Developing Anti-Discrimination Law in Europe

The 25 EU Member States compared

September | 2005

For Diversity
Against Discrimination
An initiative of the EU

THE EUROPEAN NETWORK OF LEGAL EXPERTS IN THE NON-DISCRIMINATION FIELD

Stephan | *1992*

Developing Anti-Discrimination Law in Europe

The 25 EU Member States compared

Prepared by Janet Cormack and Mark Bell
for the European Network of Independent Experts in the non-discrimination field

September 2005
(based on information current to 1 January 2005)

This publication has been commissioned by the European Commission under the framework of *the European Community Action Programme to combat discrimination (2001-2006). This programme was established to support the effective implementation of new EU anti-discrimination legislation. The six-year Programme targets all stakeholders who can help shape the development of appropriate and effective anti-discrimination legislation and policies, across the EU-25, EFTA and EU candidate countries.*

The Action Programme has three main objectives. These are:

1. *To improve the understanding of issues related to discrimination*
2. *To develop the capacity to tackle discrimination effectively*
3. *To promote the values underlying the fight against discrimination*

For more information see: http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm

Production:

human european consultancy
Hooghiemstraplein 155
3514 AZ Utrecht
The Netherlands
www.humanconsultancy.com

Migration Policy Group
Rue Belliard 205, box 1
1040 Brussels
Belgium
www.migpolgroup.com

To receive a free copy by post you can send a request to comparative@non-discrimination.net

ISBN 2-930399-22-8

Contents

The national reports and the comparative analysis have been prepared by a team consisting of:

Content management:
Jan Niessen and Fiona Palmer

Support Management:
Evelyn van Royen

Scientific Board:
Sandra Fredman, Christopher McCrudden and Gerard Quinn

Ground coordinators:
Christine Bell, Mark Bell, Isabelle Chopin, Mark Freedland and Lisa Waddington

National experts:
Dieter Schindlauer (Austria), Olivier de Schutter (Belgium), Nikos Trimikliniotis (Cyprus), Pavla Boucková (Czech Republic), Niels-Erik Hansen (Denmark), Vadim Poleshchuk (Estonia), Timo Makkonen (Finland), Sophie Latraverse (France), Susanne Baer (Germany), Nikos Gavalas (Greece), András Kádár (Hungary), Shivaun Quinlivan (Ireland), Alessandro Simoni (Italy), Gita Feldhune (Latvia), Saule Vindrinskaite (Lithuania), François Moyse (Luxembourg), Tonio Ellul (Malta), Marianne Gijzen (Netherlands), Pawel Filipek (Poland), Manuel Malheiros (Portugal), Zuzana Dlugosova (Slovakia), Maja Katarina Tratar (Slovenia), Lorenzo Cachón (Spain), Ann Numhauser-Henning (Sweden) and Barbara Cohen (United Kingdom).

Preface

In a great many European countries anti-discrimination legislation was reviewed and changed during the last couple of years. This major and unprecedented operation was set in motion with the adoption of two pieces of European legislation in 2000, namely the Racial Equality Directive and the Employment Equality Directive. How these Directives were transposed into national law of the 25 Member States is described in a series of country reports prepared by the European Network of Legal Experts in the non-discrimination field. This Network is established and managed by human european consultancy and the Migration Policy Group on behalf of the European Commission.

The reports were written by independent national experts in each Member State. The information was provided in response to questions set out in a template format which closely followed the provisions of the two Directives. The Network's scientific board, ground co-ordinators (experts on the Directives' five discrimination grounds) and content manager read and commented on various drafts of the reports. The writing process also benefited from comments made by lawyers of the European Commission. Member States were also given an opportunity to comment on the final draft of the national reports. The 25 reports cover the many changes to national law, the putting in place of enforcement mechanisms and the adoption of other measures and they contain information current as of 1 January 2005. Therefore, this comparative analysis is only based on the law as it stood on 1 January 2005. As such, they are a valuable source of information on national anti-discrimination law, a source which will be updated on an annual basis. The reports can be found on the Commission's website at
http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/legnet_en.htm#coun

This comparative analysis, prepared by Mark Bell (University of Leicester) and Janet Cormack (Migration Policy Group) compares the information set out in these country reports in a format mirroring that of the country reports themselves and draws some conclusions from the information contained in them.

The Network will continue to monitor changes in national anti-discrimination policies and law and report on them in the bi-annual European Anti-Discrimination Law Review. The updated reports will be published in the course of 2006.

Meanwhile, it should be noted that, as required by the directives, the Commission will be coming forward with its official reports to the Council and Parliament in late 2005/mid 2006 on the implementation of Directives 2000/43 and 2000/78 respectively.

Utrecht – Brussels
July 2005

Executive Summary

1. Anti-discrimination law in most Member States goes beyond the requirements of European law in some way, whether with regard to the grounds of discrimination that are prohibited by law, the scope of protection or the competencies of the specialised equality body. However, there are still considerable gaps in many Member States.

2. Whereas prior to transposition of the Racial Equality Directive (2000/43/EC) and Employment Equality Directive (2000/78/EC) many EU Member States provided protection against discrimination through a patchwork of – largely declaratory - equality clauses in a series of legislative instruments, most now have adopted more visible specific anti-discrimination legislation. Most Member States have transposed the Directives through civil and labour law; a minority also through criminal law. Core legislation still has to be adopted in two Member States.

3. Most Member States have incorporated all the grounds of discrimination included in the two Directives in their national anti-discrimination legislation. Although there were initial difficulties, sexual orientation is now present in most national legislation. Most Member States have chosen not to define the grounds of discrimination in their implementing legislation. A considerable number of Member States chose not to restrict new anti-discrimination laws to the grounds found within the Directives. In addition to expanding the list of prohibited grounds of discrimination, various countries made this a non-exhaustive list by adding a phrase such as 'or any other circumstance'.

4. The great majority of Member States have introduced legislation that expressly forbids direct and indirect discrimination, harassment and instruction to discriminate. Moreover, in most cases, the definitions provided in national legislation are very similar to the definitions found in the Directives. Many states have essentially reproduced the text of the Directives on these core concepts.

5. Implementation of the Employment Equality Directive's provision on reasonable accommodation is patchy. Where national provisions exist, these vary considerably between those which provide a basic duty, with little elaboration on how this should be implemented, to states with more extensive guidance on its practical application.

6. On the whole, protection against discrimination on any of the Directives' grounds in the Member States is not conditional on nationality, citizenship or residence status. In the majority of Member States, both natural and legal persons are protected against discrimination. There is more variation in national rules on who is to be held liable for discrimination, particularly when it occurs in the workplace.

7. While a majority of Member States seem to meet the material scope of the Directives, there are still significant gaps. In some countries transposition only affects the private sector. A common omission is self-employment. Five Member States (the Czech republic, Estonia, Latvia, Malta and Poland) still have to transpose the Racial Equality Directive in the fields outside employment. On the whole, protection against discrimination in goods and services is restricted to those available to the public. A variety of ways of distinguishing publicly

available goods from privately available goods have emerged. A number of countries provide for the same scope of protection for all grounds, thereby going beyond the Directives.

8. The exceptions to the principle of equal treatment permitted under the Directives have largely been taken up in national law. In some instances it is suspected the exceptions are wider than the Directives allow. Most Member States provide for positive action measures to prevent or compensate for disadvantages linked to one of the discrimination grounds.

9. All States combine judicial proceedings – according to the type of law, civil, criminal, labour and/or administrative - with non-judicial proceedings. Some non-judicial proceedings are of general applicability but provide an effective forum for discrimination cases, whereas others have been established especially for discrimination cases as an alternative dispute resolution procedure to the normal courts. Whereas most Member States now provide for a shift in the burden of proof in discrimination cases, there are suspected inconsistencies with the Directives' provisions in a number of Member States. The same can be said for the prohibition of victimisation. Whether sanctions applied in Member States meet the test of "effective, proportionate and dissuasive" must be considered on a case-by-case basis. However, few country experts currently predict the sanctions and remedies in their country will comply with this standard.

10. Almost all Member States now have Equality Bodies or have given the functions to be carried out by such bodies to an existing body such as a national human rights institute. A high proportion of bodies are competent not only for racial and ethnic origin discrimination but also other grounds. The functions of specialised bodies go beyond those listed in the Racial Equality Directive in many countries. It remains to be seen whether all bodies will be able to carry out their functions independently, as it required by the Directive.

11. Few Member States are considered to have adequately transposed the Directives' requirements to disseminate information on discrimination laws, to promote social dialogue and encourage dialogue with non-governmental organisations. Often these tasks fall to the specialised equality body. There appear to be more instances of structured dialogue for disability than the other grounds of discrimination.

12. Few countries have systematically ensured all existing legal texts are in line with the principle of equal treatment. In most countries the repeal of discriminatory laws will follow a finding of discrimination by the courts. Legislation which can lead to the annulment of discriminatory clauses in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations is more common among the Member States.

13. Across the EU the most pressing issue is the proper application of national anti-discrimination laws and the active enforcement of rights in practice.

Lisa | *1992*

chapter 1
Introduction

The objective of this report is to compare and contrast the anti-discrimination laws in the 25 EU Member States, as comprehensively described in the country reports written by the European Network of Legal Experts in the Non-discrimination Field and summarised in this publication. Trends and commonalities between various countries in the implementation of the Racial Equality Directive (2000/43/EC) and Employment Equality Directive (2000/78/EC) are identified. The grounds of discrimination listed in the Directives – racial and ethnic origin, religion and belief, age, disability and sexual orientation – will be considered individually and collectively. It should be recalled throughout that the purpose of this report is to provide an overview of national laws across the EU: for detailed and nuanced information about the law in a particular country, readers are invited to refer to the comprehensive country reports[1].

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

The Racial Equality Directive had to be transposed into national law by 19 July 2003 in the 15 'old' Member States and by 1 May 2004 in the 10 new Member States, the date of their accession to the EU. The Employment Equality Directive had to be transposed by 2 December 2003 in the 'old' Member States and by 1 May 2004 in the new. By now therefore, clear pictures are beginning to emerge of the implementation of the Directives and the areas in which Member States are going beyond EC law requirements. Conformity with, suspected non-conformity with, and instances of surpassing of the Directives requirements will all be analysed in this comparative exercise.

17 of the 25 Member States have generally, if not fully in some instances, transposed the two Directives into their national law: Belgium, Cyprus, Denmark, Finland, France, Greece, Hungary, Ireland, Italy, Lithuania, the Netherlands, Portugal, Slovenia, Slovakia, Spain, Sweden and the United Kingdom. The Czech Republic, Estonia, Latvia, Malta and Poland have partially transposed the Directives but significant legislation is still missing, primarily in relation to the scope of the Racial Equality Directive beyond employment (Article 3(1)(e)-(h)). Core implementing legislation still has to be adopted by Germany and Luxembourg, where the adoption of general anti-discrimination legislation is pending. A handful of Member States still have until 2006 to transpose the disability and age provisions, where they notified the European Commission that they would take advantage of the optional additional three years for transposing these provisions (Article 18 Directive 2000/78). These are Belgium, Germany, the Netherlands, Sweden and the UK for age, and France and the UK for disability.

[1] http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/legnet_en.htm#coun

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

Anti-discrimination Acts which more or less reproduce the Directives	Cyprus (2 Acts), Greece (1 Act for both) and Italy (2 decrees)
Anti-discrimination Acts covering more grounds than the Directives	Austria, Belgium, Finland, Ireland, Hungary, Netherlands, Slovakia
Combination of multi-ground anti-discrimination Acts and single-ground Acts	Denmark, Netherlands, Sweden
Several pieces of single-ground anti-discrimination legislation	United Kingdom
Combination of specific legislation and employment act	Slovenia
Combination of specific legislation, labour and penal codes, some administrative law	France, Lithuania, Portugal
Directives transposed in much wider general Act	Spain
So far only transposed in employment law	Estonia, Czech Republic, Latvia, Malta, Poland
Transposition still pending	Germany, Luxembourg, Austria (regional level) and Finland in respect of Åland Islands

A second observation about methods of implementation may be made with regard to age discrimination in particular. The transposition of Directive 2000/78 with respect to age discrimination has presented some special challenges, by comparison with the other grounds, because the great majority of Member States did not have existing general legislation against age discrimination, and had not had a great deal of debate about how such legislation might affect their existing law and practice about access to employment for young and older workers and about retirement from employment for older workers. Two contrasting patterns or models can be identified as to the way in which Member States have chosen to confront those special challenges, though it should be stressed that these are only broad stereotypes, within which significant variations occur.

One response consists of direct or nearly direct enactment in national legislation of the age discrimination provisions of the Directive, without elaborate adaptation to existing practice or detailed amendment of existing legislation. The examples were given above of Anti-discrimination Acts which more or less reproduce the Directives in Cyprus, Greece and Italy, and with regard to age discrimination in particular we could add Denmark, Austria, Slovakia and Slovenia. Underlying this response we can perhaps discern a preference for partly deferring the process of detailed adaptation of existing law and practice so that it can be resolved by judicial adjudication and subsequent interaction between the Member State and the Community organs.

A contrasting response consists of engaging in a more elaborate legislative debate within the Member State as to how the age discrimination requirements of the Directive might be fully and immediately integrated with the existing law and practice of the

Member State. The resulting legislative debate tends to be a difficult and complex one, and that serves to explain the instances cited above of Belgium, Germany, the Netherlands, Sweden and the UK, where those Member States have taken up the option of extra time to implement the age discrimination requirements in particular.

On the whole, most Member States have transposed the Directives through civil or labour law, with a minority having also introduced or amended criminal law provisions, e.g. Belgium. While in some countries a 'patchwork' of anti-discrimination provisions in various pieces of legislation still exists, e.g. Latvia, this method has largely been replaced by more general anti-discrimination provisions and legislation.

Ensuring the Directives are transposed across all of a Member State's territory and by all tiers of government with relevant competences has been the reason for delays in several Member States. The UK was delayed in its transposition in Gibraltar. Finland has recently been found by the European Court of Justice to have failed to fulfil its Community obligations by omitting the Åland islands from its transposition of Directive 2000/43.[2] In Austria, while federal legislation entered into force on 1 July 2004, five of the nine provinces still have to enact legislation. In Belgium, although almost all regions and communities have now adopted anti-discrimination legislation, significant gaps remain due to continuing discussion among the Regions and Communities concerning their competence to adopt procedural rules, such as on sanctions, *locus standi* for associations and the burden of proof. The German Federal States still have to implement the Directives; they have been waiting for the Federal Parliament to adopt anti-discrimination legislation before they embarked upon their own transposition process.

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

[2] Case C-327/04 *Commission v Finland*, 24 February 2005. Luxembourg was also found to have infringed Community law on the same day for failing to transpose Directive 2000/43, Case C-320/04 *Commission v Luxembourg*. The Court of Justice has since found Germany (Case C-329/04) and Austria (Case C-335/04) to have infringed Community law for failing to transpose Directive 2000/43.

Emanuel | *1976*

chapter 2
The grounds of discrimination

The Racial Equality Directive and the Employment Equality Directive require the Member States to forbid discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation. The Directives do not contain any definition of these grounds. This section examines how the Member States have incorporated the different grounds of discrimination into national law. This poses issues such as whether to include additional grounds beyond those mentioned in the Directives; whether to provide a definition of each ground; and how to address discrimination based on assumed characteristics or because of association with persons possessing certain characteristics.

Most Member States have chosen not to define the grounds of discrimination in their legislation designed to implement the Directives. A small group of countries have either included statutory definitions or provided definitions in accompanying documentation, such as in an explanatory memorandum accompanying the legislation. This includes: Austria, Ireland, the Netherlands, Sweden and the UK.

A. Which grounds are included?

Most Member States have included all the grounds of discrimination found within the Directives in their national anti-discrimination legislation (or in draft laws designed to implement the Directives). There are no examples of racial or ethnic origin and religion or belief being excluded from anti-discrimination legislation. Although there were initial difficulties, sexual orientation is now present in most national legislation. Latvia remains an exception. On two occasions, sexual orientation has been deleted from draft anti-discrimination laws by the relevant Parliamentary committee and replaced by making the list of prohibited grounds non-exhaustive. This technique was originally pursued by Malta in the Employment and Industrial Relations Act 2002, however, Legal Notice 461 of 2004 issued under that Act requires employment tribunals to take into account the list of prohibited grounds under Directive 2000/78/EC, including sexual orientation, in deciding whether there has been discrimination.

Member States were able to request a delay in implementing the disability and age provisions of the Employment Equality Directive until 2 December 2006. Many have not sought to exercise this option, however, there are several countries where specific measures on disability and age are still to be adopted. As regards disability, this includes Austria (at the federal level) and the UK and for age, this includes Sweden and the UK. Of course, there are several other countries, such as Germany and Luxembourg, where general legislation across all grounds is still to be adopted.

A considerable number of Member States chose not to restrict new anti-discrimination laws to the grounds found within the two Directives. Where states decided to go further than the minimum requirements, they faced two choices: which additional grounds to specify and whether to make the list of prohibited grounds non-exhaustive. In terms of grounds explicitly mentioned within national legislation, there is a very wide range of grounds to be found across the Member States. For example, Slovenia has prohibited discrimination on the grounds of education and financial status,[3] whilst Portugal has forbidden discrimination on the

[3] Implementation of the Principle of Equal Treatment Act, Official Gazette, no. 50/2004.

grounds of genetic inheritance and family status (Article 23, Labour Code). Significantly, several states have chosen to prohibit discrimination against part-time or fixed-term workers within a general law on discrimination. This combines implementation of the Article 13 Directives with implementation of Directive 97/81/EC[4] on part-time work and Directive 1999/70/EC[5] on fixed-term work. These countries include Hungary, the Netherlands and Poland.

In addition to expanding the list of prohibited grounds of discrimination, various countries made this a non-exhaustive list by adding a phrase such as 'or any other circumstance'. This will permit courts to recognise additional grounds of prohibited discrimination in the future, in a similar manner to the evolving case-law under Article 14 of the European Convention on Human Rights. Non-exhaustive lists are found in Finland, Hungary, Latvia, Poland and Slovenia. In Belgium, the federal law on combating discrimination listed the following grounds: sex, so-called race, colour, descent, national or ethnic origin, sexual orientation, civil status, birth, wealth, age, religious or philosophical conviction, actual or future state of health, disability or a physical characteristic. The exhaustive nature of this list was subsequently held to be unlawful by the Court of Arbitration.[6] It could not locate any reasonable justification for the exclusion of other grounds, such as language or political opinion, and consequently the Court required the law to be interpreted as covering any ground, including those not explicitly mentioned.

B. Racial or ethnic origin

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

Recital 6 of the Racial Equality Directive declares:

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

Some Member States have taken the view that including 'race' or 'racial origin' in anti-discrimination legislation reinforces the perception that humans can be distinguished according to 'race', whereas there is no scientific foundation for such categorisation. For example, in Austria, the term 'ethnic affiliation' has been adopted in the federal Equal Treatment Act in a conscious decision to exclude the German term '*Rasse*'. The Finnish Non-Discrimination Act refers to 'ethnic or national origin' (section 6(1)), whilst the Swedish Ethnic Discrimination Act refers to 'ethnic belonging' (section 3). In other countries, 'race' has been included in the legislation, but it is qualified. In France, various legal provisions refer to 'real or presumed' (*vraie ou supposé*) race. This issue has also arisen in debates on draft legislation in Luxembourg. The *Conseil d'État* criticised the failure to preface 'race' by terms such as 'real

4 [1998] OJ L14/9.

5 [1999] OJ L175/43.

6 Judgment no. 157/2004 of the Court of Arbitration, delivered on 6 October 2004: http://www.arbitrage.be/public//f/2004/2004-157f.pdf

or presumed'. A frequent solution to such dilemmas is to link the interpretation of 'race' to the definition found within the International Convention on the Elimination of Racial Discrimination. Article 1(1) states:

> 'the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin'.

This is mentioned in explanatory documentation in countries such as Austria, Germany, Latvia and the Netherlands.

One of the areas of ambiguity in the Racial Equality Directive is the extent to which characteristics such as colour, national origin, membership of a national minority, language or social origin fall within the scope of 'racial or ethnic origin'. There are quite divergent approaches within national legislation. Many national laws include, as a minimum, colour and national origin. The UK is alone of the view that 'colour' does not fall within the scope of the Directive. Its implementing legislation only covers discrimination on grounds of race, ethnic or national origins.[7] Whilst pre-existing legislation still forbids discrimination on the grounds of colour and nationality,[8] this has not been amended to reflect the requirements of the Racial Equality Directive.

Another difficult boundary concerns racial or ethnic origin and religion. Within the Directives, it is evident that this is an important distinction because the material scope of the Racial Equality Directive is much more extensive than that in the Employment Equality Directive. Nevertheless, national law dating from before the Directives does not always reflect this dichotomy. In the Netherlands, case-law has recognized the possibility for discrimination against Jews[9] and, in certain circumstances, Muslims[10] to be challenged as race discrimination. In the UK, discrimination against Sikhs[11] or Jews[12] has been accepted as discrimination on racial grounds (specifically, ethnic origin). In Sweden, anti-discrimination legislation previously defined religious belief as part of 'ethnic affiliation'[13] however, this has been amended to render 'religion or other belief' as an autonomous ground of discrimination.

C. Religion or belief

No Member State has attempted to provide a comprehensive definition of 'religion or belief' within anti-discrimination legislation. Even where a definition does exist, this often leaves a broad scope for interpretation. For example, in Ireland, 'religious belief' includes 'religious background or outlook'.[14] Several states provide further guidance on the meaning of 'religion or belief' in explanatory documentation accompanying the legislation. In Great Britain, this states that 'courts and tribunals may consider a

7 Race Relations Act (Amendment) Regulations 2003, S.I. 1626.

8 Race Relations Act 1976.

9 Opinion 1998/48, Equal Treatment Commission.

10 Opinion 1998/57, Equal Treatment Commission.

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

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

13 Section 3, Ethnic Discrimination Act 1999.

14 Section 2(1), Employment Equality Act 1998-2004.

number of factors when deciding what is a "religion or belief" (e.g. collective worship, clear belief system, profound belief affecting way of life or view of the world).'[15] In Austria, the explanatory notes to the federal Equal Treatment Act state 'for a religion there are minimum requirements concerning a statement of belief, some rules for the way of life and a cult. Religion is any religious, confessional belief, the membership of a church or religious community.'[16] In Sweden various definitions were debated, but ultimately no definition was included.

The term 'belief' has also been the subject of debate surrounding its meaning. In particular, some Member States have sought to limit this concept. In the Netherlands, the term *levensovertuiging* [philosophy of life] has been adopted because this had already been interpreted through case-law. It includes broad philosophies, such as humanism, but it does not extend to any view regarding society. Similarly, the Austrian guidance states: 'Belief is a system of interpretation consisting of personal convictions concerning the basic structure, modality and functions of the world; it is not a scientific system. As far as beliefs claim completeness, they include perceptions of humanity, views of life, and morals.'[17] These definitions seek to associate belief with wide-ranging philosophies, as opposed to mere opinions about specific issues. Political opinion finds itself in a grey area. Some political beliefs might be construed as philosophies on life, such as communism. At the same time, others are less comprehensive in nature; for example, a person's view on the appropriate level of taxation. Significantly, many Member States have also included political opinion as a prohibited ground of discrimination. This includes: Cyprus, Czech Republic, Denmark, Estonia, Finland,[18] France, Hungary, Italy, Latvia, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovenia, Spain, UK (Northern Ireland only).

Finally, it should be noted that definitions of 'religion' are commonly found outside anti-discrimination law. This can typically arise in laws concerning the application of the freedom of religion or in laws regulating the relationship between the State and organised religions.

D. Disability

Unlike the other grounds of discrimination, there is a proliferation of definitions of disability within national legislation. This can be attributed to several factors. First, most Member States provide certain welfare benefits for persons with a disability. Naturally, there needs to be a relatively detailed definition of who will be eligible for such entitlements. Elsewhere, national legislation often includes quota schemes that require employers to employ a certain proportion of disabled persons.[19] Again, it is necessary to define disability in order to clarify which workers could be treated as falling within the quota. Although there are consequently many examples of definitions of disability within national legislation, it is less common to find a specific definition of disability within anti-discrimination legislation.

[15] Para. 9, Explanatory Notes on the Employment Equality (Religion or Belief) Regulations 2003, at: http://www.dti.gov.uk/er/equality/eeregs.htm

[16] Nr. 307 der Beilagen XXII. GP - Regierungsvorlage – Materialien.

[17] Ibid.

[18] The Non-Discrimination Act (no. 21/2004) refers to 'opinion', whereas the Penal Code includes 'political orientation'.

[19] These often permit employers to take alternative actions, such as making contributions to a State fund for disabled persons.

Where anti-discrimination legislation defines disability, there are a number of common elements:

- Time requirements: permanency or duration of the impairment;
- Level of impairment: thresholds concerning severity;
- Current status: treatment of past, present and future impairments.

With regard to time requirements, an impairment may be required to exist for a certain period of time in order to be treated as a disability. For example, in the UK[20] the impairment should last for more than one year. In contrast, other states require the impairment to be indefinite in duration (Cyprus,[21] Sweden[22]).

In some states the impairment is required to reach a certain level of seriousness; this is sometimes classified by a percentage threshold. For example, in Luxembourg, the 2003 Law on Disabled Persons applies to those with a more than 30% reduction in working capacity.[23] Another means of assessing the seriousness of the impairment is by reference to the person's ability to perform certain functions. In Malta, the law refers to 'major life activities'[24] and in the UK, 'normal day-to-day' activities.[25]

Finally, there is divergent practice on whether disability includes past or future impairments. Irish legislation covers grounds of discrimination that previously existed, as well as grounds that may exist in the future.[26] Dutch law covers 'an actual or assumed disability or chronic disease,'[27] thereby protecting (for example) a person who previously had cancer but no longer experiences any symptoms.

Overall, it can be observed that there is a considerable variation in the definitions of disability found across the Member States. In most cases, a *medical model* of disability is enshrined in the law, which focuses on the person's functional capacity as the cause of impairment. In contrast, a *social model* views disability as arising from the interaction of an individual with his or her disability and the surrounding environment. In this perspective, disability can be caused by the inaccessible organisation of the environment.

E. Sexual Orientation

Very few states have defined sexual orientation within anti-discrimination legislation. Irish equality legislation defines sexual

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

21 Law 127(I)/2000.

22 Section 2, Disability Discrimination Act 1999.

23 Law 51/2003 on Equal Opportunities.

24 Equal Opportunities (Persons with Disability) Act 2000.

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

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

27 Art. 1(b), Act of 3 April 2003 concerning the establishment of the Act on Equal Treatment on the grounds of disability or chronic disease, *Staatsblad* 2003, 206.

orientation as 'homosexual, heterosexual or bisexual orientation'.[28] In the same vein, UK legislation refers to 'a sexual orientation towards (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of the same sex and of the opposite sex'[29]

A further issue concerns discrimination against same-sex couples. The explanatory notes to the Austrian federal Equal Treatment Act specify that less favourable treatment of same-sex couples in comparison to *unmarried* opposite-sex couples is unlawful sexual orientation discrimination.[30] A different approach has been adopted in Finland: the Non-Discrimination Act contains a non-exhaustive list of grounds. In the first case concerning discrimination against a job applicant because she was in a same-sex relationship with another woman, the Administrative Court held that being in a same-sex relationship was an *autonomous* ground of discrimination.[31] Although not enumerated in the legislation, this was implicitly covered.

F. Age

Age is generally assumed to be an objective characteristic with a natural meaning and hence it is not defined. Whilst broad exceptions exist in relation to this ground of discrimination, the Irish Employment Equality Act seems to be alone in restricting its entire application to 'persons above the maximum age at which a person is statutorily obliged to attend school'.[32]

G. Assumed and associated discrimination.

Discrimination can sometimes occur because of an assumption about another person, which may or may not be factually correct; e.g. that a woman is a lesbian. Alternatively, a person may face discrimination because they associate with persons of a particular characteristic; e.g. a non-Roma man may be denied admission to a bar because he is with friends who are from the Roma community. In many states, the application of discrimination law to these scenarios is not definitively resolved within the legislation and it will depend on future judicial interpretation. This includes Austria, Belgium, Cyprus, Denmark, Finland, Italy, Latvia, Malta, Poland, Slovenia and Spain.

Ireland provides a rare example where legislation explicitly forbids discrimination where a ground is 'imputed' to exist and discrimination due to association.[33] As mentioned earlier, in several states, the legislation refers to 'real or presumed' race (e.g. France), or to a disability that existed in the past or may exist in the future (Netherlands).

28 Section 2(1), Employment Equality Act 1998-2004.

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

30 Nr. 307 der Beilagen XXII. GP - Regierungsvorlage – Materialien.

31 Vaasa Administrative Court, 27.8.2004, Ref. No. 04/0253/3.

32 Section 6(f)(3).

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

Cornelia | *1933*

chapter 3
The definition of discrimination

The Racial Equality and Employment Equality Directives identify four forms of prohibited discrimination: direct, indirect, harassment and instructions to discriminate. In taking an overview of Member States' implementation of the Directives, this is an area where considerable progress is evident. The great majority of Member States have introduced legislation that expressly forbids each of these four types of discrimination. Moreover, in most cases, the definitions provided in national legislation are very similar to the definitions found in the Directives. Many states have chosen essentially to reproduce the text of the Directives on these core concepts. This section will examine the regulation of each type of discrimination across the national legal systems. Before making this detailed analysis, a number of preliminary observations can be made.

Although the great majority of states have chosen to follow the scheme of the Directives, there are a small number of exceptions. In the Netherlands, the law on age discrimination includes a combined prohibition of direct and indirect discrimination:

> 'In this Act, distinction shall mean distinction on the grounds of age or on the grounds of other characteristics or conduct that results in discrimination on the grounds of age.'[34]

Given that the Employment Equality Directive permits the open-ended justification of age discrimination,[35] the Dutch government took the view that it was not necessary to separate direct and indirect discrimination in respect of age. This has been contested by some commentators. Alternatively, in the UK, a different framework has been adopted in respect of disability discrimination. Here, the principal forms of discrimination are:

- discrimination due to less favourable treatment for a reason which relates to the disabled person's disability;[36]
- failure to comply with a duty to make reasonable adjustments.[37]

It should also be noted that in some states anti-discrimination legislation in civil law is complemented by criminal law provisions against discrimination. Some criminal law statutes are more general in their definition of discrimination. For example, in Finland, section 11(9) of the Penal Code [rikoslaki (391/1889)] defines discrimination as 'putting a person into a manifestly unequal position or into a substantially worse position than the others, without an acceptable reason'.[38]

Notwithstanding these examples, in the great majority of Member States the pattern found in the Directives is adhered to. Moreover, the term 'discrimination' is very commonly adopted. In a small number of cases, alternative terminology is used, but without any obvious intent to imply a different meaning. For instance, 'unequal treatment' is the term used within Estonian and

[34] Art. 1(1), Act of 17 December 2003, concerning the equal treatment on the ground of age in employment, occupation and vocational training, *Staatsblad* 2004, 30.

[35] Art. 6, Directive 2000/78.

[36] There are two ways in which an employer might unlawfully discriminate against a disabled employee or job applicant: by treating him or her less favourably (without justification) than other employees or job applicants because of his or her disability, or by not making reasonable adjustments (without justification).

[37] Section 3A, Disability Discrimination Act 1995.

[38] See also the definition of discrimination in the Belgian Law of 30 July 1981 criminalising certain acts inspired by racism and xenophobia.

Danish legislation. In contrast, Dutch anti-discrimination law separates the concepts of 'discrimination' and 'distinction'. The various laws implementing the Directives do not prohibit 'discrimination', but instead refer to unlawful 'distinction'. Discrimination is strongly associated with evidence of intent on the part of the discriminator and it is connected to the targeted protection of disadvantaged groups of persons. In contrast, distinction is a more neutral concept applicable to any type of unjustified difference of treatment between individuals (i.e. it protects all persons rather than just those from groups vulnerable to discrimination).

Finally, it should be noted that although Member States may be described as following the definitions found in the Directives, there are often slight differences between the actual text of national legislation and that within the Directives. Given the frequent absence of case-law interpreting recently adopted legislation, it is difficult to assess whether small differences in language are matters that will be resolved through purposive judicial interpretation or whether there are substantive gaps in national implementation. For example, in Belgium,[39] the test for justifying indirect discrimination does not mention the need to show that the provision, criterion or practice is *necessary*, whereas this is explicit in the text of the Directives.[40] Nonetheless, all national courts are under a general obligation 'to interpret their national law in the light of the wording and purpose of the Directive'.[41]

A. Direct discrimination

Most Member States have adopted legislation that reflects closely the definition of direct discrimination found within the Directives. There are several common elements:

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

These elements can be generally found in legislation in: Austria, Cyprus, Denmark, Estonia, Finland, Greece, Italy, Ireland, Latvia, Lithuania, Luxembourg (draft law), Malta, Portugal, Slovakia, Slovenia, Sweden and the UK. It should be noted that this legislation does not necessarily apply to the full material scope required by the Directives and it may co-exist with other legislation containing different definitions of direct discrimination. Moreover, most states have taken advantage of the opportunity foreseen in Article 6 of the Employment Equality Directive to permit justification of direct discrimination on the ground of age.

In the Czech Republic, anti-discrimination provisions can be found scattered across a wide range of legislation. In some cases, the definition of direct discrimination is close to that in the Directives. In France and the Netherlands, direct discrimination is

[39] Art. 2(2), Federal Law of 25 February 2003.

[40] Art. 2(2)(b), Directives 2000/43 and 2000/78.

[41] Case 14/83, Von Colson & Kammann v Land Nordrhein-Westfalen [1984] ECR 1891.

forbidden but it is not further defined in legislation. There is, however, pre-existing case-law in the Netherlands that would suggest that the concept of a 'direct distinction' is similar to the definition of direct discrimination found within the Directives.

With regard to comparators, the laws in Spain[42] and Hungary[43] do not expressly permit the use of a past or hypothetical comparator. In Ireland, the requirement for a comparator has been elucidated through case-law. Indeed, this appears to be the only Member State where case-law has considered in detail who the appropriate comparator can be in cases of age discrimination. The comparator here appears to depend heavily on the facts of the case. In *Perry v Garda Commissioner*,[44] the dispute concerned a voluntary retirement scheme. By comparing the situation of a 59 year old and a 60 year old, it was revealed that the 59 year old would receive an additional payment of around EUR 7,618. In other cases, a greater difference of age between the comparators has been required.

B. Indirect discrimination

A large proportion of Member States have introduced a definition of indirect discrimination that generally reflects the definition adopted in the Directives. This includes the following states: Austria, Belgium, Cyprus, Denmark, Estonia, Finland, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg (draft law), Malta, Portugal, Slovakia, Slovenia, Spain, Sweden and the UK.

As with direct discrimination, both France and the Netherlands have not included a detailed definition of indirect discrimination in national legislation. There is, however, a significant body of Dutch case-law interpreting the concept of indirect discrimination in a manner similar to that required by the Directive. In the Czech Republic, there are anti-discrimination provisions scattered across a range of laws and these contain various definitions of indirect discrimination.

The Directives define indirect discrimination by reference to provisions, criteria or practices that put persons of a particular racial or ethnic origin, religion or belief, age, disability or sexual orientation 'at a particular disadvantage when compared with other persons'.[45] The 'particular disadvantage' threshold takes a variety of forms in national legislation and it is difficult to assess at this stage whether these accurately reflect the approach in the Directives. In Hungary, indirect discrimination occurs if a provision 'puts individual persons or groups with characteristics specified in Article 8 [the prohibited grounds] in a significantly disproportionately disadvantageous situation compared to a person or group in a comparable situation.'[46] In Latvia, legislation refers to measures that result in 'adverse consequences' rather than 'particular disadvantage'.[47] The approach in Lithuania is to

42 Art. 28(1)(b), Law 62/2003.

43 Art. 8, Equal Treatment and the Promotion of Equality of Opportunities Act 2003.

44 DEC-E2001-029.

45 Art. 2(2)(b), Directives 2000/43 and 2000/78.

46 Art. 9, Equal Treatment and the Promotion of Equality of Opportunities Act 2003.

47 Art. 29(6), Labour Law.

examine whether measures create any discriminatory *advantages*. Indirect discrimination occurs where measures 'which are formally equal, however, in implementing or adapting them, an actual restriction of the use of rights or the providing of privileges, priority or advantage for persons of a certain age, certain sexual orientation, disability, racial or ethnic origin, religion or beliefs can, do, or might emerge'.[48]

The Directives anticipate a comparison between the effect of the measure on persons of a particular ethnic origin, etc. and its impact on other persons. Again, national law varies in the approach taken to the comparison required for establishing indirect discrimination. Polish law requires the measure to cause detriment for all or a significant number of employees belonging to the particular group of persons.[49] In the UK, the most common definition of indirect discrimination requires evidence that the measure placed at a disadvantage the individual complainant, as well as the group to which he or she belongs.[50] In Ireland, reference to a hypothetical comparator is not permitted in complaints of indirect discrimination in remuneration.[51]

C. Harassment

Harassment is defined in the Directives as unwanted conduct related to (racial or ethnic origin, religion or belief, disability, age, or sexual orientation) with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.[52] The majority of Member States have adopted definitions of harassment that appear similar to that contained in the Directives. This includes: Belgium, Cyprus, Czech Republic (various laws), Finland, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg (draft law), Malta, the Netherlands, Poland, Portugal, Slovenia, Spain and the UK.

In some Member States, the definition of harassment seems more restrictive than that found in the Directives. This is most obvious in Estonia, where harassment is defined as:

> 'where unwanted conduct or act, either verbal, non-verbal or physical, takes place against a person in a relationship of subordination or dependency ...'[53]

This would seem to exclude protection from harassment by other workers of a similar rank, or from those who are in more junior positions whereas the Directives do not restrict the prohibition of harassment to actions of more senior workers. Furthermore, the Directives refer to 'unwanted conduct … with the purpose or effect of violating the dignity of a person'.[54] This suggests that

48 Law on Equal Treatment 2003.

49 Art. 18, Labour Code.

50 For example, section 1(1A) Race Relations Act 1976.

51 Section 29, Employment Equality Act 1998-2004.

52 Art. 2 (3).

53 Art. 10(4), Law on Employment Contracts.

54 Art. 2(3), Directives 2000/43 and 2000/78.

harassment may occur even where the victim's dignity has not been violated, if this was the purpose of the conduct. In contrast, laws in Austria[55] and Sweden,[56] require that the victim's dignity was actually violated. The other element to the definition of harassment in the Directives is that the conduct creates 'an intimidating, hostile, degrading, humiliating *or* offensive environment' (emphasis added).[57] The Italian legislation substitutes the word 'or' for 'and', thereby making this a cumulative test and an apparently higher threshold for the complainant to satisfy.[58]

The Directives do not provide specific rules on how to determine whether the conduct is such as to violate a person's dignity or to create an intimidating, etc. environment. Several states have sought to clarify this in their national legislation. In Slovakia, reference is made to treatment 'which that person can justifiably perceive' as harassment.[59] This is understood to place the emphasis on the perception of the victim, although courts may also take into account a reasonableness standard. Similarly, in the Czech Republic, draft legislation refers to 'conduct objectively perceived by the concerned person as unwanted, inappropriate or offensive'.[60] In the UK, a combined objective and subjective assessment of the conduct is required by the courts and tribunals:

> 'conduct shall be regarded as having the effect specified … only if, having regard to all the circumstances, including in particular the perception of B [the victim], it should reasonably be considered as having that effect.'[61]

Another area left open by the Directives is the responsibility of the employer for acts of harassment caused by other workers or by third parties, such as customers. In many states, employers can be held liable for the actions of their workers to a varying degree. Some Member States have chosen to place employers under a specific duty to take action to prevent and redress harassment in the workplace. For example, in Finland, when an employer becomes aware of harassment in the workplace, there is a duty to investigate and to take measures to end the conduct.[62] A similar duty exists in Sweden, but this extends beyond employees to include universities in respect of their students.[63] In France, Article L122-52 of the Labour Code creates an obligation on the part of the employer to take all necessary measures to put an end to harassment in the workplace. In the UK and Ireland, there is no express duty on employers to take action to prevent harassment. Nevertheless, employers will not be held liable for harassment committed by their workers if they can demonstrate that they took 'reasonably practicable steps' to prevent this occurring.[64]

55 § 21(2), Equal Treatment Act 2004.

56 Sexual Orientation Discrimination Act 1999, Equal Treatment of Students at Universities Act 2001, Discrimination Prohibition Act 2003.

57 Art. 2(3), Directives 2000/43 and 2000/78.

58 Legislative decree, 9 July 2003, no. 215 (Gazzetta Ufficiale no. 186, 12 August 2003); legislative decree, 9 July 2003, no. 216 (Gazzetta Ufficiale no. 187, August 13, 2003).

59 Section 2(5), Anti-discrimination Act, no. 365/2004.

60 Section 3(5), draft anti-discrimination law.

61 For example, section 3A, Race Relations Act 1976.

62 Section 28, Occupational Safety and Health Act, no. 738/2002.

63 Art. 6, Equal Treatment of Students at Universities Act 2001.

64 Ireland: section 15(3), Employment Equality Act 1998-2004; UK: e.g. section 32(3), Race Relations Act 1976.

It is important to note that an overlap may exist between harassment as an element of anti-discrimination law and other legal provisions combating harassment in general. The latter, sometimes described as moral harassment, not only includes discriminatory harassment, but also harassing behaviour without any discrimination element (e.g. bullying). In Belgium, harassment is unlawful both within anti-discrimination legislation, but also under specific legislation against moral and sexual harassment.[65] In France, harassment is not specifically included within legal provisions on discrimination, but instead it is exclusively dealt with in legislation on moral and sexual harassment. Moral harassment is defined as 'repeated acts which result in a degradation of working conditions such as to alter one's benefit of one's rights or dignity, to alter one's physical or psychological health or to jeopardise one's professional future.'[66]

Finally, there is little evidence to date that Member States have sought to supplement legal definitions of harassment with Codes of Practice providing further guidance to employers and service-providers. Whilst this is a familiar instrument in sexual harassment law, Codes of Practice on harassment falling within the scope of the Directives were only reported in Ireland and the UK.

D. Instructions to discriminate

The Directives contain a provision stating that 'an instruction to discriminate … shall be deemed to be discrimination'.[67] A similar provision has been included in the national legislation of the great majority of Member States, with a small number of exceptions.

In France, there is no specific provision making instructions to discriminate unlawful. However, general legal principles on complicity and liability may produce similar effects. In the UK, the legal situation is complex. Instructions, pressure and inducement to discriminate are unlawful acts within anti-discrimination legislation covering race, disability and religion (Northern Ireland only). Enforcement of the provisions on race and disability in Great Britain is, however, reserved to the relevant equality bodies: the Commission for Racial Equality and the Disability Rights Commission. An individual victim cannot bring an action to challenge instructions to discriminate. Moreover, new legislation on discrimination on the grounds of sexual orientation and religion or belief does not include any specific provision forbidding instructions to discriminate.

[65] Loi du 11 juin 2002 relative à la protection contre la violence et le harcèlement moral ou sexuel au travail, Moniteur belge, 22 June 2002.

[66] Law of 17 January 2002.

[67] Art. 2(4), Directives 2000/43 and 2000/78.

chapter 4
The reasonable accommodation duty

The Employment Equality Directive places employers under a duty to 'take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.'[68] This obligation did not previously exist in the majority of Member States and it represents one of the more novel elements of the Directives. This may be reflected in the patchy implementation of this part of the Employment Equality Directive.

The reasonable accommodation duty has not been included in national legislation in Estonia, Italy and Poland. In Hungary, the legal duties are stronger in respect of persons already employed than those in respect of persons seeking employment. In Austria, federal legislation on disability discrimination is still to be adopted, but the law governing dismissals requires an employer to make a reasonable accommodation before dismissal of a person with a disability can be justified. A reasonable accommodation duty is included in legislation pending in the Czech Republic and Luxembourg.

The following states have legal provisions that approximate to the reasonable accommodation duty found within the Directive: Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Ireland, Latvia, Lithuania, Malta, Netherlands, Portugal, Slovakia, Slovenia, Spain, Sweden and the UK. These vary considerably between those which provide a basic duty, with little elaboration on how this should be implemented (e.g. Lithuania), to states with more extensive guidance on its practical application (e.g. the UK). In general, there is very little case-law in this area, so it is difficult to anticipate how the key concepts will be applied in practice.

Whilst the definition of the duty varies, it is commonly subject to the limitation that it should not create a 'disproportionate burden' for the employer: Belgium, Cyprus, France, Germany, Ireland, Latvia, Lithuania, the Netherlands, Portugal, Slovakia and Spain. In Malta, a reasonable accommodation should not unduly prejudice the operation of the trade or business run by the employer.[69]

The preamble of the Directive provides an indication of the criteria to be taken into account in determining the reasonableness of a particular accommodation. Recital 21 identifies three issues to consider and these are often included in national legislation:

- the financial and other costs entailed: Cyprus, Finland, Ireland, Malta, Spain, the UK;
- the scale and financial resources of the organisation or undertaking: Cyprus, Finland, Ireland, Malta, the UK;
- the possibility of obtaining public funding or any other assistance: Cyprus, Finland, Ireland, Malta, the Netherlands, Portugal, Spain, the UK.

In some states, there are additional criteria included in the national legislation. For example, in Malta, it is relevant to consider the number of employees requiring the accommodation.[70] In Cyprus, the financial situation of the state can be taken into account in cases against the state.[71] In the Netherlands, the legislation does not specify how to make the assessment of reasonableness, but

[68] Art. 5, Directive 2000/78.

[69] Art. 7(4), Equal Opportunities (Persons with Disability) Act, 2000.

[70] Ibid.

the explanatory memorandum proposed that it is judged by reference to whether the measure is: (a) appropriate, (b) necessary and (c) proportionate in respect of the employer. In Sweden, the employer is under a duty to do that which 'may reasonably be required'.[72]

Whether failure to provide a reasonable accommodation is to be treated as a form of unlawful discrimination is often an area of ambiguity within national legislation (e.g. France, Hungary, Latvia). In Sweden, failure to provide a reasonable accommodation is linked to the concept of direct discrimination. If a reasonable accommodation can remove the effects of a person's disability, then it will be direct discrimination for the employer to take this disability into account.[73] In contrast, failure to provide a reasonable accommodation is treated as indirect discrimination in Slovakia[74] and Spain.[75] Alternatively, in the UK, failure to provide a reasonable accommodation is defined as a specific form of discrimination.[76]

There are very few examples of reasonable accommodation duties applying beyond the ground of disability. In Sweden, there is a duty on employers to adopt active measures to make the workplace more inclusive of persons with different ethnic and religious backgrounds.[77] In Flanders, the definition of reasonable accommodation found in the Employment Equality Directive is incorporated into the law, but it has not been restricted to the disability ground.[78]

71 Section 9(2), Law 127(I)/2000.

72 Section 6, Disability Discrimination Act 1999.

73 Sections 3 and 6, Disability Discrimination Act 1999.

74 Section 7, Anti-discrimination Act 2004.

75 Art. 37.3, Law 13/1982 on the social integration of the disabled (as amended).

76 Section 3A(2), Disability Discrimination Act 1995.

77 Section 4, Ethnic Discrimination Act 1999.

78 Art. 5(4), Decreet houdende evenredige participatie op de arbeidsmarkt, 8 May 2002.

Ata'rah | *1999*

chapter 5
The personal and material scope of national provisions

A. Personal scope

The Racial Equality Directive and Employment Equality Directive are applicable to all persons. This implies that national anti-discrimination laws should apply to all persons on a Member State's territory irrespective of whether they are EU or third country nationals. On the whole, protection against discrimination on any of the Directives' grounds in the Member States is not conditional on nationality, citizenship or residence status.[79]

Recital 16 of the Racial Equality Directive states that it is important to protect all natural persons against discrimination and that Member States should also provide, where appropriate and in accordance with their national traditions and practice, protection for legal persons where they suffer discrimination on grounds of the racial or ethnic origin of their members. The Employment Equality Directive does not have an equivalent recital, however there is no reason why both natural and legal persons should not be understood under the term 'persons' in that Directive as well. In most countries both natural and legal persons are protected against discrimination. Where the law does not expressly distinguish between the two, this is assumed, as for instance in Latvia and Greece. Legal persons remain categorically unprotected in Lithuanian and Swedish law,[80] and in Austria the wording of the legislation implies that protection against discrimination is provided for natural persons only, while in Estonia local legal tradition implies that only natural persons can be recognised as victims of discrimination.

Neither Directive indicates whether the Directives should be understood as making both natural and legal persons liable for discriminatory acts. Nor do they provide who exactly should be held liable for discriminatory behaviour. This issue is discussed above in relation to harassment. The question of liability is particularly relevant in cases of discrimination in employment, as often the employer carries responsibility for the actions of his or her employees, for example for discrimination against a client or for harassment by one employee against another. In Ireland[81], the Netherlands[82] and Sweden, the anti-discrimination legislation is directed at employers and usually the person who actually acted in a discriminatory way cannot be held personally liable. In contrast, in Lithuania liability for discrimination is personal and only the person who has acted in a discriminatory way is liable under the law, not the employer or service provider.

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

[80] In Sweden this issue is currently being considered by a public Discrimination Investigations Committee.

[81] Most provisions of the Irish Employment Equality Act 1998-2004 are aimed at the employer and no clear provision is made to enable actions against the perpetrator(s) of discrimination. Exceptions are section 14 of the Act, which refers to liability being imposed on the person responsible for procuring or attempting to procure discrimination, and section 10 which refers to liability being imposed on a person who displays discriminatory advertising.

[82] Dutch legislation in the field of employment is directed towards employers, employers' organisations, organisations of workers, employment offices, public job agencies, professionals, training institutions, schools, universities etc.

It is less common to make employers liable for the actions of third parties such as tenants, clients or customers who discriminate against their employees. In Portugal, for instance, employers and services providers can only be held liable for actions of third parties where a special duty of care is imposed by law or where a special relationship can be established, for example sub-contractors[83]. Similarly, in the Netherlands, records of Parliamentary debates are thought to make clear that the Dutch legislator did not intend the anti-discrimination legislation to be enforceable against a colleague or a third party on the basis that there is no contract or relationship of authority between the parties.[84]

Trade unions and other trade or professional organisations are not usually liable for the discriminatory actions of their members.

B. Material scope

Article 3(1) of both Directives lists the areas in which the principle of equal treatment must be upheld. Four sections are common to both Directives and therefore all five grounds of discrimination: conditions of access to employment, self-employment or an occupation, including selection criteria and recruitment; access to all types of vocational training and guidance, including practical work experience; employment and working conditions, including dismissals and pay; and membership or involvement in workers' organisations, employers' organisations and professional organisations. The Racial Equality Directive extends the scope of protection against discrimination on the grounds of racial or ethnic origin to social protection, including social security and healthcare, social advantages, education, and access to and the supply of goods and services that are available to the public, including housing.

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

The respective country experts in the European Network of Legal Experts in the non-discrimination field are generally satisfied that the scope of the Directives is met in Austria (with the exception of disability and also some provincial legislation), Cyprus, Denmark, Finland, France, Hungary, Ireland, Italy, the Netherlands, Portugal, Slovakia, Slovenia and Spain. The scope of Belgian law

[83] Article 617(2) of Labour Code.

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

remains incomplete because of gaps in the regions' and communities' legislation (with regard to vocational guidance and training and protection in employment for the personnel of the Regions and Communities and education).

To fulfil the Directives' requirements, national anti-discrimination law must apply to the public and private sectors, including public bodies. Not all Member States currently meet this requirement. In Malta, the Directives have been implemented in employment legislation for the private sector only; only more general provisions in the Constitution and European Convention Act apply to the public sector. But, as is pointed out in Latvia where equal treatment in the civil service is also only covered by the Constitution, even if the equal treatment principle applies, the norms for enforcement such as the burden of proof are lacking. Amendments to apply the same protection as is available under the Latvian Labour Law to civil service relationships have been drafted. In Portugal the equality and non-discrimination provisions of the Labour Code currently apply to both private employment and public sector employees and will continue to do so until different specific regulations are adopted for the latter (Article 1(2) of Law 35/2004). The Bills currently in Parliament in Luxembourg do not cover the public sector and the Council of State has warned that Luxembourg thereby risks being held liable for inadequate transposition of EC law.

In contrast, in Hungary not all private actors are covered by the Equal Treatment Act of 2003. The Hungarian legislator took a unique approach among the EU Member States, in that it does not enumerate the fields falling under its scope, but instead lists the public and private entities which must respect the requirement of equal treatment in all their actions. These are mostly public bodies and include state, local and minority self-governments, public authorities, the army, the police, prison services, border guards, public foundations and associations, bodies providing public services, schools and universities, persons and institutions providing social and child protection services, museums, libraries, private pension schemes, voluntary mutual insurance schemes, health service providers, political parties and other organs funded by the central budget (Article 4). Four groups of private actors are listed (Article 5): (i) those who offer a public contract or make a public offer; (ii) those who provide public services or sell goods; (iii) entrepreneurs, companies and other private legal entities using state support; and (iv) employers and contractors.

Equality must be guaranteed in all sectors of public and private employment and occupation, including contract work, self-employment, military service and statutory office. A number of countries fall short of this protection. Military service is not included in the scope of Latvia's legislation transposing the Directives, while in the Netherlands, the Age Discrimination Act does not yet apply to military service (it must do by 1 January 2008 at the latest). In Estonia, Greece, Latvia, Lithuania, Malta, Sweden and the United Kingdom, self-employment and/or occupation are not fully covered, nor are these included in either of the Luxembourg Bills. Maltese law does not apply to military personnel or to persons who work or perform services in a professional capacity or as a contractor for another person where the work or service is not regulated by a specific contract of service. With respect to persons who hold statutory office, the Act will only apply if the person concerned has a contract of employment.

Estonian law only applies to employment contracts, and as a result does not regulate the work of those working under other arrangements including the self-employed and public officials. Similarly, Czech law does not yet apply to self-employment,

occupation or contract work and applies only partially to public employment. In the Netherlands the term "liberal profession" has been used instead of self-employment and will have to be broadly interpreted in order to guarantee that not only doctors, architects etc. are covered, but also freelancers, sole traders, entrepreneurs etc.

Other identified gaps in protection in the employment field include the lack of reference to 'working conditions' in Swedish law: only 'employment conditions' are expressly included, implying a more limited scope covering conditions which are regulated by an employment contract but not the circumstances in which work is carried out. Latvian law does not prohibit discrimination on the grounds of age, disability or sexual orientation in vocational guidance or training in civil service. Lithuanian legislation does not cover membership of or involvement in employers' and employees' and professional organisations, in Estonia there are no special provisions regarding access to membership of workers' organisations, and in Latvia, the membership and involvement of professional organisations is omitted.

As already noted, the Czech Republic, Estonia, Latvia, Malta and Poland have yet to transpose the Racial Equality Directive beyond the employment sphere. In Latvia other laws ensure racial discrimination is outlawed to some extent in education, social protection and social advantages, but not in goods and services. In Ireland it is questionable whether social protection, social advantages and education are covered by the scope of the Equal Status Act 2000-2004. Lithuanian law does not cover social protection or social advantages.

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

In Luxembourg the bills drafted to transpose the Directives use the exact wording of the Directives in terms of the employment-related scope, including the exception in Article 3(3), however, the scope of the Racial Equality Directive outside employment is not reproduced, thus social protection, social advantages and education would be left without protection. The Penal Code already prohibits discrimination in goods and services in the public sphere, as well as some employment-related situations, but with significant gaps. No amendments to the Penal Code are proposed.

The term "social advantages" is mostly left undefined in national legislation. In the Netherlands it is observed by the government in the Explanatory Memorandum to the General Equal Treatment Act that this notion must be interpreted in the light of ECJ case law rendered in the context of Regulation 1612/68 on free movement of workers.[85] In the Dutch government's view, the notion of social advantages refers to advantages of an economic and cultural kind which may be granted by both private and public entities. These may include student grants, public transport reductions and reductions for cultural or other events. Advantages offered by private entities are, for example, reductions for entry to the cinema and theatre.

In Sweden discrimination related to education is only prohibited in higher education.[86] However a recent government enquiry examined how discrimination in the school system should be prohibited and proposed increased liability and responsibility for violations of the integrity of students in general, which will mean that local governments or others who carry out school activities will be liable for damages in relation to students who are discriminated against by the school on the grounds of sex, ethnicity, religion or other belief, sexual orientation or disability. This proposal is currently the subject of a consultation.

The Racial Equality Directive prohibits only those goods and services, including housing, that are available to the public. The boundaries of this prohibition generated debate in many countries, and most Member States do indeed restrict protection to publicly available goods and services. Exceptions are Cyprus, France, Italy, Slovenia and Spain, where the law does not distinguish between goods and services available to the public and available privately and it is thus presumed to apply to both. A few legislatures provided definitions to delineate the circumstances in which discrimination is prohibited. In Belgium the *travaux préparatoires* of the law clarify that discrimination is prohibited wherever goods or services are offered on the market, in other words, not reserved to a closed circle. Swedish law prohibits discrimination in goods and services, including housing, which are professionally provided, and thus the law does not apply to private transactions, for example where a private individual refuses to sell a flat to an individual on the ground of one the characteristics listed. A Swedish Governmental committee is currently considering whether private individuals should be covered by the 2003 Prohibition of Discrimination Act.

The Finnish Non-Discrimination Act covers the "supply of or access to housing and movable and immovable property and services on offer or available to the general public other than in respect of relationships between private individuals". Thus for example bank and insurance services, transportation services, repair services, and the selling and hiring of premises for business are covered. Significantly, the *travaux préparatoires* provide that the powers of the European Community and the basis of the Directives have to be taken into account when interpreting this provision. The German anti-discrimination Bill reproduces Article 3(1)(h) of the Racial Equality Directive, but lays down broad exceptions: in cases of presumed race discrimination, it covers all

[85] E.g. ECJ Case C-261/83 *Castelli* of 12 July 1984 and Case C-249/83 *Hoecx* of 27 March 1985, as referred to in the Dutch explanatory memorandum to the EC Implementation Act, Second Chamber of Parliament 2002-2003, 28 770, nr. 3, p.15.

[86] 2001 Student at Universities Act, on grounds of ethnic origin, religion or belief, sex, sexual orientation and disability.

private contracts, except family and inheritance agreements and contracts which constitute a "particularly close or trust relationship of the parties and their relatives", including rental contracts for living space on the same territory or space; contracts for personal services are also exempt. In relation to all grounds covered by the Directive, it is permissible to discriminate in a rental contract in order to maintain or establish "socially stable inhabitant structures and balanced settlement structures as well as balanced economic, social and cultural structures". In the context of the debate in Germany, this is likely to be used to justify different treatment on the grounds of race, age or disability. Portuguese law provides that private associations have the right to reserve goods and services only to their members. Slovenian law does not expressly cover housing.

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

- Whereas in Austrian federal legislation the distinction between the two Directives' scope is maintained, in some provincial legislation it is levelled up: the Viennese and Carinthian Anti-discrimination Acts protect against discrimination in social protection, social advantages, education and goods and services including housing on all of the Directives' grounds (in Vienna not disability). As the provinces are extremely important landlords, this is a very significant regulation.
- In Belgium all grounds of discrimination are legislated equally in the 2003 Federal Law, whose scope includes a series of circumstances not listed in the Directives' material scope, e.g. access to, participation in and the exercise of any economic, social, cultural or political activity normally accessible to the public.
- The Czech Republic's draft law provides the same protection for all of the Directives' grounds.
- Denmark extends the prohibition of discrimination outside employment to religion or belief and sexual orientation.
- The Finnish Non-discrimination Act prohibits discrimination in access to training/education on a wide variety of grounds, including age, ethnic or national origin, nationality, language, religion, belief, opinion, health, disability and sexual orientation and "other personal characteristics"[87] The Finnish Parliament has passed a motion requiring the government to prepare a new proposal for equality legislation to level up protection across the grounds in terms of scope and enforcement mechanisms.[88] New draft legislation is required to take as its point of departure the principle that all discrimination grounds are to be treated equally.

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

[88] PTK 107/2003 vp, p.7, TyVM //2003 vp.

- In France the general principle of equality in public service guarantees equal treatment in social protection for all grounds. Also, all grounds are protected in goods and services, including housing.
- The German Bill proposes protecting against discrimination in goods and services on the Employment Equality Directive grounds in 'mass transactions'. The term is not defined.
- Hungarian law has practically unlimited material scope, treating all grounds of discrimination equally.
- Irish law has equal material scope for 9 grounds of discrimination.
- The scope of the Italian Immigration Act 1998 is open ended and thus in relation to the racial, ethnic, religious and nationality discrimination covers the full scope of the Racial Equality Directive and more.
- Lithuanian law prohibits discrimination on all grounds in education and goods and services.
- In Slovakian law, the right to health care is guaranteed equally to every person irrespective of religion or belief, marital or family status, colour, language, political or other opinion, trade union activities, national or social status, disability, age, property or other status, including sex, and racial or ethnic origin. The Anti-discrimination Act prohibits discrimination in housing on the grounds of gender, racial, national or ethnic origin. Discrimination in the field of public procurement is also unlawful: the Public Procurement Office can reverse the decision of a contracting authority if discrimination is proven.[89]
- In Slovenia, all of the Directives' grounds and other grounds enjoy protection against discrimination in the field of social protection, social advantages, education and goods and services.
- Spanish law prohibits discrimination in social advantages also on the grounds of religion or belief, disability and sexual orientation.
- In Sweden, discrimination is prohibited in social assistance and social security, including unemployment benefits and health and sickness benefits in kind on the grounds of ethnic origin, religion or belief and sexual orientation. Discrimination in goods and services is prohibited on all these grounds plus disability.
- In the UK, discrimination on the grounds of race, national or ethnic origin, nationality and colour is prohibited in all forms and levels of education. Religion or belief and sexual orientation discrimination is outlawed in further and higher education. Disability discrimination is outlawed in schools. Discrimination on grounds of disability in goods, facilities and services is prohibited (in Northern Ireland also on grounds of religion or political opinion).

[89] The details are provided for in Act No. 523/2003 Coll. on Public Procurement.

Helen | *1989*

chapter 6
Exceptions to the principle of equal treatment and positive action

A. Genuine and determining occupational requirements

Article 4 of the Racial Equality Directive and Article 4(1) of the Employment Equality Directive allow Member States to 'provide that a difference of treatment which is based on a characteristic related to [any of the Directives' grounds] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.' The majority of Member States - Austria, Belgium, Cyprus, the Czech Republic, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovakia, Spain, Sweden and the United Kingdom - have chosen to allow for such exceptions to the principle of equal treatment for all grounds covered by the Directives. Many have literally adopted the Directive's wording, but among those Member States which differ from the Directive's wording are many that risk taking the exception beyond what the Directives permit.

Notably in the UK, the test to justify the genuine occupational requirement appears to be less rigorous than in the Directives in that there is no obligation to show that to so impose the requirement has a legitimate objective. Estonia's provision on genuine occupational requirements, which allows employers to make requirements only with regard to age and disability and not the other grounds of the Directives, does not expressly refer to the legitimate aim or the principle of proportionality of the occupational requirement. Poland's provision transposing Article 4(1) is broader than the Directive, providing that the principle of equal treatment in employment is not violated by non-employment of a person on the basis of one or more grounds listed in the discrimination definition, if it is justified on account of the type of work, working conditions, or occupational requirements laid down for employees.[90] Slovenian legislation lists occupational activities in which a distinction on the grounds of religion, sex, age and disability is permitted, including the army, police and judiciary.

Judicial application of the laws will be key for testing the breadth of national exceptions. For example the substitution of the requirement of "legitimate objective" with "reasonableness" in the Italian law has been criticised for being broader than the Directives, but it may well be that the courts will hold the meaning to be the same. Italian law is also criticised for taking the genuine and occupational requirement too far by permitting "work suitability tests" for the grounds of religion or belief, age, disability and sexual orientation. These remain unaffected by the anti-discrimination law and can clearly be discriminatory in admissions to specific occupations. Latvian Courts will also be watched closely for how they interpret 'objective and substantiated precondition for performance of the relevant work or for the relevant employment'.[91]

France has not included the occupational requirements exception on the basis that the Constitution requires that no provision in French law may create inequality of treatment on the basis of origin. The explanatory memorandum to the Austrian legislation demands that this exception be interpreted narrowly and gives the example of an actor or actress affiliated to a certain ethnic

[90] Art. 183b para 2 point 1, Labour Code

[91] Article 29(2) and (9) Labour Law.

group. It also states that this exception covers health and safety considerations, especially protective provisions regulating a duty to wear uniforms or helmets for reasons of safety.

The Netherlands only provides for the genuine and occupational requirement exception for a person's racial appearance, as opposed to a characteristic related to racial or ethnic origin.[92] However, the exception goes beyond employment situations: the General Equal Treatment Act does not apply 'in cases where a person's racial appearance is a determining factor, provided that the aim is legitimate and the requirement is proportionate to that aim'[93] and the permitted exceptions are exhaustively elaborated in a 1994 governmental decree.[94] Dutch law does not permit such exceptions for religion or belief, disability or sexual orientation. They may be permitted in age discrimination, but this would be treated instead as a objectively justified case of direct discrimination.

B. Employers with an ethos based on religion or belief

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

Those Member States which did not choose to transpose this exception are the Czech Republic, Estonia, France, Lithuania, Slovenia and Sweden. The exception in Article 4(2) has not been expressly implemented in Portuguese law (though is lawful practice for religious entities to dismiss any worker who does not conform to their professed religion or stated beliefs or religious ethos in general). Austria, Cyprus, Denmark, Greece, Hungary, Italy, Ireland, Latvia, Malta, the Netherlands, Poland, Slovakia and the United Kingdom do have provisions implementing Article 4(2). In contrast, the Finnish legislator intended Article 4(2) situations to be covered by the more general genuine and determining occupational requirement provision.[95]

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

[93] Article 2(4)a) General Equal Treatment Act, as amended by 2004 EC Implementation Act. Prior to the 2004 amendment employment situations were covered by this general clause.

[94] *Besluit Gelijke Behandeling* van 18 Augustus 1994, Stb 657 (Governmental Decree on Equal Treatment of 18 August 1994, Law Gazette 657): a. The profession or activity of actor, dancer or artist insofar that the profession or activity regards the performance of a certain role; b. Mannequins, models for photographers, artists etc., insofar as requirements can reasonably be imposed upon outer appearances; c. Participation in beauty contests insofar as appearances connected with a person's race, are vital in the light of the contest's aims; d. The provision of services that can only be provided to persons having certain outer appearances.

[95] Government proposal 44/2003, p. 45

There are concerns in a number of States that the exceptions based on Article 4(2) are too wide. The exception in Greek law seems to permit exceptions in respect all persons working for public or private organisations with an ethos based on religion or belief, irrespective of the nature of their activities or the context in which they are carried out. In Italy, the law implies that the exception applies also to organisations that do not have an ethos based on religion or belief, and introduces an exception that goes beyond national rules already in force, which is not permitted by the Directives. In Slovakia, the exception for organisations with a religious ethos is believed to be too wide because it allows differences of treatment based on age, sex, religion or belief and ascertainment of sexual orientation instead of only religion and belief, and is a general exception which religious organisations can apply to any employee, regardless of the nature of the work.

There are warnings about the wording of the religious ethos exceptions in the Luxembourg and German Bills currently before Parliament. The Luxembourg Council of State has warned that the provision in the Bill transposing Directive 2000/78 would, in its current wording, introduce new restrictions on freedom of religion and freedom of speech, and thereby breach the Directive, since Article 4(2) exceptions are only permitted if they are existing law or practices incorporating existing national practices. Paragraph 9 of Germany's draft anti-discrimination legislation allows religious or belief entities and institutions associated with them to treat potential employees differently on the basis of their religion irrespective of the legitimacy and adequacy of the job requirements. It permits exceptions based on rules which call for "the loyal and truthful behaviour of employees".

C. Armed forces and other specific occupations

Recital 18 of the Employment Equality Directive states that the Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services. Article 3(4) specifies that Member States may provide that the Employment Equality Directive does not apply to the armed forces in so far as it relates to discrimination on the grounds of disability and age. Member States should thus actively declare an exception for the armed forces on these grounds if they plan to rely on this Article. A few Member States have included an express exemption for the armed forces in their legislation, e.g. in relation to both age and disability in France, Greece, Ireland, Malta[96] and in relation to disability in the UK, but others have simply maintained age and capability requirements in their regulations on the armed forces without expressly declaring an exemption from the equal treatment principle, e.g. Portugal, Slovenia, and Spain. This exception has not been made use of in Finland, Germany, Hungary, Lithuania, the Netherlands, Portugal or Sweden.

Irish law provides exemptions on the basis of age in respect of the police, prison service or any emergency service.[97] The Czech Republic's laws regulating the armed and security forces (including firemen, custom officers, prison officers and police) do not

[96] This exemption is found in the Legal Notice 461 of 2004. However the armed forces are not excluded from the scope of the Equal Opportunities (Persons with Disabilities) Act

[97] Section 37, Employment Equality Act 1998-2004

include the grounds age or disability in their anti-discrimination clauses, implying such discrimination is permitted. In Slovakia, the Anti-discrimination Act's provisions on disability and age are expressly without prejudice to the regulations on the service of customs officers, members of armed forces, armed security services, armed services, the National Security Office, the Slovak Intelligence Service and the Fire and Rescue Services. [98]

The Italian Decree transposing the Employment Equality Directive expressly deems as non-discriminatory "the evaluation of such characteristics [age, disability, sexual orientation, religion or belief] when they are relevant to establish whether a person is suitable to carry out the functions that the armed forces and the police, prison and rescue services can be called upon to carry out". This exception appears to go further than Recital 18 permits.

D. Nationality discrimination

Article 3(2) of both Directives provides that 'the Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.' This is also stated in paragraphs 12 and 13 of the preambles to the Employment Equality and Racial Equality Directives respectively. Nevertheless, in several EU Member States nationality is a prohibited ground of discrimination of general application, including the Netherlands (General Equal Treatment Act), Portugal (Labour Code, Law 134/99, Law 18/2004 of 11 May) and Spain (OL 4/2000). The Hungarian Equal Treatment Act contains an open list of prohibited grounds and nationality discrimination, being prohibited by the Constitution, can be assumed to be on that list. In Ireland the statutory definition of race includes nationality, ethnic or national origin,[99] and in the UK, racial grounds are defined as race, colour, nationality and ethnic or national origins.[100] Nationality as a ground of discrimination is to be distinguished from national origin, which is a prohibited ground, *inter alia*, in Austria, Cyprus and Sweden.

Where nationality discrimination is prohibited, it tends to be accompanied by explicit exceptions such as working in certain public sector posts or representing the country in sport.

A number of Member States have expressly excluded from the scope of their implementing legislation discrimination based on nationality and the entry and residence of third-country nationals and stateless persons and any treatment which arises from the legal status of such persons: Cyprus, Greece, Italy, Malta and Luxembourg (draft law) include this and the Czech Anti-discrimination Bill excludes the entry and residence of third country nationals. The British Race Relations Act prohibits discrimination in immigration and nationality functions on the grounds of race or colour (section 19B and 57A) and also

[98] Section 4, paragraph 1(b) of the Anti-discrimination Act

[99] Section 6(2)(h) Employment Equality Act 1998-2004

[100] Race Relations Act (s.3) and Race Relations Order (Art.5). S.78/Art. 2 define "nationality" as including citizenship.

nationality and ethnic or national origins, but the latter grounds are subject to potentially wide exceptions (ss 19C and 19D).

While in Italy nationality discrimination is prohibited under the 1998 Immigration Act, which provides for protection similar to that offered by the Directives, it is expressly excluded from the decrees transposing the Directives. The relevant provisions of the Immigration Act are however expressly left in force by the Decrees. There is concern about this transposition technique. A potential inconsistency with EC law is found in the Finnish Non-Discrimination Act, which incorporates this exception, but omits to distinguish between those foreigners who are citizens of EU countries and those who are not: Section 3 provides that the Act does not apply to the "application of provisions governing entry into and residence in the country by foreigners, or the placing of foreigners in a different position for a reason deriving from their legal status under the law".

There is some concern that the exceptions in Article 3(2) can be used to hide what is really racial or ethnic origin discrimination in the guise of legitimate nationality discrimination. The current climate in many European countries is one in which 'foreigners' often face discrimination. In Austria it is pointed out that such cases will be rather difficult to deal with in the courts if the exemption for the nationality ground is interpreted broadly by the courts; it is likely that the onus of proof will be mainly on the claimant to show the racist background of these actions. In Italy racial discrimination is often disguised as different treatment of non-EU citizens, which can lead to indirect discrimination on the grounds of ethnic origin.

E. Family benefits

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

Some Member States have incorporated this recital into their implementing legislation, e.g. Italy. In Austria the explanatory memorandum to the Equal Treatment Act refers to Recital 22, stating that 'Discrimination against homosexual partnerships compared to unmarried heterosexual partnerships is prohibited; voluntary social benefits are to be granted to all partnerships or only to married couples. Privileges for marriage remain permissible'. The UK relies on Recital 22 in its Sexual Orientation Regulations (reg. 25) and Northern Ireland Sexual Orientation Regulations (reg. 28), introducing a specific exception for benefits dependent on marital status. However, discrimination in employment against civil partners (registered same-sex partners) has been forbidden. In Ireland there are express exceptions to the prohibition against discrimination on the grounds of sexual orientation and marital status in the Employment Equality Act 1998-2004 and the Pensions Act 1990-2004, allowing the employer to limit all 'family benefits' to married partners and to those children that are legally or biologically associated with that employee.

There is no mention of benefits linked to marriage being exempt from national anti-discrimination law in Cyprus, Estonia, Poland, Latvia, Lithuania or Slovenia, but generally any family-related work benefits apply only to heterosexual marriage and it is assumed marriage-related benefits are not affected by anti-discrimination laws. In Slovakia marital status is a protected ground of discrimination in the Labour Code.

Differences in treatment between same-sex couples and different-sex couples is not permissible in Belgium, where different-sex and same-sex couples have been able to enter 'legal cohabitation' since 1998 and same-sex civil marriage has been legal since February 2003. The law does not permit same-sex couples to be excluded from work-related family benefits. Similarly in Finland, the Act on Registered Relationship (950/2001) has eliminated most instances of differential treatment between different-sex married couples and same-sex registered partners. The registration of a partnership shall have the same legal effects as the conclusion of a marriage, unless a law specifically otherwise ordains (section 8). However, the Act on Registered Partnership does not have direct implications for collective agreement provisions, which often contain provisions relating to group life insurance and holidays for example, although nowadays most benefits in collective agreements refer to people living in the same household. It is not permissible in Denmark, Hungary, the Netherlands, Portugal or Sweden to treat same-sex couples differently from different-sex couples. The Swedish Registered Partnership Act (1994:1117) was introduced to create a legal framework for homosexual couples which corresponds to that of civil marriage for heterosexuals. The legal consequences of a registered partnership under Swedish law are very similar to those of a marriage.

F. Health and safety

With regard to disabled persons, Article 7(2) of Directive 2000/78 allows Member States to maintain or adopt provisions on the protection of health and safety at work and measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment. Cypriot, Irish, Greek, Lithuanian and Portuguese law may reflect this exception to the prohibition against disability discrimination, as may the Luxembourg Bill transposing Directive 2000/78. Different treatment is expressly permitted in the Netherlands if it is necessary for the protection of public security and health,[101] and in Ireland, where a person has a disability that under the given circumstances could cause harm to that person or to others, treating that person differently to the extent reasonably necessary to prevent such harm does not constitute discrimination.[102] This can be interpreted as an exception to the principle of equal treatment.

[101] Article 3(1)a) of the Disability Discrimination Act

[102] Section 4(4) Equal Status Act 2000-2004. Section 7(4)(b) of the same Act excludes the provisions of the act in respect of the provision of education where compliance with the non-discrimination provisions would make it impossible or have a seriously detrimental effect on the provision of education to other students. What is unclear in respect of both provisions is who makes the decision as to whether a person is a harm to his or herself or others and by what standards.

In the UK, the Disability Discrimination Act does not provide for specific exceptions for health and safety reasons, but where, after reasonable accommodation, there is still a genuine health and safety risk, an employer may rely on this as a justification for less favourable treatment of the disabled person. In Finland, health and safety concerns may be taken into consideration when assessing whether the measures needed to accommodate a person's disability are to be deemed reasonable: the *travaux préparatoires* to the Non-discrimination Act indicate that measures would not be considered reasonable if they would change the operation of the work place too much and would at the same time endanger occupational safety and health.

In Belgium, there are no such explicit exceptions in the legislative instruments that implement the Directives. However, it could be argued that under Article 3 of the Federal Law of 25 February 2003, which states that it is without prejudice to the obligation to respect the fundamental rights and freedoms recognised in Belgium, any restriction to the principle of equal treatment would be justified by the need to protect the health and safety of others (the co-workers and the general public), or even of the individual concerned.

Article 8(4) of the Maltese Equal Opportunities (Persons with Disability) Act 2000 provides that nothing shall preclude an employer of a disabled person from informing, if he deems necessary, first aid and safety personnel regarding any emergency treatment that might be required by such applicant because of his disability or regarding any special precautions that might need to be taken because of the said disability.

In Austria, health and safety requirements can be considered as genuine occupational requirements, in particular 'protective provisions regulating a duty to wear uniforms or helmets for reasons of safety'. This exception is not restricted to disability discrimination but could apply to all the grounds dealt with by the Equal Treatment Act.

In a similar vain, courts in some countries may allow health and safety concerns to objectively justify alleged indirect discrimination. In the UK a number of cases alleging indirect discrimination on racial grounds have been brought in which the employer or the educational institution had imposed a dress code on health and safety grounds which disadvantaged members of particular racial groups were unable to comply with, e.g. a "no beards" requirement where food is prepared or packaged for reasons of hygiene[103] or a requirement for railway repair workers to wear protective headgear.[104] In such cases the employer must show that their need for the rule outweighs its discriminatory impact, taking into account whether there are other, non-discriminatory, ways in which the health and safety risk could be dealt with.

[103] Panesar –v- Nestle' Co. Ltd. [1980] IRLR 64; Blakerd –v- Elizabeth Shaw Ltd. [1980] IRLR 64

[104] Singh –v- British Rail Engineering Ltd. [1986] ICR 22

G. Exceptions related to discrimination on the ground of age

There are a number of common practices in the Member States that are based on different treatment of persons because of their age, for instance, minimum or maximum age requirements for employment or benefits based on length of service. The Employment Equality Directive expressly allows Member States to directly discriminate on the grounds of age, providing in Article 6(1) that 'Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.' It then lists examples of differences which could be allowed, including the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment. Under Article 6(2) Member States may provide that ages can be fixed for admission to occupational social security schemes or entitlement to retirement or invalidity benefits, as long as this does not amount to sex discrimination.

Several Member States have directly transposed Article 6 of Directive 2000/78 into national law, including Austria, Cyprus, Greece, Malta, Portugal[106] and Slovakia. Given the hesitations around age discrimination, and also the complexity of the issues, it is perhaps not surprising that some Member States allow the maximum exceptions. The German and Luxembourg draft laws also seek to directly transpose Article 6 (with the exception in Luxembourg of Article 6(1)(c), which has been left out as it is considered unnecessary). France, Italy and Slovenia also have provisions that resemble Article 6.

Article 6 has been closely followed in the Irish Employment Equality Act 1998-2004 and in Article 7(1) of the Finnish Non-Discrimination Act. However, the latter omits reference to the requirement that the means used to achieve legitimate aims must be "appropriate and necessary". It is thought that the general legal principle of proportionality may have the same effect, however. Some Belgian regional legislation reflects Article 6, and as Belgium has until 2 December 2006 to fully transpose Directive 2000/78 as it relates to age, it is possible that Article 6 will also be incorporated into Federal legislation. Sweden and the UK have also still to implement Directive 2000/78 with respect to age.

As Hungarian and Latvian law allow direct discrimination on any ground to be justified, there is no additional justification test relating specifically to age discrimination. Dutch law does not distinguish between direct and indirect age discrimination, allowing objective justification for any kind of age discrimination and expressly permitting age considerations to be taken into

[105] A Thematic Report on this theme written by the European Network of Legal Experts in the Non-discrimination Field provides a more detailed analysis, cf. Thematic Study on "Age Discrimination and European Law" by Colm O'Cinneide. Some of the findings of this study are reproduced in this section.

[106] Art. 33(4) of Law 35/2004 provides that legal rules or collective agreements permitting any such measures must be periodically evaluated and modified if they are no longer justifiable.

account in a number of circumstances. The Polish legal system allows direct discrimination on the ground of age in clearly specified situations, but there is no general clause.

Article 6(1)(b) expressly allows laws which seek to promote the vocational integration of or protect young people, older workers and persons with caring responsibilities, and indeed such laws are very common in the EU Member States. Almost every Member States has some legislation which aims to protect young employees, for instance Estonia, Finland, France, Hungary, Ireland, Malta, Poland, Portugal, Slovakia and Slovenia. Hungary also has special measures for carers, including protection against dismissals for persons with caring responsibilities for a child or close relative. In Lithuania persons accorded additional guarantees in the labour market include persons in the 16-25 age group in their first job, persons with less than five years until their entitlement to old age pension, and single parents caring for children under eight years of age.[107] In Latvia, in selecting persons to avoid redundancy, priority is given *inter alia* to persons caring for a child under 14 years or a disabled child under 16, persons with at least 2 dependant persons, and persons who have less than five years until they reach the age of retirement.[108] The Slovenian Employment Relations Act provides that the temporary absence of a worker for reasons of caring for a family member or a disabled person cannot be a criterion for determining who should be made redundant.

Minimum and maximum age requirements, in particular in access to employment, seem to be widely permitted. These can be described as direct age requirements, whereas a required number of years of experience constitutes an indirect age requirement. The Czech Republic has examples of both direct age requirements (minimum age requirements for employment and self-employment activity and maximum age limits set for certain professions) and indirect age requirements (conditions of pay dependant on years of experience, requirement of a certain education and minimum period of training for entrance to professions). In the United Kingdom a wide variety of trades and professions set minimum ages for entry as trainees and in some cases there are also maximum ages for entry. In fixing age limits, employers are expected to avoid unlawful discrimination on other grounds. In Germany there is a maximum age for access to public support to study at university and a minimum age for starting to count employment time towards benefits.[109]

Issues of age discrimination are also raised by the imposition of mandatory retirement ages, but a direct comparison of the situation in the different Member States is impeded to a large extent by the great uncertainty surrounding the question of retirement ages and the extent to which the Employment Equality Directive's age discrimination provisions require existing national practices to be altered. The term 'retirement age' itself generates confusion, due to the varying terminologies in use throughout the EU. Any Europe-wide comparison requires a clear distinction to be made between pensionable age,[110] state-

[107] Art. 92 part 2 Employment Code.

[108] Art.108 Labour Law.

[109] Age 17, according to § 6 Act on Support of Civil Servants.

[110] Some Member States use the terms retirement age and pension/pensionable age inter-changeably.

imposed retirement age and contractual or employer-imposed retirement age. Pensionable age is the age set by a Member State at which individuals become entitled to a state pension (as distinct from the age at which individuals retire from work) and age-based state pension rules are exempted from the scope of the Employment Equality Directive (Article 3(3)). As far as state-imposed mandatory retirement ages are concerned, it is not clear whether they are permitted, as the situation under the Employment Equality Directive is ambiguous. Recital 14 states that "This Directive shall be without prejudice to national provisions laying down retirement ages"; but there is no further reference in the actual text of the Directive to any automatic exemption for any form of retirement age. State-imposed mandatory retirement ages may be exempt by virtue of Article 3(3) if they can be classed as part of state social security schemes, otherwise they require justification under Article 6(1). Some states impose fixed mandatory retirement ages upon certain categories of citizens, mainly in the public sector. In Cyprus, for instance, all civil servants may retire at 55 if they wish, but they are compelled to retire at 60. In Spain, Law 30/1984 on Civil Service Reform (Article 33) imposes a mandatory retirement age of 65 for the civil service, with some exceptions.

A key issue concerns whether employers are entitled to set mandatory retirement ages by contract, collective bargaining or unilaterally. Employers may be given the right to set retirement ages by legislation in some Member States: for example in Estonia, Article 120 of the Law on Public Service provides that in general an employer has the right to terminate the employment contract of an employee if the employee has attained 65 years of age. Alternatively in other Member States, employers may be able to set retirement ages because legislation deprives employees over that age of protection under the law from unfair dismissal. This is the case in Cyprus, where under section 4 of the Law on Unfair Dismissal, the right to protection from unfair dismissal is lost upon reaching retirement age. This is also the case in the UK at present. Other countries, including France, provide that protection from unfair dismissal is lost when full pension rights accrue (Article L122-14-13 of the French Labour Code). With regard to contractual or employer-imposed retirement ages, a requirement that an employee retire at a specified age amounts to less favourable treatment on grounds of age and is therefore unlawful unless justifiable under Article 6(1). The same is true for other detriments such as loss of protection from unfair dismissal. This means that retirement ages must be objectively and reasonably justified by a legitimate aim, and the means of achieving that aim must be appropriate and necessary (Article 6(1)). Central to this issue now is whether Member States are permitted to enact a blanket exemption for retirement ages that will automatically be deemed to be justified for the purposes of Article 6(1), or whether there is a further need for express justification for the introduction of a national 'default retirement age' to be demonstrated either by the Member State on a national basis across the labour force, or by each employer on a case by case basis.

In Spain on 3 December 2004 the employers' organisations and the trade unions reached an agreement with the government to amend the Workers' Statute and to entitle the social partners to include clauses in collective agreements on the termination of contracts when employees reach the ordinary retirement age (65), provided that certain conditions and requirements are met. The government is now seeking to adopt legislation containing the literal text of this agreement to enable compulsory retirement clauses to be included in collective agreements, making clear these are not to be considered discriminatory because they are linked to "legitimate employment policy, labour market and vocational training objectives" and therefore to be objectively and reasonably justified.

In transposing the Directives there seems to have been little discussion in some Member States as to the legality of certain existing provisions and practices, and it can be expected that in time legal challenges will bring more debate to the issue of what kind of different treatment based on age should be permitted. Selection criteria for redundancy is one such issue. Taking seniority into account in determining which employees to make redundant helps avoid the possible difficulties of older workers reintegrating into the labour market but potentially amounts to indirect discrimination against younger employees. National law permits age or seniority/years of service to be taken into account in selecting workers for redundancy in Austria, Cyprus, Greece, Estonia, Latvia, Netherlands, Portugal, Spain, Slovenia, Sweden and the UK. Age itself can be considered in Sweden and the UK. According to German labour law doctrine, age and seniority have to be taken into account in cases of mass dismissal, and the Greek Supreme Court has held that age and seniority must be taken into account by employers when selecting employees for redundancy. In Hungary and Poland, employees are protected against dismissal in the years leading up to retirement (five and four years respectively). However, under the Irish Employment Equality Act 1998-2004 the employer may not select a person for redundancy on any of the discriminatory grounds prohibited by the Act, including age.

In setting sums of compensation for redundancy, the age of the employee may not be a reason for different treatment in Austria or Slovakia, but the number of years worked for the employer may be. In the UK the current statutory scheme for compensation for unfair dismissal and redundancy in the Employment Rights Act 1996 is based on the age of the worker as well as his/her period of employment. No compensation is available if the worker is age 65 or older. The period of employment is a key criterion for setting compensation in Estonia, Greece, Italy, Latvia, the Netherlands, Portugal and Spain.

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

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

Legislation in Northern Ireland provides an exception for an act done for the purpose of safeguarding national security or protecting public safety or public order.[111] The German draft anti-discrimination legislation expressly allows for unequal treatment on the basis of religion or belief, disability, age, sexual identity or sex in contracts where this prevents danger, damage or similar (§21 No.1).

[111] Race Relations Order (art. 41), Fair Employment and Treatment Order (art. 79) and the Northern Ireland Sexual Orientation Regulations (reg. 26)

In Portugal, as elsewhere, even though the laws implementing the Directives do not include any specific exceptions concerning public security, public order or similar, these exceptions may be considered implicit. The courts are accustomed to weighing fundamental rights against public security requirements.

I. Other exceptions

The comment was made in one country that the equality law is not yet sophisticated enough for there to be any significant exceptions to the principle of equal treatment. Indeed it appears that the more detailed the law and the further it goes beyond the EC Directives, the more numerous the exceptions.

Irish law provides for a considerable number of exceptions. Two in particular merit reference on account of concern about their compatibility with the Directives. Firstly, Section 35 of the Employment Equality Act 1998-2004 permits employers to offer a lower rate of remuneration to a disabled person if 'by reason of the disability, the amount of that work done by the employee during a particular period is less than the amount of similar work done, or which could reasonably be expected to be done, during that period by an employee without the disability.' Secondly, there is an exemption from the definition of employee for 'persons employed in another person's home for the provision of personal services for persons residing in that home where the services affect the private or personal life of those persons.'[112] "'Personal services', in relation to such services provided in a person's home includes but is not limited to services that are in the nature of services in loco parentis or that involve caring for those residing at home." Exceptions under the Equal Status Act 2000-2004 include a number of exceptions to the right to equal treatment in education, especially relating to religion, and differences in the treatment of persons on the ground of religion in relation to goods or services provided for a religious purpose.

The Netherlands also has an exemption for private educational establishments, which have the freedom to impose requirements governing admission to or participation in the education provided by the establishment.[113]

Notable exceptions in the Lithuanian Law on Equal Treatment are the requirement to know the State language, the prohibition from taking part in political activities and different rights applied on the basis of citizenship.

J. Positive action

Article 5 of Directive 2000/43 and Article 7(1) of Directive 2000/78 permit Member States to maintain or adopt specific measures to prevent or compensate for disadvantages linked to any of the grounds covered, with a view to ensuring full equality in practice.

[112] Section 3 Equality Act 2004.

[113] Article 7(2) of the General Equal Treatment Act

In most Member States it is legal to introduce positive action measures: Austria, Belgium, Cyprus, the Czech Republic, Estonia, Finland, Greece, Hungary, Ireland, Italy, Malta, the Netherlands, Poland, Portugal, Slovenia, Spain, Sweden and the United Kingdom. In Italy, while positive action measures are in line with the Constitution, the Decrees transposing the Directives did not include provisions on this and as yet there are only measures linked to gender and disability and to a certain extent religion. The Hungarian Equal Treatment Act contains both a general provision allowing for positive action and more explicit provisions on positive action in relation to employment, the social system and health care, and education and training. According to the case law of the French Supreme Court, positive action in France is based on neutral and general grounds of distinction such as sex, disability, territory or socio-economic condition.[114] While France does not base positive action on race or origin, persons discriminated on the grounds of their origin will be indirectly assisted by such measures.

The Belgian Constitutional Court (Court of Arbitration) has set four conditions for positive action measures to be considered non-discriminatory:[115] first, the measure must constitute a response to situations of manifest inequality; second, the legislator must have identified the need to remedy the imbalance between groups, i.e. the initiative must be based on a legislative mandate; third, the measures must be of a temporary nature and cease as soon as their objective – to remedy this imbalance – is attained; fourth, these corrective measures must not go further than is required.

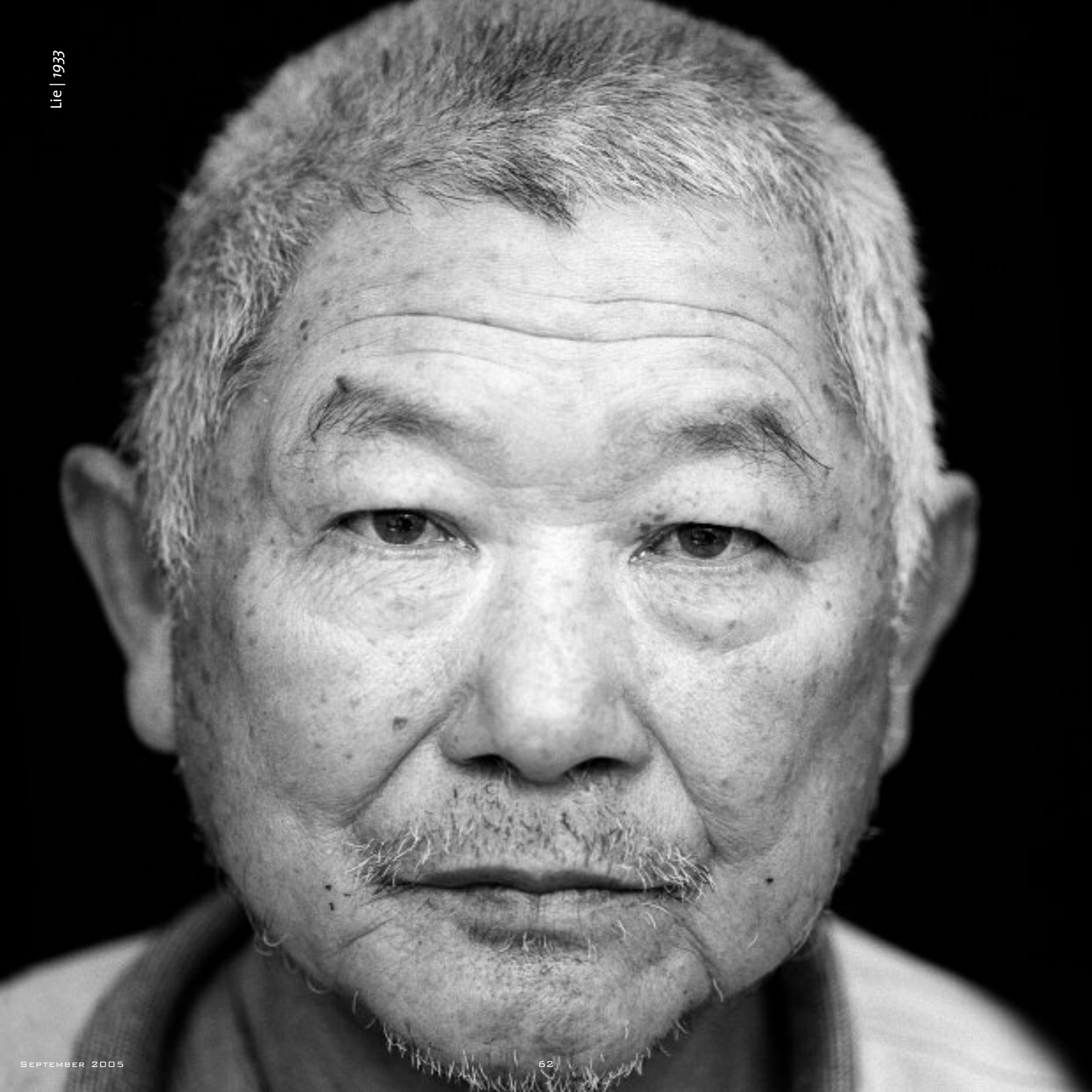
The Slovak Republic's provision on positive action in the new anti-discrimination law is currently being challenged by the government before the Constitutional Court so it remains to be seen if such measures will be allowed there. In Greece, the adoption of positive measures for promoting equality is an obligation imposed upon the State by virtue of Article 116.2 of the revised Constitution. The Finnish law goes beyond the Directives by compelling all public authorities to foster equality. UK public authorities have a similar duty to promote racial equality that is enforceable by the Commission for Racial Equality. Swedish law obliges employers to take measures designed to ensure full equality with regard to ethnic background.

Article 7(2) of Directive 2000/78 allows Member States to maintain or adopt provisions on the protection of health and safety at work or measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting the integration of disabled persons into the working environment. Disability is the ground for which there are probably most positive action, or special measures in place. These can be found in the great majority of Member States. There is a quota system for the employment of disabled persons in Austria, Belgium (public sector only), Cyprus, the Czech Republic, France, Germany, Greece, Italy, Lithuania, Malta, Poland, Portugal, Slovenia and Spain. However alternatives to employing a certain number of disabled persons such as paying a fee or tax are almost always offered. In Ireland, there is a government policy called the 3% target, which regards it as desirable that the civil and public services aim to ensure that 3% of its work force are people with disabilities.

[114] Conseil d'Etat, 1996, *public report* n° 48, p. 86 et 91.

[115] Identified by the *Cour d'Arbitrage*, 27 January 1994, Case n° 9/94, recital B.6.2, confirmed by the judgment of the Constitutional Court of 6 October 2004, recital B.79.

There are also many examples of positive action for racial or ethnic minorities, in particular Roma. Austria has positive action measures for all recognised national minorities, and these include Roma. Greece has had a special protection programme promoting Roma social integration since 1996 and has taken major legislative initiatives of a positive action character, though to little avail. The Czech Republic's Roma programmes are usually established by governmental decrees and generally they aim to improve integration of Roma, for example by combating unemployment and addressing the social problems linked to exclusion. There is a system in place for supporting Roma students in higher education through special state financial subsidies. In Slovakia, despite the debate around the constitutionality of positive action, there are measures to assist Roma in particular. The Czech Republic, Hungary and Slovakia are involved in the Roma Decade of Social Inclusion, which requires their governments to draw up and implement action plans over a ten-year period. In 2004, the Polish government announced a programme for the Roma community to be implemented over 10 years, with a budget of approximately 1,4 million euro for 2004 and approximately 2.38 million euro for each year thereafter. The programme will provide assistance to Roma in the fields of education, health care, living conditions, culture and in combating unemployment and will be implemented by local authorities and non-governmental organisations (NGOs). Slovenia has also implemented measures which seek to generate effective equality of Roma.



chapter 7
Remedies and enforcement

A. Judicial and administrative procedures

Article 7(1) of Directive 2000/43 and Article 9(1) of Directive 2000/78 provide that 'Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under [these Directives] are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.' In no Member State are discrimination disputes resolved purely in the courts. All States combine judicial proceedings – according to the type of law, civil, criminal, labour and/or administrative - with non-judicial proceedings which tend to be more easily accessible. Mediation or conciliation proceedings may be available as a mandatory part of the court proceedings, as in France, Portugal and Spain, or separately, as for example in Hungary and Slovakia. Some proceedings are exclusively for private or public sector complaints, while others hear both.

Some non-judicial proceedings are general but provide an effective forum for discrimination cases, whereas others have been established especially for discrimination cases as an alternative, complementary dispute resolution procedure to the normal courts. Among the general non-judicial procedures are Inspectorates, Ombudsmen and Human Rights Institutes.

Labour Inspectorates are charged with enforcing employment law, including equal treatment provisions, in Finland, Hungary, Latvia, Lithuania, France, Greece, Portugal and Spain. In addition in Lithuania, Employment Dispute Commissions as regulated by the Employment Code are instituted as the primary mandatory bodies for employment dispute resolution. The responsibility for the establishment of an Employment Dispute Commission in an enterprise, agency or organisation rests with the employer. They are made up of an equal number of representatives of employers and employees. In Spain victims can also submit complaints to the Education Inspectorate and in Hungary they can complain to the Consumer Protection Inspectorate.

The Latvian National Human Rights Office examines and reviews complaints concerning human rights violations and attempts to resolve conflicts through conciliation, which if unsuccessful is followed by non-binding recommendations. In Cyprus the Commissioner for Administration (Ombudsman) can issue binding recommendations and impose small fines. In Spain victims of discrimination may appeal to the general Ombudsmen (at both national and regional level) when the issue concerns acts by the public administration. In addition, there is a non-judicial procedure for discrimination cases under Law 51/2003 on equal opportunities for disabled people, which anticipates the establishment of a voluntary system of arbitration to resolve conflicts that may arise in matters of equal opportunities and discrimination (Article 17).

The Estonian Legal Chancellor provides an impartial pre-judicial conciliation procedure upon application by the victim, but the alleged discriminator can refuse to participate. In the case of discrimination by public institutions, a disciplinary procedure can be initiated on the basis of the victim's application or at the Chancellor's own initiative. It is however predicted that the Legal Chancellor will face difficulties in dealing with discrimination on grounds other than sex in fields other than employment in the absence of detailed legal provisions on these issues.

The Belgian Centre for Equal Opportunities and Opposition to Racism may file a claim under the Law of 25 February 2003 (Art. 31(1) of the Law), but will first seek a friendly settlement. The Portuguese High Commissioner for Immigration and Ethnic Minorities (HCIEM) can act as a mediator to try to avoid formal legal procedures. He can also initiate an administrative procedure and, after having heard the parties and the Permanent Committee of the Commission on Equality (CEARD), decide whether a fine should be imposed and how much that should be. The respondent has the right to appeal to the courts against the fines imposed by the HCIEM. Neither the victim nor associations have the right to appeal or to intervene in the appeal procedure.

In Slovenia an Advocate for the Principle of Equality has started working within the Office for Equal Opportunities to investigate cases of alleged discrimination in an informal procedure that is free of charge. In Hungary, the newly created Equal Treatment Authority can take action against any discriminatory act and can impose severe sanctions on persons and entities violating the prohibition of discrimination. The Ombudsman for Civil Rights (General Ombudsman) and the Ombudsman for the Rights of National and Ethnic Minorities (Minorities Ombudsman) can also investigate cases of discrimination by any public body. In the Czech Republic the draft law on protection against discrimination proposes a special conciliation procedure which would be supervised by the Public Defender of Rights.

In Finland, non-employment related complaints of ethnic origin discrimination can be submitted to the Ombudsman for Minorities and/or the Discrimination Board. The Discrimination Board may confirm a settlement between the parties or prohibit the continuation of conduct that is contrary to the prohibition of discrimination or victimisation. The Board may also order a party to fulfil its obligations under threat of imposition of a penalty of a fine. It may also issue a statement on how non-discrimination law is to be interpreted upon the request of one or both of the parties, the Ombudsman for Minorities, a court of law, a public authority or an NGO. Proceedings before the Discrimination Board are free of charge and do not require the use of legal counsel. The Ombudsman may issue statements on any discrimination case submitted to him, where necessary forward the complaint to the pertinent authorities, and if agreed to by the complainant, provide legal assistance and lead conciliation proceedings.

In Malta, the National Commission for Persons with a Disability can investigate complaints alleging failure to comply with the Equal Opportunities (Persons with a Disability) Act 2000 and, where appropriate, provide conciliation in relation to such complaints.

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

There are special court procedures in a number of countries. Spain has an urgent procedure in the Social Courts for actions for the defence of fundamental rights and civil liberties. The United Kingdom's employment/industrial tribunals hear the full range of employment disputes, including those on discrimination. In Italy the 1998 Immigration Act established a special procedure for discrimination cases and this is now applicable to all grounds of discrimination. Representation by a lawyer is not required and

the victim can apply directly to the judge in his or her place of residence (rather than the defendant's place of residence) in order to obtain an injunction against the discriminatory activity and damages. The hearing takes place "avoiding all unnecessary formality", with free choice by the judge of the most suitable method to gather evidence. In cases of particular urgency, the judge can issue an interim order, the violation of which (as that of the order issued in the final decision) constitutes a criminal offence. The Decrees transposing the Directives add to this procedure the possibility of pre-trial mediation and the possibility for the judge to order - together with the judgment - the drawing up of a plan for the elimination of discrimination, as well as the publication of the judgment in a major newspaper.

In Ireland, a specialised Equality Tribunal has an investigative role in the hearing of complaints. The procedure is informal. Complainants may represent themselves and costs may not be awarded against either party. In 2004 the jurisdiction for dismissal cases was transferred from the Labour Court to the Equality Tribunal, which now has the power to award remedies, including reinstatement.[116] The option of mediation is provided for in section 78 of the Employment Equality Act 1998-2004. A mediated settlement agreed by the parties becomes legally binding and its terms can be enforced at the Circuit Court.[117] In Poland a so-called "compensation complaint" has been operating under the Labour Code since 1 January 2004 (Art. 183d): victims of discrimination are entitled to initiate judicial proceedings and seek compensation not lower than their minimum salary. The labour court determines the compensation to be awarded, taking into consideration the type and gravity of the discrimination. This specific remedy was intended to obviate the need to use more general legal remedies, like Art. 415 Civil Code (general compensation clause), however, their use in not excluded.

Complaints with regard to the public sector are commonly dealt with separately from private sector complaints. In Italy cases concerning public employees are held in the civil courts. In Lithuania, complaints about administrative acts and acts or omissions of civil servants and municipal employees in the sphere of public administration, including social protection, social advantages, education and access to and supply of goods and services which are available to the public, can be filed with an Administrative Disputes Commission or the Administrative Courts. Cases of alleged discrimination by public institutions in Latvia can be filed with the same public institution that has treated the person differently, with a higher institution, an administrative court, or the public prosecutor's office. In France the administrative courts hear complaints from civil servants and contractual employees of the public sector and from citizens bringing action against the State or questioning a decision of State representative. In the Netherlands if the discrimination occurs in public employment, ordinary administrative law procedures apply.

The low volume of case law on discrimination so far in most Member States may well point towards barriers to justice, real and perceived. Transposition of the Directives will go some way towards improving this situation due to the Directives' enforcement provisions (see below) and the increased likelihood of civil procedures being used over penal law procedures, which traditionally

[116] Section 46 Equality Act 2004.

[117] Section 91(2), Employment Equality Act 1998-2004

have been used but pose difficulties in terms of proof and the prerogative of the State prosecutor. Notwithstanding transposition, however, a number of deterrents and potential barriers to litigation can be identified in the Member States. Firstly, there are those who are concerned that the complexity of discrimination law may be proving to be a deterrent to victims of discrimination in Austria, Luxembourg and the United Kingdom. Skilled, experienced assistance to victims can help counter this, but this remains limited in availability (in contrast to the professional advice and representation usually available to respondents). Linked to assistance are insufficient financial means to pursue a case, a second barrier cited in a number of Member States. In the Czech Republic, Lithuania and Slovakia, for example, legal aid is provided in very limited circumstances and is therefore of very limited effect in assisting access to the courts.

Another potential barrier is short time limits for bringing a case. The Directives leave it to the national legislator to set any time limits it deems appropriate (Article 7(3) Racial Equality Directive, Article 9(3) Employment Equality Directive). In Ireland, legal action must be taken under the Employment Equality Act within 6 weeks and under the Equal Status Act within 2 months. Even with the possibility of an extension if there is reasonable cause, there is concern that such short time limits can be problematic for victims, especially disabled persons. Furthermore, the length and the complexity of procedures may act as deterrents to those seeking redress, as is said to be the case in Portugal.

Basic adjustments to proceedings and court buildings to accommodate the needs of disabled complainants are often lacking and can deter disabled complainants. Physical access to courts and other public buildings is not guaranteed in Ireland,[118] Slovakia or Slovenia. Access to public buildings is not always guaranteed in practice in Hungary or Portugal despite legal requirements for this. While required to be made available in Lithuania and Portugal, the provision of information in Braille or sign language is not mandatory in the Czech Republic, Malta, Slovakia or Slovenia. In Ireland, sign language interpretation in the court system is required in the context of criminal actions, but there is no corresponding provision in respect of civil actions. In Estonia and Hungary sign language is available in the courts but Braille is rare. A further barrier in Estonia is that in practice courts usually reject complaints in Russian, in spite of the claimants' right to interpretation in court. No countries mention specific procedural rules for individuals with learning disabilities.

Finally, the infrequency of litigation itself can be a deterrent to victims of discrimination, as the impression may prevail that success is improbable. The more cases are heard about through the media, the more knowledgeable victims will become about their rights and options for vindicating those rights. The main barriers to litigants in Germany for example are not thought to be financial but lack of information, lack of standing, and the assumption of little hope of success.

[118] This is however due to be legislated for in the Disability Bill 2004.

B. Legal standing and associations

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

No special regulations on the engagement of associations in discrimination procedures are found in Denmark, Finland, Lithuania, Sweden or the UK. Individual lawyers (working for an organisation) may represent – and thereby 'engage in support of' - a victim in court upon his or her authorisation, and trade unions and employers' organisations can represent their members. In Lithuania, Article 56(3) of the Civil Procedure Code implies that NGOs are allowed to participate in civil procedures, although there are no known cases of participation of NGOs in a civil case in this context. Under Swedish procedural law anyone can engage in proceedings or support a complaint. In practice in Great Britain, complainants are supported by the equality bodies, trade unions, race equality councils, other voluntary sector advice agencies and complainant aid organisations under the normal rules of civil procedure. Employment Tribunal and Employment Appeal Tribunal procedures allow a complainant to represent him/herself or to be represented by any person.

The new Greek anti-discrimination law permits legal entities with a legitimate interest in ensuring the principle of equal treatment is applied to represent persons before any court or administrative authority, as long as they have that person's written consent (Article 13 par. 3, Law 3304/2005). The organisation must act before the court through an authorised lawyer. In Ireland, an individual or body may be authorised by an individual complainant to represent them before the Equality Tribunal or Labour Court (Article 77(11) Employment Equality Act 1998-2004). In Estonia in conciliation proceedings at the Office of Legal Chancellor, a person who has a legitimate interest in ensuring compliance with the equal treatment guarantee may also act as a representative (Article 23 (2) of the Law on the Legal Chancellor). Representation of victims by legal entities is also provided for in the Slovakian Anti-discrimination Act where that entity has the authority to do so under a separate law (e.g. as the National Centre for Human Rights has).

Few States allow associations to engage in proceedings 'on behalf of' victims of discrimination. The Spanish Law 62/2003 transposing the Directives (Article 31) provides that in cases outside employment, "legal entities legally authorised to defend legitimate collective rights and interests may engage on behalf of the complainant, with his or her approval, in any judicial procedure in order to make effective the principle of equal treatment based on racial or ethnic origin". There is no corresponding provision for employment-related cases, in which only trade unions and employers' organisations can engage. With consent,

trade unions can appear in court in the name and interest of their members. Further, the Constitution entitles any physical or legal person invoking a legitimate interest to be party to proceedings relating to the violation of fundamental rights and freedoms, and entitles legal entities with a legitimate interest to engage in administrative procedures.

In Poland general rules under the Code of Civil Procedure allow non-profit social organisations to bring a claim on behalf of individuals or join such proceedings in labour law and administrative proceedings. They can also act as *amicus curiae* and present their opinion to the court.[119] The Hungarian Equal Treatment Act allows 'social and interest representation organisations' as well as the Equal Treatment Authority to engage on behalf of the victim in proceedings initiated due to the alleged infringement of the principle of equal treatment and to engage in administrative procedures. Furthermore, social and interest representation organisations, the Equal Treatment Authority and the Public Prosecutor can bring *actio popularis* claims, provided that the violation of the principle of equal treatment was based on a characteristic that is an essential feature of the individual, and the violation affects a larger group of persons that cannot be determined accurately. Maltese regulations provide that nothing prevents legal entities with a legitimate interest in ensuring compliance with the regulations from engaging in procedures on behalf of or in support of the complainant with his or her approval.

States also have considerable discretion in the criteria they set for determining which legal entities can provide such assistance and those which cannot. The French Law of 16 November 2001 permits representative trade unions and NGOs over five years old to intervene in an action brought by any apprentice, trainee, employment candidate or employee who alleges to have been a victim of discrimination. Any person with a legitimate interest in the dismissal or granting of a civil action has legal standing before the civil courts and NGOs working to combat discrimination on the grounds of ethnic origin, race or religion may be civil parties in some penal actions.

The Hungarian 'social and interest representation organisations' referred to above include any social organisation or foundation whose objectives, set out in its articles of association or statutes, include the promotion of equal social opportunities of disadvantageous groups or the protection of human rights. In respect of a particular national and ethnic minority, the minority self-government is included, and in respect of matters related to employees' material, social and cultural situation and living and working conditions, trade unions (Article 3(f) Equal Treatment Act). In Belgium, the Centre for Equal Opportunities and Opposition to Racism, entities of public utility, associations which have had legal personality for at least five years and state as their objective the defence of human rights or the fight against discrimination and workers' and employers' organisations may engage in discrimination proceedings. Where there is an identifiable victim, that victim's consent is required.

In Italy in cases of discrimination on the grounds of race and ethnicity, associations and bodies active in the fight against discrimination that are included in a list approved by the Ministries of Labour/Welfare and Equal Opportunities can engage in

[119] Article 63 Code of Civil Procedure.

proceedings in support or on behalf of complainants. Such organisations are listed on the basis of 'their purpose and the degree of continuity of their action'. In contrast, for the grounds religion or belief, age, disability and sexual orientation, only trade unions can engage in proceedings. Similarly, Portuguese associations cannot intervene in administrative and judicial proceedings in employment discrimination cases, though in civil and criminal cases involving racial or ethnic origin discrimination, Law 18/2004 provides that "associations whose objective is the defence of non-discrimination based on racial or ethnic origin have the right to engage in judicial procedures on behalf or in support of the interested persons, with their approval" (Article 5).

A different model is found in Austria. Whereas anyone can represent alleged victims of discrimination in the informal proceedings before the Equal Treatment Commission, for court proceedings only one statutory organisation, the Litigation Association of NGOs against Discrimination, has been given third party intervention rights in the courts on behalf of the complainant, with his or her consent (§62 Equal Treatment Act). All specialised NGOs can join this Association, but those not in it are excluded from any special procedural rights. The rights are relatively weak, as they do not allow the Association to bear the costs and risks of a case; these must remain with the complainant.

The German Bill (§24) restricts legal standing rights to non-profit, long-standing organisations that have more than 75 members or more than 7 member organisations. Support is limited to first instance and civil or administrative procedures.

C. Burden of Proof

Because of the difficulties inherent in proving discrimination, Article 8 of the Racial Equality Directive and Article 10 of the Employment Equality Directive lay down that persons who consider themselves to have been discriminated against must only establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination. The respondent must then prove that there has been no breach of the principle of equal treatment. The burden of proof may thus be lower than in other civil court cases. This does not affect criminal cases (Article 8(3)/10(3)), and Member States can decide not to apply it to cases in which courts have an investigative role (Article 8(5)/10(5)). Thus for example in France, the burden of proof is not shifted in administrative procedures which are inquisitorial in nature, and Portuguese law states that the principle does not apply to penal procedure nor to actions when, in the terms of the law, it is up to the court or other jurisdiction to carry out the investigation. In the Netherlands, whereas the burden of proof is shifted in court proceedings, this is not necessary in procedures before the Equal Treatment Commission, though the Commission does nevertheless apply the shift in the burden of proof on a voluntary basis.

Belgian law goes so far as to provide examples of evidence which would lead to the shift in the burden of proof: Article 19 of the Federal Law of 25 February 2003 cites 'statistical data' and 'situation tests'[120] as two examples, which, when put before a judge, will

[120] Situation testing is a method of obtaining evidence of discrimination whereby persons such as equality body staff set up situations to check if a person is discriminating.

lead the judge to presume that discrimination has occurred thus obliging the defendant to demonstrate that, contrary to that presumption there has been no discrimination.

Several Member States have failed to transpose the burden of proof provision in line with the Directives. The provision on the burden of proof in Austrian federal legislation, while lowering the burden, is not considered to satisfactorily comply with the Directives.[121] In Italy, although the Decrees transposing the Directives contain a special evidentiary rule, it does not constitute a shift in the burden of proof. In Latvia and Poland, the burden of proof only shifts in employment cases, as the areas outside employment in the Racial Equality Directive are not yet legislated for. Lithuania, Luxembourg and Malta have no specific provisions for shifting the burden of proof in cases of discrimination prohibited by the Directives. In Estonia there is concern that the wording of the burden of proof provision is weaker than the Directives, as it sets down that once the burden of proof has shifted, employers must merely explain the reasons for their conduct or decision. In Germany the burden of proof rules exist only for sex and disability discrimination cases, and in contrast to the Directives, the anti-discrimination Bill provides that claimants must bring proof of the disadvantage suffered 'in comparison to another person'.

The Hungarian Equal Treatment Act (Article 19(1)) seems to demand more proof than the Directives require, as victims must not only establish facts on the basis of which discrimination can be presumed, but must also prove they suffered disadvantage and that they have the protected characteristic on which the perpetrator based the discrimination. It is hoped that existing case law will bridge the gap between the wording in domestic and Community law.

While the burden of proof is shifted in cases of alleged victimisation in Austria, Belgium, Ireland and Slovakia, this is not the case in Denmark, Finland, France, Latvia or the Netherlands. Arguably, as victimisation is not a form of direct or indirect discrimination under the Directives, Article 8 Racial Equality Directive and 10 Employment Equality Directive are not necessarily applicable.

D. Victimisation

Member States must ensure individuals are protected from any adverse treatment or adverse consequences as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment (Article 9 Racial Equality Directive; Article 11 Employment Equality Directive). There are two common inconsistencies with this principle in the Member States. Firstly, in a number of States, protection is restricted to employment situations and thereby fails to protect against victimisation in the areas outside employment protected by the Racial Equality Directives (Belgium, France, Czech Republic, Malta, Latvia, Poland, Portugal and Spain, Luxembourg Bill). Secondly, some States have restricted the protection to the person who made the complaint or initiated proceedings and omitted to protect others who could be adversely treated, e.g. witnesses. This fails to take into account the wording of the Directives, which refer to protection of individuals, i.e. not just the person who has

[121] However, the government is currently preparing an amendment to this provision in order to bring it into line with the Directive.

made the complaint. Belgian, Greek, Polish and Portuguese law only protects 'employees' who have filed a complaint of discrimination or brought legal action. This is also currently the situation in the Czech Republic, but under the draft anti-discrimination law protection against victimisation extends to all actions of any person who seeks protection against discrimination in a lawful manner, in his/her own interests or in the interests or another person, as well as the giving of evidence, explanation or other participation in proceedings concerning protection against discrimination.

In the UK, it is pointed out that the perpetrator of the victimisation does not need to have been involved in the initial complaint, for example an employer who refuses to employ a person because he or she had complained of discrimination or assisted a victim of discrimination in a previous job would still be liable for victimisation. Difficulties with the UK victimisation provision are however that the definition of victimisation requires the complainant to show less favourable treatment than a real or hypothetical comparator, but the Directives do not require this. Case law has demonstrated how difficult it is to find an appropriate comparator.[122] Furthermore, protection against victimisation in the UK is retrospective only: the law does not require preventative measures as are implicitly required by the EC Directives. In contrast, Slovenian protection against victimisation is quite proactive: upon finding discrimination in the original case, the Advocate of the principle of equality shall order in writing the corporate body or other body in law which is alleged to have discriminated to apply appropriate measures to protect the discriminated person from victimisation or adverse consequences as a result of the complaint. In the event an alleged offender does not act in accordance with the order of the Advocate and the person discriminated against is still subjected to victimisation, the inspector has the duty to prescribe appropriate measures that protect the person from victimisation, or to prescribe the remedying of adverse consequences of victimisation.

A further shortcoming of French law is that individuals are protected only from disciplinary action or dismissal by the employer, rather than any adverse treatment or consequences as the Directives states. Similarly in Belgium the protection is only against dismissal or the modification of employment conditions. The Polish Labour Code prohibits denunciation and dissolution of a labour contract as a result of an employee having used his rights to defend against unequal treatment (Art. 18^{3e} Labour Code) but this provision does not prohibit other possible adverse consequences. In the Italian decrees, victimisation is mentioned merely as an element to be used in assessing the amount of damages (though general rules against unfair dismissal provide some protection). In Sweden the protection against discrimination or victimisation does not fully cover self-employed persons. Estonian and Lithuanian law currently only prohibit victimisation in cases of sex discrimination.

[122] See, for example, *Aziz –v- Trinity Taxis* [1989] QB 463 and *Chief Constable of the West Yorkshire Police –v- Khan* [2001] IRLR 830.

E. Sanctions and remedies[123]

Infringements of anti-discrimination laws must be met with effective, proportionate and dissuasive sanctions, which may include compensation being paid to the victim (Article 15 Racial Equality Directive, Article 17 Employment Equality Directive). The concept of effective, proportionate and dissuasive remedies was first developed in the European Court of Justice's case law concerning sex discrimination. Due to the parallels of EC sex discrimination law with the Racial Equality and Employment Equality Directives, this case law is relevant for the latter two Directives. In any case, the meaning of that concept must be determined in each concrete case in the light of the individual circumstances. At this stage, few experts (only Italy and Finland) assess the sanctions in their country as effective, disproportionate and dissuasive.
In practice, a wide range of possible remedies exist, depending for example upon the type of law (e.g. civil, criminal, administrative remedies), the punitive or non-punitive character of the remedies, their orientation as backward-looking or forward-looking (the latter meaning remedies seeking to adjust future behaviour) and the level on which they are intended to operate (individual/micro or group/macro level). Remedies may be available through various, possibly complementary enforcement processes (administrative, industrial relations and judicial processes). Depending upon such characteristics, the remedies offered by a particular legal order will reflect different (combinations of) theories of remedies (e.g. remedial, compensatory, punitive and preventive justice) and also different concepts of equality (e.g. an individual justice model, a group justice model or a model based on equality as participation). It follows that a comprehensive enforcement approach is very broad indeed. It addresses not only procedural aspects and the substance of remedies (relief and redress for the victims of discrimination) but also broader issues such as victimisation, compliance, mainstreaming and positive action, as well as other innovative measures such as corrective taxation. Financial compensation to the victim may include compensation for past and future loss (most common), compensation for injury to feelings, damages for personal injury such as psychiatric damage, or exemplary damages to punish the discriminator (much less common).

As a whole, no single enforcement system appears to be truly encompassing. Essentially, they are all based on an individualistic and remedial - rather than a preventive – approach. Nevertheless, some interesting elements can be found in a number of Member States. Irish law provides for a broad range of remedies, including compensation awards, re-instatement and re-engagement, as well as for orders requiring employers to take specific courses of action. There is case law concerning the following of orders in particular: the creation of an equal opportunities policy; re-training of staff with particular emphasis on disability issues; reviewing recruitment procedures; reviewing sexual harassment procedures; formal training of interview boards; review of customer service practices; equality training for staff; and inviting the complainants and their companions for a complimentary meal or drink.

[123] A Thematic Report on this theme written by the European Network of Legal Experts in the Non-discrimination Field provides a more detailed analysis, cf. Thematic study by Christa Tobler : "Remedies and Sanctions in EC non-discrimination law, Effective, proportionate and dissuasive sanctions and remedies, with particular reference to upper limits on compensation to victims of discrimination". Some of the findings of this study are reproduced in this section.

In some Member States the specialised body is empowered to issue sanctions in cases in which they have found discrimination. The Cyprus Commissioner for Administration for example, can impose limited fines including fines for non-compliance with its recommendation within the specified time (subject to appeal to the Supreme Court of Cyprus). Furthermore, it can issue orders, published in the Official Gazette for the elimination within a specified time limit and in a specified way of the situation which directly produced the discrimination. The Commissioner's Reports can be used for the purposes of obtaining damages in a regional court or an employment tribunal. In Great Britain the Commission for Racial Equality and its counterpart in Northern Ireland are able to use their powers of formal investigation to investigate organisations they believe are discriminating and, where they are satisfied that unlawful acts have been committed, they can serve a binding non-discrimination notice requiring the organisation to stop discriminating and to take action by specified dates to prevent discrimination from recurring. They can apply to the county/sheriff court for an injunction (Race Relations Act s.62, Race Relations Order (Amendment) Regulations (NI) 2003 Article 59) either based on persistent discrimination after a finding of unlawful discrimination or breach of non-discrimination notice. However, it is thought that no such injunctions have ever been issued.

Interesting administrative remedies are found in Portugal. Overall, the Portuguese system contains the usual elements of individual redress in the form of civil sanctions (reinstatement, damages), criminal sanctions for some types of discrimination (race, colour, ethnic and national origin as well as religion), and administrative sanctions. Besides administrative fines, the latter include in particular the following measures, which are available in the case of all types of discrimination: publication of the decision; censure of the perpetrators of discriminatory practices; confiscation of property; prohibition of the exercise of a profession or activity which involves a public capacity or depends on authorisation or official approval by the public authorities; removal of the right to participate in trade fairs; removal of the right to participate in public markets; prohibition of access to their establishments; suspension of licences and other authorisations; removal of the right to the benefits granted by public bodies or services.

For certain cases, the European Court of Justice's case law contains specific indications regarding the Community law requirements in relation to remedies. Thus, in the case of discriminatory dismissal, the remedy (or remedies) granted must in any case include either reinstatement or compensation. Further, where compensation is chosen as a remedy it must fully make good the damage. Upper limits are not acceptable, except for situations where the damage was caused not only through discrimination. Upper limits for pecuniary damages seem to apply under the laws of Estonia (six months salary in the case of discriminatory termination of an employment contract where the victim of discrimination waived reinstatement), Hungary (twelve months average earnings, in addition to reinstatement in the case of discriminatory dismissal), Ireland (104 weeks pay; 12,697 euro where the victim of discrimination was not an employee; 6,348.69 euro under the Equal Status Act) and Sweden (32 months' wages in cases of dismissal after 10 years of employment; 48 months if the victim of discrimination is aged 60 years or older). In Finland, there appears to be an informal upper limit (15,000 euro; this limit can be exceeded for special reasons). Statutory upper limits on compensation for non-pecuniary damages seem to apply in Belgium (six months salary in the case of victimisation where a dismissal is proven to be a form of reprisal) and Malta (200 Liri, which is equivalent to 465 euro). The new Greek anti-discrimination law does not provide for compensation, only to limited fines payable to the State in some

circumstances. Damages may be awardable under the Civil Code. There appear to be no limits either in relation to pecuniary or non-pecuniary damages in the national laws of the Czech Republic, Germany (based on draft legislation which is still under debate), Italy, Luxembourg, the Netherlands, Poland, Portugal, Slovakia, Spain and the UK. In Latvia, there are currently no upper limits but this may change in the future (a draft law provides for upper limits on moral damages: 3,000 Lats or 5,000 Lats, equivalent to 4,310 and 7,184 euro, respectively, in cases of grave moral damages; 10,000 Lats, equivalent to 14,369 euro, if grave harm has been caused to life, physical integrity or health). Finally, Austrian law provides for an upper limit of 500 euro in cases of non-recruitment or non-promotion if the employer proves that the victim would not have been recruited or promoted even in the absence of discrimination. Of the countries where limits do exist, Ireland is particularly interesting because there are no comparable statutory limits on compensation for discrimination on grounds of sex.

Filippo | *1985*

chapter 8
Equal Treatment Bodies

By now most countries have designated a specialised body for the promotion of equal treatment irrespective of racial or ethnic origin, as required by Article 13 of the Racial Equality Directive. Exceptions are the Czech Republic, where the draft Anti-discrimination law proposes designating the existing Ombudsperson the specialised body, Luxembourg, where the Government has declared its intention to widen the powers of the Consultative Commission on Human Rights to act as equality body, Malta, where there are plans to accord this mandate to the Commission for the Promotion of Equality for Men and Women (set up under the Equality for Men and Women Act, 2003), and Germany, where the draft legislation seeks to set up a new federal anti-discrimination body to work with existing agencies at state and federal level. Member States which have set up completely new bodies are Denmark,[124] France,[125] Hungary,[126] Italy[127] and Slovenia.[128] Greece[129] and Spain[130] are similarly due to set up new bodies under their implementing legislation. Bodies that already existed but have recently been designated the Article 13 body are the Cypriot Ombudsman, the Estonian Legal Chancellor, the Latvian National Human Rights Office, the Lithuanian Equal Opportunities Ombudsman, the Polish Plenipotentiary for Equal Status of Women and Men (here the Commissioner of Citizens' Rights is also relevant) and the Slovak National Centre for Human Rights. In some Member States the Article 13 functions are fulfilled by, or shared between, a few organisations (e.g. Greece).

The minimum requirement on Member States is to have one or more bodies for the promotion of racial and ethnic origin equality which a) provide independent assistance to victims of discrimination in pursuing their complaints about discrimination, b) conduct independent surveys concerning discrimination and c) publish independent reports and recommendations on any issue relating to such discrimination. A high number of Member States go further than this, firstly in terms of the grounds of discrimination they cover, and secondly in terms of the powers they have to combat discrimination. The Austrian Equal Treatment Commission and Office for Equal Treatment, the Cyprus Ombudsman, the Estonian Legal Chancellor, the French High Authority against Discrimination and for Equality, the Irish Equality Authority, the Dutch Equal Treatment Commission, the Belgian Centre for Equal Opportunities and Opposition to Racism, the Hungarian Equal Treatment Authority, the Lithuanian Equal Opportunities Ombudsman, the Greek administrative bodies and the Slovenian Advocate for the Principle of Equality and Council for the Implementation of the Principle of Equal Treatment all deal with many forms of discrimination. The Equality Commission for Northern Ireland works on discrimination on the grounds of race, religious belief or political opinion, sex, sexual orientation, married status, disability and age, and in Great Britain the existing Commission for Racial Equality, Disability Rights Commission

[124] Complaints Committee for Ethnic equality in the Danish Centre for Human Rights

[125] High Authority against Discrimination and for Equality

[126] Equal Treatment Authority

[127] National Office against Racial Discrimination

[128] Advocate for the Principle of Equality and Council for the Implementation of the Principle of Equal Treatment

[129] Equal Treatment Committee and Equal Treatment Service, who will share the task of promoting the principle of equal treatment with the Ombudsperson, the Work Inspectorate and the the Economic and Social Committee.

[130] The Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin was established by the Law 62/2003 transposing the Directives. It is not yet operative as its make-up and functions still have to be regulated by a royal decree.

and Equal Opportunities Commission will be replaced by a Commission for Equality and Human Rights in the coming years. Those with the mandate only to deal with racial and ethnic origin discrimination are the Danish Complaints Committee (established within the Danish Institute for Human Rights), the Finnish Minorities' Ombudsman, the Italian National Office against Racial Discrimination, the Portuguese High Commissioner for Immigration and Ethnic Minorities and the Spanish Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. The Swedish Ombudsman against Ethnic Discrimination deals with ethnic origin and religion, but there are separate Ombudsmen for gender, disability and sexual orientation respectively.

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

A number of specialised bodies – e.g. those in Austria, Cyprus, France, Hungary, Ireland, Lithuania and Sweden - can investigate complaints of discrimination and usually can force compliance with their investigations by all persons involved. In France, the High Authority may conclude an investigation by issuing its conclusions and recommendations to the parties who will have a certain amount of time to comply. In case of non-compliance, the High Authority will have the power to call public attention to its recommendations. In addition, it may alert the relevant authorities in cases that require disciplinary sanctions against the respondent. The Hungarian Equal Treatment Authority can apply sanctions on the basis of an investigation. In Ireland, the Equality Authority may serve a 'non-discrimination notice' following an investigation. This notice may set out the conduct that gave rise to the notice and what steps should be taken in order to prevent further discrimination. It will be a criminal offence not to comply with a notice for a period of 5 years after its issue. The Equality Authority is also empowered to seek an injunction from the courts during this 5 year period to restrain any further contravention or failure to comply with a notice.

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

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

- The Belgian Centre for Equal Opportunities and Opposition to Racism has the power to take legal action in the name of public interest. Where the alleged violation has an identifiable victim (who can be a natural or legal person)[131], the power of the Centre to act is conditional upon the consent of the victim (Art. 31, *in fine*, of the Law).
- The French High Authority has the role of 'auxiliary of Justice', whereby criminal, civil and administrative courts may seek its observations in cases under adjudication. In addition, the High Authority will have the power to seek permission to submit its observations in criminal matters.
- Employers can ask the Dutch Equal Treatment Commission for an opinion on whether their employment practice contravenes non-discrimination law
- The Hungarian Equal Treatment Authority can, take legal action in the public interest with a view to protecting the rights of persons and groups whose rights have been violated.
- The Irish Equality Authority enjoys legal standing to bring complaints to the Equality Tribunal relating to patterns of discrimination, discriminatory advertising or the contents of a collective agreement. The Equality Authority may also carry out equality reviews, i.e. an audit of the level of equality that exists in a particular business or industry. Based on the results of this audit, an equality plan will be developed. The plan will consist of a programme of actions to be undertaken in employment or business to further the promotion of equality of opportunity. Where there are more than 50 employees, the Authority may instigate the review itself and prepare an action plan. If there is a failure then to implement the action plan, the Equality Authority may issue a notice detailing what steps are required for its implementation. Non-compliance with this notice may result in an order from either the High Court or Circuit Court requiring compliance.

Finally, some concerns in relation to particular countries may be illustrated. In Denmark it is maintained that transposition of Article 13 of the Racial Equality Directive violated the non-regression principle in Article 6(2) and Recital 25 of the Directive, because the resources of the body and the assistance available to victims of discrimination are less after transposition than before. It is feared that the Estonian Legal Chancellor will have difficulties in dealing with discrimination in the fields other than employment, since as yet there are no detailed legal provisions to tackle these issues. There is concern that some specialised bodies are placed too close to government, thereby risking the independence of their work. The Italian Office is located within the Ministry for Equal Opportunities and under the political responsibility of the Minster for Equal Opportunities and the future Spanish Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin will be attached to the Ministry of Labour and Social Affairs, its make-up fundamentally of a governmental nature. Moreover, the provision listing its functions does not include the word 'independent'.

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

Nandy | *1960*

chapter 9
Implementation and Compliance

A. Dissemination of information and Social and Civil Dialogue

Of all the Directives' articles, it is those on the dissemination of information and social and civil dialogue that have seen the least formal implementation by the Member States and probably the most varied response. The reason behind this lies to some extent with the vagueness of these Articles and the interpretation by some governments that they are not bound to transpose these provisions into law but simply to take some steps towards their objectives. For example, the Committee charged with considering the implementation of the Article 13 Directives in Denmark concluded that the legislation did not need to include reference to these provisions of the Directives, as they were already sufficiently transposed in Denmark. The impression prevails that these provisions have been insufficiently implemented in at least Austria, Belgium, Cyprus, Estonia, Greece, Latvia, Luxembourg, Poland, Slovenia and Spain, and, with particular regard to Directive 2000/78, Portugal and Italy.

Positive information dissemination activities include ministerial publications providing basic information on the principle of equal treatment and governmental support for training judges and lawyers on the new laws, as in Austria, and discussion of anti-discrimination rights in the mass media and access to legislation and proposals free of charge via the internet, as in Lithuania. France has recently run campaigns on race and disability, electing racial discrimination as the "Great National Cause" in 2002 and disability in 2003. In Ireland the government has launched a National Action Plan Against Racism and a National Disability Strategy. Under Article 31 of the Hungarian Equal Treatment Act, a National Equal Opportunities Programme shall be adopted every two years for the prevention of discrimination and the promotion of equal opportunities. The government must discuss the proposed programme with the relevant social and interest representation organisations and the organisations representing employers' and employees' interests before submitting it to Parliament for approval.

Information should be disseminated in a way that is accessible to all disabled people and in languages understood by minorities in that country. In Finland for instance a leaflet on the Non-Discrimination Act has been produced by the Ministry of Labour and the SEIS-project[132], and made available in Braille and both in print and on Internet in Finnish, Swedish, English, Sami, Russian, Arabic, Spanish. French television campaigns and websites are adapted for visually and hearing impaired. In contrast, information provision does not seem to cater for disabled persons' needs in Austria, the Czech Republic, Hungary, Latvia, Portugal or Slovakia. Thus far in Cyprus, information has not been produced in languages other than Greek.

Most Member States can point to the mandate of their specialised body for awareness-raising activities, for instance Denmark, Estonia, Ireland, Sweden and the UK. Where the body only has competences relating to race and ethnic origin, however, other arrangements must be made for the grounds religion and belief, age, disability and sexual orientation. This is a shortcoming in Italy, where the dissemination of information has started with the activities of the National Office against Racial Discrimination, but no particular measures are foreseen for the other grounds.

[132] "STOP – Finland Forward without Discrimination", funded by the Community Action Programme to Combat Discrimination

A small number of Member States have written into their law an obligation on employers to inform employees about discrimination laws, including Malta, Poland and Portugal. Malta extends this duty to 'any person or organisation to whom these regulations apply', who should bring the laws to the attention of the organisation's members or to any other persons who may be affected by the organisation's actions.[133] In Portugal, the failure to provide information about workers equality rights amounts to a 'light offence'. Implementation of the obligation on employers in Poland will be monitored by the National Labour Inspectorate in cooperation with the Government's Plenipotentiary for Equal Status of Men and Women.

Finally, European Union campaigns and project funding must be acknowledged for their role in many Member States in raising awareness, in particular the Commission campaign 'For equality, against discrimination' which has been at the centre of efforts in many countries, the lump sums made available to Member States by Commission DG Employment and Social Affairs for promoting implementation of the Directives and the Community Initiative EQUAL.

Some Member States consulted NGOs and the social partners in their efforts to transpose the Directives. In Hungary, the legislative concept paper and draft were sent to NGOs and put on the Ministry of Justice website with a call for comments, and in Ireland the Department of Justice, Equality and Law Reform produced a discussion document on the employment issues that arose from the Directives and invited submissions from other Government Departments, the social partners, the Equality Tribunal and the Equality Authority. In the UK well over 10,000 copies of a first consultation document were sent to a diverse range of organisations, including employers' organisations, public and private sector employers, trade unions, NGOs, lawyers' organisations, academics and others. Consultation documents were posted on the government's website, with links to versions in Arabic, Hindi, Chinese and Gujarati, and a version prepared for persons with learning difficulties. The documents were also available in Braille, large print and on tape. This contrasts starkly with Spain, where transposition has been severely criticised for being hidden, lacking consultation and parliamentary debate, the absence of a government statement and by-passing of the Council of State and Economic and Social Council. A different problem emerged in Denmark and Finland: a lack of public debate was attributable to the fact that the actors who would normally generate public discussion participated in the Committees charged with considering implementation of the Directives and felt they could not discuss issues until that (lengthy) process was over.

Few Member States have put in place permanent structures specifically for dialogue with civil society and the social partners on equality issues. At local level in France the Commission for the promotion of equality (COPEC) brings together all local actors under the authority of the representative of the State in the area (*département*) to generate cooperation and dialogue. Slovenian law requires the Government and competent ministries to cooperate with NGOs that are active in the field of equal treatment and with the social partners (Article 8 Act Implementing the Principle of Equal Treatment). Improvement in this field is expected with the establishment of the Council for the Implementation of the Principle of Equal Treatment. In Finland there is a good record of co-operation with NGOs and social partners *inter alia* through advisory bodies on youth issues, disability, rehabilitation and Roma

[133] Regulation 12 of Legal Notice 461 of 2004

affairs. A new body on minority issues is in the process of being set up and members will include ministries, social partners and NGOs. In the Netherlands, the Ministry of Social Affairs and Labour set up the (informal) network 'Equal Treatment' in 2003, comprising NGOs, the social partners and the relevant Ministries. The network convenes twice a year in order to exchange information on equal treatment. In addition, the Ministry of Social Affairs operates an 'Article 13 Project', which delivers training to small and medium-sized businesses, provides information *inter alia* in professional journals, and conducts interviews with large companies on equal treatment. Finally, the project 'Age and Employment' is funded by the Dutch Ministry of Social Affairs and Labour to the National Bureau on Age Discrimination, and promotes expertise on this issue in, among others, works councils, employers, trade unions, personnel managers and employment mediators. Informal exchanges have taken place in Belgium, where the Federal Department of Employment Labour and Social dialogue tried to ensure all actors in the field are acting in a coordinated way.

There appear to be more instances of structured dialogue for disability than the other grounds of discrimination. The Latvian National Council of the Affairs of Disabled Persons unites representatives of NGOs and state institutions to promote the full integration of disabled persons in political, economic and social life based on the principle of equality. The Lithuanian Council for Affairs of the Disabled, composed of national non-governmental organisations for the disabled and representatives of state institutions (as approved by the Government upon proposal of the Minister of Social Security and Employment), coordinates the medical, professional, social rehabilitation and integration of the disabled. In Spain relevant structures for dialogue are the Advisory Commission on Religious Freedom and the National Disability Council which represents associations of disabled persons of various kinds. Its functions include the issuing of reports on draft regulations affecting equal opportunities, non-discrimination and universal accessibility. In France there is a National Consultative Commission for the Disabled.

As with information dissemination, it is often the role of the specialised equality bodies to generate dialogue with the social partners and civil society. This is the case for the Estonian Legal Chancellor, the Irish Equality Authority, the Italian National Office against Racial Discrimination (however for racial and ethnic origin only and there are no plans for dialogue on the other grounds) and the Polish Government's Plenipotentiary for Equal Status of Men and Women (on all grounds). In France, the new specialised body has a role to play, complementing that of the existing National Human Rights Consultative Commission, which is an advisory body for the Prime Minister composed of delegates of all major human rights and anti-racist NGOs, representative trade unions and branches of the public sector.

General structures for social dialogue may be used for dialogue on equality issues in the Czech Republic, Denmark, Lithuania, Malta, Poland, Portugal, Slovakia, Sweden and the UK. There is a good record of governmental agencies or ministerial departments cooperating with non-government organisations in Slovakia and the UK.

B. Ensuring compliance

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

Few countries have systematically ensured all existing legal texts are in line with the principle of equal treatment. In transposing the two Directives, only the relevant ministries in Finland seem to have reviewed legislation in their respective administrative fields. They did not find any discriminatory laws, regulations or rules, and it therefore was deemed unnecessary to abolish any laws.
Non-governmental experts in other countries have however identified laws that are discriminatory, for example the Luxembourg General Statute of Civil Servants which sets a maximum age for recruitment (45), and in Portugal Article 175 of the Criminal Code, which punishes homosexual acts with persons aged 14 to 16 or the instigation of such acts, while the same type of acts are not punished when the 14 to 16 year old is of the opposite sex. It is pointed out by the Belgian expert that the evaluation of texts for compatibility with the Directives will require a delicate interpretation of the Directives and only the most overtly discriminatory regulations could be identified by such a screening.

In most countries therefore, the repeal of discriminatory laws is likely to arise following a complaint before the courts. In most Member States, the Constitutional equality guarantee already acts as a filter for discriminatory laws, with the Constitutional court having the power to declare void or set aside any unconstitutional provisions. However, proceedings before Constitutional courts for this purpose can be lengthy, requiring the exhaustion first of all other remedies and on this basis it can be questioned whether this is sufficient to fulfil this provision of the Directives. Aside from Constitutional clauses, there are often clauses in primary legislation which allow lower courts to declare laws that are in breach of the principle of equal treatment void. For instance in France, the Constitution, civil code and labour code all ensure provisions and clauses which breach the 'superior rule' of equality are void. In Lithuania the Employment Code provides that courts can declare acts adopted by state institutions, municipalities or individual officers invalid if they are contrary to law.

Article 26 of the new Greek anti-discrimination Law provides "Once into force, this Law repeals any legislation or rule and abrogates any clause included in personal or collective contracts, general terms of transactions, internal enterprise regulations, charters of profit or non-profit organisations, independent professional associations and employee or employer trade unions opposed to the equal treatment principle defined in this Law".

In Cyprus, contrary to the doctrine of implied repeal, laws contrary to equal treatment legislation are repealed, even if they are adopted at a later date. It seems a recommendation of the Commissioner for Administration (Ombudsman and Specialised Body) following an investigation and finding of a discriminatory law or practice, can trigger the repeal of discriminatory laws. Prior to transposition of the Directives in the UK, the Race Relations Act, Race Relations Order and Fair Employment and Treatment Order stated that the prohibition of discrimination did not apply to acts done in compliance with other legislation passed before or after these measures. The 2003 regulations have deleted that exception in these laws in line with Article 14 Racial Equality Directive and 16 Employment Equality Directive, but have not repealed any existing conflicting legislation. An exception for acts done under statutory authority remains part of the Disability Discrimination Act. In Ireland, there is concern that the Equal Status Act 2000-2004 remains subordinate to other legislative enactments, because section 14(a)(i) provides that nothing in that Act will prohibit any action taken under any enactment.

Legislation which can annul discriminatory rules in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations is more common among the Member States. General labour law is relied on to this end in many countries, including Hungary, where Article 8 and 13 of the Labour Code provides that an agreement (individual or collective) that violates labour law regulations shall be void. If annulled or successfully contested, the agreement shall be invalid (Article 9) and if invalidity results in damages, these shall be paid (Article 10). Similar general labour law provisions are found in Latvia (Article 6 Labour Law), Poland (Article 9.2 Labour Code), and Estonia (Articles 16 and 125(1) Law on Employment Contracts).

There are provisions in some Member States which specifically render discriminatory provisions in contracts or collective agreements etc. void. In Spain, Article 17.1 of Workers' Statute declares void any discriminatory clauses of collective agreements, individual pacts, and unilateral decisions of discriminatory employers. The Finnish Non-Discrimination Act provides that a court may, in a case before it, change or ignore contractual terms or terms in collective agreements that are contrary to the prohibition provided in section 6 (on discrimination) or section 8 (on victimisation) of the Act (section 10). The Employment Contracts Act also has a special provision concerning employment contracts; a provision of a contract which is plainly discriminatory is to be considered void (section 9:2).

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

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

Under the Slovakian Anti-discrimination Act, employers and relevant trade unions had until 1 January 2005 to bring the provisions of collective agreements into compliance with the principle of equal treatment. Employers have the same obligation with regard to provisions in their internal rules. Furthermore, normative acts registered by a state agency (by-laws of associations, by-laws of independent professions and workers' and employers' organisations, by-laws of profit-making organisations, etc.) must not be contrary to the principle of equality. If the by-laws submitted for registration are in breach of this principle, the registration body must reject them.

Identified shortcomings in national laws on this point are the following. The Belgian provision stating that contract clauses in violation of the prohibition of discrimination will be declared void (Article 18 2003 Law) omits the other forms of clauses listed in Article 14b)/16b). In Sweden the law does not expressly provide that discriminatory internal rules of an employer may be amended or declared void. The Luxembourg draft bill, in transposing Article 16 b) of Directive 2000/78, omits independent professions (while the draft bill on race and ethnic origin also uses the Directives' wording and contains the same prohibition, including, provisions included in statutes of non profit or profit associations and independent professions).

Ashley | *1963*

chapter 10
Conclusion

The transposition of the Racial Equality and Employment Equality Directives has immensely enhanced provision of legal protection against discrimination on the grounds of racial and ethnic origin, religion and belief, age, disability and sexual orientation across the European Union. It is encouraging how much additional protection national law provides compared to EC law in certain instances. However, this overview has also illustrated a significant number of apparent shortcomings in Member States' legislation which must be resolved. Ultimately it is up to the courts to decide whether national law is inconsistent with European law. Given the ambiguities in some of the Directives' text, and therefore also many national provisions, judicial interpretation will clarify important boundaries.

A challenge identified in many Member States is the application of anti-discrimination laws in practice. Most EU Member States have outlawed discrimination at least on some grounds for a long time, yet the number of cases brought by victims seeking to assert their equality rights remains rather low. It is hoped that the detail that has been added to the law in many countries, and in particular the specific procedural rights in the remedies and enforcement rules, will change this situation. The proper dissemination of information on anti-discrimination laws and increased dialogue among government, civil society and the social partners will also be key.

ISBN 2-930399-22-8

Developing Anti-Discrimination Law in Europe

September 2005

THE EUROPEAN NETWORK OF LEGAL EXPERTS IN THE NON-DISCRIMINATION FIELD