimination, respectively) would disappear or change their functions. The head of the Authority would be appointed by the Government for six years and cannot be removed (except for the specific reasons defined in the law). Public administrations and individuals would have a duty to collaborate with the Authority in its investigations on potential situations of discrimination. The bill also establishes the participation in the Authority of organisations with social interests, public bodies and associations for the defence of equal treatment. The design of the authority presented by the bill responds appropriately to the Paris principles relating to the status of national institutions.

Title IV establishes the regime for infractions and sanctions, addressing one of the main breaches of the directives in Spain, which was that there were sanctions laid down in the field of employment only for racial/ethnic origin and in all fields for gender and disability.

The bill is of great importance because it operates a correct transposition of the two non-discrimination directives, includes new grounds of protection (such as disease and gender identity), includes elements of the proposal for a horizontal directive, creates an equality body for all grounds and in all fields that is independent, which can be effective and has functions larger than those required by the directives, and sets infractions and sanctions against any discriminatory act.<sup>116</sup>

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<sup>116</sup> After the cut-off date of this report, on 13.02.2019, Parliament rejected the draft General State Budget presented by the Government and as a result, the President of the Government dissolved the Parliament. All bills, including the Comprehensive Bill for Equal Treatment and Non-Discrimination, were withdrawn. As of the end of July 2019, a Government has not yet been established as a result of the general elections held on the 28 April 2019. Therefore, the previous Government remains in office and legislative activity is virtually paralysed.

## 12 LATEST DEVELOPMENTS IN 2018

### 12.1 Legislative amendments

There have been no legislative developments in 2018.

### 12.2 Case law

**Name of the court:** CJEU and Social Court 1, Cuenca, Spain (Juzgado de lo Social No 1 de Cuenca).

**Date of decision:** 18 January 2018 (CJEU) and 7 March 2018 (Spanish Court)

**Name of the parties:** *Ruiz Conejero v Ferroser*

**Reference number:** C-270/167 (CJEU) and 171/2018 (Spanish Court)

**Address of the webpage:**

<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-270/16>

<http://ignasibeltran.com/wp-content/uploads/2018/03/SJS-1-Cuenca-7.3.18-Ruiz-Conejero..pdf>.

**Brief summary:** The claimant (Ruiz Conejero) was employed as a cleaner in Ferroser Servicios Auxiliares SA. He was dismissed in 2015 by his employer following several periods of sickness absences from work. In 2014, the claimant had been recognised by the competent authority as having a disability. The claimant has never informed his employer of this fact. According to the diagnosis of the Public Health Medical Services, the health problems that led to the recognition of the claimant's disability were the cause of his absences from work. The claimant does not dispute the truth or the accuracy of his absences, but he claims that there is a direct link between those absences and his disability.

Social Court 1, Cuenca, Spain, decided to submit a preliminary ruling to the CJEU. The question was:

'Does Directive 2000/78 preclude the application of a provision of national law under which an employer is entitled to dismiss an employee on objective grounds for intermittent absences from work, even if justified, which amount to 20 % of the employee's working hours in two consecutive months, provided that the total absences in the previous 12 months amount to 5 % of working hours or 25 % of working hours in four non-consecutive months within a 12-month period, in the case of an employee who must be treated as disabled within the meaning of the directive when his absence from work was caused by his disability?'

Social Court 1 of Cuenca said that workers with disabilities are more exposed to the risk of being dismissed under Article 52(d) of the Workers' Statute than other workers, whether the employer has knowledge of the disability or not. There is a difference in treatment involving indirect discrimination based on disability within the meaning of Directive 2000/78 and that difference in treatment cannot be objectively justified by a legitimate aim. The referring court therefore considers that Article 52(d) of the Spanish Workers' Statute is contrary to Directive 2000/78 and that this provision should be amended in order to take account of disabilities.

The Judgment of the CJEU of 18 January 2018 (C-270/16, *Ruiz Conejero v Ferroser*) has answered the question raised by the Spanish court. The Court (Third Chamber) has established:

'Article 2(2)(b)(i) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding national legislation under which an employer may dismiss a worker on the grounds of his intermittent absences from work, even if justified, in a situation where those absences are the consequence of



sickness attributable to a disability suffered by that worker, unless that legislation, while pursuing the legitimate aim of combating absenteeism, does not go beyond what is necessary in order to achieve that aim, which is a matter for the referring court to assess’.

After the decision of the CJEU, Social Court 1 of Cuenca issued a judgment on 7 March 2018 (case 171/2018) and declared the claimant’s dismissal null and void for discrimination on the ground of disability. For this, the judge ruled that:

1) ‘The dismissal of the claimant must be qualified as null and void’. The judge considers that, in this case, there is indirect discrimination against the claimant, as an apparently neutral business decision causes a situation of particular disadvantage to a person with disability, because the absences from work are due to illnesses derived from his officially recognised disability. The fundamental argumentation of the judge is that the labour absences that have caused the dismissal of the claimant have occurred, ‘exclusively and precisely, for diseases attributable to his disability’, even if the employer was not aware of it.

2) In addition, the Spanish judge, ‘considers that there is an evident collision between the Spanish norm and the EU norm, and that (...) there is no legislative integration element or objective, so a response from the Spanish legislator would be necessary to include in national law (...) and, specifically, in article 52(d) of the Workers' Statute (...), the exception of its application, for the purposes of computing the days of absences from work, to workers who have a recognised disability status, when said temporary disability processes derive from or are linked to the diseases causing the recognition of their disability.’

This case is important for two reasons: for having led the CJEU to adopt a judgment that clarifies the application of Directive 2000/78 in the field of indirect discrimination, and because the Spanish Parliament should modify article 52(d) of the Workers' Statute to adapt it to Directive 2000/78 and avoid the indirect discrimination that may occur against workers with disabilities.

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

The main transposition and anti-discrimination legislation at both federal and federated/provincial level.

**Country:** Spain  
**Date:** 31 December 2018

<p><b>Title of the law:</b> <i>Constitución Española (Spanish Constitution)</i> Abbreviation: SC Date of adoption: 27.12.1978 Entry into force: 30.12.1978 Latest relevant amendments: No amendments Web link: <a href="https://www.boe.es/eli/es/c/1978/12/27/(1)/con">https://www.boe.es/eli/es/c/1978/12/27/(1)/con</a> Grounds covered: Race, sex, religion, opinion and "other personal or social condition or circumstance" Constitution Material scope: All Principal content: Principle of equality and non-discrimination, and positive action</p>
<p><b>Title of the law:</b> <i>Ley 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y de orden social (Law 62/2003, of 30 December 2003, on Fiscal, Administrative and Social Measures)</i> Abbreviation: LFASM Date of adoption: 30.12.2003 Entry into force: 01.01.2004 Latest relevant amendments: No amendments Web link: <a href="https://www.boe.es/boe/dias/2003/12/31/pdfs/A46874-46992.pdf">https://www.boe.es/boe/dias/2003/12/31/pdfs/A46874-46992.pdf</a> Grounds covered: Racial or ethnic origin, religion or beliefs, disability, age, sexual orientation Administrative law Material scope: All Principal content: Directives 2000/43 and 2000/78 are transposed in Title II, Chapter III, Articles 27-43. Creates a specialised body dealing with racial or ethnic discrimination</p>
<p><b>Title of the law:</b> <i>Real Decreto Legislativo 2/2015, de 23 de octubre, Estatuto de los Trabajadores (RLD 2/2015, of 23 October, of Workers' Statute)</i> Abbreviation: LWE Date of adoption: 23.10.2015 Entry into force: 25.10.2015 Latest relevant amendments: No amendments Web link: <a href="https://www.boe.es/buscar/pdf/2015/BOE-A-2015-11430-consolidado.pdf">https://www.boe.es/buscar/pdf/2015/BOE-A-2015-11430-consolidado.pdf</a> Grounds covered: Gender, racial or ethnic origin, religion or beliefs, disability, age, sexual orientation Administrative law Material scope: Employment and occupation Principal content: All rights and duties relating to labour, employment and occupation</p>
<p><b>Title of the law:</b> <i>Ley 36/2011, de 10 de octubre, reguladora de la jurisdicción social (Law 36/2011, of 10 October, on Social Jurisdiction)</i> Abbreviation: LSJ Date of adoption: 10.10.2011 Latest relevant amendments: No amendments Entry into force: 21.12.2011 Web link: <a href="http://www.boe.es/buscar/pdf/2011/BOE-A-2011-15936-consolidado.pdf">http://www.boe.es/buscar/pdf/2011/BOE-A-2011-15936-consolidado.pdf</a> Grounds covered: Gender, racial or ethnic origin, religion or beliefs, disability, age, sexual orientation</p>

Administrative law  
Material scope: Employment and occupation  
Principal content: Infractions and sanctions on the social order labour, employment and occupation

**Title of the law: *Ley Orgánica 7/1980, 5 julio, de Libertad Religiosa (Organic Law 7/1980, 5 July, on Religious Freedom)***

Abbreviation: OLRF  
Date of adoption: 05.07.1980  
Latest relevant amendments: No amendments  
Entry into force: 13.08.1980  
Web link: <http://www.boe.es/buscar/pdf/1980/BOE-A-1980-15955-consolidado.pdf>  
Grounds covered: Religion  
Administrative law  
Material scope: Religious freedom  
Principal content: Religious freedom

**Title of the law: *RLD 1/2013, 29 Noviembre, Ley General de derechos de las personas con discapacidad y de su inclusión social (RLD 1/2013, 29 November, General Law on the Rights of Persons with Disabilities and their Social Inclusion)***

Abbreviation: GLRPDSI  
Date of adoption: 29.11.2013  
Latest relevant amendments: No amendments  
Entry into force: 04.12.2013  
Web link: <http://www.boe.es/boe/dias/2013/12/03/pdfs/BOE-A-2013-12632.pdf>  
Grounds covered: Disability  
Administrative law  
Material scope: Equal opportunities, non-discrimination, and universal access for persons with disability in all fields  
Principal content: Equal opportunities for persons with disabilities; Improvement of working and living conditions; Infractions and sanctions in the field of equal opportunities for persons with disabilities

**Title of the law: *Ley Orgánica 4/2000, 11 enero, sobre derechos y libertades de los extranjeros en España y su integración social (Organic Law 4/2000, 11 January, on the Rights and Liberties of Aliens in Spain and their Social Integration)***

Abbreviation: OLRLA  
Date of adoption: 11.01.2000  
Latest relevant amendments: No amendments  
Entry into force: 01.02.2000  
Web link: <http://www.boe.es/buscar/pdf/2000/BOE-A-2000-544-consolidado.pdf>  
Grounds covered: Nationality  
Administrative law  
Material scope: Administrative situation of aliens  
Principal content: Direct and indirect discrimination; the entire administrative situation of aliens

**Title of the law: *Ley Orgánica 10/1995, 23 noviembre, del Código Penal (Organic Law 10/1995, 23 November, Criminal Code)***

Abbreviation: OLCC  
Date of adoption: 23.11.1995  
Latest relevant amendments: 30.10.2015  
Entry into force: 24.05.1996  
Web link: <http://www.boe.es/buscar/pdf/1995/BOE-A-1995-25444-consolidado.pdf>  
Grounds covered: Gender, racial or ethnic origin, religion or beliefs, disability, age,

sexual orientation

Criminal law

Material scope: All criminal matters

Principal content: Crimes against the rights of workers; all aspects of discrimination

## ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

**Country:** Spain

**Date:** 31 December 2018

<b>Instrument</b>	<b>Date of signature</b>	<b>Date of ratification</b>	<b>Derogations/ reservations relevant to equality and non- discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
European Convention on Human Rights (ECHR)	24.11.1977	04.10.1979	Reservation with regards to Arts. 5 and 6 relating to the disciplinary regime of the armed forces	Yes	Yes
Protocol 12, ECHR	04.10.2005	13.02.2008	None	--	--
Revised European Social Charter	23.10.2000	Not ratified	--	System Co. Complaints Non signed	--
International Covenant on Civil and Political Rights	28.09.1976	27.04.1977	None	Yes	Yes
Framework Convention for the Protection of National Minorities	01.02.1995	01.09.1995	None	Yes	Yes
International Covenant on Economic, Social and Cultural Rights	28.09.1976	27.04.1977	None	No	Yes
Convention on the Elimination of All Forms of Racial Discrimination	13.09.1968	13.09.1968	None	Yes	Yes
Convention on the Elimination of	17.07.1980	05.01.1984	None	Yes	Yes

<b>Instrument</b>	<b>Date of signature</b>	<b>Date of ratification</b>	<b>Derogations/ reservations relevant to equality and non-discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
Discrimination Against Women					
ILO Convention No. 111 on Discrimination	06.11.1967	06.11.1967	None	No	Yes
Convention on the Rights of the Child	26.01.1990	06.12.1990	None	Yes	Yes
Convention on the Rights of Persons with Disabilities	30.03.2007	03.12.2007	None	Yes	Yes



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