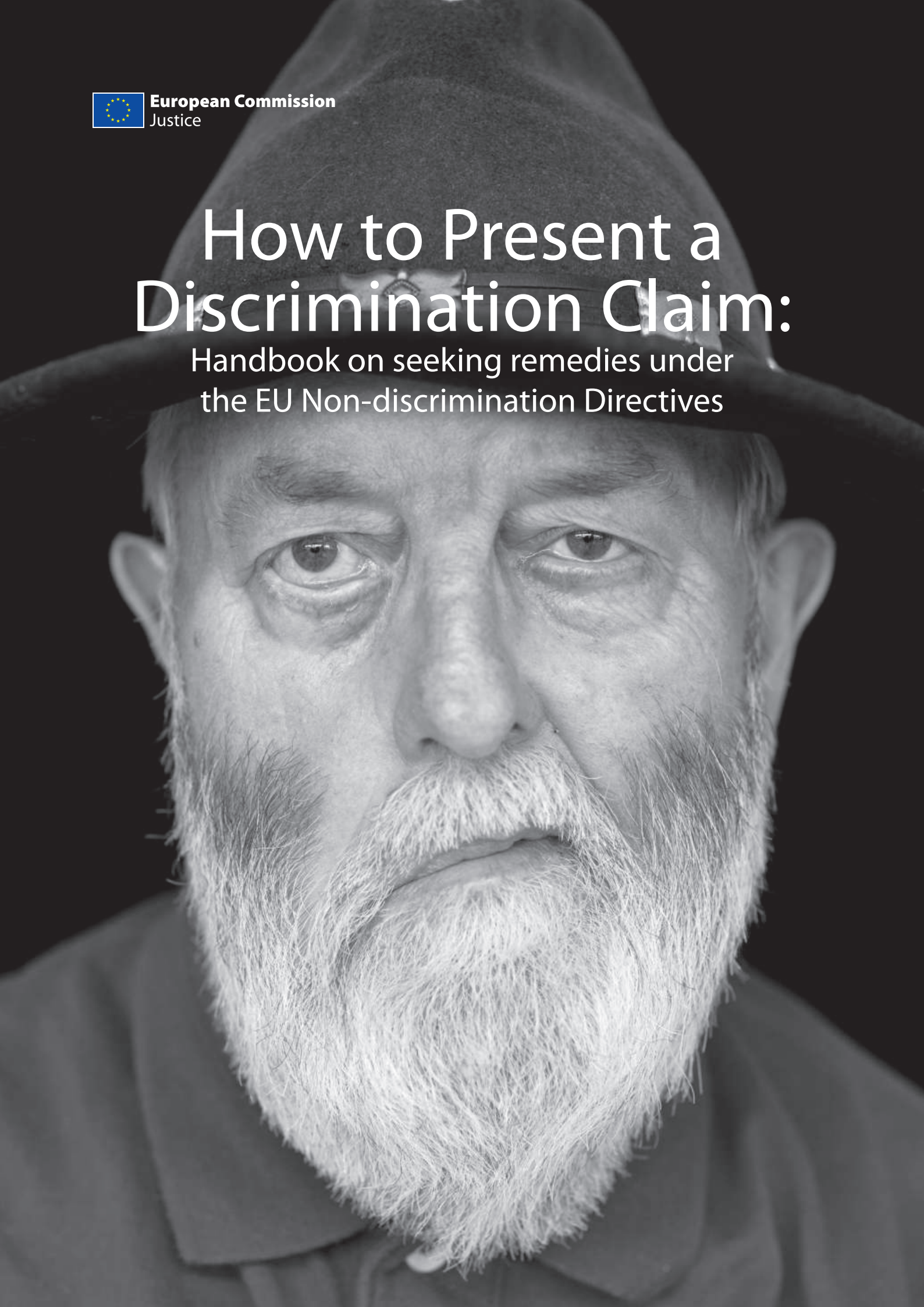




European Commission  
Justice

# How to Present a Discrimination Claim:

Handbook on seeking remedies under  
the EU Non-discrimination Directives



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Luxembourg: Publications Office of the European Union, 2011

ISBN 978-92-79-18268-6

doi:10.2767/17291

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PRINTED ON RECYCLED PAPER

# How to Present a Discrimination Claim

Handbook on seeking remedies under  
the EU Non-discrimination Directives

European Network of Legal Experts in the non-discrimination field

Written by Lilla Farkas

The section on remedies is based in great parts on Declain O'Dempsey's discussion paper

**European Commission**  
Directorate-General for Justice

Manuscript completed in July 2011

This report was financed by and prepared for the use of the European Commission, Directorate-General for Justice. It does not necessarily represent the Commission's official position.

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This publication is supported for under the European Community Programme for Employment and Social Solidarity – PROGRESS (2007-2013). This programme is managed by the Directorate-General for Justice, of the European Commission. It was established to financially support the implementation of the objectives of the European Union in the employment and social affairs area, as set out in the Social Agenda, and thereby contribute to the achievement of the Lisbon Strategy goals in these fields.

For more information see: <http://ec.europa.eu/progress>

For more information on publications from the European Network of Legal Experts in the non-discrimination field see:

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Pricilla | 1991

# Foreword

For decades the European Union focused on tackling discrimination on the grounds of nationality and sex with a view to building a strong internal market. Then in 2000, to mark the new millennium as well as a shift of focus to common constitutional values, European law prohibiting discrimination on grounds of race, ethnic origin, disability, age, sexual orientation, religion and belief in the field of employment and other areas was adopted. Shortly afterwards protection from sex discrimination was brought more into line with this new equality legislation. This body of law, the Non-discrimination Directives, has to a great extent been transposed into national law and now provides effective protection to individuals and groups who face discrimination.

The Court of Justice of the European Union has already rendered several judgments relating to the application of the Non-discrimination Directives. The European Commission has been monitoring their transposition into national law and has taken action to ensure compliance with directive provisions. The Commission has laid the ground for professional publications by academics, legal professionals and representatives of equality bodies established in order to ensure the implementation of European anti-discrimination law. Detailed legal analysis is now available to ensure that the Directives are correctly interpreted and properly implemented. The Commission has also provided the opportunity to stakeholders to share their views at various conferences and to activists of trade unions and non-governmental organisations to acquire further skills at training events focusing on the implementation of the Non-discrimination Directives in practice.

All these initiatives and undertakings have served but one objective: to spread as widely as possible the word about the potential of the Non-discrimination Directives in providing protection to victims of discrimination. Through this Handbook, the European Commission directly addresses victims of discrimination and offers them a practical tool in their quest for justice from the standpoint of European anti-discrimination law.

Why focus on European law? Apart from the fact that information on domestic and international anti-discrimination law is more readily available than on EU law (both on- and off-line), there seems to be added value in encouraging victims to rely on European law right from when they start to plan action because in contrast to the national equality laws of many Member States, its basic concepts are clear and simple. On the other hand, in contrast to international law, its concepts are well defined and often directly applicable in domestic courts. This is a key issue: unlike all regional and international human rights instruments that prohibit discrimination, European non-discrimination law may directly apply in domestic courts.

This Handbook is intended as a simple tool providing basic guidance to victims on identifying discrimination, checking whether it is lawful or unlawful and then planning action. Even when a situation is clearly discriminatory, difficult choices will have to be made about finding the best remedy. Should the case be brought before an equality body, a civil or labour court, the police, or a labour, consumer or school inspectorate? Would mediation yield quicker, less confrontational and more effective results? Can assistance in formulating the claim be sought from an NGO or legal aid organisation? What type of evidence can be used to prove discrimination? Are there specific types of evidence for discrimination claims? How can the victim access documents in support of a claim? What kinds of remedies are available in the many different types of proceedings? These are complex questions and the answers have far-reaching consequences.

The Handbook hence provides a practical framework to assist victims in planning and decision making. It focuses on giving victims the skills and knowledge to identify a situation that is illegal under European law and to seek a remedy. It strives to avoid overly legalistic language and to focus on practice instead of theory.

Why this practical focus? For the simple reason that the ultimate objective of anti-discrimination legislation is to tackle discrimination in European societies by enabling victims of discrimination to seek justice and secure remedies against unequal treatment. In order to achieve this objective, victims must be provided with practical tools and advice on how to apply anti-discrimination law in practice.

Publications so far have focused on the theoretical underpinnings of the Non-discrimination Directives, and emerging case law has also been analysed in the light of theoretical considerations. They have been useful in ensuring deeper and more uniform understanding of the Directives and stretching the boundaries of their potential. But this publication will be particularly useful for victims once they decide to take action. These are the most pressing questions facing victims across the European Union: should I seek protection from discrimination in everyday life and if so, how? How can I make best use of European non-discrimination law? How can I invoke European non-discrimination law in national courts to my advantage? What remedy should I seek? What are the first steps? Where can I turn if I face discrimination?

This Handbook provides a sound and unique basis to find answers to these questions.



# Executive Summary

Citizens across the European Union need to know more not only about their right to equal treatment but also about the legal and other avenues they can pursue when seeking to remedy a violation of this right. Surveys, such as successive Eurobarometers, indicate a relatively low awareness of the Non-discrimination Directives. Not many cases are brought to the courts, equality bodies or other competent authorities. Building on the strengths and weaknesses of existing anti-discrimination handbooks, and focusing on a much wider non-specialist audience, this Handbook addresses those who seek and provide general legal aid in the non-discrimination field.

How will you know if you have faced discrimination? Simple answers cannot be given to such a complex question. It is better to answer this short question with another short question: BUT FOR your disability, age, ethnicity, race, religion or sexual orientation would you have been treated otherwise? If the answer is yes, this Handbook includes details that help you identify discrimination and decide whether such discrimination is unlawful.

Once you are certain that you have suffered discrimination, many more questions need to be clarified. The Handbook is there to help you to ask all the important questions and find the right answers. Sometimes the answers will be discouraging – especially when it comes to predicting your chances of succeeding with a legal challenge. Still, being able to properly identify discrimination provides a certain amount of reassurance that you are in the right. You can also draw reassurance from the fact that a support system has been created for you under European law. When you know or suspect that you have been discriminated against, BEFORE taking any legal action, be sure to seek advice and assistance from a specialised equality body, a non-governmental organisation and/or a trade union. Equality bodies are the most specialised, accessible and cheapest providers of advice, assistance and more on discrimination.

European law provides strong protection from discrimination. It is only natural that victims of any unlawful action want to have access to such a high level of protection. It is important to bear in mind, however, that this protection cannot be accessed by anyone at any time. It applies only to people treated unfavourably on account of a characteristic that often leads to discrimination in certain fields.

At the same time, discrimination does not only occur at the individual level. It is often directed against groups or communities and also arises from unequal social structures. The Non-discrimination Directives provide the best tools to fight discrimination at the individual level. However, if victims work together and involve non-governmental organisations, it is possible to challenge structural discrimination.

Unlike national laws in many Member States, European law does not prohibit discrimination on an open-ended list of grounds. Still, this Handbook is useful at the national level because often the procedures and concepts transposing European non-discrimination law apply to discrimination based on grounds not covered by European law. European law is useful when it can ensure stronger or more extensive protection from discrimination than national equality legislation. It has been invoked, for instance, to define disability as broadly as possible, to ensure wider protection from age discrimination both for old and young workers (e.g. termination of contracts at a certain age or failure to consider years of employment completed before a certain age when calculating pay), to apply the reversal of the burden of proof to victimisation, to extend protection to associated discrimination on the ground of disability and to clarify that protection is due against discriminatory job advertisements without an actual application for the job.

The section dealing with the facts is central to the Handbook:

- what facts can support a discrimination claim (the *Basic information in a discrimination claim* table);

- how to present these facts (the '*Three plus one steps*' to establishing discrimination relying on the reversed burden of proof table); and
- how to collect evidence to substantiate these facts (Chapter II.4.A. 'Specific evidence').

There are also charts and tables to guide you, such as the *enforcement chart* that will assist you in selecting the most effective and suitable procedure for your case.

The Handbook provides a useful summary of sanctions that can be sought to remedy discrimination. We hope that you will find useful the examples of settlements that have already been obtained through court proceedings or mediation.

Despite the complexity of European and national anti-discrimination law, basic questions are now clear and simple. The uniform European definition of the many different forms of discrimination makes it easy to identify unequal treatment. Similarly, its common sense approach to the personal characteristics protected and the existence of procedural novelties – such as the reversed burden of proof and the standing of non-governmental organisations – make it simpler to challenge discrimination. European law imposes an obligation on Member States to (i) maintain equality bodies to assist victims and (ii) to provide for effective, proportionate and dissuasive remedies to put discrimination right.

Indeed, if and when national legislation appears vague or too complex, it is worth relying on European non-discrimination law from the very beginning of proceedings, regardless of whether they are instituted before a court, an equality body or administrative authorities. Even if a claim is not brought directly before a court, it may be referred there on appeal or review from an administrative authority, inspectorate, or even an equality body. Arguments based on EU non-discrimination law may lead any court to refer a case to the Court of Justice of the European Union. Significantly, EU anti-discrimination law may also be relied on before international judicial fora, such as the European Court of Human Rights.

# Introduction

The protection provided under European anti-discrimination law can best be realised if individual victims of discrimination have not only the will but also the skills and knowledge to seek remedies. Victims need to be aware of their rights in the fields covered by European law, but, like lawyers and NGO case workers, they should also be aware of the sanctions and procedural tools available to them.

Handbooks on anti-discrimination law at the international and national levels, as well as handbooks on strategic litigation in this field, are already available. However, the publications that go beyond the national level do not include information on newly established institutions, procedural rules, equality bodies, mediation and case law. National handbooks, on the other hand, rarely focus on victims and lay advocates. This publication aims to fill this gap by providing a practical guide to victims and legal professionals less familiar with the topic.

The Handbook's language is simple, it does not use footnotes and it strives to explain basic legal concepts to non-specialists. It runs readers through the process of bringing a case, from collecting evidence through to making a complaint at national level and up to involving the Court of Justice of the European Union (CJEU), formerly known as the European Court of Justice (ECJ). It includes basic information on invoking the Directives at the national level as well as on requests for preliminary rulings. The Handbook explains the purpose and basics of the concepts used in the Directives as well as relevant CJEU case law. It also gives some examples from EU Member States, mainly from five specifically targeted countries – Ireland, Hungary, Germany, Romania and Italy – which represent a variety of EU legal systems.

In order to stay on the practical side, we have provided tips, described typical scenarios for the application of key concepts, provided examples based on domestic and European case law and given direct access to on-line materials on basic issues. There are check lists in this Handbook to assist you in decision making and planning action. The Handbook regularly relies on internet sources and we would like to encourage readers to search for information beyond what is indicated.

The Handbook is composed of five main sections:

- Chapter I provides a background to European anti-discrimination law, its key concepts and transposition into national law;
- Chapter II deals with definitions of protected personal characteristics, the areas in which discrimination is prohibited, the legal meaning of discrimination and situations where discrimination may be lawful, as well as discrimination-specific evidence and the rules making it easier for victims to establish discrimination;
- Chapter III explains how individuals can enforce anti-discrimination law with the help of non-governmental organisations, trade unions and specialised equality bodies. It also deals with sanctions and remedies at civil, administrative and criminal law as well as mediation;
- Chapter IV provides tools to invoke European law in domestic and international proceedings and to seek interpretation from the Court of Justice of the European Union;
- The Appendices contain a list of handbooks in English and/or national languages.

As European and national non-discrimination laws are constantly changing, the Handbook can only serve as a very basic guide. It focuses on key concepts and instruments, but includes references and links to sources more specific to protected groups and particular fields as well as sources that are more targeted towards the legal profession. Examples, useful links, practical tips and typical scenarios are provided in boxes.

The Handbook reflects case law and interpretation up until 30 October 2010. The author takes no responsibility for the accuracy of the information found in the many external references and web-links in the text. The Handbook is available in English, French and German, but using free translation programmes available on the internet it will hopefully reach audiences not familiar with these languages.

The Handbook uses the following fundamental references:

- *Wikipedia* for the definition and detailed description of legal terms. Available in English at [http://en.wikipedia.org/wiki/Main\\_Page](http://en.wikipedia.org/wiki/Main_Page) and in other languages as well.
- *Developing Anti-discrimination Law in Europe: The 27 EU Member States Compared* (2009): a comparative analysis published by the Network of Legal Experts in the Non-discrimination Field and available in English at <http://www.non-discrimination.net/content/media/Comparative%20EN.pdf>.
- Thematic reports and the *European Anti-discrimination Law Review* published by the Network of Legal Experts in the Non-discrimination Field, including detailed legal analysis on disability and religion or belief-based discrimination, indirect discrimination, structural discrimination against the Roma in state education, and the meaning of housing and services under European law, available in English, French and German at <http://www.non-discrimination.net/en/publications?jsEnabled=1>.
- Country reports on the transposition of the Non-discrimination Directives into national laws and on remaining inconsistencies, summaries of case law and legislative reports prepared by the Network of Legal Experts in the Non-discrimination Field, available in English in the 'Latest documents' section of <http://www.non-discrimination.net>.
- *Combating Discrimination: a Training Manual*: a manual including practical information on the basic structure of anti-discrimination law in 24 languages and available at [http://www.migpolgroup.com/publications\\_detail.php?id=192](http://www.migpolgroup.com/publications_detail.php?id=192).
- *Strategic Litigation of Race Discrimination in Europe: from Principles to Practice*: a strategic litigation manual published by the ERRC, Interights and the MPG available at [http://www.migpolgroup.com/publications\\_detail.php?id=198](http://www.migpolgroup.com/publications_detail.php?id=198).
- *Activists and advocates – disability rights training programme*: a disability rights advocacy handbook published by the National Confederation of the Disabled People of Greece, available at [www.epikoda.ee/include/blob.php?download=epikmain1&id=0810](http://www.epikoda.ee/include/blob.php?download=epikmain1&id=0810).
- *Non-discrimination in International Law: A Handbook for Practitioners*: an international handbook published by Interights, available at <http://www.interights.org/handbook/index.htm>.





Toshi | 1975

# Part I

## European Union Law

**Useful links:**

- Website of the European Union: <http://europa.eu/>
- Access to European law in your language: <http://eur-lex.europa.eu/en/index.htm>
- Website on gender discrimination: [http://ec.europa.eu/justice/gender-equality/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/index_en.htm)
- Website on anti-discrimination: [http://ec.europa.eu/justice/discrimination/index\\_en.htm](http://ec.europa.eu/justice/discrimination/index_en.htm)
- Website of the Court of Justice of the European Union where cases can be found using the numbers indicated in this Handbook: [http://curia.europa.eu/jcms/jcms/j\\_6/accueil](http://curia.europa.eu/jcms/jcms/j_6/accueil)

**Practical tip:**

Unlike national laws in many Member States, European law does not prohibit discrimination on an open-ended list of grounds. Still, this Handbook is useful at the national level because often the procedures and concepts transposing European non-discrimination law apply to discrimination based on other grounds. For action at the international level, use the other sources mentioned in the Introduction.

**Typical scenarios:**

European law is useful when it is believed to ensure stronger or more extensive protection from discrimination than national equality legislation. It has been invoked for instance:

- to define disability as broadly as possible;
- to ensure wider protection from age discrimination both for old and young workers (termination of contracts at a certain age, a maximum age for eligibility for a job, or failure to consider years of employment completed before a certain age when calculating pay);
- to apply the reversal of the burden of proof to victimisation cases;
- to extend protection to associated discrimination on the ground of disability;
- to clarify that protection is due against a discriminatory job advertisement without an actual application for the job.

## 1.1 The Anti-discrimination Directives

What are the main aims of European anti-discrimination law?

- To promote equality
- To prohibit many types of discrimination across five + two grounds: race and ethnic origin, disability, religion and belief, age, sexual orientation + sex and nationality
- To prohibit harassment
- To prohibit victimisation
- To require reasonable accommodation of people with disabilities
- To ease the way for victims to prove discrimination and obtain remedies
- To allow positive action measures to ensure equal opportunities

There are 27 Member States of the European Union (EU), and the EU has four principal institutions that carry out its tasks. The Council of the EU passed the Non-discrimination Directives that are the main subject of this Handbook: the Racial Equality Directive and the Framework Employment Directive. The European Parliament has been engaged in the process of passing further directives in the field of non-discrimination. The European Commission's main task is to propose new legislation as well as to enforce existing European law and implement related policies. The Court of Justice of the European Union (CJEU) interprets European law.



The EU has the power to legislate or take other action in certain areas, including non-discrimination. Such areas have expanded over the years from primarily economic fields to social and political matters. Member States are subject to primary European laws, including treaty provisions on matters such as equal pay and other pieces of legislation, such as directives on sex, race, disability, and age discrimination or discrimination based on religion or belief and sexual orientation.

One of the most important characteristics of the EU system is that its laws take precedence over domestic law within its field of competence. This 'supremacy' of EU law entails that national courts must give priority ('primacy') to EU law over inconsistent domestic provisions. The EU legal system is thus 'supranational' in character. This means that unlike, for instance, the European Convention on Human Rights (an international treaty that also prohibits discrimination), EU non-discrimination law is not distinct from domestic law, but is part and parcel of it and under certain conditions has direct effect. Not only can national courts refer to EU law, they have an obligation to enforce it. Individuals can claim rights provided by European law in domestic courts if the provision they invoke has direct effect.

Certain equality provisions of the Treaties are directly applicable in domestic courts and must be enforced by them both against Member States and individuals. Directives also form part of EU legislation, but their application in domestic courts is more complex. Directives require Member States to achieve a certain result without dictating the means of achieving that result. It is up to the Member States how directives are implemented within their national legal systems, a process known as 'transposition'. They are also allowed time to make the necessary changes to their systems, the 'transposition period'.

Prior to 2000, the European Union legislated in the field of equality and non-discrimination in relation to sex and nationality. Non-discrimination on the basis of nationality was essential for a common labour market to be established in Europe. A treaty provision prohibits discrimination on grounds of nationality in order to ensure the free movement of workers (Article 45 of the present Treaty on the Functioning of the European Union; ex-Article 39 of the Treaty Establishing the European Community, EC Treaty). Issues in this regard included the legal requirement for foreign nationals acting as plaintiffs before national courts to give security for costs and lawyers' fees and rules discriminating against workers seconded by suppliers of services established in other Member States. The CJEU held, for example, that the above-mentioned treaty provision was directly applicable in the legal systems of Member States so as to render inapplicable a provision in the French maritime code that required a certain proportion of the crew of a French ship to be of French nationality (CJEU Case C-167/73).

The principle of equality of women and men was also considered important for ensuring that fair competition among employers in different Member States was not distorted by differences in employment regulations. A treaty provision provides for equal pay between men and women (Article 157 of the present Treaty on the Functioning of the European Union, ex-Article 141 of the EC Treaty). Directives relating to sex discrimination cover the field of employment. They include council directives on equal pay (75/117), equal treatment in employment (76/207), social security (79/7), the burden of proof in cases of sex discrimination (97/80), part-time work (97/81) and parental leave (96/34). The most recent pieces of legislation on the ground of gender are:

- Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:373:0037:0043:EN:PDF>
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast): <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:204:0023:0036:en:PDF>

Article 19 of the present Treaty on the Functioning of the European Union, ex-Article 13 of the EC Treaty, gives the European Union specific powers to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, age, disability or sexual orientation.

The Council has also passed two directives (referred to in this Handbook as the Non-discrimination Directives), which oblige Member States to introduce measures to eliminate discrimination:

- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Racial Equality Directive) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:EN:HTML>
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Framework Employment Directive): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:EN:HTML>

This Handbook focuses on these two Non-discrimination Directives, although other grounds will occasionally be mentioned to provide a wider context.

In order to extend the scope of protection beyond the field of employment for all the different grounds, the European Commission has prepared a proposal for a council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM/2008/0426). The proposal is pending with the Council and it is not yet part of European law: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0426:EN:NOT>

*European anti-discrimination law*



## 1.2. Transposition

The deadline for transposition into national law of the Racial Equality Directive was 19 July 2003. In the case of the Employment Framework Directive it was 2 December 2003 for the grounds of religion or belief and sexual orientation, and a further three years was allowed for transposing the provisions on age and disability discrimination in order to take account of the conditions in each particular country. The deadline for the transposition of both Non-discrimination Directives has hence passed.

Directorate General Justice-Unit D/2 – Equal Treatment Legislation is tasked with monitoring the transposition of EU Directives into national law and preparing action against Member States that fail in their duty of transposition. Inquiries have been made to many Member States and legal action has been taken against some. Member States have partly or fully implemented the Directives, but inconsistent national provisions still remain.

There are still some transposition issues outstanding, which the European Commission is monitoring with the help of the Network of Legal Experts in the Non-discrimination Field. The Non-discrimination Directives require Member States to report on measures taken to give the Directives effect in national laws, but nothing prohibits non-governmental organisations or individuals from indicating inconsistencies to the European Commission.

## 1.3. Key concepts of European equality law

The key concepts of the Non-discrimination Directives and other European equality law include the definitions of direct and indirect discrimination, harassment, victimisation and instructions to discriminate; the reversal of the burden of proof; adaptations of work places within reason that make it possible for a disabled person to work (known as ‘reasonable accommodation’); the defence of victims’ rights by non-governmental organisations and trade unions; and effective, proportionate and dissuasive sanctions including compensation. The practical use of these key concepts will be explained in this Handbook.



Jerrol | 1979

## Part II

# On What Grounds is Discrimination Prohibited?

The Non-discrimination Directives apply to all persons, which means that protection is not conditional on citizenship, nationality or residence status. The Directives apply to both individuals and legal persons such as companies, public authorities, local councils, etc.

European law prohibits unequal treatment on the grounds of racial or ethnic origin, religion or belief, disability, age, sexual orientation, sex and nationality. However, European legislation does not provide a definition of protected grounds other than sex/gender, which includes not only biological sex but also transgender sexuality. This is a fundamental concern for victims: who is protected and who is not under European law? In practice, the CJEU reserves the right to provide a European definition of protected grounds, and may broaden this definition as a result of cases referred by national courts.

Most states have incorporated all the grounds of discrimination included in the Non-discrimination Directives into their national anti-discrimination legislation, but the majority have chosen not to define them. A considerable number of states have opted not to restrict their new anti-discrimination laws to the grounds specified by the Directives. Others have made the list non-exhaustive by adding a phrase such as 'or any other circumstance'.

This chapter specifies the personal characteristics, in other words the grounds of discrimination, on which claims can be made under European law. It provides simple definitions as well as definitions taken from international treaties.

**Useful links:**

- Quick and easy source: <http://en.wikipedia.org/wiki/Racism> and related sites on sexism, ageism, etc.
- Domestic definitions in country reports: [www.non-discrimination.net](http://www.non-discrimination.net)

**Practical tip:**

Define protected grounds using the common, everyday meaning of words such as sex, race, age, etc. In case of doubt, follow the interpretations used in national or international law.

**Typical scenarios:**

In the majority of cases, protected grounds can be easily and clearly defined. Some Member States may define ethnic origin or disability very narrowly or recognise a group as religious rather than ethnic. National laws may be divided in how they treat transgender people, protecting them under sex or sexual orientation. Some national laws may protect Scientology and certain new age religious convictions under religion and belief, whereas others do not. It is often worth challenging these definitions, especially when European law provides stronger protection from discrimination for certain grounds, such as race, ethnic origin and sex.

The Irish Equality Authority provides user-friendly definitions of the protected grounds.

- The gender ground: Whether a person is a man, a woman or a transsexual person;
- The sexual orientation ground: Whether a person is gay, lesbian, bisexual or heterosexual;
- The religion ground: Different religious belief, background, outlook or none;
- The age ground: This only applies to people over 18 except for the provision of car insurance to licensed drivers under that age;
- The disability ground: This is broadly defined and includes people with physical, intellectual, learning, cognitive or emotional disabilities and a range of medical conditions;
- The race ground: A particular race, skin colour, nationality or ethnic origin.

The Irish equality legislation defines ‘the Traveller ground’ as a distinct protected ground. However, under European law the race ground and the Irish Traveller ground are both protected as ‘race and ethnic origin’ under the Racial Equality Directive.

### *Race and ethnic origin*

This ground is not defined in European law but certainly includes race, skin colour, and national or ethnic origin. It also includes Roma, Gypsies and Travellers. Ethnic minorities are identified both by themselves and by others as people with a shared history, culture and traditions, who possibly speak a minority language and adhere to a minority religion. One of the dividing lines between race and ethnic origin is the length of time the given minority group has spent in a Member State. An ethnically Turkish person would for instance be treated as a member of an ethnic minority in Bulgaria and of a racial minority in Germany.

In national laws there may be overlaps between race and ethnic origin on the one hand and nationality, language, religion and belief on the other hand. Some Member States do not recognise the existence of ethnic minorities on their territory, but may instead call them religious minorities. Such is the case of the Turkish minority in Greece. However, this does not mean that such ethnic minorities cannot qualify for protection under the Racial Equality Directive.

The term ‘race’ is defined in the International Convention on the Elimination of All Forms of Racial Discrimination. This United Nations Convention has been signed and ratified by all Member States and it is invoked in the Preamble (3) of the Racial Equality Directive, which recalls that all Member States are signatories to ICERD.

*“racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin. [our emphasis]*

Domestic law has provided its own definitions, for instance laws in Poland, Germany, Hungary and Latvia highlight that a long shared history, cultural tradition, common geographic origin or descent, common language and common religion etc. are all essential characteristics of an ethnic group.

### *Disability*

Disability is not defined in European law. The CJEU ruled that ‘illness in itself’ does not amount to disability, but that in the context of the Framework Employment Directive a disability must be understood as ‘a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life’ (CJEU Case C-13/05 *Chacón Navas*).



Gabriël | 2004



Theories about ‘disability’ as a ground of discrimination are divided between the medical and the social model of disability. National definitions rely heavily on the medical model. The *Activists and advocates – disability rights training programme* describes these models:

Essentially, the medical model says that the disadvantages which disabled people face in daily life are a direct consequence of their *impairment*. The impairment could be a person’s paraplegia, blindness, deafness, or intellectual disability etc. In other words, this model locates the ‘problem’ of disability *within the disabled person*. The problem is the person’s impairment. [...]

The social model argues that the impairment has little to do with disadvantage experienced by disabled people. The social model tells us that ‘disability’ is a so-called ‘*social construct*’. By this we mean that it is society that ‘constructs’, or creates, disability by taking as a starting-point an ‘able bodied’ standard from which a ‘disabled’ standard necessarily differs. Put briefly: it is society itself which *creates* ‘disability’ through negative attitudes, stigmatisation, prejudice and importantly, by always taking as a starting-point the standard of ‘a normal person’. Thus, according to this model, it is *not the medical impairment as such* which causes ‘disability’. [our emphasis]

For more detail on this topic, *Disability and Non-discrimination Law in the European Union: An analysis of disability discrimination law within and beyond the employment field* is available at:

<http://www.non-discrimination.net/content/media/Disability%20non-discrimination%20law.pdf>

### Age

Age is not defined in European law. Protection may apply to all ages, including young and old. Age is a protected ground in relation to employment, which in practice excludes people under 16, but in general there is no upper age limit.

For more details on this topic read *Age Discrimination and European Law*, available at:

[http://www.non-discrimination.net/content/media/Age%20discrimination%20and%20European%20Law\\_en.pdf](http://www.non-discrimination.net/content/media/Age%20discrimination%20and%20European%20Law_en.pdf)

### Religion or belief

Religion and belief are not defined in European law. These terms may apply to different religious or philosophical beliefs, background, outlook or none (from deists to atheists) if the personal views or convictions are coherent and possess a certain degree of importance, cogency and seriousness. This means that a victim does not necessarily have to belong to an ‘established’ church to be protected on the ground of religion or belief. The European Court of Human Rights has dealt with issues relating to religion and belief, so its case law may prove useful.

For more details on this topic, read *Religion and belief: discrimination in employment – the EU law*, available at:

<http://www.nondiscrimination.net>.

### Sexual orientation

Whether a person is gay, lesbian, bisexual or heterosexual. Depending on the country in question, transgender people may be protected on this ground or the gender/sex ground. The trade union Unison explains this ground as follows (*Equality Representatives Handbook*, <http://www.unison.org.uk/acrobat/18781.pdf>)

Every person has a sexual orientation and a gender identity. Your sexual orientation is who you are attracted to. Most people are attracted to others of the opposite sex (straight or heterosexual) but an estimated 10%

of people are attracted to others of the same sex (lesbian or gay) or to people irrespective of their sex (bisexual). Your gender identity is your internal sense or your own gender. For most people this conforms to the sex assigned at birth – female or male. For a minority of people (transgender people), their gender identity does not conform to the sex they were assigned at birth. Some transgender people change their name and personal details and live permanently in the gender they identify with.

#### *Sex/gender*

Whether a person is a man, a woman or a transsexual. The CJEU held that discrimination against a transsexual constituted discrimination on the grounds of sex (Case C-13/94 *P. v S.*).

The general rule developed by the CJEU in its case law is that direct discrimination based on sex can never be justified. However indirect discrimination may be objectively justified if (a) the measures used correspond to a genuine need, (b) the measures are appropriate to achieving their objectives and (c) the measures are necessary to that end (Case C-170/84 *Bilka*). The most significant case law has concerned (i) employment, (ii) maternity, (iii) indirect discrimination and part-time work and (iv) social benefits. The CJEU has been active in attempts to stop indirect discrimination against women in the job market. In response to challenges by men, it has set limits for positive action to remedy structural discrimination against women.

#### *Nationality*

This applies to the nationality of EU citizens (nationals of a Member State) in relation to freedom of movement of workers, etc. Nationals of third countries are not protected on the ground of their nationality under the Non-discrimination Directives (see Article 3, paragraph 2 of both Directive 2000/43/EC and Directive 2000/78/EC). They may be protected, however, on the ground of their race or ethnic origin, disability, age, sexual orientation, religion or belief. They may also rely on protection arising from gender equality provisions. Finally, they may be protected in certain areas (for instance in employment) under agreements with third countries or under other instruments of EU law, such as Directive 2003/109 EC on long-term legally resident third country nationals.

#### *Multiple discrimination*

A victim of discrimination may be protected on more than one ground: she may be a Muslim minority ethnic woman, an elderly Rastafarian, a disabled Roma, etc. The Racial Equality Directive's Preamble stresses that multiple discrimination may take place on the combined grounds of gender and race or ethnic origin (Recital 14). However, European law provides different levels of protection even for the best protected grounds of race and sex, which may cause problems when adjudicating multiple discrimination claims.

Victims may feel that the discrimination they have suffered is due to a combination of protected grounds and cannot be covered by one of them alone. This may be the case for instance if a Muslim Roma woman employed in Bulgaria feels that her lack of promotion is due to the combined grounds of religion, ethnic origin and sex. The concern is that she may not succeed in establishing discrimination solely on the ground of religion, or ethnic origin, or sex, or even on two grounds combined.

If it is not possible to claim multiple discrimination under domestic law because different grounds are protected to different extents and/or in different pieces of legislation, then victims have to make a choice. They may select the ground on which they can make the strongest claim and take action on that ground alone. Alternatively, they may bring a claim of multiple discrimination and if they do not succeed in domestic courts, ask for a preliminary referral to the CJEU on whether or not they are protected under European law, and if so, how. They need to bear in mind that European law is itself ground specific, and thus protects different grounds to different degrees. European

law sometimes recognises multiple discrimination, for example the Preamble to the Racial Equality Directive may be invoked in favour of claimants such as ethnic minority women. In Member States where the list of protected grounds is open, multiple discrimination may be brought under the ‘any other ground or characteristic’ clause.

*Real, assumed or associated ground*

In many cases the victim is told clearly on what ground she faces discrimination: ‘we do not serve Travellers’ (ethnic origin or race), ‘sorry, no guide dogs’ (disability), ‘young female staff sought’ (multiple sex and age discrimination).

However, there are also instances where victims feel that assumptions have been made about a protected ground, but it is not clearly stated. Discrimination based on an assumed ground – whether or not true in reality – is equally prohibited under European law. If an employee is assumed to be gay, Jewish, Muslim or pregnant and is therefore not employed, not promoted or laid off, she can seek protection under European law. It does not matter whether or not she is really gay, Jewish, Muslim, or pregnant.

The Employment Appeal Tribunal dismissed a claim for harassment brought by a man who was not gay and who was known by his harassers not to be gay, but who was nevertheless subject to homophobic abuse. The Tribunal took the view that the claimant was not subject to harassment on the grounds of his actual sexual orientation. The Court of Appeal overturned the Tribunal’s decision and ruled that the fact that the harassment occurred on the grounds of the applicant’s sexual orientation, in the sense of being based upon or linked to his real or imagined sexual orientation, was sufficient to bring the complaint within the scope of the applicable legal provisions (*English v Thomas Sanderson Blinds Ltd*, Court of Appeal, 19 December 2008, [2009] IRLR 206, <http://www.bailii.org/ew/cases/EWCA/Civ/2008/1421.html>).

There are other instances when friends, relatives or colleagues of a victim who has a real or assumed protected characteristic also suffer discrimination together or through the victim. For instance, if an ethnic minority couple together with their majority friends are denied entry to a bar, the friends suffer discrimination based on associated race or ethnic origin, in other words ‘on the ground of ethnicity’.

The CJEU has held that the prohibition of direct discrimination and harassment in the Framework Employment Directive was not limited only to people who were themselves disabled. This prohibition extended to an employee whose child was disabled and who was the primary carer of her child (CJEU Case C-303/06 *Coleman*).

The majority of Member States provide protection from discrimination on a much broader spectrum of grounds or characteristics than does European law – many even leaving the list of protected grounds open. This means that claims on these grounds can also be made to national courts and authorities. However, these claims cannot be referred to the CJEU because there is no European law to interpret.

Werner | 1987

## Part III

# In Which Areas Is Discrimination Prohibited?

The Non-discrimination Directives prohibit discrimination in both the public and private sectors including public bodies, which means that neither the state, public institutions, individuals or companies can discriminate against an individual. Broadly speaking, the Racial Equality Directive prohibits discrimination in the social and economic fields, while the Framework Employment Directive covers employment broadly understood. However, as opposed to the Racial Equality Directive the Framework Employment Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.

The majority of Member States provide protection from discrimination on grounds protected under European law and beyond, and also on a much broader scale – mainly in relation to public life (i.e. civil and political rights, such as equality before the law). This means that claims on these grounds can also be made to national courts and authorities and the same key concepts probably apply as under European law. However, these claims cannot be referred to the CJEU because there is no European law to interpret.

Both Non-discrimination Directives state that they do not cover differences of treatment based on nationality and statelessness and are without prejudice to immigration law broadly understood. Some Member States have transposed the Non-discrimination Directives without these exclusions. In general, protection against discrimination is not conditional on nationality, citizenship or residence status. In the majority of states, both natural and legal persons are protected against discrimination. There is more variation in national rules on who is to be held liable for discrimination, particularly when it occurs in the workplace.

On the whole, protection against discrimination in the provision of goods and services is mostly 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 the same scope of protection for all grounds, thereby going beyond the Directives. In contrast, however, at the end of 2010 Poland still had to transpose the Racial Equality Directive in all fields apart from employment.

Pay includes employment-related benefits provided as part of remuneration. The Non-discrimination Directives cover contract work, military service and statutory office. Employment in both the public and private sectors is covered in both Directives. In some countries protection does not extend to all employees or the self-employed.

A self-employed person is defined as a worker who works independently of an employer, in contrast with an employee who is subordinate to and dependent on an employer. The self-employed are generally concentrated in a number of occupations such as law and accountancy, farming, shop keeping, and construction. Membership and involvement in trade unions and work councils, bar and medical associations is also covered.

The Framework Employment Directive covers parts of education, namely vocational and adult training as well as university education. The meaning of ‘services’ is also unclear, but certainly includes services performed for remuneration and probably excludes services available only privately. The Racial Equality Directive covers all aspects of housing: sale and letting of properties, allocation of tenancies and management of rented accommodation in the public and private sectors, housing loans, and residential care institutions.

The Explanatory Memorandum to the proposal for the Racial Equality Directive notes that ‘social advantages’ include benefits of an economic or cultural nature which are granted within the Member States either by public authorities or private organisations. Examples given in the Explanatory Memorandum include concessionary travel on public transport, reduced prices for access to cultural or other events and subsidised meals in schools for children from low-income families.

For more details on this topic read:

The prohibition of racial and ethnic discrimination in access to services under EU law in *European Anti-discrimination Law Review* 10/2010 and Housing Rights and Racial Discrimination in *European Anti-discrimination Law Review* 10/2009, both available at [www.non-discrimination.net/en/publications](http://www.non-discrimination.net/en/publications).

*Fields covered by the Non-discrimination Directives*

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



Rebecca | 1993



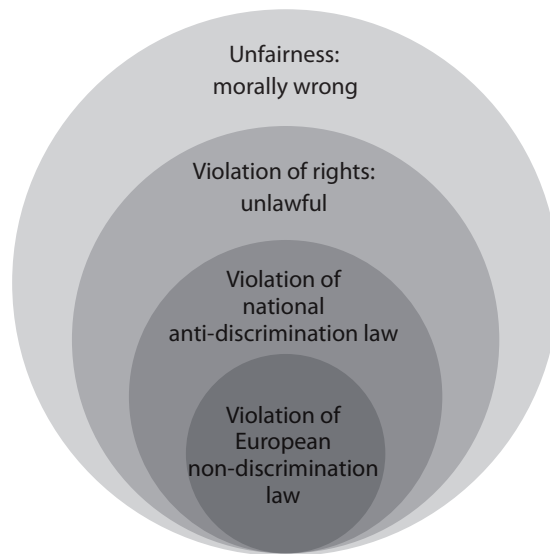
## Part IV

# The Non-discrimination Directives

## 4.1 What is meant by 'discrimination'?

In everyday life the word discrimination is often used interchangeably with injustice, unfairness, inequality, or a lack of equal opportunities. Discrimination does relate to these moral and philosophical values, but European law understands it in a much narrower sense. Discrimination does not mean any injustice, (human) rights violation or unlawful act, and protection from discrimination is only due to those who share a protected characteristic. What is more, the law may provide rules under which seemingly unfair, unjust or even unequal treatment is justifiable. As discrimination can be justified in certain instances it may not seem morally fair or just, but it is still legal.

*The circles of injustice*



The non-discrimination principle requires the equal treatment of an individual or group irrespective of a certain personal characteristic, or in other words, their protected ground. Equal treatment means that similar situations should be treated alike (a disabled and a non-disabled worker should receive equal pay for equal work) and dissimilar situations should be treated differently (reasonable adjustments should be made to allow the disabled worker to do her job). The non-discrimination principle is also used to provide protection from conditions or rules that are seemingly unrelated to a protected ground but that produce effects which systematically disadvantage people who have that characteristic. For example, saying that applicants for a job must be clean shaven puts members of some religious groups at a disadvantage.

Discrimination may consist of conduct that *intends* to discriminate (for instance, when employees over 50 are made redundant because they cost too much and are assumed to work less efficiently and fall ill more often) or of practices that may have a discriminatory *effect* (for example, when public sector employees, including cleaning and catering staff, are required to have perfect language skills, which has a detrimental effect on certain racial and ethnic minorities).

Unlike many national rules, European law does not specifically define the types of conduct that are prohibited. Its wording suggests that not only actions (whether deliberately discriminatory or not) but also *omissions and failures to act* can lead to discrimination. The key words used to describe the different situations that may lead to discrimination are:

- treatment,
- provision, criterion or practice that would put persons at a disadvantage,
- unwanted conduct,
- adverse consequence.

Discrimination does not only occur at the individual level. It is often directed against groups or communities and also results from unequal social structures. The Non-discrimination Directives provide the best tools to fight discrimination at the individual level. However, if victims work together and involve non-governmental organisations, it is possible to challenge structural discrimination.

Structural discrimination arising from national rules which permit employers to dismiss employees aged 65 or over by reason of retirement was challenged in a domestic court by Age Concern England, an NGO representing an interest group. The case was referred to the CJEU, which ruled that the issue fell within the scope of the Framework Employment Directive, which imposes on Member States the burden of establishing to a high standard of proof the legitimacy of employment, labour market or vocational training policies, including policies on mandatory retirement ages. The age of retirement has since been the subject of many other challenges and preliminary referrals and is currently the subject of debate in various Member States. (CJEU Case C-388/07 *Age Concern England*).

### 4.1.1 Direct discrimination

Direct discrimination is common in Europe and is relatively easy to spot. Most Member States have adopted legislation that reflects closely the definition of direct discrimination provided by the Non-discrimination Directives. However, national legislation predating the Non-discrimination Directives that uses a definition of direct discrimination inconsistent with the Directives may still be in force.

**Useful links:**

- Domestic anti-discrimination law analysed and compared in detail across Member States in *Developing Anti-discrimination Law in Europe: The 27 EU Member States Compared*: <http://www.non-discrimination.net/content/media/Comparative%20EN.pdf>

**Practical tip:**  
Often the 'but for' test will help you identify direct discrimination. But for my disability, would I have been treated this way? Is unequal treatment based on my age?  
Can you identify a discriminatory purpose behind the unequal treatment? Then it is more likely to be direct discrimination.  
NOTE: direct discrimination can sometimes be lawful!

**Typical scenarios:**

- Failure to recruit an applicant because of a protected characteristic;
- Discriminatory job advertisements;
- Difficulties in enrolling in schools for disabled or ethnic minority children;
- Bars, restaurants or shops denying customers entry on racial grounds or not adapting their premises to wheelchair users;
- Estate agencies or property owners not renting to minority racial or ethnic tenants;
- Pay differences: in certain Member States statistics indicate that minority men earn less than majority men and minority women earn even less than majority women;
- Restrictions on wearing religious clothing or symbols;
- Employees over 50 made redundant;
- Mandatory retirement age set at 58, 60 or 65;
- Racially segregated social housing and education.

In European law direct discrimination is when one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of his or her protected characteristic.

The company Firma Feryn specialising in selling and installing doors was advertising job vacancies. In a radio interview, its director stated that the company was only seeking to recruit fitters of Belgian origin as its customers were reluctant to let foreign fitters into their homes. The national equality body (established to assist victims of discrimination) took legal action against the company, arguing that this public statement amounted to direct discrimination. In a preliminary reference, the CJEU confirmed that the Racial Equality Directive applied to discriminatory job advertisements. It also stated that sanctions need to be applied even if there is no identifiable victim (CJEU Case C-54/07 *Feryn*).

Direct discrimination can be obvious as in the *Feryn* case or disguised (overt or covert discrimination). A typical scenario of covert discrimination is when bars or clubs maintain a members-only entrance policy, but membership is not granted in a racially neutral fashion.

More recently, the CJEU has identified direct discrimination in cases where a formally neutral criterion in fact affects one group only – by its nature or on the basis of a rule that has the force of law.

German law permits same sex couples to form life partnerships, but they cannot get married. Mr Maruko survived his life partner, who had been making payments into an occupational pension fund. He applied for a survivor's pension from the fund but was refused. In a preliminary reference, the CJEU ruled that the Framework Employment Directive applied to his case. It also ruled that partners in a same-sex life partnership were in a comparable situation to spouses in relation to a survivor's pension paid out of an occupational pension fund (Case C-267/06 *Maruko*). This ruling has already been implemented by the German Federal Labour Court in another case (Az: 3 ATR 20/07, 14.01.2009).

Direct discrimination can be lawful when European law permits an exception to the general principle of anti-discrimination, but different exceptions apply to different protected grounds. This means that when you identify unequal treatment as direct discrimination, you need to check whether an exception applies to your case before you take action.

In general, racial or ethnic direct discrimination is the most difficult to justify, while disability and age-based direct discrimination can be more easily justified. The exceptions to the principle of equal treatment permitted under the Non-discrimination Directives have largely been taken up in national law. In some instances it is suspected that the exceptions are wider than the Directives allow.

*Exceptions to direct discrimination in European law*

Type of exception	Ground	Example
Genuine and determining occupational requirements (GDOR)	All grounds	It may be lawful to only employ a Black actor to play Othello or a Chinese chef in an authentic Chinese restaurant.
Positive action	All grounds	Disability quotas in employment, extra language classes for minority racial or ethnic groups, financial incentives to promote employment of younger and/or older workers.
Employers with an ethos based on religion or belief	Religion or belief	It is lawful to only employ a member of a certain church to be head of a denominational school.

Type of exception	Ground	Example
Armed forces and other specific occupations not covered	Disability and age	National law may provide that it is lawful not to employ a person over a certain age or a certain level of disability as a soldier.
Family benefits	Sexual orientation	It is lawful to exclude same sex partners from family benefits if same sex couples can also get married in the Member State.
Health and safety	Disability	It is lawful not to employ a disabled job seeker if her employment would inevitably lead to a breach of fire regulations.
Exceptions related to age	Age	It may be lawful to put maximum limits on the age of recruitment to certain professions. NOTE: this exception is subject to a number of challenges before the CJEU, including on maximum and minimum age requirements for pilots and fire officers.
Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others	Disability, age, sexual orientation, religion or belief	National law may allow a registrar of births, deaths and marriages to be laid off if she refuses to marry same sex couples on the basis of her religious convictions.

Please note that the more general exceptions listed towards the end of the table may lead to judgments that are specific to the historical and political context of the Member State in question.

National definitions of direct discrimination share common features, which means you always need to consider ‘three plus one’ aspects (cf. section 5.2.3) when planning legal action in any country.

*Common elements of direct discrimination in national laws*

Element of national definition	Example
There is a need to demonstrate less favourable treatment.	I was not hired. I am paid less. I could not get into the bar last night. The insurance company refused to issue a policy to me.
There is a need to find a ‘comparator’, i.e. another person in a similar situation but with a contrasting characteristic that is usually shared by the majority.	I am disabled, he is not. I am a lesbian, he is heterosexual. I am a Sikh, she is white British.
It is possible to use a comparator from the past or a hypothetical comparator, or to compare treatment to an ideal minimum standard of treatment.	A previous employee who earned more doing the same job. In equal pay cases, a person at the same grade employed by a similar employer can be used as a comparator. No person should be treated like this out of respect for human dignity.
In general, direct discrimination cannot be justified except on the ground of age	See, for instance, challenges before the CJEU on maximum and minimum age requirements.

It may jeopardise your chances if you do not identify the correct comparator. For instance, in age discrimination cases it may prove difficult to identify the right age groups to prove unequal treatment. In racial, ethnic and religious discrimination it may be important to avoid comparisons with other minority racial, ethnic or religious

individuals or groups instead of a majority individual or group. In multiple discrimination cases the best comparator may not be a person who belongs to the majority group in every respect. Finding the best comparator depends on social attitudes towards different minority groups. For instance, the best comparator for a Muslim Roma in southern Bulgaria who is trying to prove ethnic discrimination may be a Muslim Turk rather than a Christian Bulgarian.

In some Member States discrimination can be established in comparison with an ideal minimum standard of treatment, for instance conduct required by respect for human dignity.

## 4.1.2 Indirect discrimination

### Useful link:

- *Limits and potential of the concept of indirect discrimination* is full of practical examples, tables and charts to help you understand how the concept of indirect discrimination is applied in practice. Available at [http://www.non-discrimination.net/content/media/limpot08\\_en.pdf](http://www.non-discrimination.net/content/media/limpot08_en.pdf)

### Practical tip:

Ask yourself why a practice that seems OK at first sight disadvantages some people more than others. Are people with a protected characteristic disproportionately represented among those disadvantaged? You may become aware of a discriminatory intention, but in general indirect discrimination is about the effect of a practice, not the intention behind it. Keep in mind that it is NOT necessary to prove the existence of a discriminatory intention in order to establish the existence of a discriminatory rule or practice.

### Typical indirect discrimination scenarios:

- Language requirements that are not in fact necessary to fill lower ranking positions (language usually serves as a proxy for non-nationals who may belong to a minority race or for nationals who may belong to a minority ethnic group);
- Inappropriately high requirements for vocational or academic qualifications;
- General ban on an occupation or activity that is only typical of people who share a certain protected characteristic (fortune telling, collection of scrap metal, street art and trading);
- Having performed military service as a requirement for recruitment (may discriminate against some religions);
- Dress codes.

In European law the general definition of indirect discrimination is: where an apparently neutral provision, criterion, or practice would put people sharing a protected characteristic at a particular disadvantage compared with other people.

In some Member States very strict language proficiency requirements for both speaking and writing in the national language need to be met for employment in the civil service, even for low-ranking positions that require few or no writing skills. As a result, racial and ethnic minorities are vastly underrepresented in the civil service at all levels.

What could be seen as indirect discrimination is often lawful because European law permits a general exception to the definition above based on the aim of the provision, criterion or practice.

When challenging language requirements you need to find out why they have been imposed. Do they ensure that the best public service is available to all citizens? Was the imposition of language requirements the only way to achieve the best public service? Are there other ways in which this could have been done? Are the best language skills necessary in all jobs to provide the best public service?

Indirect discrimination is lawful if the provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. This is for respondents to prove, but it is also useful for victims to examine whether what they think is discrimination is in fact lawful. In practice, there is a broad range of justifications that may render a certain type of indirect discrimination lawful under European law. However, there are certain principles that limit which justifications are acceptable:

- Purely budgetary (financial) considerations can never serve as objective justification for discrimination.
- The aim of the practice must be unrelated to discrimination and mere generalisations are not sufficient.
- Proportionality requires that the concrete measure taken in order to achieve the legitimate aim should be suitable for achieving that aim.
- Proportionality also requires the respondent to show that another measure with a lesser or no detrimental effect would not be effective.

How does this test apply to our example?

If the aim of the language requirements is to ensure the best public service to all citizens, that seems to be unrelated to discrimination based on race and ethnic origin. However, there are many potentially suitable ways in which this aim could have been achieved, including requirements relating to academic qualifications, length and diversity of professional experience and knowledge of foreign or minority languages, depending on the kinds of public service in question. A combination of these requirements appears particularly appropriate. It is also clear that for civil service jobs that are not dependent on language skills, these alternative selection criteria would in principle be even more appropriate than a language requirement.

How does this apply in practice?

#### Swedish Labour Court decision on discriminatory language requirements

The alleged victim of discrimination was from the former Yugoslavia. He was among five applicants who had applied for a position as a municipal architect who were invited for interview. He was discounted owing to his lack of Swedish language skills, demonstrated during the interview. When representing the alleged victim, the Ombudsman claimed that his language skills had been misinterpreted during the interview and that this amounted to direct discrimination on the grounds of ethnicity. In the alternative, the Ombudsman argued that the language requirements amounted to unlawful indirect discrimination.

The Labour Court did not accept the allegations of direct discrimination. The Court found that the interview had gone badly and that all the members of the appointment committee had agreed that the man did not possess the language skills required for the position. The question was then whether these language requirements amounted to indirect discrimination on the grounds of ethnicity. The Labour Court answered in the negative. The position of municipal architect required actions to be performed on behalf of the State and it was objectively justified, adequate and necessary to require good (though not perfect) knowledge of written and spoken Swedish.

The concept of indirect discrimination was explored in some detail in this case. In contrast to the employer, the Ombudsman argued that in order to prove a *prima facie* case of indirect discrimination, it was sufficient that the language requirements be to the detriment not only of people of the same ethnic origin as the alleged victim but of 'any person who does not have Swedish as their mother tongue'. The Labour Court concurred with the Ombudsman in this respect, although in the end it decided against the plaintiff (Labour Court Decision of 19 October 2005, AD 2005 No. 98).

The majority of Member States define indirect discrimination in line with the Non-discrimination Directives. National laws differ as to the degree of difference between the effects of a certain criterion or practice on comparable groups: do all members of the protected group need to be affected or is it enough if a considerably larger proportion of the protected group is affected? Is it sufficient for a lesser but persistent and relatively constant disparity over

a long period to be shown? The CJEU has not yet ruled on cases of indirect discrimination involving the Non-discrimination Directives. National courts have, however, addressed some issues.

Limitation by an in-house job advertisement of a vacancy to applicants who are in their first year of employment constitutes indirect discrimination on the ground of age; statistical evidence for actual disadvantage suffered by a certain age group is not necessary – it is sufficient to show the typical tendency. German Federal Labour Court, August 2009, 1 ABR 47/08.

Indirect discrimination on the ground of age assumed if interim assistance (*Überbrückungsbeihilfe*) granted by a former employer is only paid until the former employee receives an old age pension, but is justified since the grant is only meant to secure the livelihood of the former employee for a limited period (German Rhineland-Palatine *Land* Labour Court, 24 March 2009, 3 Sa 542/08).

### 4.1.3 Harassment

The majority of Member States define harassment in line with European law. In Romania, however, the definition is complex and not necessarily consistent with the Directives.

#### Useful references:

*Multi-sectoral guidelines to tackle third-party violence and harassment related to work*, 30 September 2010, available at [http://www.coess.org/pdf/multi-sectoral\\_guidelines\\_third-party\\_violence.pdf](http://www.coess.org/pdf/multi-sectoral_guidelines_third-party_violence.pdf)

#### Practical tip:

Forget comparators when you are thinking about harassment. Concentrate on the feelings the treatment arouses in you. Check if the conduct can be said to violate your dignity as a human being and create a degrading environment.

#### Typical scenarios:

- Sexist, racist or homophobic jokes or stories told in the workplace;
- Posters, e-mail messages, ordinary mail or graffiti with similar content.

Under European law harassment is unwanted conduct related to a protected ground with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. Even if the purpose is not to harass, establishing a hostile environment that violates a person's dignity (i.e. the effect) is sufficient for a finding of harassment.

There are uncertainties in national laws about the definition of a 'degrading environment' because this can be subjective: what seems degrading to one person may not appear so to people who do not have the protected characteristic.

It can also be difficult to decide who is liable for harassment, which is often committed by colleagues in the workplace. Member States provide for the liability of employers in these cases and some even place a special duty on employers to prevent or redress harassment. Public authorities and institutions such as hospitals, schools or local councils have a duty to tackle harassment committed by their employees, otherwise they can be held liable under civil law.



So far one claim of harassment has reached the CJEU, involving a mother who was the primary carer of a disabled child. Harassment included: labelling the mother ‘lazy’ when she asked for time off to care for her son, even though this was granted to the parents of non-disabled children; inappropriate and insulting comments made about both her and her child, whereas other employees took time off to look after their non-disabled children without provoking such comments; and threats of dismissal when she occasionally arrived late for work due to her child’s condition, whereas other parents did not incur such threats (CJEU Case C-303/06 *Coleman*).

Many Member States have transposed the Non-discrimination Directives to cover more fields in national law. This is how hate speech can be deemed harassment in Romania, Bulgaria and Hungary, where equality bodies have found newspapers, mayors and politicians guilty of hate speech both at the local and national levels.

#### 4.1.4 Victimisation

**Practical tip:**

Forget comparators when you are thinking about victimisation – you do not need one under European law. Is the victimisation linked to a complaint of discrimination? Victimisation not linked to a complaint of discrimination may be widespread, but it is not protected by European non-discrimination law.

Victimisation describes any adverse measure taken by an organisation (including employers and public authorities) or by an individual in retaliation for efforts to enforce the right to equal treatment. The most common example is where an employee complains about unequal treatment and the employer responds by dismissing or failing to promote the employee.

The Non-discrimination Directives define victimisation as one form of unlawful discrimination: it is any adverse treatment or consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment. There is an obligation on Member States to ensure protection from it in their national legal systems.

An air stewardess complained to the management that she had been discriminated against on the grounds of race. The airline dealt with the complaint, but failed to inform the stewardess of the outcome of the disciplinary procedure. In fact, it remained unclear what measures the airline took against the offender. The refusal of the stewardess to ‘mediate’ with the offender was seen by the management as a refusal to cooperate and a reason not to renew her contract. The Dutch Equal Treatment Commission (ETC) saw this as a clear case of victimisation. In an action challenging the dismissal, the judge found against the airline and ruled that complaints of discrimination should be dealt with in a timely and transparent fashion and that feedback must always be given to the complainant, for example on disciplinary action against the offender. Both the ETC and the judge came to the conclusion that the employer had failed to put in place transparent procedures to deal with complaints about discrimination. The ETC found a breach of equal treatment legislation, whereas the civil court simply referred to a general provision of the Civil Code to the effect that an employer should make sure that working conditions are safe (good employership), which includes providing working conditions that are free from discrimination and a transparent complaints procedure (ETC Opinion 2010-52, of 29 March 2010; Haarlem District Court, Judgment of 27 April 2010, LJN: BM5906).

Various issues have arisen with regard to transposition. The definition of victimisation in the Directives does not require victims to identify a comparator, but a comparator is required under Irish case law. It has not been

settled whether the reversal of the burden of proof applies to victimisation. Several Member States fail to provide protection from victimisation on the grounds of race and ethnic origin beyond employment. Others only protect people who make the initial complaint of discrimination but exclude witnesses. France only provides protection from adverse treatment arising from disciplinary proceedings or a dismissal. There are similar problems with Polish and Italian law. These issues are worth being challenged through preliminary referrals to the CJEU.

Protection from victimisation lies at the heart of protection from discrimination. How can a victim be expected to claim protection under the Directives if she runs the risk of being victimised? Challenges need to be made to inconsistent national laws and case law to strengthen protection under European law.

#### 4.1.5 Instructions to discriminate

Both Non-discrimination Directives prohibit instructions to discriminate. This covers, for instance, night club proprietors who instruct doormen to deny customers access on grounds of race or home owners who instruct estate agents not to let or sell their property to ethnic minorities. It would also cover instances where employers instruct temping agencies not to refer employees over a certain age to them.

A municipal employment office was not referring job applications from candidates of certain ethnic origins or ages if the employer indicated that they did not wish to employ such people. When asked about this practice, the manager of the office said that employers' requests indicated their working practices. He explicitly mentioned employers who said that they were not interested in applicants who were over 50 or of Turkish origin. He believed that it was pointless to ignore such requests as exposing candidates to inevitable rejection would have only discouraged them. The municipality launched an internal inquiry as requested by an NGO monitoring the case, but concluded that no discrimination had taken place as older people and immigrants were sufficiently represented (25%) among applicants referred by the employment office. The national equality body concluded otherwise. It found that the municipality was guilty of discrimination as recruitment of a certain proportion of job seekers from protected groups did not justify direct discrimination against them. It also held that employment offices were responsible for calling employers to account for discriminatory instructions (Dutch Equal Treatment Commission Opinion 2009-40 of 13 May 2009).

#### 4.1.6 Failure to provide reasonable accommodation for people with disabilities

The Framework Employment Directive places employers under the 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'. This burden is not disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

Most Member States have transposed the reasonable accommodation duty, but few have provided detailed rules on how this should be implemented. In Italy and Poland the duty has not been included as such in national legislation. In France its scope under national law may be narrower than under the Directive.

The reasonable accommodation duty is often subject to the limitation that it should not create a 'disproportionate burden' for the employer. The type and cost of reasonable accommodation may differ from disability to disability. For instance, mentally disabled people may only need short on-the-job training to excel as shelf stackers, while a deaf employee may need written notes and email messages to communicate. The Directive provides an indication

of three criteria to be taken into account when determining whether a particular accommodation is reasonable (Recital 21 of the Preamble). The three-pronged test is based on:

1. the financial and other costs entailed;
2. the scale and financial resources of the organisation or company;
3. the possibility of obtaining public funding or any other assistance.

A university student who used a wheelchair complained against his university for failing to make reasonable accommodations that would allow him to access to all lectures, exams, libraries and other student facilities. He also complained that the university did not comply with the general provisions of the law on the built environment. The university explained that it had taken all appropriate measures to enable the student to participate as fully as possible. As requested by the student, the university had made various adaptations, including installing a ramp and separate tables in the lecture theatre and providing personal assistance in the library. The Dutch Equal Treatment Commission appointed an expert to investigate compliance with the law on the built environment and concluded that the university was not at fault. The ETC also found that the university had made several reasonable accommodations and that the extra measures requested by the student (full access to the library and a separate reading room) were not proportionate to the investment required from the university. In conclusion, there had been no breach of equal treatment (ETC Opinion, 2010-11 of 27 January 2010).

It is not clear in much national legislation whether failure to provide reasonable accommodation constitutes discrimination. In Sweden reasonable accommodation is linked to direct discrimination. In Slovakia and Austria the failure to provide reasonable accommodation is treated as indirect discrimination, while in the United Kingdom it is a specific form of discrimination. In Bulgaria courts have found that such failure was direct discrimination. Moreover, Bulgarian law goes beyond the reasonable accommodation duty as formulated in the Framework Employment Directive, and places an absolute duty on public authorities to make built infrastructure accessible to people with disabilities.

Bulgarian Supreme Court acknowledges as absolute the positive duty of public authorities to build infrastructure accessible to people with disabilities

On 30 June 2008 the Supreme Court of Cassation ruled against the Municipality of Plovdiv, the second largest Bulgarian city, and held the public authorities liable for discrimination against a woman with a disability. She initiated court proceedings on the basis of the accessibility of public places to people with disabilities, including herself. She alleged that the general existence of non-accessible public buildings and transportation deprived her of opportunities to enjoy a social life. She did not refer to a specific incident but to the overall inaccessibility of the city's buildings and infrastructure to people with mobility disabilities. The Supreme Court ruled that the authorities' obligation laid down in the relevant legislation to eliminate barriers for people with disabilities was absolute. It awarded the plaintiff €5 250 in non-pecuniary damages for social isolation and deprivation of the right to professional and personal fulfilment. In addition, the Court ordered the authorities to remedy their failure to provide access without barriers to public buildings and means of transport to people with disabilities as well as to refrain from such infractions in the future (Supreme Court of Cassation, Decision N. 556 of 30 June 2008).

## 4.2 Can discrimination ever be justified?

Yes, under certain conditions it can be justified. European law provides limited opportunities to defendants to prove that their conduct is legal, despite being less favourable to victims. However, before legal proceedings arrive at a

stage when a defence of justification is examined, victims have the duty to make a *prima facie* case – as explained below in Chapter II.4.B.

Direct discrimination can be justified on the basis of ground-specific exceptions. Indirect discrimination can be justified on the basis of a general test. The failure to make reasonable accommodation can be justified using a three-pronged financial test. Harassment, victimisation and instructions to discriminate cannot be justified.

### 4.3 What do the Directives say about positive action?

The Non-discrimination Directives specifically provide that positive action is a justification for unequal treatment. Challenges against positive action measures usually come from members of majority groups who feel that they face unlawful discrimination as a result of positive action measures designed to improve the situation of protected groups. For example, challenges have been made by men to positive action measures designed by some Member States to promote equal opportunities for women.

The CJEU allows automatic preference on the basis of a protected ground in limited circumstances and only where candidates are deemed to have equivalent merit after individual assessment. The effect of CJEU case law has been to limit the scope of positive action in cases concerning sex equality/discrimination.

For more information on this topic, read:

*Beyond Formal Equality*, available at [http://www.non-discrimination.net/content/media/Beyond%20formal%20equality%20-%20Positive%20action%20under%20Directives%2007\\_en.pdf](http://www.non-discrimination.net/content/media/Beyond%20formal%20equality%20-%20Positive%20action%20under%20Directives%2007_en.pdf)

and

*Equal rights versus special rights? Minority protection and the prohibition of discrimination*, available at [http://www.non-discrimination.net/content/media/Equal%20rights%20versus%20special%20rights%20-%20Minority%20protection%20and%20the%20prohibition%20of%20discrimination\\_en.pdf](http://www.non-discrimination.net/content/media/Equal%20rights%20versus%20special%20rights%20-%20Minority%20protection%20and%20the%20prohibition%20of%20discrimination_en.pdf)

CJEU Case C-476/99 *Lommers* concerned the rules of a public sector employer under which subsidised nursery places were made available to female employees only, except in the case of an emergency. The CJEU found that the situations of a male and female employee were comparable and hence there was a clear difference of treatment. The CJEU examined whether the measure was permissible under European law. It held that the measure in principle fell into the category of measures designed to eliminate the causes of women's reduced opportunities for access to employment and careers. The CJEU observed that any derogation from the individual right to equal treatment must comply with the principle of proportionality. The Court noted the insufficiency of nursery places available for all of the women who required them, the availability of alternative nursery places in the relevant services market and the fact that places could be allocated to male officials in emergency situations. The conclusion was that the scheme at issue complied with European law; however, this was the case only in so far as the 'emergency' exception was construed as allowing male officials who took care of their children by themselves to have access to nursery places on the same conditions as female officials.

Victims having a protected characteristic may encounter cases where it is questionable whether measures actually constitute real positive action. For instance, measures labelled as positive action may serve as an excuse to put an upper limit on the number of ethnic minority employees recruited or sheltered employment offered to disabled

employees may pay discriminatory wages. If such measures *in fact* disadvantage a protected group, they will be deemed discriminatory and cannot qualify as an exception to the prohibition of discrimination.

The Non-discrimination Directives permit Member States to take positive action measures to ensure full equality in practice, which means that they are permitted to maintain or adopt specific measures to prevent or compensate for disadvantages linked to a protected ground. This is in contrast to the Convention on the Elimination of All Forms of Racial Discrimination, which all the Member States are parties to and which makes positive action mandatory. This difference may prove relevant in practice if a victim argues that the discrimination she or her group has suffered can only be remedied through mandatory positive action measures.

The CJEU has not so far ruled in cases where positive action programmes for ethnic minorities have been applied. It may be that the same approach to positive action will be taken as under sex equality law, but some have also argued that the CJEU may take a more lenient approach. The Framework Employment Directive also contains an additional provision regarding positive action for disabled people, and quotas in employment are often based on disability. If quotas are not respected, this may lead to discrimination, at least under national law.

German law imposes a duty on employers with more than 20 employees to have a workforce of which at least 5% are severely disabled. This rule is interpreted as establishing only a general duty. If an employer does not fulfil this duty, it does not necessarily mean that discrimination has occurred in its particular case. Some argue that in a case where 50% of the quota prescribed by law (2.5%) is not met, discrimination should be presumed. As these regulations are only a few years old, there is no case law on this matter.

Joël | 1992

## Part V

# Proving a Case: Specific Evidence and The Burden of Proof

**Useful links:**

- Redressing the Balance of Power in Discrimination Cases: the Shift in the Burden of Proof, *European Anti-discrimination Law Review* 4/2006, available at: [http://www.migpolgroup.com/publications\\_detail.php?id=173](http://www.migpolgroup.com/publications_detail.php?id=173)

Discrimination can be established in any type of legal proceedings. In civil or labour cases the general rule is that each party bears the burden of proving the facts that it alleges and which it hopes will lead to a favourable outcome. In general, a complaint of discrimination in a civil or labour court must be proven to be more probable than not. In administrative and criminal cases it is usually for the authorities to investigate and establish the facts to various degrees of certainty. Equality bodies either conduct administrative proceedings or investigate complaints according to their internal rules.

Victims have the most active role in civil and labour cases, and usually they have a more active role to play in administrative proceedings compared to criminal cases. The standard of proof is highest in criminal cases because defendants may be sentenced to severe sanctions including imprisonment. This is why in criminal cases a complaint of discrimination must be proven beyond reasonable doubt. In practice, the offender's discriminatory intent must be established in criminal cases. Even if the case is being heard by an equality body or referred to mediation, the stronger the evidence a victim has, the better her position.

Typical evidence in all sorts of proceedings includes witness statements, documents or common knowledge. In all proceedings victims have the duty to provide any evidence that they have. In many cases, discrimination is established using oral or written statements by defendants that can be proven through witnesses or documents, or by referring to matters of common knowledge.

In Germany, an employer's statement that a company employing too many foreigners is seen by customers as a 'shit business' established the assumption that a subsequent dismissal was based on the ethnic origin of the dismissed employee (Bremen Regional Labour Court, 1 Sa 29/10 of 29 June 2010).  
 In Hungary, the high proportion of Roma children in a particular school has been taken by courts to be common knowledge (Debrecen Appeals Court Judgment No. 13.P.21.660/2005).

The Non-discrimination Directives define the different types of discrimination. Whatever the type of discrimination and whatever body the victim is appealing to (civil court, labour inspectorate, equality body etc.), she needs to provide the following basic information.

Basic information in a discrimination claim

Questions	Answers
1. Who?	The bouncer
2. Did what?	Refused entry
3. To whom?	To me and my friends
4. When?	DD/MM/YY. Must have been around 23.00
5. Where?	Bar Bar
6. How?	By telling us that we needed to be members to enter
7. What is the result of the wrongdoing?	We could not enter Bar Bar and felt humiliated when we saw everybody else going in
8. Who is responsible for the wrongdoing?	The bouncer, the owner or the bouncer's employer, or all of them



Questions	Answers
9. Who witnessed the wrongdoing?	We were a group of five and there were other clients and passers-by, and the bouncer of course
10. Are there documents, statistics or expert opinions to prove the claim?	No, but my friend videoed people going in on his mobile afterwards and we carried out situation testing afterwards. It's the first time we've heard anything about membership. We have also heard on campus that this place has already sent other African students away.
11. What is the victim's protected characteristic: race or ethnic origin, age, disability, sexual orientation, religion or belief? Is it real, assumed, associated, multiple?	Four of us are Black African students and our friend is a native
12. Who is the control person or group to which the treatment suffered by the victim is comparable? NB: There is no need to identify a comparator in cases of harassment, victimisation, an instruction to discriminate, or a failure to provide reasonable accommodation. In some Member States discrimination can be established by comparison to an ideal minimum standard of treatment, for instance conduct required by respect for human dignity.	Every other client, none of whom were Black Africans
13. Does the case fall under (European) anti-discrimination law?	Yes, we believe it comes under the Racial Equality Directive: access to services available to the public

## 5.1 Specific evidence

There are various pieces of evidence that can make it easier for victims of discrimination to establish their claim, including statistics, situation testing, questionnaires, audio or video recording, forensic expert opinions and inferences drawn from circumstantial evidence.

### 5.1.1 Situation testing

Situation testing is often used to uncover discriminatory practices such as refusal of access to bars, restaurants or employment. It has also been used to uncover different treatment in access to rented apartments and even to a denominational school. Use of situation testing has spread throughout the European Union over the years. The United Kingdom and the Netherlands have been familiar with the technique for a long time, but in Belgium, Bulgaria, the Czech Republic, Denmark, Finland, France, Hungary, Latvia, Slovakia and Sweden cases based on situation testing are becoming more common. In Hungary the systematic use of testing has led to important legal victories combating widespread discrimination against Roma. NGOs and equality bodies in Austria, Cyprus and Italy are starting to use situation testing.

An applicant for a property rental with an immigrant background suspected that he was the target of discrimination. Two Swedish friends agreed to apply to the estate agency for apartments as well. They were both given a chance to see the apartment while their immigrant friend was not. Although this test was not decisive, it did help to prove the overall case. The case was decided in favour of the plaintiff and damages were awarded (Gothenburg District Court, Judgment T13077-05 of 06.11.2007).

In Denmark and the UK journalists also use situation testing to uncover and report on discriminatory practices. Another alternative function of situation testing in France is to improve public services through ‘solicited’ testing, where situation tests are carried out on the request of the management of, for example, a company, health authority or supermarket chain.

Situation testing is established in statutory law only in Hungary, France and, to a certain extent, Belgium. In other Member States, the matter is dealt with on the basis of the general law of evidence.

Definition of situation testing in Hungarian law

... in relation to the conduct of the alleged discriminator, the Equal Treatment Authority shall put into an identical situation persons who are different from the point of view of a [protected ground] but are similar from the point of view of other characteristics, and it shall examine the action of the alleged discriminator in respect of these persons from the point of view of respect for equal treatment (Article 13(1) of Government Decree 362/2004 on the Equal Treatment Authority and the Detailed Rules of its Procedure).

For further information on situation testing, read:

Proving discrimination cases: the role of situation testing in the *Anti-discrimination Law Review* 3/2006, available at [http://www.migpolgroup.com/publications\\_detail.php?id=230](http://www.migpolgroup.com/publications_detail.php?id=230)

## 5.1.2 The questionnaire procedure

In a few Member States national law provides another tool that may facilitate access to information needed to establish a *prima facie* case – the questionnaire procedure. Prior to making a formal complaint or starting a legal action, victims have the opportunity or obligation to contact the alleged discriminator and seek clarification of his or her conduct. Answers provided to such a questionnaire – or a lack of response – allow courts to draw inferences in relation to discrimination.

In Ireland the Equality Tribunal uses the questionnaire procedure. A person who believes that they may have experienced discrimination is entitled under domestic (or national) anti-discrimination legislation to write to the person they believe may have discriminated against them, asking for certain information. A statutory form of questionnaire (Forms EE.2 and ES.1) is available from the Tribunal and can be downloaded from the website. A statutory reply form gives the person who receives the questionnaire an opportunity to set out their version of events. These forms (Forms EE.3 and ES.2) are also available from the Tribunal and can be downloaded from the website. Domestic anti-discrimination law states that the Equality tribunal may draw such inferences as seem appropriate from a respondent failing to reply or supplying false, misleading or inadequate information. For a sample questionnaire, see [http://www.equalitytribunal.ie/Employment-Equality-Information/Frequently-Asked-Questions/ee\\_2.pdf](http://www.equalitytribunal.ie/Employment-Equality-Information/Frequently-Asked-Questions/ee_2.pdf)

Although the questionnaire procedure may not have been formalised in other Member States, general national rules on evidence provide victims with the ability to use any evidence, including responses by an alleged discriminator to a written inquiry about their conduct. A detailed response may also provide a plausible explanation to the victim herself and persuade her that she has not suffered discrimination.

A preliminary reference to the CJEU is pending, referred by the Federal Labour Court, Case C-415/10 *Galina Meister*, on the question of whether or not an employer is under a duty to grant access to information on whether another applicant has been employed and, if so, which criteria were decisive. If this question is answered in the affirmative, the court asks in addition whether not providing such information may constitute facts that allow the existence of discrimination to be assumed.

### 5.1.3 Statistical evidence

The Non-discrimination Directives mention statistical evidence as a possible means of establishing indirect discrimination. In general, national laws do not specify statistics as a type of evidence but permit their use.

In practice, victims have established discrimination by using statistics particularly in cases relating to unequal pay based on sex, collective redundancy based on age and segregation based on ethnicity. However, statistics are not available in many cases and statistical evidence is not a prerequisite for establishing indirect discrimination. Using statistics helps to shift the focus away from the individual victim towards broader underlying structural inequalities. This is helpful if a victim knows that there are many others who share his fate but are unwilling to bring an action against the discriminator. By using statistics he can establish patterns of discrimination against others to prove his own case.

In CJEU Case C-167/97 *Seymour-Smith and Perez*, the CJEU suggested that the conditions for obtaining certain employment rights or privileges would constitute a *prima facie* case of indirect discrimination if available statistics indicated that a considerably smaller percentage of women than men were able to satisfy the condition.

German courts routinely allow statistical evidence to establish indirect discrimination. The groups compared are formed on a case by case basis. It has been consistently held in case law that essentially equal groups have to be treated equally. It depends on the specific context which criteria are used to establish that groups are essentially equal or not. There is no settled case law on a specific quantitative measure for establishing a disproportionate effect of a rule on one group in comparison to another group. Statistics on society in general are used if available. If not, statistics relevant for the individual case are calculated. The groups to be compared are determined by the personal scope of the rule challenged. For example, if a collective agreement is in dispute, everyone bound by this agreement forms the relevant group. If a challenge is made to a recruitment selection guideline, the relevant group consists of the job applicants, although it is disputed whether all applicants should be considered or only sufficiently qualified applicants.

In Ireland, courts are likely to rely on statistics put forward by the victim. Where statistics are not available in a particular case, courts rely on an employer's statistics. When collecting statistical data or requesting them from defendants, some basic questions need to be considered:

- Is the time period long enough to show disproportionate impact?
- What is the best statistical range (employees aged 50 and over or employees aged 55 and over compared to the below-30s or below-28s)?
- Are the groups compared in essentially similar positions?

The Hungarian Equal Treatment Authority most often relies on statistics in relation to complaints concerning failure to recruit on the ground of age in cases when large numbers of employees are recruited at the same time. In a case where a victim complained that he had not been selected for a job due to his age (51 years), the Authority required statistics on the age of the new recruits as well as the age of all the employees in the same job. The Authority established that the company had employed several people of around the ages of 35 and 40, and that the oldest person in the given position was 47 years old. Based on this, the Authority rejected the claim. It needs to be pointed out that the age limits for comparator groups need to be chosen very carefully in such cases, as employees of around the age of 35 may not be comparable to the 51-year-old victim.

Often, even convincing statistics may not be enough alone to establish discrimination and other types of evidence need to be sought.

The German Federal Labour Court decided that, although it is possible to consider the discrepancy between the ratio of men to women in the general workforce of a company and in management positions as incidental evidence, this evidence alone is not enough to shift the burden of proof (Decision 8 AZR 1012/08 of 22 July 2010). A group of public employees made redundant allegedly as a result of budget cuts argued on the basis of their own statistics that they had faced discrimination on the ground of age as 80% of their age group was 55, while 90% of the younger employees recruited immediately after their lay-off were below 30. The Czech trial court dismissed these statistics and did not shift the burden of proof. The Constitutional Court found the statistics to be the key evidence in the case. It shifted the burden of proof and requested the defendant to provide the criteria for selecting employees for redundancy, the difference between the old and new selection criteria, and job descriptions. It found that the new selection criteria and job descriptions were used to merely conceal age-based discrimination (Czech Constitutional Court, Decision of 30 April 2009, No. II. ÚS 1609/08).

#### 5.1.4 Other types of evidence

Other types of evidence include audio or video recording if permitted by law or court practice, preliminary statements from the parties, demonstration of a typical tendency, the opinion of expert witnesses, inferences drawn from circumstantial evidence and public statements published or broadcast.

The *Romanian* Anti-discrimination Law allows the use of audio and video recordings. In practice, the Steering Board of Romania's equality body, the National Council for Combating Discrimination (NCCD), can accept any evidence relevant to the case during its hearings and before its deliberations. This is an exception from ordinary civil procedure and while the NCCD regards this evidence as unproblematic, there is still a significant need for judges to be educated in this respect. The NCCD's internal procedural rules state that the taking and rebuttal of evidence should take place at the same time if possible.

The *German* Federal Anti-discrimination Agency is entitled to ask parties to a potential case of discrimination to provide a statement on the matter. There is no obligation to answer such a request. This rule aims to collect information about a specific case to enable the Agency to provide proper advice and is a potential step towards an amicable settlement of the case. The Agency reports that this procedure is used with some success.

Limitation by an in-house job advertisement of a vacancy to applicants who are in their first year of employment constitutes indirect discrimination on the ground of age; statistical evidence for actual disadvantage suffered by a certain age group is not necessary – it is sufficient to show the typical tendency (German Federal Labour Court, 8 August 2009, Decision 1 ABR 47/08)

In *Italy* litigation against institutional discrimination can be supported by statements by government officials that reveal inconsistencies between written policies and verbal statements. This could apply for instance to cases where policies were introduced on an allegedly 'ethnically blind' basis using ambiguous terms like 'settlements of nomadic communities' but government representatives mentioned the Roma directly in interviews published on official websites.

In *Hungary* the Equal Treatment Authority most frequently appoints an expert in equal pay for equal work complaints, in the case of which special technical expertise is often needed to assess whether two different (or not identical) positions may be regarded as equal work. Another field where special expertise is frequently needed is education cases. In one case for example, an expert was appointed to evaluate whether conditions provided by a school met legal requirements in order to establish whether the local council had violated its obligations towards children with slight learning disabilities.

### 5.1.5 Rules enabling access to documents and obtaining witness statements prior to court hearings

Victims are often dissuaded from challenging a discriminatory act or practice because they fear that the evidence they know exists will not be accessible or that witnesses will not testify. While it cannot be guaranteed that witnesses will give an account of events identical to the victim's recollections, it is worth inquiring whether they would be willing to testify prior to taking legal action. Steps can also be taken to ease access to documents otherwise not available to the victim prior to or during proceedings. In practice, equality bodies, administrative bodies or the police may be more effective in obtaining documents in support of the victim's case. The questionnaire procedure or any other similar attempt can also facilitate access to information.

During the proceedings defendants are normally under a duty to provide the documents requested. Some administrative bodies and the police can search the premises of defendants in order to recover documents. A French judgment illustrates this: 'the Defendant cannot argue that the Plaintiff's evidence is inadequate if he failed to provide the documents requested by the court. The corollary of the right to have access to the evidence of the opposing party is that failure to comply transfers the burden of proof to the Defendant' (*IBM v Buscail*, Court of Appeal, Montpellier, no. 0200504, 25 March 2003).

The *Italian* legal system does not have the concept of 'discovery of documents' prior to legal action, and in civil cases witness evidence must be gathered in court hearings.

In *Germany*, as a general principle the witness testifies in court. The Federal Anti-discrimination Agency is not a quasi-judicial body. Consequently, witness statements or documents are provided as a matter of voluntary cooperation. Other federal agencies, however, have to provide the necessary information to the Federal Anti-discrimination Agency, subject to the protection of personal data.

The Romanian Anti-discrimination Law obliges all public and private persons and entities in possession of *relevant* documents to share them with the equality body (the NCCD) or face an administrative fine. However, a similar provision is not available in relation to the plaintiff when preparing for a court case. If the plaintiff chooses to file a complaint to the courts instead of the NCCD, only the court can request documents and the court order will be based on general rules of civil procedure.

In *Hungary*, legal strategies can be used to prepare for proceedings properly. The same case may be litigated in different forums, and there is nothing to stop a victim using more than one venue in relation to the same violation. The Equal Treatment Authority is an administrative body and it is obliged to fully establish the facts of a given case, and – if the evidence is not sufficient – to acquire any relevant evidence upon its own initiative. This means that if they file a case with the Authority, victims may be able to obtain evidence that they would otherwise not be able to acquire. Victims also have the right to submit a motion for gathering evidence: if they know that the discriminator possesses a particular document, they can ask the Authority to oblige the other party to provide it.

## 5.2 Proving a case: the shared or reversed burden of proof

The CJEU understood early on that victims 'could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory' (CJEU Case C-109/88 *Danfoss*). This principle, first formulated in case law, was then adopted in European law and serves as the basis for proving discrimination under the Non-discrimination Directives.

The Non-discrimination Directives provide for the reversal of the burden of proof: when victims establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it is for the respondent to prove that there has been no breach of the principle of equal treatment.

More favourable rules can be introduced in national laws, but the reversal of the burden of proof does not apply to criminal proceedings. Member States can also exclude its application to administrative or judicial proceedings of an inquisitorial nature where a state body investigates the facts of the case. France does not allow for a reversal of the burden of proof in administrative proceedings, while Portugal excludes it from the proceedings of courts that carry out investigations. Whereas all EU Member States now provide for a shift in the burden of proof in discrimination cases, inconsistencies with the Directives' provisions are suspected in a number of states.

**Practical tip:**

Look at your evidence and consider whether it could persuade a court that it is more likely than not that your claim is true.

**Typical scenarios**

The burden of proof can be shifted in cases of direct and indirect discrimination, instructions to discriminate, harassment and reasonable accommodation. It is unclear whether this rule also applies to victimisation.

The CJEU and subsequent European non-discrimination law sought to provide effective protection against discrimination and achieved this through reversing the burden of proof. The shift in the burden of proof does not mean that victims do not have to convince the court that they have a case. They must first establish a *prima facie* case, in other words convince the court of the probability that they suffered discrimination. The burden of proof then moves to the respondent, who must show that discrimination played no part in the treatment or effect complained of. If the respondent is unable to give objective reasons for the treatment that are unrelated to discrimination, he will be liable for a breach of non-discrimination law.

The burden of proof does not shift in criminal cases and in general in cases where the authorities or courts are responsible for investigating the facts. In other words, the burden of proof must shift in civil and employment courts but not necessarily in any other proceedings. However, victims in these proceedings are also well advised to provide the basic relevant information.

Several Member States opted for a single piece of legislation dealing with anti-discrimination, and most Member States have transposed the Non-discrimination Directives through civil and employment law; both solutions enable the reversal of the burden of proof. A minority of states have transposed the Directives through criminal law, where guilt of discrimination must be established beyond reasonable doubt.

### 5.2.1 *Prima facie* cases: establishing a presumption of discrimination

The CJEU found a *prima facie* case had been established when it was shown that the pay of speech therapists was significantly lower than that of pharmacists, and that the former were almost exclusively women while the latter were predominantly men. This information was enough to shift the burden of proof (Case C-127/92 *Enderby*).

Statements by which an employer publicly lets it be known that it will not recruit any employees of a certain ethnic or racial origin may constitute facts of such a nature as to give rise to a presumption of a discriminatory recruitment policy. It is, thus, for that employer to adduce evidence that it has not breached the principle of equal treatment, which it can do, *inter alia*, by showing that the actual recruitment practice of the undertaking does not correspond to those statements (Case C-54/07 *Feryn*).

In Ireland *prima facie* evidence is evidence which in the absence of any credible contradictory evidence provided by the defendant would lead any reasonable person to conclude that discrimination had occurred. The Labour

Court has laid down the extent of the evidential burden on a claimant wishing to establish a *prima facie* case of discrimination. The claimant must 'establish facts from which it may be presumed that the principle of equal treatment has not been applied to them. This indicates that a claimant must prove, on the *balance of probabilities*, the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination. It is only if these primary facts are established to the satisfaction of the Court, and they are regarded by the Court as being of sufficient significance to raise a *presumption of discrimination*, that the onus shifts to the respondent to prove that there was no infringement of the principle of equal treatment' (our emphasis) (*Mitchell v Southern Health Board* (2001) Labour Court DEE011).

The 'balance of probabilities' means that the court needs to believe that the complainant's claim is more likely than not to be true. There are national laws that specify when a presumption of discrimination can be established in a more lenient manner.

The Hungarian Equal Treatment Act includes the concept of the presumption of discrimination, which is based on the idea that establishing a protected ground and a disadvantage in itself creates a strong enough suspicion of discrimination for the burden of proof to be shifted. This is more advantageous for the victim than the solution applied by the Directives because in the Hungarian system the causal link between the protected ground and the disadvantage does not need to be substantiated in any way.

The test for the burden of proof to be shifted only requires that the victim substantiates, rather than proves, his/her claims. Substantiation involves a lower level of certainty: if the victim establishes facts from which it may be presumed that (i) a disadvantage was suffered and (ii) that she has a protected characteristic (real or assumed), then the burden of proof shifts.

If the case has been substantiated, the defendant has to prove

- a) that the circumstances substantiated by the victim or the *actio popularis* claimant do not exist; or
- b) that it has observed or was not obliged to observe the requirement of equal treatment.

The Directives do not use intent in their definitions of discrimination. It is irrelevant to a finding of discrimination, which means that it need not be established by the victim, apart from in criminal cases. However, if a victim of discrimination initiates criminal proceedings, then the perpetrator's intent will be the focus of attention and the burden of proof does not shift.

Finding an appropriate 'comparator' may be problematic in certain situations. If a court considers a comparison inappropriate, it may find against the victim. In addition, a court may compare the victim with a group or individual who also faces discrimination. This may happen if an alleged victim of ethnic or religious discrimination is compared against another minority and not against the majority. For instance, in a Member State where 85% of the citizens are Catholic and only 5% are Jewish, Muslim and Protestant, it is likely that any victim from a minority religion should be compared to a Catholic. A court may also compare a severely disabled person to a mildly disabled person instead of a person without a disability. There may also be cases where there is no appropriate comparator against whom treatment can be measured. This may often arise in cases of multiple discrimination. The Non-discrimination Directives allow for hypothetical comparators (for example, in equal pay cases, a person at the same grade employed by a similar employer). However, there is no need to identify a comparator in cases of harassment, victimisation, an instruction to discriminate, or a failure to provide reasonable accommodation. In some Member States discrimination can be established in comparison to an ideal minimum standard of treatment, for instance conduct required by respect for human dignity.

## 5.2.2 Use by defendants of the ‘justification defence’

If the burden of proof has shifted, cogent evidence is then required to discharge the burden. In *Campbell Catering Ltd v. Aderonke Rasaq* the Irish Labour Court indicated that evidence must be substantial and persuasive in order to successfully rebut the presumption of discrimination. ‘While the Court is not bound to apply the law of evidence with the same strictness as would be found in a court of law, it can not allow hearsay evidence in rebuttal of testimony given on oath’ (Equality Tribunal 2004 EED048).

Many justifications for discriminatory behaviour are economic or market-based. However, a distinction must be made between economic excuses for direct discrimination and objectively justifiable economic justifications that accompany efforts made in good faith to achieve fair practice. For example, the CJEU has not given weight to arguments regarding the higher cost of ensuring equal pay between men and women for governments, national economies, or private enterprises (Case C-43/75 *Defrenne*).

With regard to sex discrimination the CJEU has established several specific possible justifications in the area of employment relations. It has indicated that an employer may justify a requirement (such as a higher level of training) only if it can demonstrate that it is important for performing specific tasks. It has also stated that mobility cannot be used independently as an indicator or proxy for quality of work. The CJEU has also suggested that pay differentials based on length of service require no particular justifications (Case C-109/88 *Danfoss*). It has allowed another possible justification for differential pay – the need of the employer to raise pay to attract candidates because of the state of the job market (Case C-127/92 *Enderby*).

Defendants may also argue that the principle of freedom of contract should override provisions promoting equality. If individuals have contractually agreed to work for lower pay or under worse conditions, then governments or other judicial authorities should not interfere. The CJEU holds that EU equal pay provisions override freedom of contract – equal pay is protected even if individual and collective agreements specify unequal compensation (Case C-43/75 *Defrenne*).

The European Court of Human Rights has held that the right not to be discriminated against on the basis of racial or ethnic origin cannot be waived even with parental consent (*D.H. and Others v the Czech Republic*, judgment of 13 November 2007).

## 5.2.3 Rebutting the ‘justification defence’

Victims need to rebut evidence produced by the defendant as part of the ‘justification defence’. They need to ensure that the court formulates exceptions narrowly and examines the necessity, adequacy and proportionality of provisions, criteria, or practices in cases of indirect discrimination as suggested above. Victims need to make sure that defendants are called on to demonstrate that their ‘justification defence’ can answer the questions arising from the definition of exceptions under European law.



*‘Three plus one’ steps to establishing discrimination relying on the reversed burden of proof*

3+1 steps	What to do in practice
<p>+1. The case falls under European anti-discrimination law and the reversed burden of proof applies to it.</p> <p>NOTE: The burden of proof is not reversed in criminal and some administrative cases. In general, in criminal cases discriminatory intent must be proven beyond reasonable doubt.</p>	<p>Check the <i>Fields covered by the Non-discrimination Directives</i> box above.</p> <p>Decide what type of proceedings you want to start.</p>
<p>1. First, the victim must establish a convincing case of discrimination that at first sight seems credible (a <i>prima facie</i> case). In other words the victim must show that he or she suffered negative treatment or an adverse impact as a consequence of the protected characteristic.</p>	<p>Fill in the <i>Basic information in a discrimination claim</i> table above.</p> <p>Check this information against the definitions of discrimination. In our example, the bouncer is liable for direct racial discrimination and the owner for an instruction to discriminate on the ground of race.</p> <p>What evidence is available? For instance, witnesses and video recordings.</p> <p>What evidence needs to be obtained? For instance, membership policy, operating licence, or dress code.</p> <p>Can further evidence be generated? For instance, can the victims and their friends carry out situation testing at Bar Bar?</p> <p>Will they testify in court if needed?</p>
<p>2. If the victim succeeds in proving a <i>prima facie</i> case of discrimination, then under the Non-discrimination Directives the burden of proof shifts to the defendant. If the burden of proof shifts, defendants must then provide evidence to justify the discriminatory action or show that the <i>prima facie</i> case is ill founded, otherwise they will be held liable for discrimination. This justification must show that the exceptions allowed under European law apply to the case.</p>	<p>Which exceptions are relevant? The case amounts to (an instruction to) direct racial discrimination. This means that the <i>Exceptions to direct discrimination</i> will apply (see above).</p> <p>Can the defendant(s) successfully rely on the applicable exceptions? In practice, bar owners may argue that the victims did not comply with the dress code, that the bar that night was reserved for a private party or members only, or that the victims did not behave properly: they were drunk or behaved in a disorderly manner. Whatever the defence of justification, it must remain within the limits of the applicable exceptions contained in the Non-discrimination Directives. Defendants have the duty to provide detailed evidence to support their defence, so that it seems more probable than not.</p>
<p>3. The victim must rebut the arguments raised by the defendant as part of his or her defence of justification.</p>	<p>For instance, the victim must show that none of the <i>Exceptions to direct discrimination</i> apply, that the video recording demonstrates that no-one else was asked about membership or shows how other customers were dressed, or that domestic law does not allow members-only bars.</p>

*How does this work in practice?*

**3+1 steps: The Bar Bar case**

- +1 Does the case fall under the Racial Equality Directive? Yes.  
We first applied to the equality body, thinking that we might later go to a civil court for an apology or damages.
- 1. We reported the owner for an instruction to discriminate on the ground of race on the basis of our statements, our friends' witness testimonies and the mobile video. We asked the equality body to obtain the bar's membership policy, operating licence and dress code. We carried out situation testing with six friends, who also testified before the equality body.
- 2. The owner argued that it was all the bouncer's fault and that they always have Black customers. A Black person came in to testify on his behalf. The bouncer said he had not been instructed to refuse entry to Black students. He turned us away because we all seemed drunk and disorderly.
- 3. Our witnesses testified that they had never seen a Black customer in Bar Bar. The mobile recording luckily showed we were not disorderly. Situation testing also supported us because Black testers were not let in. To stay on the safe side, we extended our complaint to the bouncer. The equality body ruled in our favour. The bouncer apologised. The equality body was keen to broker an amicable settlement among us, but we wanted the owner to apologise and he refused. We are planning civil action against him, but must we sue the bouncer too?





Yogini | 1989

## Part VI

# How Can Individuals Enforce the Law?

**Practical tip:**  
 When you know or suspect that you have been discriminated against, BEFORE taking any legal action, seek advice and assistance from a specialised equality body, a non-governmental organisation and/or a trade union.

*Procedures for enforcing the right to equal treatment*

Judicial procedures	Non-judicial procedures
Civil courts	Ombudsmen and equality bodies
Labour courts	Labour inspectorate
Administrative courts	Consumer and school inspectorates
Criminal courts (public prosecution service or police)	
Mediation	Conciliation

The Non-discrimination Directives place a duty on states to make available judicial and/or administrative procedures to victims of discrimination, and all states provide both judicial and non-judicial procedures. The type of judicial procedure initiated depends on what kind of law has been broken: civil, criminal, labour or administrative. Complaints about the public sector are often dealt with in administrative courts, while the private sector is dealt with in civil courts. In some jurisdictions, general non-judicial procedures as well as discrimination-specific procedures provide an effective alternative to the courts.

European anti-discrimination law also places a duty on states to maintain bodies to promote equal treatment in relation to race and ethnic origin as well as gender. Almost all states now have equality bodies or national human rights institutes acting as equality bodies. A high proportion of bodies are competent for most or all of the protected grounds.

Mediation or conciliation processes may be available as a mandatory part of court proceedings, as is the case in France, Portugal and Spain, or as an optional solution, as is the case in Italy, Romania, Hungary and Slovakia.

Among the general non-judicial bodies that can examine claims are inspectorates, ombudsmen and human rights institutes. Labour inspectorates are charged with enforcing employment law, including equal treatment provisions, while education and consumer inspectorates act in their respective fields.

The ombudsmen in general examine and review complaints of human rights violations including unequal treatment and often attempt to resolve conflicts through conciliation, which if unsuccessful is followed by non-binding recommendations. In Cyprus the Commissioner for Administration (also referred to as the Ombudsman) can issue binding decisions and impose small fines for non-compliance with its decisions. However, in practice the decisions issued are recommendations which tend to be complied with, at least by individuals, even though they are not legally binding. Often ombudsmen have the power to initiate administrative or criminal proceedings.

Equality bodies either follow the ombudsman model or act as administrative authorities: they investigate complaints, issue rulings and order preventive or remedial action, including the payment of financial sanctions. None of the equality bodies has the power to award compensation to a victim. While ombudsmen's actions may be limited to the public sector, equality bodies in general have the power to also react to complaints relating to the private sectors.

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

Non-binding recommendations whether issued by ombudsmen or equality bodies do not preclude applicants from seeking binding court judgments on the same case. In some countries, such as the Netherlands and Austria, the courts are obliged to take the equality bodies' opinion into consideration and give clear reasons for any dissenting decisions. In other countries courts are not obliged to do so, but if an equality body conducts administrative proceedings and its decision becomes final, it must be taken into account by courts.

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

Although the number of complaints submitted to courts or equality bodies has been gradually rising, the low volume of case law on discrimination in most countries points towards barriers to justice.

**Difficulties with criminal action and ways to overcome them: supplementary private prosecution**  
 The public prosecution service used its discretion not to prosecute a landowner and a French mayor. The victim instituted direct criminal proceedings against the mayor alone. He accused the mayor of having intervened with the seller in order to prevent the sale of land on the ground that there were already too many Roma in the area, thereby committing the crime of discrimination in access to goods and services. The court decided that the fact that the state itself had not prosecuted the landowner who refused to sell had no bearing on the criminal responsibility of the mayor, who, by his own actions had made himself an accomplice to the refusal to sell. The mayor was convicted of discrimination by a person in public office and sentenced to a three-month suspended prison sentence and one year of ineligibility to hold or be elected to public office. His electoral office was therefore revoked and he was prevented from running for re-election (Court of Cassation, Criminal Chamber, no. 06-81060, 28 November 2006).

*Tips to overcoming procedural barriers*

Barrier	Escape route
Criminal proceedings, which have traditionally been used, pose difficulties in terms of proof and the prerogative of the public prosecutor to press charges.	Use civil or administrative proceedings or complain to the equality body instead.
Complexity of domestic anti-discrimination law	Tackle it by using information available from equality bodies, trade unions and specialised non-governmental organisations as well as from publications cited in this Handbook.

Barrier	Escape route
Lack of specialised legal services	Take advantage of the skills and experience of equality bodies, non-governmental organisations, trade unions and legal aid services.
Costs in general	Seek financial assistance to pursue a case and secure adequate representation. In many countries legal aid is available and it can also be obtained from certain equality bodies, trade unions or non-governmental organisations specialising in non-discrimination.
	Seek a waiver from legal fees that may be available in discrimination cases. In several countries victims with low financial means can be exempted from legal fees.
	Find the least expensive procedure: in general, proceedings before equality bodies and administrative authorities, criminal proceedings, mediation and conciliation are free of charge. In these proceedings the general rule is that each party bears his or her own costs, which means that victims cannot be ordered to pay the costs of defendants.
Court proceedings are lengthy	Seek redress from equality bodies or inspectorates or through mediation.
Access to public buildings and procedures is not always guaranteed in practice	Request basic adjustments to court buildings to accommodate the needs of disabled victims in good time.
Pay attention to short time limits for bringing a case...	...and challenge them if necessary through a preliminary referral to the CJEU.

In Ireland, sign language interpretation in the court system is required in the context of criminal actions, but there is no corresponding provision for civil actions. In Hungary sign language is available in the courts, but Braille is rare.

Could short time limits to be challenged under European non-discrimination law?  
 Under the German General Equal Treatment Law there is a time limit of two months for claims, beginning either with receipt of the job application by the employer or knowledge of the disadvantageous behaviour. In Ireland, the Equal Status Act 2000-2004 requires a complainant to notify the respondent in writing within two months of the date of the incident (or the date of the last incident), of the nature of the complaint and the intention to pursue the matter with the Equality Tribunal if there is no satisfactory response. Although an extension is possible if the complainant was prevented from sending the notification within the normal time period for a reasonable cause, there is concern that such short time limits can be problematic for victims, especially people with literacy difficulties, inadequate command of the state's official language and disabled people.  
 In Hungary claims for certain types of legal dispute (for instance termination of employment) have to be initiated 30 days after the injurious measure.

The Non-discrimination Directives do not specify any time limits, but time limits as short as 15 days, a month or even two months may not be appropriate under European law in as much as it may be argued that they do not ensure in practice the right to access to a procedure for enforcing the EU Non-discrimination Directives, at least not in all cases.



There are special court procedures in a number of countries that victims rarely use.

In Italy the 1998 Immigration Act established a special procedure for discrimination cases that is now applicable to all grounds of discrimination. Representation by a lawyer is not required and the victim can apply directly to the judge of an ordinary civil court with territorial jurisdiction for his or her place of residence in order to obtain an injunction against the discriminatory activity as well as damages. The hearing takes place 'avoiding all unnecessary formality', with a free choice by the judge of the most suitable method for gathering evidence. In particularly urgent cases, the judge can issue an interim order, violation of which constitutes a criminal offence. The decrees transposing the Directives also make it possible for the judge to order a plan to be drawn up for eliminating discrimination as well as the publication of the judgment in a major newspaper.

Tjeerd | 1956

## Part VII

# Representation of Victims

**Useful links:**

- Legal standing: the practical experience of a Hungarian organisation in *European Anti-discrimination Law Review* 5/2007, available in English at [http://www.non-discrimination.net/content/media/07lawrev5\\_en.pdf](http://www.non-discrimination.net/content/media/07lawrev5_en.pdf)

In all European legal systems, victims can enforce their right to equal treatment on their own or through a legal representative. If discrimination affects a group, the individual victims can team up and take action together. This has been done mainly with the assistance of trade unions in cases relating to lower pay for women. What is more, the Non-discrimination Directives make it incumbent on Member States to ensure that associations, foundations, charities or other organisations (trade unions for instance) which have a legitimate interest in ensuring compliance with the Directives, may engage, either on behalf or in support of the victim, with his or her approval, in any judicial and/or administrative procedure in which equal treatment can be enforced. Countries are not expressly obliged to ensure that the most effective assistance is available in all types of proceedings, but it is arguable that the proper interpretation of the Directives would still require that non-governmental organisations or trade unions are permitted to act on behalf or in support of victims.

Acting on behalf of a victim or supporting her in proceedings are two different types of assistance. Acting on behalf of a victim means that non-governmental organisations or trade unions can represent the victim in proceedings. Few states allow associations to engage in proceedings 'on behalf of' victims of discrimination. Support, on the other hand, can be provided through advice prior or during the proceedings or through interventions. Being able to 'support' a victim is more common across the Member States than being able to engage in proceedings 'on behalf of' a victim. A common form of support is when individual lawyers (working for an organisation) represent a victim in court upon his or her authorisation.

## 7.1 Standing

In law, standing or *locus standi* means the ability of a party to sue, i.e. that it can demonstrate to the court sufficient connection to and injury from the law or action challenged in order to support her or his participation in the case.

### 7.1.1 Standing of victims

In Europe, victims have automatic standing in court as well as in non-judicial proceedings. If a victim is under age (under 18), then generally his parents represent her. If he is over 18 and under guardianship, as could be the case for mentally disabled victims, then generally he is represented by his guardian.

Victims have the right to report or challenge an instance of discrimination, make submissions, seek remedies and instruct a lawyer – or in some, mainly administrative proceedings even a lay person or a relative – to represent them. In turn, victims must often bear the costs of litigation.

In Ireland, an individual or body may be authorised by an individual complainant to represent them before the Equality Tribunal or Labour Court. In Austria anyone can represent alleged victims of discrimination in informal proceedings before the Equal Treatment Commission.

## 7.1.2 Standing of NGOs

In *Germany*, anti-discrimination associations may now support plaintiffs in court proceedings even if representation by a lawyer is mandatory. These associations are allowed to act on behalf of the plaintiff and, most importantly, give legal advice. If a plaintiff is represented by counsel from an association, acts by the counsel are deemed to be acts by the plaintiff, unless the plaintiff specifies otherwise. In disability law, associations have legal standing and representative actions are possible. They may, for example, challenge a failure by a public body to provide an environment free of barriers as specified in various legal regulations and the anti-discrimination law. They can also challenge breaches of general regulations on standard form contracts. They have similar powers in the field of consumer protection.

In *Romania*, NGOs with a legitimate interest in combating discrimination can appear in court as parties and may engage, either on behalf of or in support of the plaintiff, in any judicial and/or administrative discrimination proceedings based on a request issued by the victim. When the discrimination concerns a community or a group of people, the Romanian Anti-discrimination Law gives NGOs legal standing even without the approval of the alleged victims.

The *Hungarian* Equal Treatment Act allows 'social and interest representation organisations' as well as the Equal Treatment Authority to engage on the victim's behalf in proceedings initiated due to the alleged infringement of the principle of equal treatment and to engage in administrative procedures. The Hungarian 'social and interest representation organisations' 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 disadvantaged groups or the protection of human rights. This includes the minority self-government for a particular national and ethnic minority and trade unions for matters related to employees' material, social and cultural situation and living and working conditions. 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 people that cannot be determined accurately.

In *Italy*, the government included in the 2008 budgetary law a provision introducing a class action for obtaining financial compensation for wrongs perpetrated against groups of consumers. After having been frozen for a while, this new piece of legislation entered into force, in a slightly modified form, on 1 January 2010.

In the United Kingdom, associations with sufficient interest (*locus standi*) in a matter may bring judicial review actions under administrative law against public authorities, even if they have not themselves been the victims of a wrongful act. This requirement of sufficient interest has been given a generous interpretation in recent years by the UK courts, and trade unions, NGOs and the equality body bring important actions against public authorities through judicial review proceedings. In addition, courts and tribunals may at their discretion permit associations with relevant expertise to make a 'third-party intervention' in any case, whereby associations may present legal arguments on a point of law that is at issue in the proceedings. Such third-party interventions are often permitted in complex discrimination law cases. In practice, complainants are supported by the equality bodies, trade unions, race equality councils, other voluntary sector advice agencies and complainant aid organisations under the normal rules of civil procedure. Employment Tribunal and Employment Appeal Tribunal procedures allow a complainant to represent him/herself or to be represented by any person.

In France NGOs working to combat discrimination on the grounds of ethnic origin, race or religion may be civil parties in some criminal actions. Although there is no specific provision in the Code of Administrative Justice, it is common practice to allow NGO interventions before administrative courts provided that the NGO works to achieve a goal that corresponds to the subject matter of the case. NGOs can also make submissions in civil cases and before the labour courts.

In Austria, only the Litigation Association of NGOs against Discrimination has been given third-party intervention rights in the courts on behalf of the victim, with his or her consent. The law does not allow the Association to assume the costs and risks of a case; these must be borne by the victim. For disability, the NGO the Austrian National Council of Disabled Persons has been given a similar right of intervention in court cases.

### 7.1.3 Standing of trade unions

In several countries, trade unions can represent their members in labour disputes, including non-discrimination in the workplace. Some of the most prominent equal pay cases under European sex discrimination law have been uncovered, financially supported or even represented by trade unions, as in *Danfoss*. Here, a Danish trade union acted on behalf of female members arguing that a company paid men more for the same work. The company in turn was represented by the Danish Employers' Association.

In Germany, a work council or a union represented in enterprises that are subject to the Industrial Relations Act has the right to take court action against severe cases of discrimination.

## 7.2 The role of equality bodies

### Useful links:

- For information on national equality bodies in your language visit: <http://ec.europa.eu/social/main.jsp?catId=616&langId=en>
- For comparative information on equality bodies, read: *Catalysts for change? Equality bodies according to Directive 2000/43/EC*, available in English, French or German at <http://www.non-discrimination.net/publications>
- Influencing the law through legal proceedings – powers and practices of equality bodies: [http://www.equineteurope.org/powers\\_practices\\_final\\_draft\\_240910\\_1.pdf](http://www.equineteurope.org/powers_practices_final_draft_240910_1.pdf)
- For information on the European Network of equality bodies, including the contact addresses of national equality bodies, visit: <http://www.equineteurope.org/>
- For more general information on public bodies assisting victims, visit: [http://fra.europa.eu/fraWebsite/your\\_rights/your\\_rights\\_en.htm](http://fra.europa.eu/fraWebsite/your_rights/your_rights_en.htm)

### Practical tip:

Equality bodies are the most specialised, accessible and cheapest providers of advice, assistance and more on discrimination. Make sure you contact them BEFORE you take action.

Most countries have designated a specialised body for promoting equal treatment irrespective of racial or ethnic origin, as required by Article 13 of the Racial Equality Directive. The minimum requirement on Member States is to have one or more bodies for promoting racial and ethnic 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.

Many states go further than this, firstly in terms of the grounds of discrimination that these bodies cover, and secondly in terms of their powers to combat discrimination. However, the Danish Equal Treatment Board, the Finnish Ombudsman for Minorities, the Italian National Office against Racial Discrimination, the Portuguese High

Commissioner for Immigration and Intercultural Dialogue, and the Spanish Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin are only mandated to deal with racial and ethnic discrimination.

In some Member States the functions specified by Article 13 are fulfilled by, or shared between, a few organisations. In Poland, there are several institutions which have the mandate to promote racial and ethnic equality; these are the Ombudsperson, the Ministry of the Interior, the Government Plenipotentiary for Equal Treatment and the Department of Women, Family and Counteracting Discrimination within the Ministry of Labour and Social Policy.

## 7.2.1 Advice and information

The equality bodies provide assistance to victims of discrimination in a variety of ways. All specialised bodies provide information to victims on their websites and/or in specific publications, and most provide advice on any queries. Several specialised bodies give their – usually non-binding – opinion on complaints submitted to them, e.g. the Austrian and Dutch Equal Treatment Commissions, the Danish Equal Treatment Board, the Latvian Ombudsman's Office, the Greek Ombudsman and Equal Treatment Committee, and the Slovenian Advocate of the Principle of Equality. Such proceedings do not preclude the victim from subsequently taking legal action before the courts with a view to obtaining a binding remedy.

Most bodies can arrange for conciliation between the parties and most can review and comment on legislative proposals and the reform of existing laws. The Dutch Equal Treatment Commission has the power to advise organisations (including government bodies) about whether their employment practices contravene non-discrimination law.

The Irish Equality Authority may 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 is developed. The plan consists of a programme of actions to be undertaken in employment or business to further equality of opportunity. Where there are more than 50 employees, the Authority may instigate the review itself and produce an action plan. If there is a failure to implement the action plan, the Equality Authority may issue a notice detailing what steps are required for its implementation. Non-compliance with this notice may result in an order from either the High Court or Circuit Court requiring compliance.

Regrettably, some equality bodies do not have a positive track record, in which case victims may prefer to seek advice and support from non-governmental organisations.

## 7.2.2 Supporting individuals who want to go to court

Some specialised bodies provide assistance in the form of supporting legal action – the Belgian, Finnish, Hungarian, Irish, Italian, Northern Irish, British, and Swedish bodies can do this. The Irish Equality Authority may engage in judicial or other proceedings in support of a claimant (before the Equality Tribunal or in civil courts, or by making representations to employers or service providers).

Support can come through financing a legal action, such as in the *Coleman* case, where the Commission of Equality and Human Rights helped the victim to obtain a broad interpretation of the disability ground from the CJEU.

In various countries, equality bodies have the power to litigate in their own right if this serves the public interest, and usually if the victims cannot be identified. The Hungarian Equal Treatment Authority may initiate an *actio*

*popularis* action with a view to protecting the rights of unidentified people and groups whose rights have been or likely to be 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 Belgian Centre for Equal Opportunities and Opposition to Racism has the power to take legal action in the public interest, which it used in the *Feryn* case (CJEU Case C-54/07). Where the alleged violation has an identifiable victim (who can be a natural or legal person), the Centre's power to act is conditional upon the consent of the victim.

### 7.2.3 Interventions and friend of the court briefs

The Irish Equality Authority was granted the right before the High Court to act as an *amicus curiae* (friend of the court) in order to give evidence in relation to the Racial Equality Directive. Following a legal challenge, this right was subsequently upheld by the Irish Supreme Court (Supreme Court [2006] IESC 57). Other bodies such as trade unions or employer bodies do not have formal standing before civil courts, but in practice may support parties before an equality tribunal or labour court.

The Romanian equality body does not have a right to intervene in civil cases but the Anti-discrimination Law provides that it will be summoned in all cases. The law does not specifically mention the National Council for Combating Discrimination particular legal standing but it is in fact viewed as an expert witness.

The Hungarian Equal Treatment Authority may intervene in the judicial review of a public administrative decision brought by another public administrative body concerning the principle of equal treatment. The Authority has used this power only once during its five years of operation, in a school segregation case where it intervened in favour of the Office of Public Administration, which lost.

The French Equal Opportunities and Anti-discrimination Commission (HALDE) has the role of legal adviser (*auxiliaire de justice*) and criminal, civil and administrative courts may seek its observations in cases under adjudication. In addition, its powers have been extended to include the right to seek permission to submit its observations in criminal matters.

### 7.2.4 Adjudication / Power to act as a court

A number of specialised bodies – e.g. those in Austria, Bulgaria, Cyprus, France, Hungary, Ireland, Lithuania, Romania and Sweden – can investigate complaints of discrimination and usually can enforce compliance with their investigations by all parties involved. In France, the Equal Opportunities and Anti-discrimination Commission (HALDE) may conclude an investigation by issuing a sworn statement returning a finding of discrimination which can only be over-turned with substantial evidence before the courts. If an investigation finds direct intentional discrimination (a criminal offence), the Commission can propose a *transaction pénale* – a kind of negotiated criminal sanction – to the perpetrator which s/he can either accept or reject. This could be a fine or publication (for instance a press release). If the proposed negotiated sanction is rejected or, having been accepted there is a subsequent failure to comply with it, the Authority can initiate a criminal prosecution, in place of the public prosecutor, before a criminal court.

The Protection against Discrimination Commission in Bulgaria has the power to impose sanctions, including fines and 'soft' penalties such as public apology or publication of its decision.

The Hungarian Equal Treatment Authority can apply sanctions on the basis of an investigation. In Ireland, the Equality Authority may serve a 'non-discrimination notice' following an investigation. This notice may set out the



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

### 7.3 Interventions

In most European countries interested third parties – equality bodies, non-governmental organisations or trade unions – can intervene in court proceedings to advance the interests of one party. Victims can also contact these organisations in order to seek assistance in the form of intervention on their behalf.

In Germany, any intervention can be submitted to the respective court as part of the legal argument of the respective parties.

Romanian NGOs may file petitions to intervene in specific cases based on the provisions of general civil procedure. The courts will decide if their interest justifies their intervention.

In Hungary, if somebody has a legally based interest in the outcome of a lawsuit between other parties, they may intervene (until the end of the first instance procedure) to assist the party whose victory is in their interest. The intention to intervene must be announced in writing or verbally at the court hearing and the intervener must indicate which party he/she/it is supporting and identify its legally based interest in that party's victory. The court decides whether or not to allow the intervention. The court may hear the parties before delivering a decision on the intervention if it deems necessary. There is no appeal against the decision to allow intervention, whereas a refusal to allow intervention may be appealed.

#### Restrictive Hungarian court practice on intervention

NGO interventions in Hungarian court cases are not likely to succeed as the intervener's own (concrete) legally based personal or financial interest must be demonstrated. NGOs have been denied the right to intervene even in cases where administrative proceedings were initiated on the basis of official reports submitted by them. Intervention was even denied to national Jewish and Roma organisations in the prosecution's application to have the extremist paramilitary group the Hungarian Guard Association struck off the register of civil society organisations.

### 7.4 Friends of the court (*amici curiae*)

A friend of the court brief is an intervention by a third party that is not a party to the action. This third party seeks to use the court as a platform to emphasise a point of law that might not otherwise be considered. Usually the third party provides a written brief for the information of the court. As with third-party interventions, victims are advised to seek assistance from equality bodies, non-governmental organisations and/or trade unions about using *amici curiae*.

The Irish Equality Authority was granted the right to appear as an *amicus curiae* in two cases relating to Traveller accommodation (*Doherty and Anor v. South Dublin County Council, the Minister for the Environment, Heritage and Local Government, Ireland and the Attorney General* and *Lawrence v. Mayo County Council and ors*). *Amicus* briefs are relatively new in the Irish context; in these particular cases both the Irish Human Rights Commission and the Equality Authority provided them. Prior to this such briefs had been entered on two occasions, one by the UNHCR and one again by the Irish Human Rights Commission. Unlike the Irish Human Rights Commission, the Equality Authority does not have a statutory right to intervene but relied on the inherent discretion of the court and sought

and received permission to intervene in this case. The Irish courts require a body seeking to enter an *amicus* brief to establish proof of a legitimate interest in the case.

Though the institution of *amicus curiae* is not provided by Romanian law, some human rights NGOs have invoked the rules permitting *amicus* briefs to the European Court of Human Rights and submitted such briefs in cases of discrimination in their area of expertise. The same has been done in Hungary.



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## Part VIII

# Sanctions and Remedies: The Role of Courts and Administrative Authorities in Enforcing Non-discrimination Law

**Useful links:**

- For an overview of what remedies to ask for and why, read *Remedies and sanctions in EC non-discrimination law* available in English, German and French at [http://www.non-discrimination.net/content/media/Remedies%20and%20Sanctions%20in%20EC%20non-discrimination%20law%20\\_en.pdf](http://www.non-discrimination.net/content/media/Remedies%20and%20Sanctions%20in%20EC%20non-discrimination%20law%20_en.pdf)
- For a practitioners' overview of the topic provided by the European Academy of Law, visit <http://www.era-comm.eu/oldoku/remedies.htm>

**Practical tip:**

There are various aspects you need to consider when starting legal action. You need to consider first what type of person you are and which legal avenue best suits you. A combination of proceedings may yield the best results.

Breaches of the Non-discrimination Directives must be met with effective, proportionate and dissuasive sanctions, which may include compensation being paid to the victim. The concept of effective, proportionate and dissuasive remedies was first developed in the CJEU's case law on sex discrimination, which is of relevance to the Non-discrimination Directives. The meaning of effective, proportionate and dissuasive remedies must be determined in each specific case in the light of individual circumstances.

For certain cases, the CJEU's case law contains specific indications of requirements in terms of remedies. Thus, in the case of discriminatory dismissal, the remedy (or remedies) granted must in all cases include either reinstatement or compensation. Further, where compensation is chosen as a remedy it must fully make good the damage. Upper limits are not acceptable, except for situations where the damage was not caused through discrimination alone (Case C-180/95 *Draehmpael*).

Remedies may be available through various, possibly complementary, enforcement processes, such as administrative, industrial relations and judicial proceedings. Enforcement covers not only procedural aspects of cases 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. Still, no single national enforcement system appears to be truly encompassing. Essentially, they are all mostly based on an individualistic and remedial approach. This means that they cater for individual victims seeking a remedy for the discrimination that he or she has suffered.

## 8.1 Civil law

Across the EU, a wide range of remedies are available, depending for example upon the type of law: civil, criminal, or administrative. Remedies can be punitive or non-punitive, backward-looking or forward-looking (to adjust future behaviour), and address individual or group needs.

Under civil law victims litigate in civil courts. They may seek to have the burden of proof reversed and request various sanctions including compensation. In some countries, labour courts operate independently of civil courts and procedures in these courts are in most cases preceded by arbitration or mediation. Trial court judgments are subject to appeal and judicial review of appeal judgments is often available.

### 8.1.1 Typical sanctions

The most typical sanction under civil law is compensation. 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 damage to mental health, or exemplary damages to punish the discriminator and set an example to others (much less common).

In Hungary, specific sanctions and remedies redressing discrimination exist under civil law. The court may oblige the respondent to discontinue and refrain from further breach; oblige the respondent to make restitution in a statement or by some other suitable means and to make, at his own expense, an appropriate public apology; oblige the respondent to restore the state preceding the breach, and to eliminate or deprive of its illegal nature, at his own expense, any consequence of the breach; or oblige the respondent to pay compensation and/or a public interest fine.

Irish labour law provides a broad range of remedies including compensation awards, re-instatement and re-engagement, as well as orders requiring employers to take specific courses of action. Case law shows that these orders have led to employers taking steps such as creating an equal opportunities policy; reviewing recruitment procedures; reviewing sexual harassment procedures; providing formal training for interview boards; reviewing customer service practices; and running equality training for staff.

## 8.1.2 Is an upper limit of compensation in breach of European law?

There appear to be no limits in relation to either pecuniary or non-pecuniary damages in the national laws of Bulgaria, the Czech Republic, Denmark, Italy, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and the United Kingdom. In Estonia, the December 2008 amendments of both the Employment Contracts Law and the Civil Service Law specify that the upper limit of compensation for illegal termination of employment or service does not apply in the case of discriminatory termination under the Law on Equal Treatment and the Law on Gender Equality. The same rule is repeated in the Law on the Resolution of Individual Labour Disputes.

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

In Latvia there is no maximum amount for damages under civil law, but the Law on Reparation of Damages caused by State Administrative Institutions sets maximum amounts of non-pecuniary damages for personal and moral (non-material) injury. It is unclear as yet whether the courts would award damages for both personal and moral harm in cases of discrimination. Austrian law specifies an upper limit of €500 in cases of non-recruitment or non-promotion if the employer proves that the victim would not have been recruited or promoted anyway. Of the countries where limits do exist, Ireland is particularly interesting because there are no comparable statutory limits on compensation for discrimination on grounds of sex. In Poland there is a minimum level of compensation which is linked to the minimum wage.

In France courts are still very conservative in calculating pecuniary loss and amounts awarded remain rather low. This is also the case for compensation awards in Ireland where the Equality Authority officers have stated that they feel constrained by the maximum level of compensation they can award under the Employment Equality Act. In Ireland the average award before the Equality Tribunal in 2007 was €14 431, and the highest award was €125 000. The average award in equal status cases was €2 751, an increase compared to 2006. In Sweden damages for violations of non-discrimination legislation range from between €3 700 to €10 000, depending on the circumstances and if there are no mitigating circumstances. In Slovakia an inconsistent and varying approach is taken to financial compensation.

Dutch courts are generally reluctant to grant compensation for non-pecuniary damage. In a number of early cases concerning discrimination in access to services in Hungary, compensation of around €400 was consistently awarded. This is double the monthly minimum wage, so not very dissuasive. Recently, however, average amounts have risen with discrimination based on racial or ethnic origin being sanctioned with non-pecuniary damages of around €2 000 in recent cases. Punitive damages do not exist, but a so-called ‘fine to be used for public purposes’ may be imposed by the court if the amount of compensation that can be imposed is insufficient to mitigate the gravity of the actionable conduct. This fine is, however, payable to the state and not the victim.

In the United Kingdom, employment tribunals have awarded average compensation of £8 000 to £10 000 (€9 430 – €18 000) in recent years, with some awards of only a few hundred pounds and exceptional awards well in excess of £100 000 (€118 000).  
*UK Country Report*, [http://www.non-discrimination.net/content/media/2009-UK-Country%20Report%20LN\\_final.pdf](http://www.non-discrimination.net/content/media/2009-UK-Country%20Report%20LN_final.pdf), page 159.

With the possible exception of the United Kingdom compensation figures seem relatively low. This, coupled with the length of time it can take to get a decision – for instance in Ireland it takes three years for cases to be heard by the Equality Tribunal – throws doubt on the effectiveness of the remedy and even whether it in actual fact makes good the damage. Its dissuasiveness is also questionable as such sums may not deter larger employers. Spanish legislation provides that company turnover may be used to determine the level of sanction in some cases. This is an interesting option.

## 8.2 Criminal law

Most Member States provide criminal sanctions against discrimination. These sanctions may range from community service to fines and imprisonment. As a rule, criminal proceedings commence with a report from the victim to the police, who are responsible for investigating the case. The reversed burden of proof does not apply to criminal proceedings, and what is more, most countries require that a perpetrator’s discriminatory intent be established beyond reasonable doubt. Cases are prosecuted in criminal courts by the public prosecutor and victims have a limited role to play – mainly testifying. If the prosecution refuses to prosecute the case, many countries allow victims to step in and take the case to court as (supplementary) private prosecutors.

## 8.3 Administrative law

Various countries provide sanctions under administrative law (i.e. the body of law that governs the activities of administrative authorities of government). Labour, consumer or school inspectorates tend to conduct administrative proceedings as do a few equality bodies – such as the Hungarian Equal Treatment Authority. Administrative bodies conduct their own investigations and the burden of proof may not apply to their proceedings. They bring decisions that may be challenged in court. Victims are advised to monitor such cases closely.

In some Member States the specialised body is empowered to issue sanctions. For instance, the Bulgarian Protection against Discrimination Commission has powers to impose financial sanctions ranging between the equivalents of €125 and €1 250, amounts that would be dissuasive to the majority. These sanctions are administrative fines and are not awarded to the victim as compensation but go to the state budget.

In the United Kingdom, the British Commission for Equality and Human Rights and the Equality Commission for Northern Ireland are able to use their powers of formal investigation to investigate organisations they believe to be guilty of discrimination and, where they are satisfied that unlawful acts have been committed, they can serve a



binding 'compliance notice' requiring the organisation to stop discriminating and to take action by specified dates to prevent discrimination from recurring. They also have the power to enter into (and to enforce via legal action if necessary) binding agreements with other bodies who undertake to avoid discriminatory acts and to seek an injunction to prevent someone committing an unlawful discriminatory act.

Interesting administrative remedies are found in Portugal. Besides administrative fines, the following remedies are available in all cases of discrimination: publication of the decision; censure of the perpetrators of discriminatory practices; confiscation of property; prohibition of the exercise of a profession or activity which involves a public prerogative or depends on authorisation or official approval by the public authorities; removal of the right to participate in trade fairs; removal of the right to participate in public markets; prohibition of access to their own premises for the perpetrators; suspension of licenses and other authorisations; and removal of the right to the benefits granted by public bodies or services.

## 8.4 Mediation

Mediation or conciliation is available in most countries in all types of proceedings, and in some countries is mandatory. Some states provide mediation through specific services. Equality bodies often promote mediation. For victims who fear being victimised or bullied during court proceedings, are weary of adversarial procedures and publicity, and/or are looking for flexibility in relation to remedies, mediation is an ideal solution. It is also much less costly and lengthy than civil proceedings.

In Ireland mediation cases are conducted in private, and are not reported. An informal mediation service provided by the Equality Tribunal since December 2000 has facilitated a more speedy resolution of equality disputes at work, compared with the traditional, and more formal, equality investigation route. According to the Equality Tribunal, its mediation service is, on average, three times quicker than the alternative equality dispute resolution option – a formal investigation decided by an equality officer. Equality cases that have resulted in mediated agreements have been completed in just six months (from the original date of referral to the date of signing the agreement), compared with an average of 18 months in employment investigation cases (again, from the original date of referral to the date of decision). The Equality Tribunal mediation process involves dispute resolution by direct negotiation between the disputing parties. Mediation is guided by the principle of self-determination and is completely voluntary (either party may withdraw at any stage) and informal, and does not involve written submissions. Agreements are not published (unlike equality officer decisions in investigations), and the parties are also given a 'cooling-off' period before being asked to sign an agreement, to ensure that both sides can give informed consent on signing. Any agreement, once signed, is legally binding and enforceable. A key distinction between equality mediation and traditional industrial relations mediation (which occurs through the Labour Relations Commission), is that, whereas under industrial relations conciliation, there is an assumption that a compromise settlement will be reached somewhere in the 'middle ground', no such assumption is made in equality mediation. In many of the cases that were resolved, an outline agreement was reached in the first session, which is scheduled to last two hours. In general, the mediation process rarely involves more than two sessions before an agreement is formally signed.

Some states are introducing mediation into their legal system, as is the case in Italy.

Abia | 1993

Formalised mediation has still no relevant role in anti-discrimination cases, apart from the ‘grey area’ of the mediation allegedly informally conducted by the equality body through its contact centre. Nevertheless, the introduction of mediation is one of the most widely discussed reforms to the Italian legal system. The legislative decree of 4 March 2010 introduces a new form of mediation for civil and commercial cases to be carried out by specialist registered mediators. Mediation will be compulsory for some categories of case before they can be heard in court. It is not yet clear how this decree will relate to anti-discrimination cases (which are not specifically mentioned) since they are already covered by a special summary procedure.

The following examples illustrate the flexibility of remedies achieved through mediation in Ireland:

- Assurance that an employee’s visual impairment would not impede future promotion prospects;
- Appointment of a complainant to a newly created research post;
- Agreement to nominate an employee for a specific training course;
- Agreement to grant an employee a backdated promotion;
- Offer to pay an employee’s counselling fees and acknowledgement of distress caused;
- Goodwill gesture of €1 250 and a restaurant voucher to the value of €100;
- Assistance provided to an employee in applying for an educational grant;
- Apology and a €400 voucher for a hardware store;
- Access granted to a person with a disability through hotel grounds to a public beach;
- Agreement by a local authority to provide a purpose-built wheelchair-friendly bungalow;
- Apology for upset caused and a donation of €2000 to a charity;
- Apology and a year’s membership of a fitness club to a person with a disability;
- Undertaking by a financial institution to provide customers with privacy when completing sensitive forms;
- Review of a tenant’s rent and a return to the former rent structure.

In many jurisdictions, more than one type of proceeding can be initiated. By combining proceedings victims can secure the most effective remedies at the lowest cost.

#### Combining proceedings

In Hungary, victims of discrimination may sue in civil courts by claiming that the right to equal treatment is an inherent right protected by the Civil Code. These provisions provide victims of discrimination with a flexible instrument, as they apply to all types of discrimination no matter which field or ground is at issue. However, if the plaintiff loses the case he/she has to pay the other party’s legal costs (even if due to indigence he/she is exempted from other costs, such as court fees).

Administrative bodies may not grant compensation to the victim and may not oblige the discriminator to apologise or provide any other moral remedy. It is therefore advisable from a strategic point of view to first bring administrative proceedings, within which the administrative body concerned will gather the evidence and establish the facts in a relatively short time. The victim can then use this evidence to apply to a court for compensation. While legal representation is not mandatory for either a civil lawsuit or for the Equal Treatment Authority’s proceedings, assistance from a professional clearly represents a substantial advantage when employing such strategies.

## 8.5 The use of procedures and remedies in practice

O’Dempsey’s summary below of the many different sanctions provides further guidance to victims in deciding what remedy to seek and what procedure to follow.

This chapter is based in part on Declan O’Dempsey’s *Remedies and Enforcement of the Obligations under the Framework and Race Directives*, available at [http://www.era-comm.eu/oldoku/Adiskri/04\\_Remedies/2007\\_ODempsey\\_EN.pdf](http://www.era-comm.eu/oldoku/Adiskri/04_Remedies/2007_ODempsey_EN.pdf).

The practice of EU countries varies. Some countries, such as Austria, France, Portugal and Luxembourg, relied in the past mainly on criminal sanctions. Other countries use a civil model, but rely on a concept of moral damage for breach of constitutional provisions. Damages include damages for injury to feelings, psychiatric (or other) injury as well as direct financial losses such as lost wages. The legal systems of most European states provide for various types of sanctions, ranging from fines and imprisonment under criminal law, to payment of compensation for damages to the victim under civil law.

The first requirement imposed by the Directives is that the sanction must be **effective**, therefore administrative processes having no legal consequences may not comply with this requirement. The use of a human rights ombudsman to persuade state organs to comply with discrimination requirements may not yield effective remedies either.

Criminal sanctions may be required by the Directives in as much as sufficient protection for the worst kinds of discrimination must be given. Criminal proceedings are necessary for gross acts of discrimination involving actual or threatened personal violence; to prevent persistent harassment; to control the abuse of freedom of speech stirring up hatred and provoking violence. For certain types of behaviour the requirement that the employer/discriminator pays damages may not be a sufficient deterrent to persuade the discriminator not to discriminate. Different levels of criminal offence will require different sanctions: fines, imprisonment or community punishments – depending on the severity of the offence.

It is debated whether criminal sanctions are appropriate in all cases of discrimination and whether they provide the individual with proper redress. Generally they belong to the state. In criminal proceedings the police investigate the facts and a prosecutor has the decision whether to bring or continue the prosecution. The person who experiences the discrimination does not generally have control over the process and cannot exercise initiative or control over them.

In civil law, early cases across the EU illustrate the tendency of the tribunals to award comparatively low amounts of compensation for non-financial loss. Such low awards can be criticized as failing to provide an effective remedy for the wrong done. Moral damages awards should be such as to ensure that the law is not brought into disrepute and should be such as effectively to compensate for the damage to the person’s status. The sanctions must also be effective to ensure equality of opportunity. This may require restitution of a job or job opportunity (Case C-409/95 *Marshall II*).

Remedies must also be **proportionate** and **dissuasive** of discrimination. The requirement that the remedy is proportionate means that the remedy must maintain a fair balance between individuals and as between individuals and the wider community having regard to the aim of eliminating discrimination. For the most severe forms of discrimination, the system of compensation should be such as to ensure that an employer cannot afford to take the risk of discriminating and the effect of prohibiting an upper limit to compensation to the person suffering discrimination is that the employer may in a sufficiently serious case run the risk of going out of business. Therefore the system of compensation should not have an upper limit.

Civil law sanctions need not be confined to monetary remedies. The Directives point out that they may comprise compensation. They may take the following forms:

- a. Preventive orders
- b. Remedial orders
- c. Compensation
- d. Punitive compensation
- e. Punitive orders

In most cases a combination will be required.

Preventive orders of a court include interim injunctions and declarations. Where a person is experiencing discrimination on a continuing basis, the wrongdoer can be required to do something or refrain from certain actions or suffer a penalty from the court.

A plaintiff was denied access to an adult education programme managed by a state secondary school on the grounds that she was wearing an Islamic headscarf. An injunction ordering her immediate re-integration was granted. The French equality body presented its observations (*Said v Greta of Paris*, Administrative Court of Paris, 27 April, 2009, no 0905233/9).

Remedial orders: in certain jurisdictions the body specified to undertake investigations may also have the power to order a specified course of action.

Compensation should include any economically assessable damage, such as: (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

Where compensation is awarded to penalise breaches of the prohibition of discrimination, such compensation has to be more than nominal so as to guarantee effective protection and to provide a deterrent to employers. Thus a system of law requiring fault to be proved before discrimination compensation can be awarded will be in breach of the requirements of the directives. An upper ceiling may be placed on non-monetary compensation and may be justified where there was no prospect of the person being recruited even if they had not been discriminated against.

The principle of ordinary compensation in discrimination is that the person who has suffered the wrong should be put in the same position he or she would have been in if he or she had not suffered the wrong. The victim must be compensated for losses that have already happened (for example salary up to the date of the hearing), but the court must also make a forecast as to the course of future events. This forecast is constructed on the basis of the best assessment that can be made on the relevant material available to the court including the court's knowledge of the prevailing local labour market conditions. Compensation for future predicted loss can include lost profits where appropriate. The Claimant may need compensation for lost promotion opportunities if the promotion can be predicted as following on from a job which discrimination has denied to the Claimant. However compensation must also cover matters such as the loss of a job which the Claimant finds enjoyable. How is that to be compensated? This is a real issue when a person loses their vocation. It is really a species of non-monetary loss.

Exemplary or punitive damages – including fines or financial awards imposed by civil courts on respondents – may be appropriate where there has been oppressive, unconstitutional conduct by servants of the government: where the conduct has been calculated to make a profit which may exceed the compensation to the complainant; where statute expressly authorizes such an award. They can be justified by reference to the principle in the Directives of dissuasive sanctions.

Aggravated damages may increase damages and be a dissuasive element in sanction. Where the employer has behaved in a 'high-handed, malicious, insulting or oppressive manner', that behaviour may have occurred prior to complaint by the employee but can also include the way in which the defence was conducted if it was conducted in an insulting manner intended to embarrass, intimidate and deter the applicant from pursuing her case.

The feature of discrimination of all sorts which causes the greatest difficulty in determining an appropriate sanction is that when discrimination is established, there must be some recognition that the right to human dignity has been damaged and probably also:

- a. The feelings of the person experiencing discrimination. This encompasses feelings of irritation disappointment and other relatively short lived emotions, but also severe emotional disturbance requiring medical intervention;
- b. The financial position of the person experiencing the discrimination  
Discrimination often undermines the confidence of the person against whom it is aimed. In certain cases the effects of discrimination go beyond simple injury to feelings and result in a psychiatric injury. Such damages should be recoverable from the same tribunal considering the discrimination claim

The undoubted aim of the Directives is proportionate deterrence. How is that to be achieved?

In many countries the effect of a court finding that a criminal offence is racially aggravated is that the sentence given for the offence is increased to reflect the seriousness of the racial aggravation. The court must state in public that the offence was racially aggravated. This allows the courts to apply sanctions to racially motivated behaviour which is otherwise criminal. The definition of a 'racially aggravated offence' might cause some difficulty. In the UK for an offence to be 'racially aggravated', at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial group or the offence is motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group.

Some countries have relied on systems of fines for breach of the Labour Code (Czech Republic, Estonia, Hungary, Latvia and Slovakia). However a fine does not compensate the individual. While administrative fines may deter, they do not by themselves fulfil the requirement of compensation for the individual.

Upper limits on the amount of compensation that may be recovered in civil proceedings do not permit adequate and proportionate compensation. In Italy (and many other states) there is a system whereby unlimited compensation, including compensation for non-pecuniary loss may be recovered.

Various forms of publicity may be effective (a) publicity in the local press (b) publicity in the workplace (c) directed publicity to state organs (d) maintenance of a public registry of decisions (e) obligations to declare information in certain circumstances, such as in tender applications. In France there is a requirement to place a notice at work and in the local papers as to the result of the complaint. In Italy, if the company receives benefits from the state or regions or a contractor with public authorities for the execution of public works etc, the judge must transmit his decision to the relevant public authority, which will then withdraw the benefit or contract. If the case is particularly severe a company can be excluded from such contracts for up to two years.

**Practical tip:**

When making a decision on enforcing your right to equal treatment, consider the aspects listed in the Enforcement Chart.

*Enforcement Chart*

	Equality body	Mediation	Administrative proceedings	Civil proceedings	Labour court	Criminal proceedings
What role does the victim play in the proceedings?						
Time limits for filing a claim						
Procedural fees						
Length of proceedings						
Is representation mandatory?						
Is representation available (NGO, trade union, other)?						
Who collects the evidence?						
What remedies are available?						
Costs to be paid to other party if case is lost						
Enforcement						

Peter | 1977



## Part IX

# How to Use EU Law

The Non-discrimination Directives, in common with other EU laws, take precedence over domestic anti-discrimination law. In practice, this 'supremacy' of EU law means that national courts must give priority (primacy) to the Non-discrimination Directives over inconsistent domestic anti-discrimination provisions. EU non-discrimination law is not distinct from domestic law, and under certain conditions it has direct effect. Not only can national courts refer to the Non-discrimination Directives – they have an obligation to enforce them. Victims can claim the rights provided in these Directives before domestic courts if the provision that they invoke has direct effect. Directives bind Member States to achieve the result envisaged, but leave them a time-period for transposition and a choice of implementing measures.

Victims are well advised to rely on the Non-discrimination Directives from the outset of domestic proceedings, regardless of whether they are instituted before a court, an equality body or administrative authorities. Even if a claim is not brought directly before a court, it may be referred there on appeal or review from an administrative authority, inspectorate, or even an equality body. Arguments based on EU non-discrimination law may in practice lead any court to refer a case to the Court of Justice of the European Union. Significantly, such arguments can also be made before international judicial fora such as the European Court of Human Rights, which deals for instance with discrimination in education.

## Part X

# Invoking EU Law in Domestic Proceedings

**Useful links:**

- Website of the Court of Justice of the European Union, where preliminary referrals, Opinions of Advocate Generals and judgments can be found: <http://curia.europa.eu/>
- More on European law in English at [http://en.wikipedia.org/wiki/European\\_Union\\_law](http://en.wikipedia.org/wiki/European_Union_law)

**Practical tip:**

Improve your chances of success in your country's courts by relying on an interpretation of a key concept provided by the CJEU or the national courts of other Member States.

**Typical scenarios:**

Court cases hinging on key concepts of the Non-discrimination Directives that have not been properly transposed or not transposed at all.

## 10.1 Provisions that have direct effect

Even if Member States fail to implement or fully implement the Non-discrimination Directives, their provisions may have direct effect in national legal disputes if three conditions are met (CJEU Case 26/62 *Van Gend en Loos*):

- the provision confers a right to an individual;
- it is sufficiently precise;
- and unconditional.

If directly effective, directive provisions can be invoked by an individual against the State in domestic courts. However, some provisions do not have direct effect, for instance those on positive action or dialogue with non-governmental organisations. At the same time, the direct effect of other provisions is questionable. For instance, the wording of the provisions on the defence of rights is so elusive that it is unclear whether non-governmental organisations have the right to even intervene in administrative proceedings in support of victims of discrimination if domestic law does not explicitly provide for such a right.

The following provisions seem to have direct effect and can therefore be invoked in claims brought against public authorities, local councils, state bodies (such as health authorities) and bodies providing public services:

- definition of direct discrimination;
- definition of indirect discrimination;
- definition of harassment;
- prohibition of instructions to discriminate;
- prohibition of victimisation;
- reversal of the burden of proof in judicial proceedings under civil and labour law;
- the right of victims to claim compensation.

Irish law does not define harassment as discrimination in areas outside of employment, although the Racial Equality Directive prohibits harassment in various other fields, such as housing, health care, access to services available to the public, etc. What is more, it does not permit the use of a hypothetical comparator when claiming equal pay discrimination, although the definitions of discrimination in both Directives allow such comparators. In claims against state bodies, local councils and public service providers victims can rely on directive provisions relating to the fields of application and the definitions of different forms of discrimination.

A more detailed discussion of the direct effect of the Non-discrimination Directives is available in the strategic litigation manual quoted in the introduction to this Handbook.

## 10.2 Interpretation of domestic law in compliance with the Directives

In claims brought against state bodies the CJEU urges domestic courts to read domestic law in a way that conforms to directive provisions. It has ruled that in applying national law domestic courts are required to interpret their national law in the light of the wording and the purpose of a directive. (CJEU Case C-14/83 *Von Colson*). In other cases the CJEU has required a directive-conform interpretation of domestic law even against private entities (CJEU C-106/89 *Marleasing*).

In the Hungarian *Hajdúhadház* case (an *actio popularis* or representative action by a non-governmental organisation on the segregation of Roma children in primary school), the Supreme Court was asked to make a preliminary referral to the CJEU, or failing that, interpret domestic law in light of the Racial Equality Directive. The Supreme Court fulfilled this request and found that in light of the Racial Equality Directive's provisions on direct discrimination and its applicability to education and positive action, segregation based on ethnic origin could only be justified if it occurred as a consequence of positive action, namely the provision of ethnic minority education requested by the parents. (Supreme Court, Judgment No. Pfv. IV.20/936/2008/4).

What happens if a victim wants to rely on European law in a case against another individual or private entity? Member States are required to implement the Non-discrimination Directives so as to prohibit discrimination in both the private and the public spheres.

In this case, it should be noted that the CJEU has ruled that individuals who have suffered adverse effect by a Member State's failure to implement a directive can bring claims against that state to seek damages for failure to implement or for serious mis-implementation, even if the right in question is against a third party (CJEU Case C-6/90 *Francovich*). This opportunity has not yet been tested in the non-discrimination context.

A *Francovich* claim can only be brought against a Member State and only if three + one conditions are met:

1. the purpose of the directive must be to grant rights to individuals, which is the case for both Non-discrimination Directives;
2. it must be possible to identify the content of those rights on the basis of the provision of the directives, which is definitely the case with the rights under the Non-discrimination Directives;
3. there must be a causal link between the breach of the Member State's obligation and the damage suffered; +1. the violation caused by the infringements of obligations on the Member State must be sufficiently serious.

One example:

Germany transposed the Racial Equality Directive on 18 August 2006 instead of 19 July 2003. The case raised the issue of the government's liability for a would-be plaintiff's lack of entitlement to compensation in an employment case originating in January 2006 and falling under the Directive. The Berlin Superior Court of Justice ruled that there was no entitlement to compensation against the German government on the ground of delayed implementation of the Directive, since the Directive itself – despite granting rights – does not specify sanctions (e.g. compensation) (Judgment, 6 February 2009, 9 U 10/08).

Note: In fact, Article 15 of the Racial Equality Directive specifies that Member States must provide for effective, proportionate and dissuasive sanctions 'which may comprise the payment of compensation to the victim'.

The non-discrimination principle has a unique status in European law, which in certain situations affects its applicability in national legal disputes even before the deadline for transposition has passed. In relation to national law transposing another directive, the CJEU held that it is incumbent upon national courts to ensure the full effect of the general principle of non-discrimination on the ground of age by leaving unimplemented all clauses in national law that could run contrary to European law (CJEU Case C-144/04 *Mangold*). The limited conditions under which national law could be left unimplemented were later clarified and reinforced by the CJEU (Case C-427/06 *Bartsch*).

### 10.3 Seeking interpretation from the national court or the CJEU?

If national law is inconsistent with European law, apart from all the options discussed so far, national courts of any instance may also be requested to seek interpretation from the CJEU through a referral for a preliminary ruling. The preliminary reference procedure has the advantage of promoting uniformity in the interpretation and application of European law. It also has the advantage of involving the CJEU, which may be more familiar with European non-discrimination law than the national courts in many Member States and may at times prove rather more sympathetic to victims. If requested, national courts or tribunals may or (when there is no judicial remedy against their decision) must request a preliminary ruling. National lower courts are more likely to refer a case to the CJEU if they do not agree with the decisions of higher courts.

The Romanian Constitutional Court (the RCC) has declared unconstitutional the power of the courts and the National Council for Combating Discrimination (the NCCD) to find that a legislative provision has triggered discrimination and to suspend its application, raising doubts about the existence of an effective remedy. The courts can petition the RCC if they find that discrimination is due to legal provisions contrary to the principle of equality, but the NCCD cannot.

From 2008 the Anti-discrimination Law has come under heavy attack with complaints filed to the RCC by defendants penalised for discrimination by the courts or the NCCD. The RCC declared unconstitutional the NCCD's mandate to examine and sanction complaints that relate to laws which in practice trigger discrimination. In 2008, the Ministry of Justice challenged the application of the Anti-discrimination Law by the courts, which had invoked it when they ruled that legislative provisions on the salary-related rights of judges breached the principle of equality. This ruling was deemed contrary to the principle of the separation of powers, and the RCC found that the provisions of the Anti-discrimination Law are unconstitutional if they are interpreted as implying that the courts are competent to declare laws void or refuse to enforce them on the grounds that they are discriminatory and to replace them with rules created by the judiciary or with the provisions of other laws.

A case is now pending at the CJEU (Case C-310/10) by which the Bacău Court of Appeal is asking the CJEU:

1. Do Article 15 of [the Racial Equality Directive] and Article 17 of [the Framework Employment Directive] ... preclude national legislation or a judgment of the Constitutional Court prohibiting the national judicial authorities from awarding to claimants who have been discriminated against the compensation for material and/or non-material damage which is considered appropriate in cases in which the compensation for the damage caused by discrimination relates to salary rights provided for by law and granted to a socio-professional category other than that to which the claimants belong?

2. If the answer to Question 1 is in the affirmative, are the national courts required to await the repeal or amendment of the provisions of national law and/or a change in the case-law of the Constitutional Court, or are the courts required to apply Community law, as interpreted by the CJEU, directly and immediately to the proceedings pending before them, declining to apply any provision of national law or any judgment of the Constitutional Court which is contrary to the provisions of Community law?

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:234:0027:0027:EN:PDF>

This case relates to a ground of discrimination which is not covered by EU law (discrimination based on a 'socio-professional' category). But the case concerns EU law since it relates to the application of the national law that transposes the EU Anti-discrimination Directives. This law prohibits discrimination on the grounds mentioned in the gender and non-discrimination EU directives as well as on other grounds.

There may be national courts that refuse to refer a case for preliminary ruling, even if under European law they are under an obligation to do so (if they are courts of last instance). No remedy exists against such refusals. European institutions do not have the right to intervene in domestic proceedings falling under the scope of the Non-discrimination Directives. However, there have been occasions where a court's refusal to refer did not harm the victims as the national court itself interpreted domestic legislation in light of the Non-discrimination Directives, such as in the Hungarian *Hajdúhadház* case above.

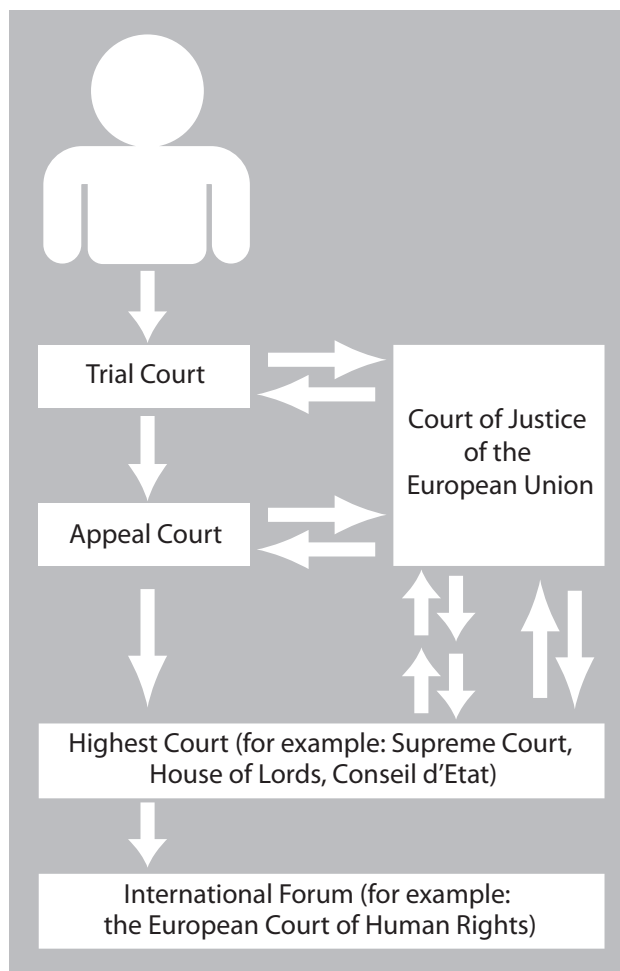
National courts may hold strange views about the applicability of the Directives and the preliminary referral procedure.

In a Hungarian case concerning the right of people under guardianship to employment, a non-governmental organisation requested a preliminary ruling on whether the automatic exclusion of people under guardianship from employment relationships was in line with the Framework Employment Directive. A metropolitan court held that the automatic exclusion of people under guardianship was not acceptable, and the decision on their employment should be based on an individual assessment of the person's abilities and the requirements of the job. The court claimed that the applicability of the Directive depended on whether there was a cross-border element in the case, and since it concerned employment of Hungarian citizens by a Hungarian employer, the Directive could not be invoked (Judgment No. 24.K.32.943/2009/7). This last point, however, was irrelevant to the application of the Directive, which applies to all employment relationships.

Sadly, there have also been cases where a refusal to refer may have denied victims protection that could otherwise be available under European law, such as in the German case above.

In these instances two options are left open: 1. to petition the constitutional court for an interpretation if victims have the right to petition; 2. to challenge the final domestic judgment in an international forum relying on European law, especially if national law seems to be inconsistent with it. Arguments based on the Non-discrimination Directives have already been used in cases before the European Court of Human Rights, such as in a case that concerned indirect discrimination against Roma children in special schools (*D.H. and Others v the Czech Republic*, judgment of 13 November 2007, available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=%22THE%20CZECH%20REPUBLIC%22&sessionId=73517906&skin=hudoc-en.>)

*European law can be relied upon by every court:*







Djailey | 1981

## Part XI

# Requesting a Preliminary Ruling

**Useful links:**

- Details of the functioning of the Court of Justice of the European Union are available in English at [http://en.wikipedia.org/wiki/European\\_Court\\_of\\_Justice](http://en.wikipedia.org/wiki/European_Court_of_Justice)

Any court or tribunal of a Member State may ask the CJEU to interpret a provision of the Non-discrimination Directives if it considers it necessary for it to give judgment in a case. Courts against whose decisions there is no judicial remedy under national law must refer questions of interpretation to the CJEU, unless the CJEU has already ruled on the point or unless the correct application of the provision is obvious.

Questions referred for a preliminary ruling must concern the interpretation of a provision of European law only, since the CJEU does not have the power to interpret national law. It is for the referring court to apply the relevant provision of European law in the specific case pending before it.

Referring questions to the CJEU generally suspends national proceedings until the Court gives its ruling. Questions of the interpretation of European law are frequently of general interest and the Member States and Community institutions are entitled to submit observations. Proceedings for a preliminary ruling before the Court of Justice are free of charge. The CJEU does not rule on costs.

The decision in which the national court applies for a preliminary ruling must contain a clear explanation of the factual and legal context of the main proceedings. In particular, it must include an account of the facts which are essential for understanding the full legal significance of the main proceedings, an account of the points of law which may apply, a statement of the reasons which prompted the national court to refer the question or questions to the Court of Justice and, if need be, a summary of the arguments of the parties. The purpose of all this is to put the CJEU in a position to give the national court an answer which will be of assistance to it. The court's decision in which it makes the reference must also be accompanied by copies of the documents needed for a proper understanding of the case, especially the text of the applicable national provisions. However, as the case-file or documents appended to the decision making the reference are not always translated in full into the other official languages of the Community, the national court must make sure that its decision includes all the relevant information.

*Check list for preliminary referrals, based on the Coleman case, C-303/06*

Does the case fall under European law? - Are the people involved (parties) covered? - Is the protected ground covered or does the issue have relevance for a protected ground?	Yes: an employee and her employer Yes: disability is covered; the question is whether or not harassment in association with disability is covered
Is the field covered?	Yes: employment
Does European law apply to the whole or greater part of the period in which the discrimination took place?	Yes, the harassment occurred after the Framework Employment Directive had been transposed into national law.
Is there a legal issue that needs interpretation by the CJEU? A key concept has not been properly transposed or not transposed at all Principles established by the CJEU are not respected by domestic law	Yes: is the mother facing harassment on the basis of her association with disabled child? The definition of a protected ground is at issue.

## 11.1 Formulating the questions

It is not for the CJEU to decide issues of fact or differences of opinion as to the interpretation or application of rules of national law. In general, questions are formulated by the party requesting preliminary referral from the domestic court – the victim or the respondent. The domestic court may adopt these questions or amend them. It is for the domestic court to describe the facts to the CJEU that are necessary to make a ruling.

In most cases the wording of the questions referred seems to be complicated and overly legalistic, which should not deter victims from requesting preliminary referrals. If they believe that a simple issue, such as tight time limits, upper limits of compensation, the definition of direct discrimination or any other key concept does not conform to European law, they must raise this during domestic proceedings and request referrals to the CJEU, trusting that the domestic court will translate their questions into proper legal formulations.

In essence, the CJEU has ruled on simple issues so far. The only challenge is therefore to identify a simple issue and the provision of the Non-discrimination Directives that needs interpretation. National courts will translate these into legal language.

*Simple issues, complex questions: EXAMPLES*

Case C-411/05 *Palacios de la Villa*

Issue	Is a collective agreement making provision for the termination of an employment contract when the worker has reached 65 and is receiving an old age pension discriminatory on the ground of age?
Questions	1) Does the principle of equal treatment, ... on the grounds of age ... laid down in Article 13 EC and Article 2(1) of Directive 2000/78, preclude a national law ... pursuant to which compulsory retirement clauses contained in collective agreements are lawful, where such clauses provide as sole requirements that workers must have reached normal retirement age and must have fulfilled the conditions set out in the social security legislation of the Spanish State for entitlement to a retirement pension under their contribution regime? In the event that the reply to the first question is in the affirmative:  (2) Does the principle of equal treatment ... require this court, as a national court, not to apply to this case the first paragraph of the single transitional provision ...?’

Case C-13/05 *Chacón Navas*

Issue	Does the definition of disability include illness?
Questions	(1) Does Directive 2000/78, ... include within its protective scope a ... [worker] who has been dismissed by her employer solely because she is sick?  (2) In the alternative, if ... the first question is answered in the negative, can sickness be regarded as an identifying attribute in addition to the ones in relation to which Directive 2000/78 prohibits discrimination?’

Case C-303/06 *Coleman*

Issue	Is disability through association protected under European law? (Is the harassment and dismissal of an employee who is not herself disabled but who has a disabled child prohibited?)
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Questions	<p>(1) In the context of the prohibition of discrimination on grounds of disability, does [Directive 2000/78] only protect from direct discrimination and harassment persons who are themselves disabled?</p> <p>(2) If the answer to Question (1) above is in the negative, does [Directive 2000/78] protect employees who, though they are not themselves disabled, are treated less favourably or harassed on the ground of their association with a person who is disabled?</p> <p>(3) Where an employer treats an employee less favourably than he treats or would treat other employees, and it is established that the ground for the treatment of the employee is that the employee has a disabled son for whom the employee cares, is that treatment direct discrimination in breach of ... [Directive 2000/78]?</p> <p>(4) Where an employer harasses an employee, and it is established that the ground for the treatment of the employee is that the employee has a disabled son for whom the employee cares, is that harassment a breach of [Directive 2000/78]?</p>
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Case C-54/07 *Feryn*

Issue	<p>In order to establish direct race discrimination is it sufficient to rely on a public statement by an employer following a job advertisement?</p> <p>Can such discrimination be established in absence of an identifiable plaintiff?</p> <p>What proves a <i>Prima facie</i> case of discrimination?</p> <p>What evidence can substantiate a justification defence?</p> <p>What type of sanctions shall be imposed in this case to comply with EU law?</p>
Questions	<p>(1) Is there direct discrimination within the meaning of ... Directive 2000/43/EC ... where an employer, after putting up a conspicuous job vacancy notice, publicly states: 'I must comply with my customers' requirements. If you say "I want that particular product or I want it like this and like that", and I say "I'm not doing it, I'll send those people", then you say "I don't need that door". Then I'm putting myself out of business. We must meet the customers' requirements. This isn't my problem. I didn't create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? – I must do it the way the customer wants it done!'[?]</p> <p>(2) Is it sufficient for a finding of direct discrimination in the conditions for access to paid employment to establish that the employer applies directly discriminatory selection criteria?</p> <p>(3) For the purpose of establishing that there is direct discrimination within the meaning of ... Directive 2000/43/EC ..., may account be taken of the recruitment of exclusively indigenous fitters by an affiliated company of the employer in assessing whether that employer's recruitment policy is discriminatory?</p> <p>(4) What is to be understood by 'facts from which it may be presumed that there has been direct or indirect discrimination' within the terms of Article 8(1) of Directive 2004/43? How strict must a national court be in assessing facts which give rise to a presumption of discrimination?</p> <p>(a) To what extent do earlier acts of discrimination (public announcement of directly discriminatory selection criteria in April 2005) constitute 'facts from which it may be presumed that there has been direct or indirect discrimination' within the terms of Article 8(1) of [Directive 2000/43]?</p> <p>(b) Does an established act of discrimination in April 2005 (public announcement in April 2005) subsequently give rise to a presumption of the continuation of a directly discriminatory recruitment policy? Having regard to the facts in the main proceedings, is it sufficient, in order to raise the presumption (that an employer operates and continues to pursue a discriminatory recruitment policy) that, in April 2005, in answer to the question whether, as an employer, he did not treat people from foreign and indigenous backgrounds in the same manner and was thus actually a bit racist, he publicly stated: 'I must comply with my customers' requirements. ...</p>

	<p>(c) ... can a joint press release issued by an employer and the national body for combating discrimination, in which acts of discrimination are at least implicitly confirmed by the employer, give rise to such a presumption?</p> <p>(d) Does the fact that an employer does not employ any fitters from ethnic minorities give rise to a presumption of indirect discrimination when that same employer some time previously had experienced great difficulty in recruiting fitters and, moreover, had also stated publicly that his customers did not like working with fitters who were immigrants?</p> <p>(e) Is one fact sufficient in order to raise a presumption of discrimination?</p> <p>(f) ... can a presumption of discrimination on the part of the employer be inferred from the recruitment of exclusively indigenous fitters by an affiliated company of that employer?</p> <p>(5) How strict must the national court be in assessing the evidence in rebuttal which must be produced when a presumption of discrimination ... has been raised? Can a presumption of discrimination ... be rebutted by a simple and unilateral statement by the employer in the press that he does not or does not any longer discriminate and that fitters from ethnic minorities are welcome; and/or by a simple declaration by the employer that his company, excluding the sister company, has filled all vacancies for fitters and/or by the statement that a Tunisian cleaning lady has been taken on and/or, having regard to the facts in the main proceedings, can the presumption be rebutted only by actual recruitment of fitters from ethnic minorities and/or by fulfilling commitments given in the joint press release?</p> <p>(6) What is to be understood by an 'effective, proportionate and dissuasive' sanction, as provided for in Article 15 of Directive 2000/43 ...? ... does [this] requirement ... permit the national court merely to declare that there has been direct discrimination? Or does it, on the contrary, also require the national court to grant a prohibitory injunction, as provided for in national law? ... is the national court further required to order the publication of the forthcoming judgment as an effective, proportionate and dissuasive sanction?'</p>
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Case C-267/06 *Maruko*

Issue	Is a compulsory system of occupational pensions discriminatory on the basis of sexual orientation if it refuses to grant survivor's pension to a same sex partner?
Questions	<p>1. Is a compulsory occupational pension scheme, such as the scheme ... administered by the [Vddb], a scheme similar to state schemes as referred to in Article 3(3) of Directive 2000/78 ...?</p> <p>2. Are benefits paid by a compulsory occupational pension institution to survivors in the form of widow's pensions to be construed as pay within the meaning of Article 3(1)(c) of Directive 2000/78 ...?</p> <p>3. Does Article 1 in conjunction with Article 2(2)(a) of Directive 2000/78 ... preclude regulations governing a supplementary pension scheme under which a registered partner does not after the death of his partner receive survivor's benefits equivalent to those available to spouses, even though, like spouses, registered partners live in a union of mutual support and assistance formally entered into for life?</p> <p>4. If the preceding questions are answered in the affirmative: Is discrimination on grounds of sexual orientation permissible by virtue of Recital 22 in the preamble to Directive 2000/78 ...?</p> <p>5. Would entitlement to the survivor's benefits be restricted to periods from 17 May 1990 in the light of the case-law in <i>Barber</i>?</p>

Case C-88/08 *Hütter*

Issue	Is the exclusion of work experience acquired prior to 18 when determining the pay of contractual employees of the States discrimination based on age?
Question	'Are Articles 1, 2 and 6 of [Directive 2000/78] to be understood as precluding national legislation ... which excludes creditable previous service from being taken into account in the determination of the reference date for salary increments in so far as such service was completed before the person concerned reached the age of 18?'

## 11.2 Proceedings before the CJEU

The CJEU has its own Rules of Procedure. As a rule the Court's proceedings include a written phase and an oral phase. The proceedings are conducted in a language chosen by the applicant, although the working language of the Court is French. The Registrar is responsible for the receipt, transmission and custody of documents and pleadings.

The case is assigned to a Chamber of three or five judges or a Grand Chamber of 13 judges. It is also sent to an Advocate General, who prepares an opinion suggesting to the Court how it should decide. The Commission and any Member State has the right to submit their own arguments on the legal issues at stake.

Public hearings are held where representatives of the Commission, the Member States and the applicant can present their views to the Chamber dealing with the case.

Some months later, the Advocate General announces his Opinion on the case to the Court and publishes it in all the EU's official languages.

The Court decides in private and delivers its judgment in writing at a later date, sending the case file back to the national court. All parties bear their own costs.

The referring national court must apply the law as interpreted by the CJEU without modification to the dispute before it. CJEU rulings interpreting European law also serve as a guide for other national courts dealing with substantially similar issues.

In *Coleman*, for instance (CJEU Case C-303/06), the reference for a preliminary ruling came from the London South Employment Tribunal (United Kingdom), made by a decision of 6 July 2006 and received at the Court on 10 July 2006.

The written proceedings were followed by a hearing on 9 October 2007, where observations were submitted by the legal representatives of the victim (Ms Coleman) and her employer; the UK and six other governments; and the European Commission.

The Grand Chamber heard the Opinion of the Advocate General Mr Poiares Maduro at the sitting on 31 January 2008 and gave its judgment on 17 July 2008.





Kelvin | 1997

## Part XII

# Invoking EU Law in International Proceedings

If a key concept has not been properly transposed or not transposed at all, and/or principles established by the CJEU are not respected by domestic law and the domestic court refuses to refer the case for a preliminary ruling, then the final domestic judgment may be challenged in an international forum, relying on arguments based on European law.

The rules on admissibility and adjudication of such complaints are detailed in the strategic litigation manual, quoted in the introduction to this Handbook, on pages 131-144. The fora that may be addressed by individual victims in cases of discrimination relating to the Non-discrimination Directives are the following:

## 12.1 European Court of Human Rights (ECtHR)

### Useful links:

- For practical information in your own language on applications to the European Court of Human Rights download an application pack from: <http://www.echr.coe.int/ECHR/EN/Header/Applicants/Apply+to+the+Court/Application+pack/>
- Admissibility criteria are explained here: [http://www.echr.coe.int/NR/rdonlyres/91AEEEBEBC-B90F-4913-ABCC-E181A44B75AD/0/Practical\\_Guide\\_on\\_Admissibility\\_Criteria.pdf](http://www.echr.coe.int/NR/rdonlyres/91AEEEBEBC-B90F-4913-ABCC-E181A44B75AD/0/Practical_Guide_on_Admissibility_Criteria.pdf)
- Search ECtHR case law here: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

### Practical tip

For practical information on procedures and guidance scroll down to page 33 in the application pack. Here the ECtHR provides information in your language about the rights it protects, the kind of cases it can deal with, the conditions for making an application, the way you should fill in the application form and the rules of procedure.

Apply to the ECtHR if you are seeking compensation ('just satisfaction') as UN treaty bodies cannot grant you compensation.

When you are looking for cases similar to yours, use key words and specify the Articles of the European Convention that you think are relevant, such as Article 14 that prohibits discrimination in relation to any other rights protected under the Convention.

### 12.1.1 What cases can the ECtHR deal with (admissibility criteria)?

- Exhaustion of domestic remedies: the ECtHR will only deal with a case after all national remedies have been exhausted. The Court provides general information on what remedies are considered effective.
- Who may complain about whom (*rationae personae*): individual or NGO applicants must be direct victims of a violation. You can only complain to the ECtHR about matters which are the responsibility of a public authority (legislature, administrative authority, or court of law). The Court cannot deal with complaints against private individuals or private organisations.
- When to bring the complaint (*rationae temporis*): States can only be held responsible for violations that occurred after they ratified the European Convention on Human Rights and Fundamental Freedoms. All EU Member States had done so before the transposition of the Non-discrimination Directives into their national laws.
- Six month limit: the ECtHR can only deal with an application within a period of six months from the date on which the final domestic decision was taken. After a decision of the highest competent national court or authority has been given, you have six months within which you may apply to the ECtHR, beginning from when the final court decision in the ordinary appeal process is served on you or your lawyer.
- Where the violation took place (*rationae loci*): broadly speaking, Member States can be held liable for violations that occur on their sovereign territory.

- f. What can you complain about (*rationae materiae*): the ECtHR will only examine complaints that relate to the rights contained in the European Convention on Human Rights. Non-discrimination has a special status in the Convention, so you are advised to carefully read up on the subject in this Handbook.
- g. Other international procedures: an application will not be admissible if its contents are essentially the same as a complaint already made to another international mechanism, such as a United Nations treaty body mentioned below.
- h. Applications must not be anonymous: give your personal details in the application. You may ask for confidentiality if the circumstances require.
- i. Abuse of the right of application: an application must not be written in offensive language and must contain all the relevant information.
- j. Manifestly ill-founded: an application will be declared manifestly ill-founded if at first sight it appears unfounded and if the allegations made are not supported by the material the applicant has submitted.

### 12.1.2 How to apply to the ECtHR

The ECtHR's official languages are English and French but if it is easier for you, you may alternatively write to the Registry in the official language of one of the States that have ratified the Convention. Applications to the ECtHR may be made only by post. All correspondence relating to your complaint should be sent to the following address:

The Registrar  
 European Court of Human Rights  
 Council of Europe  
 F-67075 STRASBOURG CEDEX.  
 FRANCE

## 12.2 United Nations treaty bodies

- a. Human Rights Committee. Information on individual communications: <http://www2.ohchr.org/english/bodies/petitions/index.htm>
- b. Committee on the Elimination of All Forms of Racial Discrimination. Information on individual complaints: <http://www2.ohchr.org/english/bodies/cerd/procedure.htm>
- c. Committee on the Elimination of Discrimination against Women. Information on individual petitions: <http://www2.ohchr.org/english/law/cedaw-one.htm>



Heather | 1992

## Conclusions and Final Practical Tips

What steps do you need to take when you feel you have faced discrimination? What advice should you give when a client claiming to be a victim of discrimination walks through your door? Legal professionals, case workers and the victims themselves first need to ask this question: what is the victim's protected characteristic? BUT FOR their disability, age, ethnicity, race, religion or sexual orientation would they have been treated otherwise? It is important to bear in mind that protection under European non-discrimination law is due to people treated unfavourably on account of a protected ground in certain fields.

If the answer to the BUT FOR question is yes, next it may be helpful to look at the European definition of the different forms of discrimination to analyse the unequal treatment. This exercise may be done in two phases. First, it may be worth finding out the following:

- What constitutes less favourable treatment? For instance: failure to recruit, education, services, promotion, or lower pay. DIRECT DISCRIMINATION
- What is the provision, criterion, or practice that puts the victim at a particular disadvantage? For instance: language requirements. Do people from the same protected group suffer from a similar disadvantage? INDIRECT DISCRIMINATION
- Does the conduct intimidate, degrade or humiliate the victim or does it create an offensive environment? For instance: homophobic jokes. HARASSMENT
- Does the less favourable treatment result from involvement in a complaint or proceedings against discrimination? For instance: a disabled employee who is not promoted complains and is subsequently laid off. VICTIMISATION
- Did somebody instruct the discriminator to treat the victim less favourably? AN INSTRUCTION TO DISCRIMINATE
- Does the treatment breach the requirement to make reasonable accommodations for disabled people? FAILURE TO PROVIDE REASONABLE ACCOMMODATION

The answers to these questions will point to the type of discrimination in question.

Second, it may be worth identifying a comparator – if one is needed at all:

- The Non-discrimination Directives allow for hypothetical comparators.
- There is no need to identify a comparator in cases of harassment, victimisation, an instruction to discriminate, or a failure to provide reasonable accommodation.
- In some Member States discrimination can be established compared to an ideal minimum standard of treatment, for instance conduct required by respect for human dignity.

The answers to the questions above will indicate the facts that need to be established in legal proceedings as well as the limits of a defence of justification. Once you have identified the type of discrimination and the best potential comparator, you may safely move on to collecting evidence, arranging it and planning to counter a defence of justification.

Establishing the facts lies at the heart of any legal proceedings, which in cases of discrimination is as a general rule accelerated through the reversal of the burden of proof. The following are outlined in this Handbook:

- what facts can support a discrimination claim (see the *Basic information in a discrimination claim* table);
- how to assess these facts (see the *'Three plus one' steps to establishing discrimination relying on the reversed burden of proof* table); and
- how to collect evidence to substantiate these facts (see Chapter II.4.A. 'Specific evidence').



This Handbook also contains charts and tables to guide you through procedures and assist you in selecting the most effective and proceedings on the basis of the *enforcement chart*. Tips on overcoming procedural barriers include the following:

- Use civil or administrative procedures or complain to the equality body instead of initiating criminal proceedings.
- Tackle the complexity of domestic anti-discrimination law by using information available from equality bodies and specialist non-governmental organisations.
- Take advantage of the skills and experience of the equality bodies.
- Seek financial assistance to pursue a case and secure adequate representation. In many countries legal aid is available from equality bodies.
- Seek a waiver from legal fees that may be payable in discrimination cases.
- Find the least expensive procedure: in general, proceedings before equality bodies and administrative authorities as well as criminal proceedings and mediation/conciliation are free of charge.
- If court proceedings are lengthy, then seek redress from equality bodies or inspectorates or through mediation.
- Request basic adjustments to court buildings to accommodate the needs of disabled victims in good time.
- Pay attention to short time limits for bringing a case and challenge them if necessary through a preliminary referral to the CJEU.

The Handbook provides a useful summary of sanctions that can be sought to remedy discrimination. Settlements secured through mediation show a high level of invention and variety that may be used for inspiration.

BEFORE taking any legal action it is advisable to consult a specialised equality body, a non-governmental organisation and/or a trade union. Equality bodies are the most specialised, accessible and cheapest providers of advice, assistance and more on discrimination.

Discrimination is often directed against groups or communities and also arises from unequal social structures. The Non-discrimination Directives provide the best tools to fight discrimination at the individual level. However, if victims work together and involve non-governmental organisations, it is possible to challenge structural discrimination

If and when national legislation appears vague or too complex, it is worth relying on arguments based on European non-discrimination law from the very beginning of proceedings, regardless of whether they are instituted before a court, an equality body or administrative authorities. Any claim may be referred to a court on appeal or review from an administrative authority, inspectorate, or even an equality body. Arguments based on EU non-discrimination law may lead any court to refer a case to the Court of Justice of the European Union. Such arguments have already been made for instance before the European Court of Human Rights. A prime example of these arguments can be found in *D.H. and Others v. the Czech Republic*, judgment of 13 November 2007 (application No. 57325/00 available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>).

Chris | 1954

# Appendices

## Area-specific handbooks in English

- *Handbook on European non-discrimination law* by the European Union Agency for Fundamental Rights (FRA) and the European Court of Human Rights (ECtHR). In particular, it takes into account the work done by the European Network of Legal Experts in the Non-discrimination Field:  
[http://www.fra.europa.eu/fraWebsite/research/projects/proj\\_implementationeuLaw\\_en.htm](http://www.fra.europa.eu/fraWebsite/research/projects/proj_implementationeuLaw_en.htm)
- *Cases, Materials and Text on National, Supranational and International Non-discrimination Law*, published as a lus Commune Casebook for the Common Law of Europe:  
<http://www.casebooks.eu/nonDiscriminationLaw/about/>
- *EU Anti-discrimination Law*, Evelyn Ellis (2005), Oxford University Press,  
<http://fds.oup.com/www.oup.co.uk/pdf/0-19-926683-2.pdf>
- *Proving Discrimination Cases – the Role of Situation Testing*, Migration Policy Group, (2009),  
[http://www.migpolgroup.com/publications\\_detail.php?id=230](http://www.migpolgroup.com/publications_detail.php?id=230)

## Internet resources

UN resource page: [http://www.hrea.org/index.php?doc\\_id=975](http://www.hrea.org/index.php?doc_id=975)

UN disability resource page <http://www.un.org/disabilities/default.asp?id=212>

## Materials in the national languages of the five countries studied

### *Ireland:*

Both the Equality Authority (<http://www.equality.ie/>) and the Equality Tribunal (<http://www.equalitytribunal.ie/index.asp>) provide detailed guidance on bringing anti-discrimination cases.

### *Romania:*

ACCEPT, *Minighid antidiscriminare* (2006), available at:

<http://www.antidiscriminare.ro/upload/documente/document-8.pdf>

Centrul de Resurse Juridice, *Manual antidiscriminare* (2005), available at:

<http://www.crj.ro/Manual-antidiscriminare/>

RomaniCRISS, *Ghid de bune practici privind dreptul la nediscriminare* (2007), available at:

<http://www.romanicriss.org/ghid%20de%20bune%20practici%20drept%20nediscriminare.pdf>

### *Italy:*

No handbooks are available in Italian.

*Hungary:*

There are no handbooks, but there are commentaries that expressly deal with this subject:

Gyulavári, Tamás – Kádár, András Kristóf: *A Magyar antidiszkriminációs jog vázlata*. Bíbor Kiadó, Miskolc (2009);

Balogh, Lídia – Kádár, András Kristóf – Majtényi, Balázs – Pap, András László: *Antidiszkriminációs és esélyegyenlőségi alapismeretek*. L'Harmattan Kiadó, Budapest (2010);

*Küzdelem a megkülönböztetés Ellen. Európai Közösségek Hivatalos Kiadványainak Hivatala*, Luxembourg (2006).

*Germany:*

The German Federal Anti-discrimination Agency has published guides about the AGG (the Anti-discrimination Act) on its webpage, [www.antidiskriminierungsstelle.de](http://www.antidiskriminierungsstelle.de).

Numerous handbooks, commentaries and introductory texts on the matter have also been published by commercial legal publishers, e.g.:

Däubler/Bertzbach, *Allgemeines Gleichbehandlungsgesetz*, 2<sup>nd</sup> ed. (2008);

Bauer/Göpfert/Krieger, *Allgemeines Gleichbehandlungsgesetz*, 2<sup>nd</sup> ed. (2008);

Rudolf/Mahlmann, *Handbuch Gleichbehandlungsrecht* (2007).

The handbook *Awareness Raising and Legal Training on Discrimination Practices* (2004), is available in Finnish, French, German, Greek, and Swedish from: [http://iom.fi/content/view/35/47/#awareness\\_raising\\_2004](http://iom.fi/content/view/35/47/#awareness_raising_2004)



## European Commission

**How to Present a Discrimination Claim:** Handbook on seeking remedies under the EU Non-discrimination Directives

Luxembourg: Office for Official Publications of the European Communities

2011 – 116 pp. – 21x29.7cm

ISBN 978-92-79-18268-6

doi: 10.2767/17291

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