



# Developing Anti-Discrimination Law in Europe

The 27 EU Member States, Croatia, Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared.

*Justice*

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# **Developing Anti-discrimination Law in Europe**

**The 27 EU Member States, Croatia, Former Yugoslav  
Republic of Macedonia, Iceland, Liechtenstein, Norway  
and Turkey compared**

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

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<sup>1</sup> As regards the major significant changes in a few countries, information may be based on data after 1 January 2012.

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# Preface

Over 10 years ago a major and unprecedented evolution occurred in the European Union with the adoption in 2000 of two pieces of EU legislation in the field of anti-discrimination: the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC). The transposition and implementation of these legal provisions into the national legal systems of the 27 Member States is described in a series of annually updated country reports produced by the European Network of Legal Experts in the Non-discrimination Field. In addition, the Network also includes candidate countries (**Croatia**, the **Former Yugoslav Republic of Macedonia**, **Iceland** and **Turkey**) and, since 2012, EEA countries (**Liechtenstein** and **Norway**).<sup>2</sup> The Network annually reports on their national legislation compared with the anti-discrimination standards set by the EU. This Network was established and is managed by the Human European Consultancy and the Migration Policy Group.

The national reports are written by independent national experts in each country covered by the Network. The information is provided in response to questions set out in a template format which closely follows the provisions of the two Directives, although all countries included in the Network do not have the same compliance obligations. The 33 reports cover national law, the establishment of enforcement mechanisms, jurisprudence and the adoption of other measures. They contain information current as of 1 January 2012.<sup>3</sup> As such, they are a valuable source of information on national anti-discrimination law and can be found on the Network's website at: [www.non-discrimination.net](http://www.non-discrimination.net).

This Comparative Analysis, drafted by Isabelle Chopin and Thien Uyen Do (Migration Policy Group), compares and analyses the information set out in the 2011 country reports in a format mirroring that of the country reports themselves and draws some conclusions from the information contained in them.

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

<sup>3</sup> Where major changes in legislation have been adopted at national level after the cut-off date of 1 January 2012, they have been included and this has been indicated accordingly.

# Introduction

The objective of this report is to compare and contrast anti-discrimination law in the 27 EU Member States and EU candidate countries (namely **Croatia**, **the FYR of Macedonia** and **Turkey**), as comprehensively described in the annually updated country reports written by the European Network of Legal Experts in the Non-discrimination Field and summarised in this publication. This year edition also includes EEA countries, namely **Iceland** (which is also an EU candidate country), **Liechtenstein** and **Norway**, which became part of the Network from 2012 and for which national experts have produced their first annual country report.

The grounds of discrimination listed in the Directives – racial or ethnic origin, religion or belief, disability, age and sexual orientation – are considered individually and collectively. It should be recalled throughout that the purpose of this report is to provide an overview of national laws and to contrast them. In addition, compliance obligations differ considerably between EU Member States, candidate countries and EEA countries. Consequently, for detailed and nuanced information about the law of a particular country, readers are referred to the comprehensive country reports. These country reports contain information current as of 1 January 2012.

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

The Racial Equality Directive had to be transposed into national law by 19 July 2003 in the EU 15 Member States and by 1 May 2004 in the EU 10, the date of their accession to the EU. The latest accession countries, **Bulgaria** and **Romania**, had to transpose the EU legislation by 1 January 2007. The Employment Equality Directive had to be transposed by 2 December 2003 in the 'old' Member States and by either 1 May 2004 or 1 January 2007 in the 'new' ones. If and when they accede, **Croatia**,<sup>4</sup> **the FYR of Macedonia**, **Iceland** and **Turkey** will have to align their national legislation with EU law by the date on which they enter the EU. EU directives on anti-discrimination are not binding on EEA countries, as the EEA agreement only provides obligations on those countries vis-à-vis EU legislation related to the internal market. In practice, provisions on anti-discrimination exist, but the level of protection varies greatly compared with EU standards. As a matter of fact, protection against discrimination in these countries is much more developed in relation to the ground of gender than for the other grounds.

<sup>4</sup> The European Union signed the Accession Treaty with **Croatia** in December 2011. Subject to the Treaty's ratification by all Member States, **Croatia** will become an EU Member State on 1 July 2013.

Jaap | 1987





# **Chapter 1**

## **Protected grounds of discrimination**

Further to the introduction of ex-Article 13 TEC<sup>5</sup> by the Amsterdam Treaty (now Article 19 TFEU<sup>6</sup>), two ground-breaking EC directives banning discrimination on grounds of racial or ethnic origin, religion or belief, age, disability and sexual orientation were adopted in 2000. These directives presented profound challenges to the existing approaches to combating discrimination based on racial or ethnic origin, religion or belief, disability, age and sexual orientation across Europe and aimed to ensure that all individuals living in the EU, regardless of their nationality, could benefit from effective legal protection against such discrimination. All Member States were required to review their existing legislation and to make the necessary changes to comply with the requirements of the directives, and candidate countries were similarly required to do so in order to comply with EU law in force by their date of accession.

The Racial Equality Directive<sup>7</sup> requires Member States to prohibit certain forms of discrimination, namely direct and indirect discrimination, harassment and instruction to discriminate, on the grounds of racial or ethnic origin. It covers employment, self-employment and occupation, as well as vocational training, social protection including social security and healthcare, social advantages, education and access to and supply of goods and services available to the public, including housing. The Employment Equality Directive<sup>8</sup> limits the protection granted to the field of employment and occupation as well as vocational training, and prohibits direct and indirect discrimination as well as harassment and instruction to discriminate, on the grounds of religion or belief, age, sexual orientation and disability.

The European Union's commitment to the principle of non-discrimination was reaffirmed in the Charter of Fundamental Rights in December 2000 which states that, "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited"<sup>9</sup>.

Even though all Member States have transposed the two Directives into their national law, certain discrepancies still remain. It was only in 2010 that **Poland** eventually transposed the Directives, in particular giving effect to provisions on the scope of the Racial Equality Directive beyond employment (Article 3(1)(e)-(h)) and the creation of a specialised equality body.<sup>10</sup>

As far as the candidate countries are concerned, **Croatia** has adopted an Anti-discrimination Act, in force since January 2009, but there are certain points which are not in compliance with the Directives. Exceptions to the prohibition of discrimination are too wide, unclear and open to interpretation. In **the FYR of Macedonia**, the first comprehensive Anti-discrimination Act entered into force on 1 January 2011, replacing various anti-discrimination provisions contained, among others, in the Labour and Criminal Codes, but sexual orientation is not specifically mentioned. Although most of the recent **Turkish** legislative changes reflect an effort towards harmonisation, there are still major shortcomings

<sup>5</sup> Treaty establishing the European Community.

<sup>6</sup> Treaty on the Functioning of the European Union, also called the Lisbon Treaty (the Lisbon Treaty amended the TEC and changed its name to the TFEU).

<sup>7</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19 July 2000, pp. 22-26.

<sup>8</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 2 December 2000, pp. 16-22.

<sup>9</sup> Article 21 of the Charter.

<sup>10</sup> Several attempts have been made since 2006 to adopt a comprehensive Equal Treatment Act.

(see below).<sup>11</sup> In all candidate countries, greater efforts towards harmonisation should undeniably be made to bring the major existing discrepancies into line with EU standards as a prerequisite to possible future accession.

Concerning the EEA countries, only **Norway** has comprehensive anti-discrimination legislation, in line with both the Employment Equality Directive and the Racial Equality Directive. **Iceland**<sup>12</sup> and **Liechtenstein** do have some anti-discrimination provisions scattered among various pieces of legislation, including constitutional law, civil law, administrative law, criminal law and labour law, but they are far from reflecting the standards of the Directives.<sup>13</sup>

A number of different transposition methods can be identified among the states:

- adoption of anti-discrimination acts which more or less reproduce the Directives;
- adoption of anti-discrimination acts covering more grounds than the Directives;
- adoption of combinations of multi-ground anti-discrimination acts and single-ground acts;
- adoption of several pieces of single-ground anti-discrimination legislation;
- adoption of combinations of specific legislation and an employment act;
- adoption of combinations of specific amendments to legislation, labour and criminal codes and some administrative law;
- adoption of a much wider general act.

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

Ensuring that the Directives are transposed throughout the territory of a Member State and by all tiers of government with relevant competences was a reason for delays in several Member States. The **United Kingdom** was delayed in its transposition in Gibraltar. **Finland** was found by the Court of Justice of the European Union (CJEU) to have failed to fulfil its obligations by omitting the Åland Islands from its transposition of Directive 2000/43/EC. Since the end of the transposition period in 2003, the European Commission has sent a great number of reasoned opinions for failure to notify or for non-conformity. And, 10 years after the adoption of the Directives, there are still some pending cases. In 2009, the **Dutch** General Equal Treatment Act also came under scrutiny, in particular with regard to the definition of direct and indirect discrimination<sup>14</sup> but also in relation to the exception provided for ethos-based organisations in Article 4(2). The **Netherlands** eventually brought its legislation in line with EU law with regard to the definitions of direct and indirect discrimination in November 2011.<sup>15</sup> In the reasoned opinions sent in October 2007 and June

<sup>11</sup> A draft Law on Combating Discrimination and Establishment of an Equality Council was presented by the government in 2009. After the text was submitted for public consultation, expectations were high for this new comprehensive piece of legislation. However, although amendments significantly removed all references to sexual orientation and sexual identity, the bill has not yet been adopted.

<sup>12</sup> A comprehensive anti-discrimination bill is foreseen, to be presented to Parliament in autumn 2012.

<sup>13</sup> **Iceland** and **Liechtenstein** have traditionally developed legislation related to gender, with concepts of discrimination specifically related to that area, and there are only a few provisions regarding the other protected grounds.

<sup>14</sup> In the **Netherlands**, the word 'distinction' is used in the equal treatment legislation, instead of 'discrimination'. Although the Government is taking the stance that there is no substantive difference between these words, this choice of terminology has engendered a lot of criticism from (among others) the **Dutch** Council of State [*Raad van State*].

<sup>15</sup> Wet van 7 November 2011, Staatsblad 2011, 554.

2011, the Commission considered that **Belgium** had not correctly transposed the two Directives. On 20 June 2011, the Commission referred **Italy** to the Court of Justice for failure to transpose the Employment Equality Directive with regard to the duty to provide reasonable accommodation.<sup>16</sup> The most recent case arose in December 2011 with the introduction of a new retirement age for judges and prosecutors in **Hungary**, following which the Commission launched accelerated infringement proceedings.<sup>17</sup>

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

### A. Which grounds are covered?

The Racial Equality Directive and the Employment Equality Directive require Member States to prohibit discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation in the field of employment. Moreover, the material scope of the Racial Equality Directive has been enlarged to also cover social protection including social security, healthcare, education, and goods and services, including housing. The Directives do not contain any definition of the grounds. This section examines how the Member States, candidate countries and EEA countries have incorporated the different grounds of discrimination into national law. This involves issues such as whether to provide a definition of each ground and how to address discrimination based on assumed characteristics. In addition, this section will highlight the main issues arising with respect to each ground during the implementation process.

Most countries have chosen not to define the grounds of discrimination in their implementing legislation (for instance, **France, Greece, Hungary, Poland, Romania, Slovenia, Croatia** and **the FYR of Macedonia**). A small group of countries have included statutory definitions or have at least provided definitions in accompanying documentation, such as an explanatory memorandum. This group includes **Austria, Estonia, Ireland, the Netherlands, Sweden** and the **United Kingdom**. In many countries, definitions or guidelines for definitions have subsequently been provided by national court rulings.

All countries have included the general principle of equal treatment or specific grounds of discrimination in their constitution (except the **UK**, which lacks a written constitution, **Denmark**, which does not include a general anti-discrimination clause in the Constitution, **Liechtenstein**, which only includes reference to women and men, and **Norway**, which generally refers to human rights). As already mentioned, constitutional provisions are commonly either not directly applicable or they have vertical effect only in litigation involving the State as the respondent. In **Bulgaria, Cyprus, Denmark, Estonia, Luxembourg, the Netherlands, Slovenia, Spain, Turkey, Iceland** and **Liechtenstein**, constitutional provisions are deemed to be applicable to horizontal relations as well.<sup>18</sup> In a minority of countries, horizontal direct effect remains theoretical or largely debatable (for instance, **Belgium, Ireland, Italy, Poland, Portugal, Croatia** and **the FYR of Macedonia**).

In the majority of countries, general constitutional equality guarantees apply, thus theoretically covering the material scope of the Directives (see Chapter 2), at least in the public sector. However, it is highly unlikely that constitutional provisions alone are adequate to sufficiently transpose the Directives. Where Protocol 12 to the European Convention

<sup>16</sup> C-312/11, *Commission v Italian Republic*, action brought on 20 June 2011.

<sup>17</sup> **Hungary** decided to lower the mandatory retirement age for judges, prosecutors and public notaries from 70 years to the general pensionable age (62 years) as of 1 January 2012.

<sup>18</sup> In **Turkey**, Article 10 of the Constitution (general non-discrimination provision) has been directly applicable since January 2012, further to the constitutional reform on the right to initiate a constitutional review by individuals.

on Human Rights (which contains a general prohibition of discrimination by the State against an open number of groups) is applicable in national law, such as in **Cyprus, Finland, the Netherlands, Spain and Croatia**, the scope of national law is broad, at least in relation to the public sector. In terms of concrete legislative provisions, however, most countries are far more restrictive and exhaustively list the areas to which discrimination legislation applies.

As already mentioned, most countries have transposed the Directives through civil or labour law, with a minority having also maintained, introduced or amended criminal law provisions (e.g. **Belgium, Denmark, Estonia, France and Luxembourg**) to further realise the equal treatment principles enshrined in their constitutions. While in some countries anti-discrimination provisions still exist in various pieces of legislation, e.g. **Bulgaria and Latvia**, this method has largely been replaced by more general anti-discrimination provisions and legislation and, more recently, a move towards multiple-ground equal treatment acts has also been discernible.

Some countries, such as the **UK**,<sup>19</sup> having recently opted for a single act, have taken the opportunity to clarify existing provisions and to fill the gaps and inconsistencies caused by a patchy legal framework. In the **Netherlands**, the government is currently working on a new General Equal Treatment Act in which four distinct laws (the General Equal Treatment Act, the Equal Treatment for Men and Women in Employment Act, the Disability Discrimination Act and the Age Discrimination Act), as well as several Civil Code provisions, will be integrated into one single act, with no changes in scope or content foreseen. A proposal for a comprehensive reform of **Finnish** anti-discrimination legislation is under way but not to be expected before the end of 2012. In September 2011, the **Norwegian** government started drafting a comprehensive anti-discrimination act.

In contrast, a few attempts to adopt a single comprehensive instrument have failed, for instance in **Spain**. The anticipated dissolution of Parliament and the general elections that followed in November 2011 disrupted the decision-making process and the new government showed no intention to follow up on the proposal.

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

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

**Grounds protected on the national level in various laws, whether at the federal or regional level**

<b>AUSTRIA</b>	Gender, ethnic affiliation, race or ethnic origin, religion, belief, age, sexual orientation, disability, disability of a relative, sexual identity, gender, pregnancy, maternity, nationality.
<b>BELGIUM</b>	Alleged race, colour, descent, ancestry, ethnic and national origin, nationality, age, sexual orientation, civil status, birth, wealth/income, religious or philosophical belief, actual or future state of health, disability, physical characteristics, genetic characteristics, political opinion, language, social origin, social position, trade union conviction, gender (including pregnancy, birth, maternity leave and transgender), gender reassignment.

<sup>19</sup> **UK** Equality Act 2010 of 8 April 2010.

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

<b>NORWAY</b>	Ethnicity, national origin, descent, skin colour, language, religion or belief, disability, age, sexual orientation, political affiliation, membership of trade unions, part-time/temporary worker.
<b>POLAND</b>	Gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age and sexual orientation, membership of a trade union, civil (marital) and family status.
<b>PORTUGAL</b>	Race, colour, nationality, ethnic origin, religion, ancestry, sex, language, country of origin, political or ideological convictions, education, economic situation, social condition, sexual orientation, civil status, family situation, disability, genetic inheritance, pre-existing risk to health, reduced capacity to work, disability or chronic disease, membership of a trade union, age.
<b>ROMANIA</b>	Race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, age, disability, chronic disease, HIV positive status, membership of a disadvantaged group or any other criterion.
<b>SLOVAKIA</b>	Sex, religion or belief, race, affiliation to a nationality or an ethnic group, disability, age, sexual orientation, marital status and family status, colour of skin, language, political or other opinion, national or social origin, property, lineage/gender or other status, unfavourable health condition, duties to a family, trade union involvement, membership of or involvement in a political party, a political movement or other association, other status.
<b>SLOVENIA</b>	Gender, ethnicity, race or ethnic origin, religion or belief, disability, age, sexual orientation, national and social origin, skin colour, health condition, family status, membership of a trade union, financial situation, ethnic roots, language, political or other belief, social status, birth, education, social position or other personal circumstance.
<b>SPAIN</b>	Race or ethnic origin, religion or belief, age, disability, sexual orientation, gender, marital status, origin, social status, political ideas, affiliation or non-affiliation to a union, official language of the state of Spain, family ties with other workers in a company, colour, descent, religious convictions and practices, ideology, membership of an ethnicity, race or nation.
<b>SWEDEN</b>	Sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation, age.
<b>TURKEY</b>	Language, race, gender, political opinion, philosophical belief, religion and sect or any such considerations, colour, disability.
<b>UNITED KINGDOM</b>	Northern Ireland: disability and dependant status, racial grounds, including grounds of colour, nationality (including citizenship), ethnic origins, national origins, membership of the Irish Traveller community, religion, political belief and belief, racial group, age, marital status, sexual orientation, gender.
	Great Britain (England, Wales and Scotland): racial grounds, including grounds of colour, nationality (including citizenship), ethnic origins, national origins, gender, including gender reassignment, pregnancy and maternity, marriage/civil partnership status, disability, religion/belief, sexual orientation, age.
	United Kingdom: race and ethnic origin, religion or belief, age, disability, sexual orientation.

## B. Racial or ethnic origin

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

Recital 6 of the Racial Equality Directive declares:

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

Some countries have taken the view that including the terms 'race' or 'racial origin' in anti-discrimination legislation reinforces the perception that humans can be distinguished according to 'race', whereas there is no scientific foundation for such a categorisation. For example, the **Finnish** Non-Discrimination Act refers to 'ethnic or national origin' (Section 6(1)), whilst the **Swedish** 2008 Discrimination Act refers to 'ethnicity' (Section 5) and defines it as "national or ethnic origin, skin colour or similar circumstance". In other countries, 'race' has been included in the legislation, but it is qualified. **Austria** also rejects the idea of separate races and therefore the notion of 'race' has been removed from legal texts to be replaced with 'ethnic affiliation'. In **Germany**, heated criticism and opposition have arisen for the same reasons. In **France**, various legal provisions refer to 'real or assumed' (*vraie ou supposée*) race. Although the **Hungarian**

Fundamental Law refers to ‘race’ and ‘colour’, the Equal Treatment Act also mentions ‘racial affiliation’ and ‘belonging to a national minority’.

One of the areas of ambiguity in the Racial Equality Directive is the extent to which characteristics such as colour, national origin, membership of a national minority, language or social origin might fall within the scope of ‘racial or ethnic origin’. Some national laws include, as a minimum, colour and national origin within legislation implementing the Racial Equality Directive. Some states, such as **Hungary, Poland** and **Slovenia**, have specific and detailed laws on the protection of national minorities. It is often unclear whether the concepts of ethnic/national minority found within these laws will be relied upon when national courts interpret anti-discrimination legislation.

The boundary between ethnic origin and religion is also problematic. Within the Directives, it is evident that this is an important distinction because the material scope of the Racial Equality Directive is much more extensive than that of the Employment Equality Directive.

**Lucy Vickers, *Religion and belief discrimination in employment*<sup>20</sup>**

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

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

Ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.<sup>21</sup>

In the **Netherlands**, case law has recognised the possibility for discrimination against Jews,<sup>22</sup> and in certain circumstances Muslims,<sup>23</sup> to be challenged as racial discrimination. In the **United Kingdom**, discrimination against Sikhs<sup>24</sup> or Jews<sup>25</sup> has been accepted as discrimination on racial grounds (specifically, ethnic origin). Similarly, due to the

<sup>20</sup> Lucy Vickers, *Religion and Belief: Discrimination in Employment – EU law*, Thematic report by the European Network of Legal Experts in the Non-Discrimination Field, 2007.

<sup>21</sup> Para 55, *Timishev v Russia*, Applications 55762/00 and 55974/00, 13 December 2005.

<sup>22</sup> Opinion 1998/48, Equal Treatment Commission.

<sup>23</sup> Opinion 1998/57, Equal Treatment Commission.

<sup>24</sup> *Mandla v Dowell Lee* [1983] 2 AC 548.

<sup>25</sup> *Seide v Gillette Industries Ltd.* [1980] IRLR 427.



historical background of Nazi ideology in **Germany**, anti-Semitism is regarded as discrimination on the grounds of race and not of religion.

A number of common problems have arisen in the process of implementing the Racial Equality Directive. First, the Directive is distinguished by its broad material scope, extending beyond employment to include areas such as social protection, education, and goods and services including housing. Yet several states have not adopted adequate legislation on discrimination outside employment. Secondly, the Racial Equality Directive requires Member States to establish a body or bodies for the promotion of equal treatment. All Member States and candidate countries included in this review, except **Iceland** and **Turkey**, have set up such a body. The **Czech Republic** and **Spain** only put in place their equality bodies for the first time during the course of 2009. The 2010 anti-discrimination legislation in **Poland** finally designates the existing Office of the Ombudsperson (Commissioner for Civil Rights Protection – *Rzecznik Praw Obywatelskich*) as the equality body. In the **FYR of Macedonia**, the Anti-discrimination Act made provision for the establishment of the Commission for Protection from Discrimination in 2011.<sup>26</sup> Of the EEA countries, only **Norway** has a specialised body mirroring the requirements of the Racial Equality Directive.<sup>27</sup>

### C. Religion or belief

No state has attempted to provide a comprehensive definition of ‘religion or belief’ within anti-discrimination legislation (e.g. an exhaustive inventory of protected religions), nor has it ever been defined at the international level. In **Hungary**, Article 6 of Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities stipulates that religious activities are linked to a world view directed towards the transcendental and showing a system of faith-based principles which are focused on existence as a whole. It also embraces the entire human personality through specific requirements of conduct that do not offend morals and human dignity.

Further guidance on the meaning of ‘religion or belief’ is in some states provided by explanatory documentation accompanying legislation or by court rulings, such as in **Belgium, France, Germany** and the **Netherlands**.<sup>28</sup>

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

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

*The criteria for determining what is a ‘philosophical belief’ are that it must be genuinely held; be a belief and not an opinion or viewpoint based on the present state of information available; be a belief as to a weighty*

<sup>26</sup> The founding session of the Commission was held on 17 January 2011.

<sup>27</sup> **Iceland** has no specialised body with regard to racial and ethnic origin and **Liechtenstein** has a specialised body of some description dealing with disability.

<sup>28</sup> The term *levensovertuiging* (philosophy of life) has been adopted because this had already been interpreted through case law. It includes broad philosophies, such as humanism, but it does not extend to every view of society. In addition to *levensovertuiging*, the **Dutch** General Equal Treatment Act (GETA) also covers *godsdienst* (religion).

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*and substantial aspect of human life and behaviour; attain a certain level of cogency, seriousness, cohesion and importance; and be worthy of respect in a democratic society, compatible with human dignity and not conflict with the fundamental rights of others. So, for example, any cult involved in illegal activities would not satisfy these criteria.*<sup>29</sup>

Most of the controversy around the implementation of the provisions of the Employment Equality Directive on religion or belief centres on the extent of any exceptions provided for organised religions (e.g. churches) and organisations with an ethos based on religion or belief (e.g. religious schools). The Directive provides a rather complex exception in Article 4(2), which permits such organisations to make requirements relating to employees' religion or belief in narrow circumstances. Some states have provided exceptions that appear to go beyond the strict terms of the Directive (e.g. **Hungary** and **Croatia**) or which remain ambiguous (e.g. **Greece, Ireland, Italy, the Netherlands, Romania** and the **UK**). **France, Portugal** and **Sweden** did not adopt an exception clause for employers with an ethos based on religion or belief.

Finally, there has been a serious increase in case law arising since the adoption of the Directives relating to dress codes and religious symbols,<sup>30</sup> thus indicating that manifestation of religious belief through dress or symbols is one of the key issues in the practical implementation of the Directives. For instance, such cases have been recorded in **Belgium, Denmark, France,**<sup>31</sup> **Germany, Greece, Italy, the Netherlands, Sweden** and the **United Kingdom**. In **Sweden**, further to a hotly debated case regarding a student who wore a niqab during training to become a daycare teacher,<sup>32</sup> the School Inspectorate issued guidelines on a ban on veils covering an individual's face in classrooms, with the support of the Equality Ombudsman. There is legislation regulating access to employment in, for instance, **Germany** where several Länder (e.g. Baden-Württemberg, Bavaria and Hesse) enacted a new law prohibiting the display of religious symbols in violation of the principle of neutrality, further to a case where a civil servant returned to work wearing a burka. In **Turkey**, a regulation related to the general attire of staff in public administration has been occasionally invoked to prohibit the wearing of the Islamic headscarf in the public sector.<sup>33</sup> Moreover, a ban has been imposed in universities since 1983 by the High Board of Education, which was upheld by the Constitutional Court.<sup>34</sup>

**In Belgium, the dismissal of an employee wearing the headscarf may be justified to preserve the neutrality of a private company**<sup>35</sup>

In February 2003, a Muslim woman was hired under a permanent employment contract as a receptionist by a private company providing catering services to private and public sector clients. In April 2006, she informed her superior that she wanted to wear the headscarf during working hours. In a conversation

<sup>29</sup> [http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpgaen\\_20100015\\_en.pdf](http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpgaen_20100015_en.pdf).

<sup>30</sup> See, for instance, *Lautsi and others v. Italy* (no. 30814/06), ECtHR (Grand Chamber) Judgment of 18 March 2011 or *Eweida v. United Kingdom* (no. 48420/10).

<sup>31</sup> See for instance Versailles Court of Appeal decision no. 10/05642 in *Baby Lou*, 27 October 2011 where the court ruled that the principle of freedom of religion could not undermine the principles of secularism and neutrality, therefore asking an employee to remove her veil in accordance with in-house regulations and the nature of the duties carried out was deemed lawful. See also, Montreuil Administrative Court decision no. 1012015, in *Recteur de l'Académie de Créteil*, 22 November 2011, on parents wearing the veil when taking part in school trips.

<sup>32</sup> Equality Ombudsman decision, case 2009/103 of 30 November 2010.

<sup>33</sup> Regulation Concerning the Attire of Personnel Working at Public Institutions, Official Gazette no. 17849, 25 October 1982.

<sup>34</sup> Despite the recent attempt by the Director of the High Board of Education in October 2010 to end the ban on the wearing of headscarves, several universities were reported to be continuing with the prohibition in practice.

<sup>35</sup> Labour Court of Appeal (*Arbeidshof*) of Antwerp, *Centre for Equal Opportunities and Opposition to Racism and Samira Achbita v. NV G4S Security Services*, decision no. 2011/2128 of 23 December 2011.

with the head of office, she learned that wearing a headscarf would not be tolerated as any visible political, philosophical or religious symbol was incompatible with the company's policy of neutrality. The board of directors amended the staff regulations in order to prohibit the wearing of any visible symbol expressing political, philosophical or religious convictions. After she refused to remove her headscarf, her employment contract was terminated with a severance package equivalent to three months' salary.

The woman, with the support of the Centre for Equal Opportunities and Opposition to Racism, initiated a legal action. She asked for EUR 13,220.90 as compensation for unfair dismissal, alleging direct and indirect discrimination on the grounds of religion, as prohibited by the Anti-discrimination Act of 25 February 2003, and violation of religious freedom, as guaranteed by Article 9 of the European Convention on Human Rights. The case ended before the Labour Court of Appeal of Antwerp, which rejected the claim considering that unfair dismissals require manifestly unreasonable behaviour by the employer.

At the time of the relevant facts, the Anti-discrimination Act of February 2003 was in force and not yet repealed by the General Anti-discrimination Act of 10 May 2007, which therefore could not be invoked. The Court held that, since the prohibition applied to all employees, there was no difference in treatment. In addition, the Court found that even if indirect discrimination was proven, it could be justified by an objective and reasonable aim, while religious freedom was not an absolute right and could be subject to limitation. The Court therefore concluded that an employer could prohibit the wearing of any religious signs in order to preserve the neutral image of the company. In the light of those conclusions, the dismissal was not found unreasonable.

### **Specific provisions on religion or belief – ethos-based organisations**

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

### **New legislation brings legal uncertainty around ethos organisations in Hungary**

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

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

It still remains to be seen how the relation of this new provision with Article 22 Paragraph (1) Point (b) of the Equal Treatment Act (ETA) on ethos organisations will be interpreted. Article 12 of Act CCVI does not specify what types of special conditions may be set and therefore the provision could be interpreted along the lines of Article 22 as a declarative rule which merely reinforces already existing special rights of organisations based on a religious ethos put in place under the ETA. In addition, a similar interpretation would stem from the EU principle of indirect effect, which compels domestic authorities, including judges, to interpret national laws in a way that is compatible with EU law.

However, another interpretation might also be possible. It could be argued that there would have been no point in re-declaring an already existing right, and therefore the legislator's intention behind the adoption of Article 12 of Act CCVI was to allow church institutions to set conditions going beyond those already permitted under the ETA. In this case there would be a collision between the ETA and the new provision. Based on the principle of *lex posterior derogat legi priori* ("the later law overrules the earlier one"), this collision could be solved in favour of Article 12. However, this interpretation opens the door for employment-related differentiation that goes way beyond what is allowed by the Employment Equality Directive.

At the outset, it is important to distinguish between national legislation that does not apply to employment within religious organisations and national legislation which does apply, but provides certain exceptions.

Not all countries chose to include the Article 4(2) exception: such was the case of **France, Portugal, Romania, and Sweden**. The **Romanian** anti-discrimination law (Ordinance 137/2000) does not include specific provisions on an exemption for employers with an ethos based on religion or belief to comply with the Directive either, but the provisions of Article 9 on determining occupational requirements which are recognised as exemptions under a clear legitimacy and adequacy test can be interpreted to allow ethos or religion-based exceptions. **Turkey** does not provide an exception for employers with an ethos based on religion or belief. In contrast, the following states have adopted provisions in national law which seek to rely on Article 4(2): **Austria, Bulgaria, Cyprus, the Czech Republic, Denmark, Germany, Greece, Hungary, Italy, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Slovakia, Slovenia, the United Kingdom, Croatia, the FYR of Macedonia and Norway**.

#### **The 'sole fact provision' under Dutch law**

Currently, in the Netherlands, the General Equal Treatment Act does not apply to the internal affairs of churches, of other religious communities, or of associations of a spiritual nature. This restriction complies with the Employment Equality Directive provided that it is limited to the appointment of religious staff for the purposes of teaching or practising religion. In addition, Article 5(2)(a) and (c) states that ethos-based private schools and other denominational organisations may discriminate where it is necessary in order to realise their religious or philosophical purposes or founding principles. Such requirements

may, however, not lead to differential treatment based on the *sole fact* of political opinion, race, sex, nationality, sexual orientation or civil status. The sole fact provisions aims at eliminating the possibility that difference in treatment is exclusively made on the grounds of political opinion, race, sex, nationality, hetero- or homosexual orientation or civil status. Additional circumstances are necessary to make such a distinction lawfully but the law does not specify which circumstances could count as 'additional'.

In 2006, the European Commission initiated an infringement procedure against the Netherlands, and asked the government to bring this exception into line with the wording of the Directive, as the current provision was deemed to be insufficiently clear and open to interpretation.

There are concerns in several states that the exceptions based on Article 4(2) may be too wide (e.g. **Greece, Ireland, Italy** and **Croatia**). Whereas the Employment Equality Directive stipulates that a differentiation based on the religious ethos of an organisation may only be based on the religion of the individual subjected to differentiation, and not on any other characteristics, **Hungarian** provisions do not impose such limitation.<sup>36</sup> Meanwhile, in **Bulgaria**, there is an inconsistency in the wording between the Directive and the Protection against Discrimination Act, as rather than defining the occupational requirement as "genuine, legitimate and justified", the Act terms it "genuine and determining", making it arguably stricter than under the Directive. In **Ireland**, the Employment Equality Act does not refer to the terms 'legitimate' or 'proportionate' as required by the Directive. In **Croatia**, the exception for employers with an ethos based on religion or belief is not limited to situations where a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.<sup>37</sup>

#### D. Disability

On 23 December 2010, the EU ratified the UN Convention on the Rights of Persons with Disabilities and was thus the first international organisation to accede to an international treaty on human rights.<sup>38</sup> This means that all legislation, policies and programmes at EU level must comply with the Convention's provisions on disability rights, within the limits of EU responsibilities. Countries that have ratified the Convention should take action in the following areas: access to education, employment, transport, infrastructure and buildings open to the public, and granting the right to vote, improving political participation and ensuring full legal capacity of all people with disabilities.

In 2006, the CJEU provided its first decision on the meaning of 'disability' in the case of *Chacón Navas*. The Court distinguished disability from sickness:

...the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life ...

<sup>36</sup> Problems may arise with the new Church Act (Act CCVI) adopted in 2011 which claims that, "since church institutions are ideologically committed, such conditions may be determined concerning recruitment and the establishment, maintenance and termination of the legal relationship of employment as are necessary to preserve their specific identity". The interaction with the Equal Treatment Act remains unclear. On 2 April 2012, Commissioner Reding announced that further inquiry on conformity with the directive will be conducted [www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-001428&language=EN](http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-001428&language=EN).

<sup>37</sup> The **Croatian** Government is planning to reform the Anti-discrimination Act and an expert group has been established to draft amendments.

<sup>38</sup> For the full list of countries which have signed/ratified the Convention, please see Annex 1.

In order for the limitation to fall within the concept of 'disability', it must therefore be probable that it will last for a long time.<sup>39</sup>

The majority of national legislation contains many examples of definitions of disability (e.g. **Austria, Belgium, Cyprus, the Czech Republic, Estonia, Germany, Lithuania, Luxembourg, Portugal, Slovakia, Spain, Sweden, the FYR of Macedonia, Turkey, Iceland and Norway**) but these stem from the context of social security legislation rather than anti-discrimination law. As far as candidate countries are concerned, there is no definition of disability in the Anti-discrimination Act in the **FYR of Macedonia** mirroring *Chacón Navas*. The **Turkish** definition refers to difficulties in adapting to social life and the need for protection,<sup>40</sup> which significantly differs from the definition provided by the CJEU. In **Iceland**, definition of disability does not refer to professional life and merely includes mental or physical disability which requires special services and assistance without further specifying in which areas of life.

At present and unless future case law provides otherwise, national definitions of Member States appear *a priori* in line with the *Chacón Navas* ruling of the CJEU, except for some countries where discrepancies may exist, such as **Cyprus, Denmark, Greece, Poland, Slovakia** and the **United Kingdom**.<sup>41</sup> Notably, **Bulgaria** sets out a wider interpretation of disability as it does not require the limitation to result in "hinder[ing] the participation of the person concerned in professional life"<sup>42</sup> – the existence of an impairment or limitation is sufficient, regardless of the implications this may have for the individual's professional life. In addition, this national definition is broader in material scope because it applies to any field including, but not limited to, professional life. However, the concept of permanent disability is narrower than in CJEU case law as it requires three additional elements: the permanence of what is effectively the equivalent of a hindrance to participation, a threshold of 50% of incapacity and official medical certification acknowledging the incapacity. Similarly, **Lithuania** does not limit material scope to professional life, as reference is made to public life.<sup>43</sup> However, mental and psychological impairments are not addressed by **Lithuanian** legislation, although they are adequately addressed in practice, in line with the *Chacón Navas* definition. In addition, the Act on the Social Integration of the Disabled defines a person with a disability as a person who has been assigned a level of disability or a level of 55% or less of working capacity. Disabilities must thus be acknowledged by the competent authority. Countries including **Estonia, Hungary** and **Malta** go beyond the employment field by referring to everyday activities or all aspects of social life<sup>44</sup> and, likewise, **Sweden** and **Norway** do not seem to restrict the scope of relevant impairment to professional activities only. In **Liechtenstein** definition of disability seems to be in line with *Chacón Navas* as it refers to "the result of a deficiency of functions that is not just temporary and is based on a physiological, mental or psychological condition or an impairment of sensory functions which constitutes a possible complication for participation in the labour market".

<sup>39</sup> Paras 43-45, Case C-13/05 *Chacón Navas v Eurest Colectividades SA*, judgment of 11 July 2006, [2006] ECR I-6467. See commentary by Lisa Waddington (2007) 44 *Common Market Law Review* 487.

<sup>40</sup> "A person with a disability is a person who has difficulties in adapting to social life and in meeting daily needs due to loss of physical, mental, psychological, sensory or social capabilities at various levels by birth or by any reason thereafter and who therefore needs protection, care, rehabilitation, consultancy and support services", Article 3(a) of the 2005 Law on Persons with Disabilities.

<sup>41</sup> The **UK** definition requires that impairment has to have lasted for at least 12 months, or the period for which it is likely to last is at least 12 months or it is likely to last the rest of the person's life. It is unclear whether this reading is incompatible with the *Chacón Navas* decision.

<sup>42</sup> Integration of Persons with Disabilities Act, sections 1.1 and 1.2 Additional Provisions.

<sup>43</sup> Social Integration of Disabled Persons Act, 1991, No. 36-969.

<sup>44</sup> For **Estonia**, see Article 5 Equal Treatment Act. For **Hungary**, see Article 4 of the Rights of Persons with Disabilities Act.

### The term 'handicap' in Romania

In Romania, specialised legislation, distinct from anti-discrimination legislation, refers to 'handicap' and, until September 2010, 'persons with disabilities' were defined as those "lacking abilities to normally carry out daily activities due to a physical, mental or sensory impairment and requiring protective measures for rehabilitation, integration and social inclusion".<sup>45</sup> This definition was amended in September 2010 by Emergency Ordinance 84/2010 to "persons whose social environment hinders completely or limits their access to equal opportunities in the life of society, requiring protective measures to support their integration and social inclusion, as the social environment is not adapted to their physical, sensory, psychological, mental and/or associated impairments",<sup>46</sup> which goes beyond the definition of disability used in *Chacón Navas* as the emphasis is put on the duty to secure accessibility and on the intertwining of social and medical elements in disability.

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

"the generic term for impairments/deficiencies, limitations in activity and restrictions in participation defined according to the International Classification of Functioning, Disability and Health adopted by the World Health Organization, and which highlight the negative aspect of the interaction between the individual and the environment."<sup>47</sup>

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

The CJEU's requirement for it to be probable that the impairment will last is echoed in various definitions of disability in national law. For example, in both **Austria**<sup>48</sup> and **Germany**<sup>49</sup> impairments must be likely to last for more than six months in order to amount to disabilities, while in the **United Kingdom**<sup>50</sup> the impairment should last for at least 12 months. In contrast, other states require the impairment to be indefinite in duration (**Cyprus**<sup>51</sup> and **Sweden**<sup>52</sup>).

It is not yet clear whether the Court regards the formula provided in *Chacón Navas* as an exhaustive definition of disability. In particular, this definition leaves no space for the protection of those assumed to be disabled or likely to have a future disability. These scenarios are anticipated in some national legislation. For instance, **Irish** legislation covers discrimination on grounds that exist at the present moment, grounds that previously existed and grounds that

<sup>45</sup> Article 2 of **Romanian** Act 448/2006 on the Protection and promotion of the rights of persons with a handicap (06.12.2006).

<sup>46</sup> *Romania/ Ordonanță de urgență nr.84 din 20 septembrie 2010 pentru modificarea și completarea Legii nr. 448/2006 privind protecția și promovarea drepturilor persoanelor cu handicap*, Emergency Ordinance 84/2010 on amending Act 448/2006 on the protection and promotion of the rights of persons with a handicap (20.09.2010).

<sup>47</sup> Article 3 (16) of **Romanian** Act 448/2006 on the Protection and promotion of the rights of persons with a handicap (06.12.2006).

<sup>48</sup> Section 3, Disability Equality Act 2005.

<sup>49</sup> Section 2, Social Code IX and Section 3 Disabled Equality Act.

<sup>50</sup> Section 1(1), Disability Discrimination Act 1995.

<sup>51</sup> Act 127(I)/2000.

<sup>52</sup> Chapter 1, Section 5, Paragraph 4, Discrimination Act (2008:567).



may exist in the future.<sup>53</sup> **Dutch** law covers “an actual or assumed disability or chronic disease”,<sup>54</sup> thereby protecting (for example) a person who previously had cancer but no longer experiences any symptoms. The **Slovak** Anti-discrimination Act states that “discrimination on the ground of previous disability, or discrimination against a person in a case in which it could be, based on external symptoms, possible to presume that she or he is a person with a disability, shall be deemed to be discrimination on the ground of disability”.<sup>55</sup> **Slovak** and **UK** law also protect individuals with respect to past disabilities.

### **Specific provisions on disability – the reasonable accommodation duty**

One of the most significant innovations within the Employment Equality Directive is the duty placed on employers to “take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer”.<sup>56</sup> This provision has been implemented very unevenly across the states.

The following states have legal provisions that approximate to the reasonable accommodation duty found within the Directive: **Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Latvia, Lithuania,**<sup>57</sup> **Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia,**<sup>58</sup> **Spain, Sweden, the United Kingdom, Croatia, the FYR of Macedonia,**<sup>59</sup> **Liechtenstein** and **Norway**. These vary considerably, from states which provide a basic duty with little elaboration on how this should be implemented (e.g. **Lithuania**) or how a disproportionate burden must be assessed (e.g. **Latvia, Sweden, Croatia** and the **FYR of Macedonia**) to states with more extensive guidance on its practical application (e.g. the **United Kingdom**). In **Cyprus**, the duty to adopt ‘reasonable measures’ is not restricted to the workplace but also covers basic rights (rights to independent living; diagnosis and prevention of disability; personal support with assistive equipment, services etc.; access to housing, buildings, streets, the environment, public transport, etc.; education; information and communication through special means; services enabling social and economic integration; vocational training; employment in the open market etc.; and supply of goods and services, including transport and telecommunications). By contrast, in **Malta**, reasonable accommodation is restricted to employees, hence to the exclusion of job seekers which is in breach of Directive 2000/78/EC. Having said this, outside the field of employment, the duty is not absolute.

<sup>53</sup> Section 6(1)(a), Employment Equality Act 1998-2004.

<sup>54</sup> Article 1(b), Act of 3 April 2003 to establish the Act on Equal Treatment on the Grounds of Disability or Chronic Disease, *Staatsblad* 2003, 206.

<sup>55</sup> Section 2a, paragraph 11(d) of the Act No 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination and on Amending and Supplementing Certain Acts, as amended.

<sup>56</sup> Article 5, Directive 2000/78/EC.

<sup>57</sup> However, the wording of the Equal Treatment Act lacks precision and seems to be softer than the Employment Equality Directive. **Lithuania** has also ratified the UN Convention on the Rights of Persons with Disabilities which entered into force in September 2010 but it is not clear whether failure to provide reasonable accommodation can be considered as discrimination.

<sup>58</sup> The 2010 Act on Equal Opportunities of People with Disabilities (*Zakon o izenačevanju možnosti invalidov*, Official Journal of the Republic of **Slovenia**, No. 94/2010) establishes the duty to provide reasonable accommodation in conformity with the Directive. The law uses the inaccurately translated term ‘appropriate accommodation’ instead of ‘reasonable accommodation’. The purpose of this act is to prevent and eliminate discrimination towards people with disabilities and to encourage equal opportunities for people with disabilities in all areas of life.

<sup>59</sup> Clear provisions regarding reasonable accommodation have been introduced with the entry into force of the Anti-discrimination Act.

**Failure to provide reasonable accommodation to a job seeker suffering from obesity amounts to discrimination according to the Dutch equality body<sup>60</sup>**

An obese woman applied for a job as a postman to deliver mail (approximately 40 kilograms for each delivery) by bicycle. After she filed an application form online, providing her CV and information about her state of health, she was invited for an interview on the basis of a high test score. After she took the interview with a HR manager, it was made clear that she would not be appointed because of her excess weight.

The ETC first investigated whether excess weight or obesity fell under the scope of the Disability Discrimination Act (DDA), which covers disability and chronic diseases. Neither concept is defined in the DDA. The UN World Health Organization (WHO) has established that adults with a Body Mass Index (BMI) of 25-30 are overweight, and people with a BMI higher than 30 are considered obese. There are three levels of obesity: BMI 30-35 (obesity), 35-40 (serious obesity) and 40 and above (morbid obesity). All forms of obesity are considered as a chronic disease by the WHO. The applicant had a BMI of more than 40. For this reason, she fell under the scope of the DDA according to the ETC.

A person who, as a consequence of a disability or chronic disease, cannot perform the essential tasks or functions of a job, cannot rely on the DDA unless reasonable accommodations are possible. In this case, the ETC concluded that the post company based its decision not to hire the woman on general observations and previous experience, and that it did not really investigate whether this particular person would or would not be able to perform the essential tasks or functions of her job. Furthermore, the company did not look into possibilities for reasonable accommodation (e.g. delivering the mail by foot or car). One function of the DDA is to prevent discrimination based on general assumptions or prejudices (stereotypes).

The ETC consequently noted that the HR manager based her decision on general assumptions related to the poor physical condition of seriously overweight people. The post company had therefore discriminated against the woman on the ground of chronic disease.

<sup>60</sup> Equal Treatment Commission Opinion 2011-78 of 13 May 2011.

The concept of reasonable accommodation has not been included in national legislation in **Italy**,<sup>61</sup> **Turkey**<sup>62</sup> and **Iceland**.<sup>63</sup> **Poland** has only recently introduced reasonable accommodation in its legislation.<sup>64</sup> In **France**,<sup>65</sup> the duty to provide reasonable accommodation is narrower in scope than under the directive, as it has not been transposed, for instance, to cover officials working in the parliament who can only rely on the direct application of the Employment Equality Directive on the basis of domestic case law.<sup>66</sup> In **Hungary**, the duty of reasonable accommodation has not entirely been implemented. Concerns are particularly severe with regard to access to employment as Act XXCI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities contains the obligation to accommodate the needs of people with disabilities in the course of recruitment and to adapt the working environment for current employees, but does not seem to prescribe that reasonable effort should be made to adapt the workplace to special needs with a view to actually employing a person with a disability. In **Bulgaria** the Protection against Discrimination Act, Articles 16 and 32, makes provision for reasonable accommodation for persons with disabilities in employment and education respectively. In **Romania**, the 2000 anti-discrimination law (Ordinance 137/2000) does not stipulate reasonable accommodation for persons with disabilities, but Act 448/2006 on the Promotion and Protection of the Rights of Persons with Disabilities, which has the same personal scope as the Ordinance, establishes the duty to ensure reasonable accommodation in access to various public and private services and facilities and in labour relations.

Whilst the definition of the duty varies, it is commonly subject to the limitation that it should not create a 'disproportionate' or 'unreasonable' burden for the employer (in **Austria, Belgium, Bulgaria, Cyprus, France, Germany, Ireland, Latvia, Lithuania, the Netherlands, Portugal, Slovakia, Spain, Croatia and Norway**). The preamble of the Directive provides an indication of the criteria to be taken into account in determining the reasonableness of a particular accommodation. Recital 21 identifies three issues to consider, and these are often included in national legislation or case law:

- the financial and other costs entailed: **Bulgaria, Cyprus, Finland, France, Germany, Ireland, Malta, Spain, the United Kingdom, Liechtenstein and Norway**;
- the scale and financial resources of the organisation or undertaking: **Austria, Finland, Ireland, Malta, Slovakia, the United Kingdom, Liechtenstein and Norway**; and

<sup>61</sup> The Commission has consequently initiated an infringement procedure against **Italy** for failure to transpose the duty to provide reasonable accommodation in 2011 (C-312/11).

<sup>62</sup> However, the Persons with Disabilities Act requires both public and private employers to take necessary measures to eliminate or alleviate the barriers and hardship faced by employees with disabilities or job applicants in employment processes and to make physical adjustments. A very limited duty to provide reasonable accommodation is provided by the Civil Servants Act, addressed at people with disabilities working in the public sector. In addition, the United Nations Convention on the Rights of Persons with Disabilities, to which **Turkey** is a signatory, prohibits denial of reasonable accommodation as a form of discrimination. Nevertheless, there is no explanation of the concept of reasonableness or guidance on how the test should be conducted.

<sup>63</sup> The Act on the Equality of People with Disabilities does provide that assistance in employment should be given when necessary, including adapting the working environment to the worker's needs.

<sup>64</sup> The 2010 Equal Treatment Act eventually introduced the duty to provide reasonable accommodation. The Disabled Persons Act (amended by the Equal Treatment Act) provides in its new Article 23a (1-3) that:

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

<sup>65</sup> See Administrative Supreme Court decisions in the *Perreux* case of 30 October 2009 and the *Bleitrach* case of 30 October 2010.

<sup>66</sup> For more details on the **French** situation regarding reasonable accommodation, please also see the tables below.

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- the possibility of obtaining public funding or any other assistance: **Austria, Cyprus, Finland, France, Germany, Ireland, Malta, the Netherlands, Portugal, Spain, Slovakia, the United Kingdom, Liechtenstein and Norway.**

National legislation is often ambiguous about whether failure to provide reasonable accommodation is to be treated as a form of unlawful discrimination (e.g. **Hungary** and **Latvia**). In some countries there is still no case law that could lead to the conclusion that such an approach is being taken (e.g. **Lithuania** and **Luxembourg**). In **Cyprus**, no reasonable accommodation case has ever been tried in the courts, but the code of conduct on disability discrimination in the workplace issued by the Equality Body in 2010 explicitly provides that an employer's failure to adopt reasonable accommodation measures amounts to unlawful discrimination and is punishable with a fine or even imprisonment, like all other forms of discrimination.<sup>67</sup> **Irish** case law holds that a failure to provide reasonable accommodation amounts to discrimination.<sup>68</sup> The courts did not, however, state whether it is a form of direct or indirect discrimination. In **Bulgaria**, there is no provision relating failure to provide reasonable accommodation to bans on direct or indirect discrimination, but in several cases the courts have found that this constituted direct (rather than indirect) discrimination. In **Greece**, failure to meet the duty on reasonable accommodation was found to amount to direct discrimination.<sup>69</sup>

In **France**, a failure to meet the duty constitutes unlawful discrimination, but it is not specified whether this is classified as direct or indirect discrimination. In **Sweden**, failure to provide reasonable accommodation is treated as direct discrimination in the fields of employment and education. In contrast, failure to provide reasonable accommodation is treated as indirect discrimination in **Austria** and **Denmark**. In **Slovakia**, failure to provide reasonable accommodation is regarded as a violation of the principle of equal treatment (which is broader than the prohibition of discrimination and its individual forms and also encompasses the duty to adopt measures to prevent discrimination) and it does not equate to direct or indirect discrimination. However, this does not mean that in specific situations the actions or omissions of an employer cannot at the same time also fall within definitions of the specific forms of discrimination defined by the **Slovak** Anti-discrimination Act – mainly direct or indirect discrimination or harassment. Meanwhile, in the **United Kingdom** failure to provide reasonable accommodation is defined as a specific form of discrimination and in the **Netherlands** as a prohibited form of distinction.<sup>70</sup> In the **Czech Republic**, there are two co-existing definitions of indirect discrimination which establish eligibility for reasonable accommodation. The first can be found in the Employment Act and applies to the right to employment, recruitment, training, retraining and other areas covered by the law on employment. The second is provided in the Anti-discrimination Act and applies to all areas covered by anti-discrimination legislation (including access to employment). In practice, it is difficult to say which one of the two would prevail.

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

<sup>67</sup> Available (in Greek) at:

[www.no-discrimination.ombudsman.gov.cy/sites/default/files/kodikas\\_gia\\_diakriseis\\_logo\\_anapirias\\_ergasia.pdf](http://www.no-discrimination.ombudsman.gov.cy/sites/default/files/kodikas_gia_diakriseis_logo_anapirias_ergasia.pdf).

<sup>68</sup> *A Complainant v. Bus Éireann* DEC E2003-04.

<sup>69</sup> Decision 2048/2008 of the court of first instance of Athens.

<sup>70</sup> See above, footnote 14.

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

	RA provided for people with disabilities	RA extended to other grounds than disability
	Law	
<b>AUSTRIA</b>	Employment of People with Disabilities Act, §§ 7c(4)-(6).	Judicial interpretation required of the Viennese Anti-Discrimination Act.
	Federal Disability Equality Act, §§ 6(3), 6(4)	
<b>BELGIUM</b>	General Anti-Discrimination Federal Act, Art. 5 and 14.	No.
<b>BULGARIA</b>	Protection Against Discrimination Act, Art. 16 and 32.	For religion. <sup>71</sup>
<b>CROATIA</b>	Anti-Discrimination Act, Art. 4/2.	No.
<b>CYPRUS</b>	Act on Persons with Disabilities, Art. 5(1A) and 9.	No.
<b>CZECH REPUBLIC</b>	Anti-Discrimination Act, Section 3 §2.	No.
<b>DENMARK</b>	Act on Prohibition of Differential Treatment in the Labour Market, Section 6, Subsection 2.	No.
<b>ESTONIA</b>	Equal Treatment Act, Art. 11.	No. <sup>72</sup>
<b>FINLAND</b>	Non-discrimination Act, Section 5.	No.
<b>FRANCE</b> <sup>73</sup>	Labour Code, Art. L 5213-6 and 5212-13.	No.
	Social Welfare Code, Art. L114.	
<b>FYR of MACEDONIA</b>	Prevention and Protection Against Discrimination Act, Art. 5 para. 1, line 12; 8; 15 and para. 1, line 3.	For religion. <sup>74</sup>
<b>GERMANY</b>	Social Code IX, Art. 81.4.	Possibly religion. <sup>75</sup>
<b>GREECE</b>	Equal Treatment Act, Arts 5, 9 and 11.	No.
<b>HUNGARY</b>	Act on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities, Art. 15. <sup>76</sup>	No.
<b>ICELAND</b>	Not explicitly. <sup>77</sup>	No.
<b>IRELAND</b>	Employment Equality Act, s. 16(3).	No.
<b>ITALY</b>	No. <sup>78</sup>	No.
<b>LATVIA</b>	Labour Law, Art. 7 (3).	No.
<b>LIECHTENSTEIN</b>	Act on Equality of People with Disabilities, Art. 10-20.	No.
<b>LITHUANIA</b>	Equal Treatment Act, Art. 7.	No.
<b>LUXEMBOURG</b>	Equal Treatment Act, Art. 18 and 20.	No.
<b>MALTA</b>	Equal Opportunities (Persons with Disabilities) Act, Art. 7 and 20.	No.
	Equal Treatment in Employment Regulations, Art 4.A.	No.
<b>NETHERLANDS</b>	Equal Treatment on the Grounds of Disability and Chronic Disease Act, Art. 2.	No.
<b>NORWAY</b>	Anti-Discrimination and Accessibility Act on Prohibition of Discrimination on the Basis of Disability, s. 12.	No.

<sup>71</sup> Protection against Discrimination Act, Article 13, for religion.

<sup>72</sup> According to Articles 10 (1) and 10<sup>1</sup> (1) of the Law on Occupational Health and Safety, an employer shall create suitable working and rest conditions for disabled workers, pregnant women, women who are breastfeeding, and minors.

<sup>73</sup> There are gaps in the **French** legislation regarding reasonable accommodation that does not cover some persons such as magistrates, non- registered disabled persons, non-salaried disabled workers and disabled persons who are members of the professions or self-employed.

<sup>74</sup> Law on prevention and protection against discrimination, Article: 14, para.1, line 3, 4, 5.

<sup>75</sup> Depending on the judicial interpretation of the article 4 of the Basic Law (Constitution).

<sup>76</sup> Judicial interpretation of the Disability Law is nevertheless still needed.

<sup>77</sup> National law does not explicitly include employer's duty to accommodate the needs of persons with disabilities, nor does it define what reasonable accommodation is. Nevertheless, Article 29 of the Act on the Affairs of Persons with Disabilities states that those should be given assistance in their employment when necessary.

<sup>78</sup> **Italy** has not included the concept of reasonable accommodation in its legislation therefore the European Commission referred **Italy** to the Court of Justice of the EU with an infringement procedure (C-312/11).

	RA provided for people with disabilities	RA extended to other grounds than disability
	Law	
<b>POLAND</b>	Act on Vocational and Social Rehabilitation and Employment of Persons with Disabilities, Art. 23a.	No.
<b>PORTUGAL</b>	Labour Code, Art. 85 and 86.	No.
<b>ROMANIA</b>	Act 448/2006 on the Promotion and Protection of the Rights of Persons with Disabilities, Art. 5(4).	For religion. <sup>79</sup>
<b>SLOVAKIA</b>	Act on Equal Treatment in Certain Areas and Protection against Discrimination, Section 8 Para 1.	No.
<b>SLOVENIA</b>	Act on Equal Opportunities of People with Disabilities, Art. 3(3).	No.
<b>SPAIN</b>	Law 51/2003 on Equal Opportunities, Non-Discrimination and Universal Access for Persons with Disabilities, Art. 7.	For religion. <sup>80</sup>
<b>SWEDEN</b>	Discrimination Act, Ch. 2, S. 1.	Yes.
<b>TURKEY</b>	No. <sup>81</sup>	No.
<b>UNITED KINGDOM</b>	UK Equality Act 2010, S. 20.	No.
	NI Disability Discrimination Act 1995.	No.

### Specific provisions on disability – health and safety

With regard to disabled people, Article 7(2) of Directive 2000/78/EC allows Member States to maintain or adopt provisions on the protection of health and safety at work. Some national legislators have interpreted this provision as permitting health and safety exceptions to non-discrimination on the ground of disability, e.g. **Cyprus, Greece, Ireland, Luxembourg, the Netherlands and Croatia**. In **Ireland**, for instance, if a person has a disability that under the given circumstances could cause harm to that person or to others, treating that person differently to the extent reasonably necessary to prevent such harm does not constitute discrimination.<sup>82</sup> In the **FYR of Macedonia**, the new Anti-discrimination Act sets out three exceptions regarding pregnant women or mothers, the educational needs of people with disabilities and more generally the special protection of people with disabilities. In **Bulgaria**, there are no exceptions for health and safety relating to any of the protected grounds, including disability, under the Protection against Discrimination Act. However, under the Healthy and Safe Working Conditions Act, employers have a duty to only assign to their employees tasks that are compatible with their capabilities<sup>83</sup> in view of the specific dangers for employees with a reduced work capability,<sup>84</sup> and a number of other laws and pieces of secondary legislation governing specific fields, such as transportation (including aviation) and other risk-intensive occupations, provide health requirements for access to employment in those fields. Similarly, the **Romanian** Anti-discrimination Ordinance does not provide specific exceptions in relation to disability in the context of the health and safety provisions of the Directive. However, the general exception of objective and justified limitation, allowed by Article 9 of the Anti-discrimination Ordinance, could be applicable.

<sup>79</sup> Art. 134 (1) letter F of the Labour Code in relation to observance of religious celebrations of the employees grants two vacation days for two religious celebrations each year, to be taken according to the faith of the employee, under the condition that the faith of the employee is recognised as a state recognised religion.

<sup>80</sup> Law 24/1992, of 10 November, adopting the cooperation agreement between the State and the Federation of Evangelical Religious Entities of **Spain**, article 12.1; Law 25/1992, of 10 November, adopting the cooperation agreement between the State and the Jewish Communities of **Spain**, article 12.1 and 2, Law 26/1992, of 10 November, adopting the cooperation agreement between the State and the Islamic Commission of **Spain**, article: Art. 12.1 and 2.

<sup>81</sup> Judicial interpretation will be required notably of the Law on Persons with Disabilities.

<sup>82</sup> Section 4(4) Equal Status Act 2000-2008.

<sup>83</sup> Article 16 (1.2a).

<sup>84</sup> Article 16 (1.3).

## E. Sexual orientation

The introduction of legal protection against discrimination for the first time on the ground of sexual orientation has been challenging for a number of states as it has proved to be controversial. At present, very few countries have defined sexual orientation within anti-discrimination legislation. In **Bulgaria**, sexual orientation is defined under the Protection against Discrimination Act, Section 1.9 Additional Provisions as “heterosexual, homosexual or bisexual orientation”. **Germany, Ireland** and **Sweden** provide a similar definition. **British** legislation refers to “a sexual orientation towards (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of the same sex and of the opposite sex”<sup>85</sup> The 2006 **German** General Equal Treatment Act adopts the term ‘sexual identity’ while the Federal **German** Constitutional Court refers to both sexual identity and sexual orientation. This is understood to reach beyond sexual orientation and also encompasses protection against discrimination for transsexual people.<sup>86</sup> In **France** and the **Netherlands**, the concept of sexual orientation has not been interpreted in a way that covers transsexuality and transvestism. Discrimination on these grounds is regarded as sex discrimination, in contrast with **Denmark**.

Although explicitly mentioned in the **Hungarian** Equal Treatment Act of 2003, the provision prohibiting discrimination in the new Fundamental Law of **Hungary**<sup>87</sup> does not list sexual orientation among the grounds protected from discrimination.<sup>88</sup> However, the Constitutional Court, ordinary courts and the Equal Treatment Authority have in the past acknowledged sexual orientation as one of the other protected grounds listed in Article 70/A of the former Constitution. Anti-discrimination provisions in the **FYR of Macedonia, Iceland** and **Turkey** do not explicitly mention sexual orientation as a protected ground. As far as EEA countries are concerned, national legislation in **Liechtenstein** gives no definition of sexual orientation. **Norway** provides a similar definition as in many countries, as sexual orientation covers heterosexual, homosexual and bisexual orientation. Transsexualism is encompassed in the definition of gender.

### Dismissal of a homosexual teacher from a Dutch Protestant school deemed unlawful<sup>89</sup>

The case concerned a homosexual teacher who was dismissed from a fundamentalist Protestant school after he left his wife and children to live together with his male partner. The Cantonal Court of the Hague held that any educational school based on a religious denomination has the right to require from staff members that they become ‘identity bearers’ by endorsing its religious convictions and maintaining the religious identity of the institution. This right constitutes an exception to the general principle of non-discrimination and is laid down in Article 5(2) of the General Equal Treatment Act. According to this provision, differences in treatment are not permitted if based solely or exclusively on the fact that someone is homosexual. In other words, additional circumstances are necessary for the distinction to be lawful. Directive 2000/78/EC does not mention any ‘additional circumstances’ but the examples given by the Government during the parliamentary debates on the General Equal Treatment Act relate these terms to behaviour or circumstances having a close link with the religious ethos of the organisation, which seems to be in conformity with the Directive.

<sup>85</sup> Regulation 2(1), Employment Equality (Sexual Orientation) Regulations 2003, S.I. 1661.

<sup>86</sup> See Federal Constitutional Court (*Bundesverfassungsgericht*) of 6 December 2005; 1 BvL 3/03, paragraph 48 et seq.

<sup>87</sup> The new Constitution came into force on 1 January 2012.

<sup>88</sup> Article XV of the Fundamental Law states: “**Hungary** grants fundamental rights to everyone without any discrimination, namely discrimination based on race, colour, gender, disability, language, religion or other opinion, national or social origin, financial, birth-related or any other situation”.

<sup>89</sup> Cantonal Court of the Hague, decision LJN:BU3104 of 2 November 2011.



For the first time, a court had to decide whether the facts of the case presented such ‘additional circumstances’ or whether the teacher was dismissed solely on the basis of his relationship with his same-sex partner. The judge concluded that the school did not sufficiently investigate whether the teacher’s relationship with his partner would affect his duties as an ‘identity bearer’ and that he was dismissed on that sole fact. The Court observed that the teacher discussed his relationship with pupils and parents and that he made his dismissal public; that could, however, not count as ‘additional circumstances’. Nor was the assumption that the working relationship between the school board and the teacher was seriously damaged could be considered as an additional circumstance. Consequently, the Court concluded that the dismissal was void and that the teacher was entitled to be re-instated in the school.

Many of the difficulties encountered in implementing the sexual orientation provisions of the Directive relate to the breadth of any exceptions applying to employers with a religious ethos (see the section above on religion or belief). These exceptions are sensitive because they stir up debate around reasonable accommodation beyond disability in the EU: some employers may be hostile to homosexuality because of their religious beliefs, while others are looking to strike the right balance between the interests of employees holding religious convictions and the interests of lesbian, gay, bisexual and transsexual people.<sup>90</sup>

Another key issue relates to partners’ benefits (see the *Maruko* case<sup>91</sup>) and the extent to which national law permits employers to limit work-related benefits to those employees who are married (e.g. a pension entitlement for a surviving spouse). It should also be noted that, in the majority of states, there are few or no examples of cases of discrimination on the grounds of sexual orientation being brought before the courts. Issues around confidentiality or fear of victimisation may deter some individuals. Moreover, in some states the wider political climate remains unfriendly or openly hostile to equality for lesbian, gay and bisexual people (e.g. **Poland**, **Lithuania** and the **FYR of Macedonia**).

## F. Age

Age is generally assumed to be an objective characteristic with a natural meaning and hence it is not defined. The **Swedish** Discrimination Act defines age as the “length of life to date” and includes all ages, ensuring that the young and the old are evenly protected. Likewise, most states have not restricted the scope of the legislation, but the **Irish** Employment Equality Act 1998-2008 limits its application to “persons above the maximum age at which a person is statutorily obliged to attend school”.<sup>92</sup> Similarly, in **Denmark** legislation was adopted in 2006 which removes protection from persons under 18 if differential treatment is stipulated in a collective agreement.<sup>93</sup> Moreover, the prohibition against differential treatment due to age does not apply with regard to the employment and conditions of pay and dismissal of young people under the age of 15, since their employment is not regulated by a collective agreement. In the **UK**, the provisions (which have not yet been implemented) of the 2010 Equality Act which prohibit age discrimination in the provision of goods and services and the performance of public functions will apply only to discrimination suffered by adults over the age of 18; children under this age will not be protected by this extension of age discrimination legislation.

The transposition of Directive 2000/78/EC with respect to age discrimination presented particular challenges because the great majority of Member States did not have existing general legislation against age discrimination. **Turkey** has not yet incorporated age discrimination into its national legislation.

<sup>90</sup> See Application numbers 48420/10 and 59842/10, *Lillian Ladele and Gary McFarlane against the United Kingdom*, ECtHR.

<sup>91</sup> Case C-267/06, *Maruko v. Versorgungsanstalt der deutschen Bühnen*, 2008 ECR I-1757.

<sup>92</sup> Section 6(f)(3).

<sup>93</sup> Act No. 31/2006.

Two contrasting patterns or models can be identified in how countries chose to confront these challenges, though it should be stressed that these are only broad patterns, within which significant variations occur. One pattern consists of direct or nearly direct enactment into national legislation of the age discrimination provisions of the Directive, without elaborate adaptation to existing practice or detailed amendment of existing legislation. **Cyprus, Greece and Italy** have passed anti-discrimination laws which more or less reproduce the Directives.

A contrasting response consisted of engaging in a more elaborate legislative debate at the national level as to how the age discrimination requirements of the Directive might be fully and immediately integrated within existing law and practice. The resulting legislative debate tended to be difficult and complex in some Member States, which is why **Belgium, Germany, the Netherlands, Sweden** and the **United Kingdom** took up the option of extra time to implement age discrimination requirements in particular.

### Specific provisions on age

The Employment Equality Directive permits national law to include a range of exceptions in relation to both direct and indirect age discrimination. Article 6(1) states: “Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary”. It then lists examples of differences which could be allowed, including the fixing of minimum conditions of age, professional experience or seniority for access to employment. As a consequence, there remains very substantial uncertainty across the states as to which forms of age discrimination will be treated as justified by national courts. In *Mangold v Helm*,<sup>94</sup> the Court of Justice provided an early indication that directly discriminatory practices need to be carefully scrutinised by national courts. That ruling, in conjunction with the *Kücükdeveci* case,<sup>95</sup> might potentially greatly affect national implementation, particularly as the CJEU ruled that prohibition of discrimination on the grounds of age must be considered as a general principle of EU law to which the Directive merely gives expression.<sup>96</sup>

A key issue relating to the age provisions of the Employment Equality Directive is retirement. In principle, compelling employees to leave work because they have reached a certain age is direct age discrimination which will require objective justification. Meanwhile, Recital 14 indicates that retirement ages may be regarded as justified age discrimination. It states that “this Directive shall be without prejudice to national provisions laying down retirement ages”. National law varies greatly in this area, ranging from states with no national compulsory retirement age (e.g. the **Czech Republic**) to states which permit compulsory retirement by public and private employers at a specific age (e.g. **Italy**).

Several Member States have simply inserted the text of Article 6 of the Employment Equality Directive into national law, including **Austria, Cyprus, Greece, Malta, Portugal** and **Slovakia**. Meanwhile, **Finland, France, Germany, Ireland, Italy, Luxembourg, Romania, Slovenia** and the **United Kingdom** have provisions that resemble all or part of Article 6.

<sup>94</sup> Case C-144/04, *Mangold v. Helm*; [2005] ECR I-9981.

<sup>95</sup> Case C-555/07, judgment of 19 January 2010 (not yet reported).

<sup>96</sup> *Mangold*, and in particular the CJEU's exercise of powers in that case, was (unsuccessfully) challenged before the Federal Constitutional Court in **Germany**, showing the still fragile authority of EU law in **Germany** regarding the general principle of age discrimination. See Decision by the **German** Federal Constitutional Court (*Bundesverfassungsgericht*), 2 BvR 2661/06 of 6 July 2010.

### Repeal of default retirement age in the UK

The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011, which came into force on 6 April 2011, removed the possibility for employers to enforce compulsory retirement ages without risk of unfair dismissal claims by amending the Equality Act 2010. Between 6 April and 1 October 2011, only people who were notified before 6 April, and whose retirement date was before 1 October, could be compelled to retire using the default retirement age and, after 1 October 2011, employers were not able to use the default retirement age provision to compel employees to retire. All age-related dismissals have to be justified by the employer.

At the outset, it is important to distinguish between the age at which people become entitled to receive pensions (pensionable age) and the age at which they are required to cease employment (retirement age). Sometimes these are linked in national law. In **Malta**, protection against unfair dismissal is lost at retirement age and in **Hungary** such protection is reduced. In **Latvia**, the Constitutional Court has held that it is not disproportionate to require civil servants to retire at pensionable age.<sup>97</sup> In **Cyprus**, a series of judicial decisions have recently sought to justify differences in retirement ages for different employees, introducing a rather wide spectrum of exceptions premised upon a doctrine that equality must be applied only to equal situations and that “different things... can only be dealt with differently”.

The approach in national law to retirement age can be loosely grouped into three categories. First, there are Member States where national law does not impose any compulsory retirement age, nor does it remove protection from unfair dismissal for workers after a certain age. In general, this includes the **Czech Republic**, **Poland** and **Slovakia**. Retirement ages are not specified in national legislation in **Denmark** or **Germany**, but these are commonly found in collective agreements.

In a second group of states, retirement ages are specified for public sector employees. The precise age varies: **Belgium** (65), **Cyprus** (63 – being phased in), **Hungary** (70),<sup>98</sup> **Portugal** (70), and **Spain** (65). In **France**, the retirement age specified for public sector employees (65) can be subject to derogation. In **Bulgaria**, in some sectors, such as the professional army<sup>99</sup> and the police,<sup>100</sup> the law imposes age limits after which people, both women and men, can no longer remain in service, although they are not prohibited from finding employment in other sectors and still collecting their pensions.

Finally, there are states where national law permits the compulsory retirement of employees, whether in the public or private sector, because they have reached a certain age: **Finland** (68), **Italy** (65), **Luxembourg** (68), **Romania** (63-65),<sup>101</sup> **Sweden** (67), **Croatia** (65), the **FYR of Macedonia** (62-64)<sup>102</sup> and **Norway** (70). In **Ireland**, an employee may be dismissed after he or she has reached the ‘normal retiring age’ for that position. The general legislative rule in **Bulgaria** is that workers may be dismissed on the ground of age once they reach the applicable pensionable ages, which vary

<sup>97</sup> Case 2003-12-01, decision of 18 December 2003.

<sup>98</sup> These provisions were not subject to debate in **Hungary** during the transposition of the directives. However, they have come under serious domestic and international criticism when the mandatory retirement age for judges (which was 70 before the coming in to force of the Fundamental Law in April 2011) was abruptly reduced to 62 with an insufficient transitory period.

<sup>99</sup> Defence and Armed Forces of the Republic of Bulgaria Act, Article 127 (1). For soldiers, the limit is 49 years; that limit is raised for each higher rank, with 60 years as the limit for the highest ranking officers.

<sup>100</sup> Ministry of Interior Act, Article 245 (1). The limit is 60 years.

<sup>101</sup> The retirement age is 63 for women and 65 for men.

<sup>102</sup> The retirement age is 62 for women and 64 for men.

based on the particular number of years in service. However, this does not affect any other rights to labour protection, including protection against unfair dismissal, which workers retain as long as they are employed.

#### **Automatic termination of employment contracts at retirement age examined by the CJEU<sup>103</sup>**

Mr Prigge, Mr Fromm and Mr Lambach initiated a legal action against their employer, Deutsche Lufthansa AG, for the automatic termination of their employment contracts at the age of 60, pursuant to Article 19(1) of Collective Agreement No 5a. After the first instance courts dismissed their claim, they brought the dispute before the German Federal Labour Court (*Bundesarbeitsgericht*). The national court referred the case to the Court of Justice of the European Union, which was requested to examine the compatibility of the clause with Directive 2000/78/EC.

The Court immediately recognised direct discrimination on the ground of age and turned examining the justification of ensuring air traffic safety brought forward by the social partners in the light of the exception laid down in Article 2(5) of Directive 2000/78/EC regarding public security. The Court recognised that ‘measures that aim to avoid aeronautical accidents by monitoring pilot’s aptitude and physical capabilities with the aim of ensuring that human failure does not cause accidents’ contributed to public security. However, national and international legislation considered that it was sufficient to restrict pilots’ activities past the age of 60 instead of creating a total ban. The Court consequently held that the measure was not necessary for the achievement of the objectives pursued relating to public security and the protection of health.

The Court then examined whether possessing particular physical capabilities as an airline pilot could fall within the meaning of Article 4(1) of Directive 2000/78/EC on genuine and determining occupational requirement. It recognised that it is essential that they possess particular physical capabilities in so far as physical defects may have significant consequences and that such capabilities may diminish with age. The objective relating to air traffic safety therefore constituted a legitimate objective within the meaning of Article 4(1) of Directive 2000/78/EC. However, by fixing the age-limit at 60, the social partners imposed a disproportionate requirement as national and international legislation authorised the carrying out of pilots’ activities until the age of 65, under certain conditions.

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

A number of similar cases have recently been reported at the national level, where pilots having reached the retirement age challenged national measures which contravened EU law and international standards.<sup>104</sup>

Another key issue is the justification with regard to age, and national practice varies greatly in this area. Article 6(1) (b) of the Employment Equality Directive expressly allows laws which seek to promote the vocational integration or protection of young people, older workers and persons with caring responsibilities. Such laws are very common. Almost every state has some legislation or practices which aim to protect and to promote young employees, or to

<sup>103</sup> Case C-447/09, *Prigge and Others v Deutsche Lufthansa AG*, not yet reported.

<sup>104</sup> See for instance, **Denmark**, the **Netherlands** (District Court of Amsterdam of 21 February 2011 and Equal Treatment Commission of 22 March 2011) or **Norway**.

ensure a balance of age in the workforce. For instance, the **UK** permits age distinctions in the payment of the national minimum wage in order to encourage employers to employ younger workers, which seems controversial under the CJEU case law on age. As a matter of fact, confusion around the justification issue is clearly noticeable throughout the EU, in particular as regards compulsory retirement, and domestic case law also shows that national jurisdictions are not always consistent in finding discrimination.

Minimum and maximum age requirements, in particular in access to employment, seem to be widely permitted. These can be described as direct age requirements, whereas a required number of years of experience constitutes an indirect age requirement. The **Czech Republic** has examples of both direct age requirements (minimum age requirements for employment and self-employed activity and maximum age limits set for certain professions) and indirect age requirements (conditions of pay dependent on years of experience and requirement of a certain education and a minimum period of training for entrance to professions).

In transposing the Directives there seems to have been little discussion in some Member States as to the legality of certain existing provisions and practices, and confusion still remains. An exception is the **Netherlands**, where every government department was obliged to produce a report giving an inventory of age criteria in its legislation in order to review the legitimacy of such distinctions. The compatibility of retirement ages with Directive 2000/78/EC has been partially clarified by the Court of Justice, most notably in its decisions in Cases C-87/06 *Pascual García* [2006], C-411/05 *Palacios de la Villa* [2007] ECR I-8531 and C-488/05 *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR I-1569, C-45/09, *Rosenblatt* [2010] ECR I-0000, C-447/09, *Prigge*, not yet reported.

## G. Assumed and associated discrimination

Discrimination can sometimes occur because of an assumption about another person which may or may not be factually correct, e.g. that the person has a disability. Alternatively, a person may face discrimination because they associate with persons of a particular characteristic, e.g. a non-Roma man may be denied admission to a bar because he is with friends from the Roma community. In many countries, the application of discrimination law to such scenarios is neither stipulated nor expressly prohibited, and only future judicial interpretation will clarify this issue. This is the case for instance in **Finland, Greece, Italy, Latvia, Malta, Poland, Romania, Slovenia, Spain**, the **UK**,<sup>105</sup> **Iceland, Turkey** and **Liechtenstein**.

### CJEU ruling in landmark case *Coleman* on discrimination by association<sup>106</sup>

On 17 July 2008, the Court of Justice of the European Union delivered judgment in the case of *Coleman v. Attridge Law and Steve Law*. The judgment interprets the meaning of the prohibition of direct discrimination and harassment in employment and occupation on grounds of disability pursuant to Article 2(2) (a) and Article 2(3) of Council Directive 2000/78/EC of 27 November 2000 and especially the meaning of discrimination by association.

The CJEU stated that the purpose of the Directive is to prohibit all forms of discrimination in employment and occupation on the protected grounds, namely disability, sexual orientation, age and religion

<sup>105</sup> However, in the **United Kingdom** the explanatory notes to the 2010 Equality Act make it clear that associative discrimination and discrimination on the basis of perception are intended to be covered by the Act.

<sup>106</sup> Case C-303/06, *S. Coleman v Attridge Law, Steve Law*. For a recent national illustration regarding discrimination by association, see the **Dutch** case p. 91.

or belief and is not limited to a particular category of person. As the CJEU explained, “An interpretation limiting its application only to people who are themselves disabled is liable to deprive the Directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.” (para.51).

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

In relation to harassment, the Court used the same reasoning to conclude that “...the prohibition of harassment laid down by those provisions is not limited only to people who are themselves disabled. Where it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the prohibition of harassment laid down by Article 2(3).”

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

**Ireland** provides a rare example where legislation explicitly forbids discrimination where a ground is ‘imputed’ to exist and discrimination due to association.<sup>107</sup> **Croatia** prohibits discrimination based on misconception<sup>108</sup> (although there is no case law on discrimination based on a perception or assumption of a person’s characteristic), whereas in the **Czech Republic** discrimination on the ground of assumed characteristics is forbidden. The **Bulgarian** Protection against Discrimination Act also explicitly prohibits discrimination on perceived or assumed grounds and discrimination by association.<sup>109</sup> As mentioned earlier, in several states the legislation refers to ‘real or assumed’ race (e.g. **France**) or to a disability that existed in the past or which may exist in the future (e.g. the **Netherlands**). The **Austrian** Federal Disability Equality Act extends protection to relatives (parents, children, siblings or partners) caring for disabled persons and the same is stated in the Employment of People with Disabilities Act, which protects close relatives with caring responsibilities. Amendments to the Equal Treatment Act entered in force on 1 March 2011 providing protection to individuals who experience discrimination or harassment due to their close relationship with a person whose sex/ethnic affiliation/religion or belief/age/sexual orientation constitutes the ground for discrimination or harassment.<sup>110</sup> In the Flemish Framework Decree of 10 July 2008 in **Belgium**, the definition of direct discrimination expressly states that it is applicable in cases of discrimination based on an assumed characteristic. Perceived or assumed discrimination is covered by the **Norwegian** Anti-discrimination Act, the Anti-discrimination and Accessibility Act and the Working Environment Act, provided that it has actually resulted in a worse or less favourable treatment.

<sup>107</sup> Section 6(1)(b), Employment Equality Act 1998-2004.

<sup>108</sup> Article 1(3) of the Anti-discrimination Act.

<sup>109</sup> Additional Provisions, Section 1.8. See also the CJEU’s judgment of 17 July 2008 in Case C-303/06 *Coleman v Attridge Law, Steve Law* [2006] OJ C237/6.

<sup>110</sup> §§ 5/4, 19/4, 21/4 Equal Treatment Act.

## H. Multiple discrimination

The EU has recognised the significance of multiple discrimination, although both the Employment Equality Directive and the Racial Equality Directive do not specifically address the issue. Explicit provisions are provided in a few Member States only. For instance, in **Greece**, a new provision adopted in 2011 explicitly refers for the first time to multiple discrimination.<sup>111</sup> The Protection against Discrimination Act in **Bulgaria** defines multiple discrimination as “discrimination based on more than one [protected] ground”.<sup>112</sup> It places a statutory duty on public authorities to give priority to positive action measures to the benefit of victims of multiple discrimination.<sup>113</sup> In case of multiple discrimination, the Commission for Protection against Discrimination (the equality body) holds hearings in a larger panel of five members, instead of the ordinary three-member panel.<sup>114</sup> In the **Netherlands**, the government decided not to follow the Equal Treatment Commission’s suggestion to include multiple discrimination in the General Equal Treatment Act.<sup>115</sup> In **Germany**, Section 4 of the General Act on Equal Treatment provides that any unequal treatment on the basis of several prohibited grounds has to be justified with regard to each of these grounds. In addition, Section 27.5 states that in cases of multiple discrimination the Federal Anti-discrimination Agency (*Antidiskriminierungsstelle des Bundes*) and the competent agents of the federal government and the Bundestag must cooperate. Multiple discrimination constitutes an aggravating circumstance under the **Romanian** Anti-discrimination Law,<sup>116</sup> as well as in **Portugal** where the level of compensation may then be higher. In **Iceland**, it has been reported that the new comprehensive anti-discrimination legislation to be presented in autumn 2012 will include a provision on multiple discrimination. In **Turkey**, segregation and institutional discrimination based on one or more grounds is mentioned in the anti-discrimination bill but multiple discrimination is not specifically addressed. However, all existing national provisions bear limited effects in practice and case law remains very scarce.<sup>117</sup> In the few existing cases reported, no specific approach with regard to the comparator had been followed by either the courts or the equality bodies.

<sup>111</sup> See Article 2 (1) of Act 3996/2011 concerning the general reform of the Labour Inspectorate adopted on 5 August 2011: “The labour inspectorate supervises the implementation of the principle of equal treatment irrespective of racial or ethnic origin, religion or other beliefs, disability, age or sexual orientation, taking into consideration instances of multiple discrimination in accordance with Article 19 of Act 3304/2005”.

<sup>112</sup> Additional Provisions, § 1.11.

<sup>113</sup> Article 11 (2). Under Art. 11 (1) authorities are placed under a general statutory duty to take positive action whenever necessary to achieve the legislation’s goals.

<sup>114</sup> Article 48 (3).

<sup>115</sup> Tweede kamer 2011-2012, 28 481, no 16, p. 4.

<sup>116</sup> Article 2(6) states that, “Any distinction, exclusion, restriction or preference based on two or more of the criteria foreseen in para. 1 shall constitute an aggravating circumstance in establishing the contraventional responsibility, unless one or more of its components is not subject to criminal law”.

<sup>117</sup> For instance, the National Council for Combating Discrimination reported having issued sanctions against multiple discrimination in seven cases in 2002 and in two cases in 2004. No cases have subsequently arisen.





# **Chapter 2**

## **Definitions and scope**

An overview of Member State and candidate country anti-discrimination legislation reveals considerable progress in this area since the adoption of the Directives. The great majority of states have introduced legislation that expressly forbids each of the four types of discrimination. Moreover, in most cases, the definitions provided in national legislation are very similar to the definitions found in the Directives. Many states have chosen essentially to reproduce the text of the Directives on these core concepts. This chapter will examine the regulation of each type of discrimination across the national legal systems.

At the outset, it should be noted that although states may be described as following the definitions found in the Directives, there are often slight differences between the actual text of national legislation and that of the Directives. Given the frequent absence of case law interpreting the legislation, it is difficult to assess whether small differences in language will be resolved through purposive judicial interpretation or whether there are substantive gaps in national implementation.

### A. Direct discrimination

All EU countries, **Croatia**, the **FYR of Macedonia** and **Norway** have adopted legislation that reflects closely the definition of direct discrimination found within the Directives. There are several common elements:

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

These elements can be generally found in legislation in **Austria, Belgium, Bulgaria, Cyprus**, the **Czech Republic, Denmark, Estonia, Finland, France** (although hypothetical comparison is not covered, in breach of the Directives), **Germany, Greece, Italy, Ireland, Latvia, Lithuania, Luxembourg, Malta, Poland** (although the definition of direct discrimination given in the Labour Code is still erroneous with regard to the comparator), **Portugal, Slovakia, Slovenia, Sweden**, the **United Kingdom, Croatia** and the **FYR of Macedonia**. It should be noted that this legislation does not necessarily apply to the full material scope required by the Directives and it may coexist with other legislation containing different definitions of direct discrimination. Moreover, most states have taken advantage of the opportunity provided for in Article 6 of the Employment Equality Directive to permit justification of direct discrimination on the ground of age.

There is no legislation related to direct discrimination in **Turkey** and **Iceland**.<sup>118</sup> In **Liechtenstein**, direct discrimination is explicitly prohibited on the grounds of gender and disability only.

Although different from the definitions proposed by Directive 2000/43/EC and Directive 2000/78/EC, the 2000 **Romanian** Anti-discrimination Ordinance provides a detailed definition, attempting to cover the whole range of actions and omissions leading to discrimination. The Ordinance allows justifications of direct discrimination in the fields of housing and access to services and access to goods (in breach of Directive 2000/43/EC), if such a “restriction is objectively justified by a legitimate purpose and the methods used to reach such a purpose are adequate and necessary”.<sup>119</sup> In **Slovakia**, the prohibition of general justification of direct discrimination is not explicit and can only be

<sup>118</sup> Definition in **Iceland** is only found for gender.

<sup>119</sup> Article 10, Act 324/2006 on the Amendment of Government Ordinance 137/2000 on the Prevention and Punishment of All Forms of Discrimination, (20 July 2006).

derived from interpretation. In **Bulgaria** the Protection against Discrimination Act does not permit general justification for direct discrimination with respect to any grounds.

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

	Law	Article
<b>AUSTRIA</b>	Federal Equal Treatment Act	§§ 19(1), 32(2)
	Employment of People with Disabilities Act	§ 7c(1)
	Federal Disability Equality Act	§ 5(1)
<b>BELGIUM</b>	Federal Racial Equality Act	Art. 4, 7°
	General Anti-discrimination Federal Act	Art. 4, 7°
<b>BULGARIA</b>	Protection Against Discrimination Act	Art. 4(2)
<b>CROATIA</b>	Anti-discrimination Act	Art. 2/1
<b>CYPRUS</b>	Act on Equal Treatment in Employment and Occupation	Arts. 2, 6(1)(a)
	Act on Equal Treatment irrespective of Race or Ethnic Origin	Arts. 2, 5(2)(a)
	Act on Persons with Disabilities	Arts. 2, 3(a)
<b>CZECH REPUBLIC</b>	Anti-discrimination Act	S. 2 para 3
<b>DENMARK</b>	Act on Prohibition of Differential Treatment in the Labour Market	S. 1, Subsection 2
	Ethnic Equal Treatment Act	S. 3, Subsection 2
<b>ESTONIA</b>	Equal Treatment Act	Art. 3
<b>FINLAND</b>	Non-Discrimination Act	S. 6(2)1
<b>FRANCE</b>	Act on the Adaptation of National Law to Community Law in Matters of Discrimination	Art. 1
<b>FYR of MACEDONIA</b>	Prevention and Protection against Discrimination Act	Art. 6, para 1
<b>GERMANY</b>	General Equal Treatment Act	Art. 3.1
<b>GREECE</b>	Equal Treatment Act	Arts. 5 and 9
<b>HUNGARY</b>	Act on Equal Treatment and the Promotion of Equal Opportunities	Art. 8
<b>ICELAND</b>	<sup>120</sup>	-
<b>IRELAND</b>	Employment Equality Act	S. 6
	Equal Status Act	S. 3
<b>ITALY</b>	Legislative Decree no. 215 on the Implementation of Directive 43/2000	Art. 2
	Legislative Decree no. 216 of 2003 on the Implementation of Directive 78/2000	Art. 2
	Law no. 67 on Measures for the Judicial Protection of Persons with Disabilities Victims of Discrimination	Art. 2
<b>LATVIA</b>	Labour Law	Art. 29(5)
<b>LIECHTENSTEIN</b>	Act on Equality of People with Disabilities	Art. 6§1
<b>LITHUANIA</b>	Equal Treatment Act	Art. 2, para 7
<b>LUXEMBOURG</b>	Equal Treatment Act	Art. 1
<b>MALTA</b>	Equal Treatment in Employment Regulations	Art. 3(2)(a)
	Equal Treatment of Persons Order	Art. 2(2)(a)
<b>NETHERLANDS</b>	General Equal Treatment Act	Art. 1(a) and (b)
	Equal Treatment on the Grounds of Disability and Chronic Disease Act	Art. 1(a) and (b)
	Equal Treatment in Employment on the Ground of Age	Art. 1(1)
<b>NORWAY</b>	Anti-Discrimination Act on Prohibition of Discrimination based on Ethnicity, religion, etc.	S. 4
	Working Environment Act	S.13-1
	Anti-Discrimination and Accessibility Act on Prohibition of Discrimination on the Basis of Disability	S. 4

<sup>120</sup> Direct discrimination is only defined and prohibited in Gender law.

	Law	Article
<b>POLAND</b>	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment	Art. 3
<b>PORTUGAL</b>	Principle of Equal Treatment Act	Art. 3(3)(a)
	Act on the Prohibition of Discrimination based on Disability and Pre-Existing Risk to Health	Art. 3(a)
	Labour Code	Art. 24(1) and 25(1)
<b>ROMANIA</b>	Ordinance on the Prevention and Punishment of All Forms of Discrimination	Art. 2
<b>SLOVAKIA</b>	Act on Equal Treatment in Certain Areas and Protection against Discrimination Equal Treatment Act	S. 2a, para 2
<b>SLOVENIA</b>	Act Implementing the Principle of Equal Treatment	Art. 4(2)
	Employment Relationship Act	Art. 6(3)
	Vocational Rehabilitation and Employment of Disabled Persons Act	Art. 5
<b>SPAIN</b>	Act on Fiscal, Administrative and Social Measures	Art. 28.1.b
<b>SWEDEN</b>	Discrimination Act	Ch. 1, S. 4, point 1
<b>TURKEY</b>	-	-
<b>UNITED KINGDOM</b>	(UK) 2010 Equality Act	S. 13
	(NI) The Race Relations Order	Art. 3
	(NI) Fair Employment and Treatment Order	Art. 3
	(NI) Disability Discrimination Act	S. 3A
	(NI) Employment Equality (Age)	Reg. 3
	(NI) Equality Act (Sexual Orientation) Regulations 2006	Reg. 3

## B. Indirect discrimination

A large proportion of states have introduced a definition of indirect discrimination that generally reflects the definition adopted in the Directives. This includes **Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Spain, Sweden, the United Kingdom, Croatia, the FYR of Macedonia and Norway**. In **Turkey and Iceland**, indirect discrimination is explicitly prohibited on the grounds of gender and maternity only, thus not meeting the requirements laid down in the Directives. In **Liechtenstein**, indirect discrimination covers disability and gender only.

In **Denmark**, the interpretation provided by national courts seems to be narrower than the definition given in the Directives. In **Slovenia**, the law requires individuals to be in an “equal or similar situation and conditions”, without further details. **Slovenian** law therefore seems more restrictive than the Directives.

The Directives envisage a comparison between the effect of a measure on persons of a particular ethnic origin etc. and its impact on other persons. National law varies in the comparison required for establishing indirect discrimination. In the **United Kingdom**, the definition of indirect discrimination requires evidence that the measure placed the individual complainant, as well as the group to which he or she belongs, at a disadvantage.<sup>121</sup>

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

	Law	Article
<b>AUSTRIA</b>	Federal Equal Treatment Act	§§ 19(2), 32(2)
	Employment of People with Disabilities Act	§ 7c(2)
	Federal Disability Equality Act	§ 5(2)

<sup>121</sup> Section 19 of the Equality Act 2010.

	Law	Article
<b>BELGIUM</b>	Federal Racial Equality Act	Art. 4, 9°
	General Federal Anti-discrimination Act	Art. 4, 9°
<b>BULGARIA</b>	Protection Against Discrimination Act	Art. 4 (3)
<b>CROATIA</b>	Anti-discrimination Act	Art. 2/2
<b>CYPRUS</b>	Act on Equal Treatment in Employment and Occupation	Arts. 2, 6(1)(b)
	Act on Equal Treatment irrespective of Race or Ethnic Origin Act	Arts. 2, 5(2)(b)
	Act on Persons with Disabilities	Arts. 2, 3(a)
<b>CZECH REPUBLIC</b>	Anti-discrimination Act	S. 3, para 1 and 2
<b>DENMARK</b>	Act on Prohibition of Differential Treatment in the Labour Market	S. 1, Subsection 3
	Ethnic Equal Treatment Act	S. 3, Subsection 3
<b>ESTONIA</b>	Equal Treatment Act	Art. 3
<b>FINLAND</b>	Non-Discrimination Act	S. 6(2)2
<b>FRANCE</b>	Act on the Adaptation of National Law to Community Law in Matters of Discrimination	Art. 1
<b>FYR of MACEDONIA</b>	Prevention and Protection against Discrimination Act	Art. 6, para 2
<b>GERMANY</b>	General Equal Treatment Act	Art. 3.2
<b>GREECE</b>	Equal Treatment Act	Arts. 3(B) and 7(1)(B)
<b>HUNGARY</b>	Act on Equal Treatment and the Promotion of Equal Opportunities	Art. 9
<b>ICELAND</b>	<sup>122</sup>	-
<b>IRELAND</b>	Employment Equality Act	S. 10 and 22
	Equal Status Act	S. 3
<b>ITALY</b>	Legislative Decree no. 215 on the Implementation of Directive 43/2000	Art. 2
	Legislative Decree no. 216 on the Implementation of Directive 78/2000	Art. 2
	Law no. 64 on Measures for the Judicial Protection of Persons with Disabilities Victims of Discriminations	Art. 2
<b>LATVIA</b>	Labour Law	Art. 29 (6)
<b>LIECHTENSTEIN</b>	Act on Equality of People with Disabilities	Art. 6§2
<b>LITHUANIA</b>	Equal Treatment Act	Art. 2, para 4
<b>LUXEMBOURG</b>	Equal Treatment Act	Art. 1
<b>MALTA</b>	Equal Treatment in Employment Regulations	Art. 3(2)(b)
	Equal Treatment of Persons Order	Art. 2(2)(b)
<b>NETHERLANDS</b>	General Equal Treatment Act	Art. 1(c)
	Equal Treatment on the Grounds of Disability and Chronic Disease Act	Art. 1(c)
	Equal Treatment in Employment on the Ground of Age Act	Art. 1(1)
<b>NORWAY</b>	Anti-Discrimination Act on Prohibition of Discrimination based on Ethnicity, Religion, etc.	S. 4
	Working Environment Act	S. 13-1
	Anti-Discrimination and Accessibility Act on Prohibition of Discrimination on the Basis of Disability	S. 4
<b>POLAND</b>	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment	Art. 3
<b>PORTUGAL</b>	Principle of Equal Treatment Act	Art. 3(3)(b)
	Act on the Prohibition of Discrimination based on Disability and Pre-Existing Risk to Health	Art. 3(b)
	Labour Code	Art. 24(1) and 25(1)
<b>ROMANIA</b>	Ordinance on the Prevention and Punishment of All Forms of Discrimination	Art. 2(3)
<b>SLOVAKIA</b>	Act on Equal Treatment in Certain Areas and Protection against Discrimination	S. 2a, para 3

<sup>122</sup> Indirect discrimination is only defined and prohibited in Gender law.

	Law	Article
<b>SLOVENIA</b>	Act Implementing the Principle of Equal Treatment	Art. 4(3)
	Employment Relationship Act	Art. 6(3)
	Vocational Rehabilitation and Employment of Disabled Persons Act	Art. 5
<b>SPAIN</b>	Act on Fiscal, Administrative and Social Measures	Art. 28.1.c
<b>SWEDEN</b>	Discrimination Act	Ch. 1, S. 4, point 2
<b>TURKEY</b>	-	-
<b>UNITED KINGDOM</b>	(UK) 2010 Equality Act	S. 19
	(NI) Race Relations Order	Art. 3
	(NI) Fair Employment and Treatment Order	Art. 3
	(NI) Employment Equality (Age)	Reg. 3
	(NI) Employment Equality (Sexual Orientation)	Reg. 3

### C. Harassment

The concept of harassment, in particular sexual harassment, was traditionally developed in the 1990s from EU gender equality legislation. Harassment in the Anti-discrimination Directives does not differ much from the baseline established, and is defined as unwanted conduct relating to racial or ethnic origin, religion or belief, disability, age, or sexual orientation with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.<sup>123</sup> The majority of states have adopted definitions of harassment that appear similar to that contained in the Directives. This includes **Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovenia, the United Kingdom, Croatia, the FYR of Macedonia and Norway**. In **Spain**, 'hostile' and 'degrading' are not included in the national definition, which refers to the creation of an intimidating, humiliating or offensive environment only. In **Romania**, harassment is defined in the 2000 Anti-discrimination Ordinance, in the Act on Equal Opportunities between Men and Women and in the Criminal Code, but none of the definitions provided are in complete compliance with the definition of harassment set out in the Directives. They refer only to unwanted conduct related to any of the grounds with the effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment and not to unwanted conduct relating to any of the grounds with the purpose or effect of violating the dignity of a person, etc. In **Turkey**, only sexual harassment is explicitly prohibited and is punishable under criminal law if it constitutes defamation.<sup>124</sup> Otherwise the concept has not been defined by law. Likewise, only sexual harassment and harassment on grounds of gender is protected in **Iceland** and in **Liechtenstein** only harassment on grounds of disability is covered.

#### **Racial harassment found against a sales representative of (black) South African origin in Ireland<sup>125</sup>**

The plaintiff started employment in July 2005 as a residential sales representative, entailing door-to-door (cold-calling) sales. He alleged racial harassment, including an offensive racist joke and denial of promotion and claimed that he was subjected to consistent verbal harassment on grounds of race by a colleague and the Regional Sales Manager.

In relation to the issue of harassment, the Equality Officer was satisfied on the evidence that such incidents did take place and that the complainant brought these formally to the attention of the company. The company did investigate the alleged harassment, but the Equality Officer did not find its investiga

<sup>123</sup> Article 2(3).

<sup>124</sup> See Articles 24 and 25 of the Labour Law and Articles 94 and 105 of the Criminal Code.

<sup>125</sup> Equality Officer decision, DEC-E2011-025.

tion objective and impartial but rather was of the view that it had set out to prove the complainant wrong. In relation to the promotion aspect, at the hearing the Equality Officer asked for the profile of nationalities of field sales representative and of those promoted to Team Coach/Team Leader/Regional Sales Manager. 85% to 90% of approximately 300 Field Sales Representatives were foreign nationals. There had been 19 promotions to team leader since 2007, 16 of these were Irish, one was South African (white), one was Australian and one was British. It was significant that even though foreign nationals made up 85% to 90%

of field sales representatives, only 16% of non-Irish nationals were promoted above this level. Regarding length of service before being promoted, the shortest length of service was 7.23 months and the longest was 54.6 months.

The complainant had been working there 48 months before he went on sick leave due to the effects of the harassment. The Equality Officer accepted evidence that employees on the complainant's team did not apply for promotions without the approval of the Area Sales Manager, and that promotional vacancies were filled without the complainant being advised by this person of these vacancies. Therefore, the Equality Officer was satisfied that the complainant had established a *prima facie* case that he was not allowed access to promotion in the same way as Irish Nationals were and the respondent failed to rebut this.

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

The Directives do not provide specific rules on how to determine whether conduct is such as to violate a person's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment. Several states have sought to clarify this in national legislation. For instance, under **Slovakia's** Anti-discrimination Act harassment means conduct which results in or may result in the creation of an intimidating, unfriendly, shameful, humiliating, degrading or offensive environment and which has or may have the purpose or effect of violating a freedom or human dignity. In the Equal Treatment of Persons Order in **Malta**, harassment refers to any unwelcome act, request or conduct, including spoken words, gestures or the production, display or circulation of written words, pictures or other material that any person can be subjected to. **Finland** provides a wider definition as it covers the violation of physical integrity in addition to the violation of dignity and includes not only individuals but also groups. In **Cyprus**, the Code of Conduct on Disability Discrimination issued by the Equality Body in September 2010 explains the law and provides concrete examples regarding harassment in the workplace.

#### **Interpretation of harassment by Hungarian courts**

In 2009, the Mayor of Kiskunlacháza (central Hungary) spoke at a public demonstration held after the murder of a young girl about the population having had enough of 'Roma aggression' and made other statements giving the impression that he believed the murder to have been committed by Roma.

On 19 October 2009, the Hungarian Helsinki Committee filed an *actio popularis* claim to the Equal Treatment Authority concerning the Mayor's statements, alleging that by making statements capable of stirring up negative sentiment against the Roma community and creating a hostile environment for its members, he had committed harassment. In its decision dated 19 January 2010, the Equal Treat

ment Authority established that harassment had been committed.<sup>126</sup> The Mayor filed an application for the decision to be reviewed. The Metropolitan Court quashed the Authority's decision and ordered a new hearing on 4 October 2010, arguing that the Mayor's statements were not made in any official capacity. Relying to Article 4 of the Equal Treatment Act, the Court stated that mayors must comply with anti-discrimination law in their capacity as elected representatives and in legally regulated social relations with residents of the municipalities that they are in charge of, including when they carry out procedures and take measures relating to those residents. Statements made during in a demonstration or in newspapers do not fall within the scope of the Equal Treatment Act.

On appeal, the Supreme Court found that the Mayor had unquestionably made the statements in his official capacity,<sup>127</sup> and referred the case back to the Equal Treatment Authority to determine whether the public statements fell within the scope of any of the Mayor's statutory tasks or competences defined by law or whether they can be regarded as acts that do not fall within the Mayor's statutory remit but create 'legally regulated social relations' between members of the group concerned and the Mayor. In addition, the Supreme Court instructed the Authority to examine whether harassment can be committed against a group since the legal definition of harassment mentions 'person' with no reference to a 'group'.

In the new proceedings, the Authority pointed out that under Article 8 of the Local Councils Act, local councils are responsible for ensuring the rights of national and ethnic minorities, including their right to live peacefully in settlements.<sup>128</sup> The Authority then referred to Decision 961/B/1993 of the Constitutional Court, which ruled that mayors fulfill a representative role as part of their obligations under public law. Consequently, when a mayor speaks at a public demonstration he exercises statutory functions falling within the scope of the Equal Treatment Act. In addition, the Authority stated that not only direct and indirect discrimination may be committed against groups but also harassment within the meaning of the Equal Treatment Act. The Authority based its findings on the reasons contained in the Preamble to the Equal Treatment Act and on the fact that *actio popularis* claims (which necessarily concern groups) are not excluded with regard to harassment.

The Authority concluded that since the Equal Treatment Act applies to statements made by mayors, harassment can be committed against groups and the Mayor's statements were definitely capable of creating a humiliating and threatening environment for the local Roma community, harassment had occurred. At the time of writing, we did not know whether the Mayor will appeal the decision but it is very likely that the case will reach the Supreme Court again.

Another area left open by the Directives is the responsibility of the employer for acts of harassment by other workers or by third parties such as customers. In many states, employers can be held liable for the actions of their workers to varying degrees. Some countries have chosen to place a specific duty on employers to take action to prevent and redress harassment in the workplace. For example, the 2006 **German** General Equal Treatment Act places employers under a legal duty to prevent discrimination occurring in the workplace. This includes a duty to protect employees from discrimination by third parties.<sup>129</sup> Similarly, **Norway** imposes a special duty on employers to prevent harassment in their areas of responsibility. **Croatia** obliges employers to protect employees' dignity against the conduct of superiors, co-workers and third persons in connection with the work performed, if this conduct is unwanted and contrary to special

<sup>126</sup> Equal Treatment Authority decision EBH no. 187/2010.

<sup>127</sup> Supreme Court decision no. Kfv.III.39.302/2010/8 of 18 October 2011.

<sup>128</sup> Equal Treatment Authority Decision EBH/21/2012 of 20 April 2012.

<sup>129</sup> Section 12.4 AGG.



regulations.<sup>130</sup> **Ireland** also prohibits harassment by an employer, a colleague, a client, customer or other business contact of the employer.<sup>131</sup> **Sweden** is not so explicit regarding co-workers and third parties. In the **Netherlands**, colleagues cannot be held responsible for harassment whereas the employer or individuals acting on their behalf can be held liable. In **Belgium**, further to the dismissal of a trade union representative charged with harassment in November 2010, the **Belgian** association of employers called for the development of a general code of practice on harassment with trade unions but it has not yet been adopted. In **Hungary**, the Equal Treatment Act does not provide protection against harassment committed by colleagues at work and in the **United Kingdom** the government announced its intention to repeal the provisions dealing with third party harassment.

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

	Law	Article
<b>AUSTRIA</b>	Federal Equal Treatment Act	§§ 21, 34
	Employment of People with Disabilities Act	§ 7d
	Federal Disability Equality Act	§ 5(3)
<b>BELGIUM</b>	Federal Racial Equality Act	Art. 4, 10°
	General Federal Anti-discrimination Act	Art. 4, 10°
<b>BULGARIA</b>	Protection Against Discrimination Act	Art. 5 in conjunction with § 1.1. Additional Provisions
<b>CROATIA</b>	Anti-discrimination Act	Art. 3/1
<b>CYPRUS</b>	Act on Equal Treatment in Employment and Occupation	Arts. 2, 6(1)(c)
	Act on Equal Treatment irrespective of Race or Ethnic Origin	Arts. 2, 5(2)(c)
	Act on Persons with Disabilities	Arts. 2, 3(b)
<b>CZECH REPUBLIC</b>	Anti-discrimination Act	S. 4, para 1 and 2
<b>DENMARK</b>	Act on Prohibition of Differential Treatment in the Labour Market	S. 1, Subsection 4
	Ethnic Equal Treatment Act	S. 3, Subsection 4
<b>ESTONIA</b>	Equal Treatment Act	Art. 3
<b>FINLAND</b>	Non-Discrimination Act	S. 6(2)3
<b>FRANCE</b>	Act on the Adaptation of National Law to Community Law in Matters of Discrimination	Art. 1
<b>FYR of MACEDONIA</b>	Prevention and Protection against Discrimination Act	Art. 7(1)
<b>GERMANY</b>	General Equal Treatment Act	Art. 3.3
<b>GREECE</b>	Equal Treatment Act	Art. 2
<b>HUNGARY</b>	Act on Equal Treatment and the Promotion of Equal Opportunities	Art. 10(1)
<b>ICELAND</b>	<sup>132</sup>	-
<b>IRELAND</b>	Employment Equality Act	S. 14A
	Equal Status Act	S. 11
<b>ITALY</b>	Legislative Decree no. 215 on the Implementation of Directive 43/2000	Art. 2
	Legislative Decree no. 216 on the Implementation of Directive 78/2000	Art. 2
	Law no. 67 on Measures for the Judicial Protection of Persons with Disabilities who are Victims of Discrimination	Art. 2
<b>LATVIA</b>	Labour Law	Art. 29(7)
<b>LIECHTENSTEIN</b>	Act on Equality of People with Disabilities	Art. 6
<b>LITHUANIA</b>	Equal Treatment Act	Art. 2, para 5
<b>LUXEMBOURG</b>	Equal Treatment Act	Art. 1
<b>MALTA</b>	Equal Treatment in Employment Regulations	Art. 3(3)
	Equal Treatment of Persons Order	Art. 2(2)(c)

<sup>130</sup> Article 5(5) of the Labour Act.

<sup>131</sup> Section 14A(1)(a), Employment Equality Act 1998-2008.

<sup>132</sup> Harassment is only defined and prohibited in Gender law.

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	Law	Article
<b>NETHERLANDS</b>	General Equal Treatment Act	Art. 1 a
	Equal Treatment on the Grounds of Disability and Chronic Disease Act Disability Discrimination Act	Art. 1 a
	Equal Treatment in Employment on the Ground of Age Act	Art. 2
<b>NORWAY</b>	Anti-Discrimination Act on Prohibition of Discrimination based on Ethnicity, religion, etc.	S. 5
	Working Environment Act	S.13-1(2)
	Anti-Discrimination and Accessibility Act on Prohibition of Discrimination on the Basis of Disability	S. 6
<b>POLAND</b>	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment	Art. 3
<b>PORTUGAL</b>	Labour Code	Art. 29(1)
<b>ROMANIA</b>	Ordinance on the Prevention and Punishment of All Forms of Discrimination	Art. 2(5)
<b>SLOVAKIA</b>	Act on Equal Treatment in Certain Areas and Protection against Discrimination	S. 2a, para 4
<b>SLOVENIA</b>	Act Implementing the Principle of Equal Treatment	Art. 5
	Employment Relationship Act	Art. 6(a)
<b>SPAIN</b>	Act on Fiscal, Administrative and Social Measures	Art. 28.1.d
<b>SWEDEN</b>	Discrimination Act	Ch. 1, S. 4, point 3
<b>TURKEY</b>	-	-
<b>UNITED KINGDOM</b>	(UK) 2010 Equality Act	S. 16
	(NI) Race Relations Order	Art. 4A
	(NI) Fair Employment and Treatment Order	Art. 3A
	(NI) Employment Equality Act (Sexual Orientation) Regulations 2006	Reg. 5
	(NI) Disability Discrimination Act	S. 3B
	(NI) Employment Equality (Age)	Reg. 6

#### D. Instructions to discriminate

The Directives contain a provision stating that “an instruction to discriminate (...) shall be deemed to be discrimination”.<sup>133</sup> A similar provision has been included in the national legislation of the great majority of countries,<sup>134</sup> with a small number of exceptions (e.g. **Turkey** and **Iceland**). Under **Bulgarian** and **Croatian** law, only an intentional instruction to discriminate is regarded as discrimination. In addition, the **Bulgarian** Protection against Discrimination Act requires the perpetrator to be in a position of influencing others. Similarly, in **Norway**, a relationship of subordination, obedience or dependency between the instructor and the person receiving instructions must exist. In **France** such a provision was introduced by Act 2008-496, although general legal principles on complicity and liability were previously able to produce similar effects. For instance, unlawful discrimination was found where an estate agent refused to rent accommodation to people with surnames of ‘foreign origin’ following instructions from the owner.<sup>135</sup> **UK** law does not expressly regulate instructions to discriminate, though less favourable treatment “because of” a protected ground is regarded as including an instruction to discriminate on protected grounds.<sup>136</sup> **Turkey** and **Iceland** do not prohibit instructions to discriminate.

<sup>133</sup> Article 2(4), Directives 2000/43/EC and 2000/78/EC.

<sup>134</sup> In **Liechtenstein** instruction to discrimination is explicitly prohibited on the grounds of gender and disability only.

<sup>135</sup> Court of Cassation, Criminal Chamber, 7 June 2005, no. 04-87354.

<sup>136</sup> *Weathersfield Ltd (t/a Van & Truck Rentals) v Sargent* [1999] ICR 425.

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

	<b>Law</b>	<b>Article</b>
<b>AUSTRIA</b>	Federal Equal Treatment Act	§§ 19(3), 32(3)
	Employment of People with Disabilities	§ 7c(8)
	Federal Disability Equality Act	§ 5(4)
<b>BELGIUM</b>	Federal Racial Equality Act	Art. 4, 12°
	General Federal Anti-discrimination Act	Art. 14
<b>BULGARIA</b>	Protection Against Discrimination Act	Art. 5 in conjunction with § 1.4. Additional Provisions
<b>CROATIA</b>	Anti-discrimination Act (judicial interpretation required) <sup>137</sup>	Art. 4/1
<b>CYPRUS</b>	Act on Equal Treatment in Employment and Occupation	Arts. 2, 6(1)(d)
	Act on Equal Treatment irrespective of Race or Ethnic Origin	Arts. 2, 5(2)(d)
	Act on Persons with Disabilities	Art. 2, 3(a)
<b>CZECH REPUBLIC</b>	Anti-discrimination Act	S. 4, para 4
<b>DENMARK</b>	Act on Prohibition of Differential Treatment in the Labour Market	S.1, Subsection 5
	Ethnic Equal Treatment Act	S. 3, Subsection 5
<b>ESTONIA</b>	Equal Treatment Act	Art. 3
<b>FINLAND</b>	Non-Discrimination Act	s. 6(2)4
<b>FRANCE</b>	Act on the Adaptation of National Law to Community Law in Matters of Discrimination	Art. 1
<b>FYR of MACEDONIA</b>	Prevention and Protection against Discrimination Act	Art. 9
<b>GERMANY</b>	General Equal Treatment Act	Art. 3.5
<b>GREECE</b>	Equal Treatment Act	Art. 2
<b>HUNGARY</b>	Act on Equal Treatment and the Promotion of Equal Opportunities	Art. 7(1)
<b>ICELAND</b>	-	-
<b>IRELAND</b>	Employment Equality Act	S. 2 (a)
	Equal Status Act	S.2(1) and 2(a)
<b>ITALY</b>	Legislative Decree no. 215 on the Implementation of Directive 43/2000	Art. 2
	Legislative Decree no. 216 on the Implementation of Directive 78/2000	Art. 2
<b>LATVIA</b>	Labour Law	Art. 29(4)
<b>LIECHTENSTEIN</b>	Act on Equality of People with Disabilities	Art. 9
<b>LITHUANIA</b>	Equal Treatment Act	Art. 2, para 8
<b>LUXEMBOURG</b>	Equal Treatment Act	Art. 1
<b>MALTA</b>	Equal Treatment in Employment Regulations	Art. 3(4)
<b>NETHERLANDS</b>	General Equal Treatment Act	Art. 1(a) and (b)
	Equal Treatment on the Grounds of Disability and Chronic Disease Act	Art. 1 (a)
	Equal Treatment in Employment on the Ground of Age Act	Art. 1(2)
<b>NORWAY</b>	Anti-Discrimination Act on Prohibition of Discrimination based on Ethnicity, religion, etc.	S. 6
	Working Environment Act	S.13-1(2)
	Anti-Discrimination and Accessibility Act on Prohibition of Discrimination on the Basis of Disability	S.7
<b>POLAND</b>	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment	Arts. 3 and 9
<b>PORTUGAL</b>	Principle of Equal Treatment Act	Art. 3 (5)
	Act on the Prohibition of Discrimination based on Disability and Pre-Existing Risk to Health	Arts. 2, 3, 4(a) to (m), 5(1) (a) to (c)
<b>ROMANIA</b>	Ordinance on the Prevention and Punishment of All Forms of Discrimination	Art. 2(2)

<sup>137</sup> The law prohibits intentional encouragement to discriminate, but it does not specifically address instructions to discriminate.

	Law	Article
<b>SLOVAKIA</b>	Act on Equal Treatment in Certain Areas and Protection against Discrimination	S. 2a, para 6
<b>SLOVENIA</b>	Act Implementing the Principle of Equal Treatment	Art. 4(4)
	Employment Relationship Act	Art. 6(3)
<b>SPAIN</b>	Act on Fiscal, Administrative and Social Measures	Art. 28.2
<b>SWEDEN</b>	Discrimination Act	Ch. 1, S. 4, point 5
<b>TURKEY</b>	<sup>138</sup>	-
<b>UNITED KINGDOM</b>	(UK) Equality Act	s. 111
	(NI) The Race Relations Order	Art. 30
	(NI) Fair Employment and Treatment Order	Art. 35
	(NI) Disability Discrimination Act	S. 16C/28UB

## E. Personal scope

The Racial Equality Directive and Employment Equality Directive are applicable to all persons. This means that national anti-discrimination laws should apply to all persons on a Member State's territory, irrespective of whether they are EU or third-country nationals. On the whole, protection against discrimination in the Member States on any of the grounds included in the Directives is not conditional on nationality, citizenship or residence status.<sup>139</sup> Even so, some countries have included nationality in their list of protected grounds (see table page 69).

Recital 16 of the Racial Equality Directive states that it is important to protect all natural persons against discrimination and that Member States should also provide, where appropriate and in accordance with their national traditions and practice, protection for legal persons where they suffer discrimination on the grounds of the racial or ethnic origin of their members. The Employment Equality Directive does not have an equivalent recital, but there is no reason why both natural and legal persons should not be understood under the term 'persons' in this Directive as well. In most countries both natural and legal persons are protected against discrimination. Where the law does not expressly distinguish between the two, this is assumed, as for instance in **Bulgaria**, **Greece** and **Latvia**. Legal persons remain categorically unprotected in **Swedish** law,<sup>140</sup> and in **Austria** the wording of the legislation implies that protection against discrimination is provided for natural persons only, while in **Estonia** the Equal Treatment Act refers to the rights of persons and the local legal tradition implies that only natural persons can be victims of discrimination (unless this is challenged in the national courts). In the **Czech Republic**, while liability applies to both legal and natural persons, only natural persons have a right to equal treatment and protection against discrimination pursuant to the Anti-discrimination Act. Similarly, the Act on Equality of People with Disabilities in **Liechtenstein** seems to refer to natural persons only.

Neither Directive indicates whether it should be understood as making both natural and legal persons liable for discriminatory acts. Nor do they state who exactly should be held liable for discriminatory behaviour. This issue is discussed above in relation to harassment. The question of liability is particularly relevant in cases of discrimination in employment, as often the employer bears responsibility for the actions of his or her employees, for example, for

<sup>138</sup> However, the Law on Civil Servants prohibits chiefs of civil servants to give them orders that are in violation of the law.

<sup>139</sup> In **France**, for example, the principle of equality is applicable to non-nationals unless the legislator can justify a difference in treatment on the basis of public interest, cf. Constitutional Council, 22 January 1990, 296 DC, R.F.D.C. No. 2 1990, obs. Favoreu.

<sup>140</sup> In **Sweden**, the Discrimination Inquiry Commission has proposed protection for legal persons in a number of areas (but not all) covered by non-discrimination legislation (SOU 2006:22, page 332 *et seq.*). However, this proposal has not been finally accepted.

discrimination against a client or for harassment by one employee against another. For instance, in **Ireland**,<sup>141</sup> the **Netherlands**<sup>142</sup> and **Sweden**, anti-discrimination legislation is directed at employers, and usually the person who actually acted in a discriminatory way cannot be held personally liable. Due to the limits to the personal scope of the Equal Treatment Act in **Hungary**, the law does not provide for protection against harassment committed by colleagues. In **Bulgaria**, the courts have interpreted the Protection against Discrimination Act as providing a basis to hold legal entities liable for discrimination by their employees even where no damages but other remedies have been sought. In contrast, in **Spain** liability for discrimination is personal and only the person (natural or legal) who has acted in a discriminatory way is liable under the law, rather than the employer or service provider.

It is less common to make employers liable for the actions of third parties, such as tenants, clients or customers who discriminate against their employees. In **Portugal**, for instance, employers and providers of services can only be held liable for actions of third parties where a special duty of care is imposed by law or where a special relationship can be established, for example sub-contractors.<sup>143</sup> Similarly, in the **Netherlands** records of parliamentary debates are thought to make clear that the **Dutch** legislature did not intend that anti-discrimination legislation should be enforceable against a colleague or a third party, on the basis that there is no contract or relationship of authority between the parties.<sup>144</sup> Pursuant to **Croatian** anti-discrimination law, employers and service providers cannot be held liable for actions of third parties but employers are obliged to ensure the dignity of their employees against the conduct of persons whom they regularly meet in connection with their work.<sup>145</sup> In the **FYR of Macedonia**, liability for third party conduct would depend upon the character of the relationship and future court practice regarding this matter. **Turkish** criminal law does not allow employers to be held liable for employees or third persons, whereas civil law only covers liability for employees. In **Romania**, liability is individual; according to the case law of the national equality body, employers can be held liable for actions of their employees if there is joint responsibility, but not for actions of third parties. The national equality body has used personal liability in determining the degree of responsibility of each party.

#### Conditions for engaging a private company's liability for actions of a contractor clarified in Romania<sup>146</sup>

Lavinia Rausch was refused entrance to a night club in Romania. The doorman argued that she could not use her wheelchair because the venue was crowded. She was again denied access on different nights, although the club was empty. Before the National Council on Combating Discrimination (NCCD), the respondent invoked logistical conditions which made it difficult for people using a wheelchair to access the venue even though there was a ramp. However, with prior notice, appropriate measures could be taken to allow people with disabilities to enter and to provide adequate staff assistance. In addition, the club claimed that the plaintiff had been invited to remain on the terrace which was acces

<sup>141</sup> Section 8(1) of the Employment Equality Act 1998-20087 prohibits discrimination by employers and employment agencies. Most of the prohibitions within the legislation are aimed at the employer, and no clear provision is made to enable actions against the person(s) who actually discriminated. The exceptions are Section 14 of the Act, which refers to liability being imposed on a person responsible for procuring or attempting to procure discrimination, and Section 10 which refers to liability being imposed on a person who displays discriminatory advertising.

<sup>142</sup> **Dutch** legislation in the field of employment is directed towards employers, employers' organisations, organisations of workers, employment offices, public job agencies, professional bodies, training institutions, schools, universities etc.

<sup>143</sup> Article 617(2) of the Labour Code.

<sup>144</sup> Explanatory Memorandum to the Act on Equal Treatment on the ground of Age in Employment, Occupation and Vocational Training (Act on Equal Treatment on the Ground of Age in Employment), Second Chamber of Parliament, 2001-2002, 28 170, No. 3, p.19.

<sup>145</sup> Article 5(5) of the Labour Act.

<sup>146</sup> National Council on Combating Discrimination, *L Rausch v S.C. Elaine S.R.L.*, decision 365 of 14 September 2011.

sible to wheelchairs and that the doorman was not an employee of the club, but working for a security company under a subcontract.

The NCCD found discrimination in access to services to the public and discrimination affecting the right to human dignity on grounds of disability. The decision also clarified the conditions in which a company may be held liable for discriminatory acts by subcontractors. Private companies are under an obligation to include clauses on equality and non-discrimination and management of discrimination cases in their internal regulations. The NCCD ordered the company owning the bar to pay a total of ROM 5,000 (EUR 1,100), reportedly the highest fine imposed so far in such a discrimination case.

Trade unions and other trade or professional organisations are usually not liable for the discriminatory actions of their members, except in **Denmark** where trade unions are liable if an employee of the trade union discriminates against a member of the trade union. However, that liability is restricted to the actions of employees only. In **Norway**, trade unions can be held liable for actions of their members only if they operate on behalf of the organisation or if key members give instructions.

## F. Material scope

Both the Racial Equality Directive and the Employment Equality Directive require discrimination to be forbidden in employment and vocational training. Article 3(1) of both Directives lists the areas in which the principle of equal treatment must be upheld.

### Material scope of the Racial Equality and Employment Equality Directives

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

The material scope of the Directives is met in **Austria, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Malta, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, the United Kingdom, Croatia, the FYR of Macedonia and Norway** but not in **Turkey, Iceland and Liechtenstein**. In **Belgium**, the division of competences between the different levels of government still causes

discrepancies regarding the implementation of the material scope of the Directives.<sup>147</sup> In the **Czech Republic** the Anti-discrimination Act of 17 June 2009 has quite a broad scope, extending beyond the requirements of the Directives, as it covers, for all grounds to the same extent, work and employment relations; access to employment, self-employment and occupation; healthcare; education; social security and social protection; social advantages; and services including housing. In **Slovakia**, the prohibition of discrimination applies also to all these fields for all prohibited grounds which go beyond the list contained in the Directives (although the prohibition of discrimination in the field of housing only applies to legal persons and entrepreneurs).

To fulfil the requirements of the Directives, national anti-discrimination law must apply to the public and private sectors, including public bodies. Not all states currently meet this requirement. In the **FYR of Macedonia**, there is no equivalent and consistent approach for the public sector. Article 5 of the **Turkish** Labour Act prohibiting discrimination applies to employees under a labour contract, irrespective of whether they work in the public or the private sector. Some categories of workers are, however, excluded from the scope of the Labour Act, such as workers performing sea and air transport activities or domestic services, and civil servants who are subject to the Civil Servants Act. In the same way, in **Hungary** not all private actors are covered by the Equal Treatment Act of 2003. The **Hungarian** legislature took a unique approach among the EU Member States, in that it does not enumerate the fields falling under its scope, but instead lists the public and private entities which must respect the requirement of equal treatment in all actions falling under the scope of the Equal Treatment Act. These are mostly public bodies and include state, local and minority self-governments and public authorities (Article 4 of the Equal Treatment Act). Four groups of private actors are listed (Article 5): (i) those who offer a public contract or make a public offer; (ii) those who provide public services or sell goods; (iii) entrepreneurs, companies and other private legal entities using state support; and (iv) employers and contractors.

## Employment

Equality must be guaranteed in all sectors of public and private employment and occupation, including contract work, self-employment, military service and statutory office. A number of countries fall short of this protection. Military service is not included in the scope of legislation transposing the Directives in, for instance, **Latvia**, **Greece** and **Ireland**, while in the **Netherlands** the Age Discrimination Act has applied to military service only since 1 January 2008.

In **Greece**, **Latvia**, **Lithuania**<sup>148</sup> and the **United Kingdom**, self-employment and/or occupation are not fully covered. Partial amendments have been enacted for racial and ethnic origin to bring the **Latvian** anti-discrimination law in line with EU provisions on self-employment.<sup>149</sup> Gaps with regard to the other grounds in the field of employment still remain. Act 3/2011 of 5 February 2011 has eventually transposed the EU Directives with regard to self-employment in **Portugal**. **Maltese** law does not apply to military personnel or to people who work or perform services in a professional capacity or as contractors for others where the work or service is not regulated by a specific contract of service. With respect to people who hold statutory office, the **Maltese** Employment and Industrial Relations Act 2002 only applies if the person concerned has a contract of employment. In the **Netherlands** the term 'liberal profession' has been used instead of self-employment but has at all times been interpreted broadly, in particular by the Equal Treatment

<sup>147</sup> For instance, although the Region of Brussels-Capital filled the gap with regard to social housing in March 2009, discrepancies still persist as regards social advantages and access to goods and services in general, which are regional competences.

<sup>148</sup> Self-employment is not explicitly mentioned in the Equal Treatment Act, and legislation regulating particular professions such as attorney, notary, etc., does not provide anti-discrimination provisions. Further interpretation of the Equal Treatment Act by courts or the Equal Opportunities Ombudsman is required.

<sup>149</sup> Amendments to the act on the prohibition of discrimination of natural persons who are economic operators adopted on 21 May 2009, published in *Latvijas Vēstnesis*, 89 (4075), 9 June 2009, amendments adopted on 25 February 2010, published in *Latvijas Vēstnesis*, 43 (4235), 17 March 2010.



Commission, in order to guarantee that not only doctors, architects etc. are covered, but also freelancers, sole traders, entrepreneurs etc.

In **Lithuania**, a provision prohibiting discrimination with regard to membership of or involvement in employers' and employees' organisations was introduced into the Equal Treatment Act only by the latest amendments of June 2008. Likewise, the **Romanian** Anti-discrimination Ordinance does not expressly spell out the prohibition of discrimination on grounds of membership of a trade union or professional organisation. However, the national equality body and the courts have interpreted that membership of trade unions or professional organisations falls under the protected ground of 'social category' or under 'any other category' and is therefore protected by anti-discrimination legislation. A similar reasoning applies in the **FYR of Macedonia**.

### **Social protection**

Concerns remain with regard to the transposition of the Racial Equality Directive beyond the employment sphere in **Lithuania**. There are no specific provisions referring to social protection on the protected grounds of the Directives in **Turkey, Iceland** and **Liechtenstein**. In **Lithuania**, the Equal Treatment Act does not explicitly cover social security and healthcare but it does envisage a general duty to implement equal opportunities: "State and local government institutions and agencies must within the scope of their competence ensure that in all the legal acts drafted and passed by them, equal rights and treatment are laid down without regard to gender, sexual orientation, age, disability, race, ethnicity, origin, religion, beliefs or convictions, language and social status". This could be interpreted to encompass social security and healthcare as well, as these fields are not explicitly excluded either. The Ombudsman has given a divergent reading where social security and social protection do not fall under the scope of the Equal Treatment Act, and whereas healthcare does, since the wording of the Act regarding goods and services is broad enough to include healthcare services.<sup>150</sup> In **Poland**, the new Equal Treatment Act widens the material scope of anti-discrimination legislation on grounds of racial and ethnic origin and now fully covers fields beyond employment, including social protection and healthcare, education, and access to goods and services, including housing.

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

### **Social advantages**

The term 'social advantages' is mostly left undefined in national legislation. In the **Netherlands** it is observed by the government in the Explanatory Memorandum to the General Equal Treatment Act that this notion must be interpreted in the light of CJEU case law rendered in the context of Regulation 1612/68 on the free movement of workers.<sup>151</sup> In the **Dutch** government's view, the notion of social advantages refers to advantages of an economic and cultural nature

<sup>150</sup> Equal Opportunities Ombudsperson, Annual Report for 2010, available in Lithuanian at [www.lygybe.lt](http://www.lygybe.lt).

<sup>151</sup> See for example CJEU Case C-261/83 *Castelli* of 12 July 1984 and Case C-249/83 *Hoecx* of 27 March 1985, as referred to in the **Dutch** Explanatory Memorandum to the EC Implementation Act, Second Chamber of Parliament 2002-2003, 28 770, no. 3, p. 15.



which may be granted by both private and public entities. These may include student grants and price concessions for public transport and cultural or other events. Advantages offered by private entities include, for example, concessionary prices for the cinema and theatre.

## Education

In the majority of states, issues arise in relation to discrimination in the education of children from racial and ethnic minorities. Of particular concern is the segregation of Roma children, which constitutes one of the most widespread manifestations of discrimination against the Roma. Another common issue that arises is the lack of data in many states on the socio-economic situation of people vulnerable to racial discrimination. This makes it difficult to identify the extent of disadvantage and whether any progress is being made in reducing inequalities.

Roma segregation in education provides a good example of the serious challenges faced by several states in terms of implementation and effective enforcement,<sup>152</sup> including **Bulgaria**, the **Czech Republic**, **Cyprus**,<sup>153</sup> **Finland**, **Greece**, **Hungary**, **Poland**, **Romania**, **Slovakia**, **Croatia** and the **FYR of Macedonia**.

There are Roma in all the countries covered with the apparent exception of **Luxembourg**, **Malta**, **Iceland** and **Liechtenstein**. In **Bulgaria**, the **Czech Republic**, **Hungary**, **Latvia**, **Poland**, **Romania**, **Slovakia** and **Croatia**, a disproportionate number of Roma children attend remedial 'special' schools for children with intellectual disabilities and are thereby segregated from the mainstream school system and receive an inferior level of education, which affects their life chances.<sup>154</sup> In **Romania**, 60% of Roma children attending pre-school go to segregated kindergartens, according to a UNICEF report released in 2011.<sup>155</sup>

Segregation of the Roma also occurs in some mainstream schools by virtue of the existence of segregated classes. This is the case in **Bulgaria**, the **Czech Republic**, **Finland**, **Greece**, **Hungary**, **Latvia**, **Poland**, **Romania**, **Slovakia**, **Slovenia** and **Croatia**. In **Poland** there were a number of segregated 'Roma classes' or 'remedial classes' which followed a special curriculum but the situation is gradually improving. In 2008, the Minister of Education decided to stop the creation of new Roma classes and to abolish the existing Roma classes within a period of two years (2009-2010).<sup>156</sup> This means that as of 2011 there should be no more Roma classes in **Poland**. In 2008, there were 68 Roma-only classes in **Croatia**. In **Slovakia** 'zero-grade' classes have been established for children who are not expected to be able to absorb the standard curriculum as a result of their social and linguistic environment. Although formulated neutrally, these measures have in practice been aimed most specifically at Roma children, and Roma children are also their almost exclusive beneficiaries. In **Finland**, the Roma are streamed into special education classes more often than other pupils. Notably, **France**, **Slovakia** and the **United Kingdom** have legislation expressly prohibiting segregation in schools between persons of different racial or ethnic groups but concerns have been expressed by various stakeholders about

<sup>152</sup> A thematic report written in 2007 by Lilla Farkas, Roma Expert for the European Network of Legal Experts in the Non-discrimination Field, entitled *Segregation of Roma children in education, addressing structural discrimination through the Race Equality Directive* provides a more detailed analysis of this issue.

<sup>153</sup> It should be noted that the total Roma population in **Cyprus** is relatively marginal compared to other countries. In 2011 the Equality Body issued a report on the first complaint ever filed in relation to discrimination against Roma, which concerned the adequacy of measures for the support and integration of Roma children in the educational system, Equality Body report AKR 18/2008 of 27 September 2011.

<sup>154</sup> See thematic report by Lilla Farkas (*op. cit.* at footnote 152).

<sup>155</sup> UNICEF, **Romanian** Ministry of Education, Impreună Agency released a study of access of Roma children to quality education: *A school for everybody? Access of Roma children to quality education [O școală pentru toți? Accesul copiilor romi la o educație de calitate]*".

<sup>156</sup> See minutes from the fourth meeting of the 'Team on Roma issues' at: [www.mswia.gov.pl/portal/pl/473/Zespol\\_do\\_Spraw\\_Romskich\\_Komisji\\_Wspolnej\\_Rzadu\\_i\\_Mniejszosci\\_Narodowych\\_i\\_Etnic.html](http://www.mswia.gov.pl/portal/pl/473/Zespol_do_Spraw_Romskich_Komisji_Wspolnej_Rzadu_i_Mniejszosci_Narodowych_i_Etnic.html).

*de facto* segregation arising from residence patterns. In the **Czech Republic**, although the School Act formally abolished special schools, and in spite of the National Action Plan for Inclusive Education developed in 2010, segregation of Roma children continues in practice, which was heavily criticised by the UN Committee on the Rights of the Child in its concluding remarks adopted on 17 June 2011.<sup>157</sup>

There are only a few instances where segregated classes have been challenged under national legal systems, for instance in **Bulgaria, Denmark, Finland, Greece, Hungary**<sup>158</sup> and **Slovakia**. In **Finland** there has been one case where *de facto* segregation of immigrant children at school was successfully challenged.<sup>159</sup> In **Greece** intervention of the Ombudsman was necessary to ensure that the public authorities in the Peloponnese provided temporary classrooms for Roma children who had been excluded from a school on the basis that the building facilities were inadequate.<sup>160</sup> In 2003, 57 **Croatian** citizens of Roma origin lodged a complaint arguing that they had been segregated at primary school on the grounds of their racial or ethnic origin. In court, the ECtHR found that there had been a difference in treatment based on ethnic origin and that such separations, resulting from a lack of command of the **Croatian** language, had not been objectively justified, appropriate and necessary.<sup>161</sup>

#### Successful *actio popularis* in a segregation case in Slovakia<sup>162</sup>

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

The court rejected the school's arguments and found direct discrimination on the ground of ethnicity considering that the school failed to carry out its obligations, preferring unlawful segregated education rather than the development of inclusive education. It also requested the school to publish the court's ruling in a special professional journal for teachers and to redress the situation by installing mixed classrooms. The school was ordered to pay the costs of proceedings. At the time of writing, an appeal of the decision was pending.

In many states, including **Belgium, Cyprus, Finland, Lithuania, Portugal** and **Croatia**, school absenteeism and disproportionately high drop-out rates are serious issues among the Roma, Sinti and Traveller communities. In **Lithuania**, a 2008 report on Roma education stressed that most Roma children (69%) did not attend either pre-school

<sup>157</sup> UN Committee on the Rights of the Child Concluding Observations of 17 June 2011, CRC/C/CZE/CO/3-4.

<sup>158</sup> See **Hungarian** Supreme Court decision no. Pfv.IV.20.037/2011/4 of 29 June 2011.

<sup>159</sup> In **Finland**, segregation was not aimed at Roma children in particular.

<sup>160</sup> The **Greek** Ombudsman has been reported as increasingly examining complaints related to Roma pursuant to the Act 3304/20005. In addition, the Deputy Chief Prosecutor of the Supreme Court issued an internal decree on 22 February 2011 requesting all prosecutors to combat Roma discrimination and exclusion (Protocol Number 720 /22-02-2011).

<sup>161</sup> ECtHR, *Oršuš and Others v. Croatia* (no. 15766/03), Chamber Judgment of 16 March 2010.

<sup>162</sup> District Court in Prešov decision 25 C 133/10-229, *Center for Civil and Human Rights v Elementary School in Šarišské Michaľany* of 5 December 2011.

establishments or pre-school groups; and participation in after-school activities is uncommon among Roma.<sup>163</sup> In the **FYR of Macedonia**, the Roma population has the lowest level of educational achievement, with 39% of Roma not attending primary school and only 17.4% enrolled in secondary education.<sup>164</sup> In **Poland** the school attendance rate among the Roma was 82% in 2009/2010. In **Romania**, the vast majority of pupils who drop out of school due to poverty and the low quality of education are from the Roma population (70%).

In a large number of Member States, residence patterns also lead to a high concentration of Roma children (e.g. **Cyprus**, **Hungary**, **Romania** and **Slovakia**) or children from particular ethnic minorities (e.g. **France**, the **Netherlands**, and the **United Kingdom**<sup>165</sup>) in certain schools, resulting in so-called 'ghetto schools'. These schools follow the same curriculum but the quality of education and the physical condition of the buildings is often inferior. Some states are considering making attempts to try to remedy this form of *de facto* segregation. In the **Netherlands**, equal treatment legislation has been used to respond to the desire of many school boards or local governments to institute plans to ensure a spread of children from different cultural backgrounds across all schools through the use of housing and education policies to prevent the emergence of 'black' or 'ghetto' schools.

There have been several attempts by governments to address the segregation of Roma pupils.<sup>166</sup> In **Hungary** positive action initiatives are underway in education to integrate Roma through the integration of socially disadvantaged pupils and students. In **Romania**, the Ministry of Education adopted Order no. 1540/2007 on Banning School Segregation of Roma Children and Approving the Methodology for Preventing and Eliminating School Segregation of Roma Children. The Order is intended to prevent, ban and eliminate segregation and includes sanctions for those who do not observe its provisions. In **Hungary**, the Secretary of State for Social Inclusion has launched a number of initiatives to improve the situation of Roma such as support amounting to HUF 275,500,000 (EUR 950,000) for innovative methods aimed at promoting the successful elementary education of disadvantaged children.<sup>167</sup> The **FYR of Macedonia** strategy for the Roma population sets out education as one of the government's priorities. In **Norway**, the governmental action plan to improve the Roma situation in Oslo includes elements related to schooling,<sup>168</sup> in particular specific education provided in Norwegian as well as classes in the mother tongue. Computers are also made available for distance and home education.

### **Access to and supply of goods and services**

The Racial Equality Directive prohibits discrimination concerning access to and supply of goods and services, including housing, that are available to the public. The boundaries of this prohibition have generated debate in many countries, and most states do indeed restrict protection to publicly available goods and services. Exceptions include **Bulgaria**,

<sup>163</sup> *Romų padėties tyrimas: Romai švietimo ir darbo rinkos sankirtoje, Socialnių tyrimų instituto etninių tyrimų centras, 2008 gruodis*, [www.tmid.lt/wp-content/uploads/2009/05/sti\\_tmidi\\_romu-padeties-tyrimas-2008\\_ataskaita.doc](http://www.tmid.lt/wp-content/uploads/2009/05/sti_tmidi_romu-padeties-tyrimas-2008_ataskaita.doc).

<sup>164</sup> [www.unicef.org/tfymacedonia/MK\\_SITAN\\_ENG.pdf](http://www.unicef.org/tfymacedonia/MK_SITAN_ENG.pdf).

<sup>165</sup> Concerns persist as to the concentration of ethnic minority students in particular schools, which reflects the wider issues of divided communities and social segregation. State schools in certain parts of England, in particular the East End of London and some northern cities such as Bradford, often contain high numbers of black and Asian pupils, with some schools also being overwhelmingly Muslim in student composition.

<sup>166</sup> For a discussion of some of these measures, see the section in Chapter 3 on positive action.

<sup>167</sup> Since this initiative was launched in February 2012, visible results are yet to be seen.

<sup>168</sup> There are 71 registered Roma pupils in 22 schools in Oslo, out of a total of 700 Roma.

**France, Italy, Lithuania,**<sup>169</sup> **Luxembourg,**<sup>170</sup> **Malta, Romania, Slovenia, Spain, Croatia** and **Norway**, where legislation does not distinguish between goods and services available to the public and available privately, and is thus presumed to apply to both. Under current legislation, there are no specific provisions forbidding discrimination concerning the supply of goods and services available to the public in the **FYR of Macedonia.**<sup>171</sup> A few legislatures have provided definitions to delineate the circumstances in which discrimination is prohibited. **Swedish** law prohibits discrimination in the supply of goods and services, including housing, which are professionally provided, and thus the law does not apply to private transactions. There is some concern over the exception from the material scope of the provision of goods and services under **German** law for all transactions concerning a special relationship of trust and proximity between the parties or their families, including the letting of flats. The **Finnish** Non-Discrimination Act covers the “supply of or access to housing and movable and immovable property and services on offer or available to the general public other than with respect to relationships between private individuals”. Thus, for example, banking and insurance services, transportation services, repair services, and the selling and hiring of premises for business are covered. Significantly, the *travaux préparatoires* of the Non-Discrimination Act provide that the powers of the European Union and the basis of the Directives must be taken into account when interpreting this provision. Legislation on issues falling under the jurisdiction of the Åland Islands prohibits discrimination in the ‘professional’ (not strictly private) provision of goods and services, including housing. **Portuguese** law provides that private associations have the right to reserve goods and services only for their members.

As with education, discrimination against the Roma in the field of housing is a serious issue facing most states. Roma and Travellers usually live on the outskirts of cities, in settlements which do not provide a basic standard of living or on parking spots considered illicit by the authorities in countries such as **Belgium, Bulgaria, Cyprus,** the **Czech Republic, France, Lithuania, Poland, Portugal, Romania, Slovakia, Croatia** and the **FYR of Macedonia.** In recent years, many cases have been reported of forced expulsion and segregation (e.g. in **Greece, Romania** and **Turkey**) or in relation to campsites and stopping places for Travellers (e.g. in **France** and the **UK**). In June 2011, the European Committee for Social Rights declared **Portugal** in contravention of the European Social Charter with regard to the right to housing of Roma and precarious living conditions.<sup>172</sup>

Further to the EU framework for National Roma Integration up to 2020 adopted in April 2011 by the European Commission,<sup>173</sup> EU Member States were requested to prepare or revise National Roma Integration Strategies in order to address more effectively the challenges of Roma inclusion to tangibly improve the situation of the Roma population. This is the first time that Roma inclusion has been addressed at the EU level and set out as an important priority by all Member States to develop a sustainable approach that combines efforts in different areas including education, employment, health and housing. In addition, the Decade of Roma Inclusion 2005-2015, formally signed in 2005, aims

<sup>169</sup> Note that religious communities or associations, as well as associations founded by these religious communities or their members, are not obliged to comply with the Equal Treatment Act while providing goods and services, when the purpose of this provision is of a religious character.

<sup>170</sup> Although in general no difference is made between goods and services available to the public and those offered by private associations, there is a special provision applicable to associations. Article 6 of the General Discrimination Act of 28 November 2006 deems any provision to be void that is included in a contract, a collective agreement or internal regulation of a company or of rules of private associations, of bodies representing independent professions and organisations of workers and employers, and that is contrary to the principle of equal treatment.

<sup>171</sup> The new Anti-discrimination Act (entered into force in 2010 and to be implemented in 2011) provides for the prohibition of discrimination concerning the supply of goods and services available to the public but this is only enumerated without any further explanation.

<sup>172</sup> European Committee of Social Rights, decision on the merits of 30 June 2011 in Complaint no. 61/2010 registered on 23 April 2010 and brought by the European Roma Rights Centre (ERRC).

<sup>173</sup> Communication ‘An EU Framework for National Roma Integration Strategies up to 2020’, COM(2011)173 of 5 April 2011.

to improve the socio-economic status and social inclusion of Roma in **Bulgaria, Croatia, the Czech Republic, the FYR of Macedonia, Hungary, Romania, Slovakia and Spain. Slovenia** has observer status under this initiative.<sup>174</sup> Governments are required to draw up and implement action plans over a 10-year period until 2015.

### **French Supreme Court finds ministerial instructions targeting Roma camps unlawful<sup>175</sup>**

On 5 August 2010, the Minister of the Interior addressed specific instructions to prefects (representatives of national government at local level), prefects of police and directors of the national police to evacuate illegal stopping places on private land and land belonging to the State. The instructions followed the President of the Republic's announcement on 30 July 2010 that 300 sites were to be evacuated within three months, with Roma settlements as the priority. Prefects and directors of the national police were urged to mobilise police services primarily against Roma and to take all measures necessary to cooperate with border authorities and the French agency for immigration and promoting integration (*Office Français de l'Immigration et de l'Intégration*) so as to organise the removal and return to Romania and Bulgaria of those who could not legally justify their presence on French territory. It further instructed that one Roma settlement per week be removed. On 13 September 2010, new instructions were issued with no more reference to specifically targeting Roma. The Minister of Interior limited the directives to the evacuation of illegal camps.

SOS Racism petitioned the Supreme Administrative Court (*Conseil d'Etat*) to annul both ministerial instructions on the ground that they were discriminatory against the Roma. The Court held that the wording of the ministerial instructions of 5 August 2010, although aiming to promote respect of public order and the protection of private land, could not specifically target individuals on the grounds of their ethnic origin without disregarding the principle of equality as protected by the Constitution. The instructions were therefore considered to be illegal and void. However, allegations that the ministerial instructions of 13 September 2010 were unlawful were dismissed as only the dismantling and removal of illegal stopping places on private land or land belonging to the State was concerned.

### **Beyond the Directives**

Many states have maintained the diverging scope of the two Directives, only expressly outlawing discrimination in social protection, social advantages, education and goods and services available to the public in relation to racial and ethnic discrimination. However, a number of states provide the same protection for other grounds of discrimination as well, if not all grounds, and thus go beyond the requirements of the Directives.

### **The following illustrates areas in which countries exceed EU law provisions:**

- Whereas in Austrian federal legislation the distinction between the scopes of the two Directives is maintained, in most provincial legislation it is levelled up.<sup>176</sup>
- In Bulgaria the Protection against Discrimination Act explicitly applies universally to the exercise of all rights and freedoms deriving from law, implicitly including in full any particular field such as any sector of employment and occupation, and all the other fields mentioned under the Racial Equality

<sup>174</sup> [www.romadecade.org/home](http://www.romadecade.org/home). Note that the Roma Decade also includes the following non-EU countries: Albania, Bosnia Herzegovina, Montenegro, Serbia and the United States as an observer.

<sup>175</sup> *Conseil d'Etat* (Administrative Supreme Court) no. 343387, 7 April 2011.

<sup>176</sup> Only lower Austria has not followed the line.

Directive.<sup>177</sup> In respect of its universal material scope, a number of decisions both by the courts and by the equality body expressly recognise that the Act provides comprehensive, total protection.

- Denmark extends the prohibition of discrimination outside employment to religion or belief and sexual orientation.
- The Finnish Non-Discrimination Act prohibits discrimination in access to training/education on a wide variety of grounds, including age, ethnic or national origin, nationality, language, religion, belief, opinion, health, disability, sexual orientation and 'other personal characteristics'.<sup>178</sup>
- In France the general principle of equality in public services guarantees equal treatment in social protection and education for all grounds. In addition, all grounds are protected in the provision of goods and services, including housing.
- Hungarian law has practically unlimited material scope, treating all grounds of discrimination equally.
- The Irish Employment Equality Act 1998-2008 and Equal Status Act 2000-2008 both prohibit discrimination on nine grounds: marital status, family status, sexual orientation, religious belief, age, disability, gender, race (including nationality and ethnic origin) and membership of the Traveller community.
- The scope of the Italian Anti-discrimination Decrees partially corresponds with other pre-existing legislation still in force, primarily the Immigration Act of 1998. This Act offers protection that mostly overlaps with that of the Decrees, which cover all the fields specified in the two Directives.
- In Latvia, differential treatment on the grounds of race, colour, gender, age, disability, health condition, religious, political or other conviction, national or social origin, property or family status or other circumstances (sexual orientation as a prohibited ground is not expressly listed) is covered in the field of social protection within the public sphere, and social security and social services provided by the State.
- In Slovakian law, the right to healthcare is guaranteed equally to every person irrespective of sex, religion or belief, race, affiliation to a nationality or ethnic group, disability, age, sexual orientation, marital status and family status, colour of skin, language, political or other opinion, national or social origin, property, lineage/gender,<sup>179</sup> trade union activities or other status.<sup>180</sup> The Anti-discrimination Act prohibits discrimination in housing on the same grounds except for trade union activities. Discrimination in the field of public procurement is also unlawful.
- In Slovenia, protection is enjoyed with regard to all of the grounds listed in the Directives and other grounds of discrimination in the fields of social protection, social advantages, education and goods and services.
- In Sweden, discrimination is prohibited in social security and healthcare, including social services, state grants for education, social insurance and related benefit systems on the grounds of ethnic origin, religion or belief, disability and sexual orientation. The prohibition on discrimination in goods, services and housing applies to all the above-mentioned grounds as well, while age is again exempted from the prohibition.

<sup>177</sup> Protection against Discrimination Act, Article 6.

<sup>178</sup> The Act has a limiting clause, however: section 3 provides that the Act does not apply to the aims or content of education or the education system. According to the *travaux préparatoires*, this takes into account Article 149(1) of the EC Treaty (presently Article 165(1) of the TFEU), which states, *inter alia*, that "the Community shall fully respect the responsibility of the Member States for the content of teaching and the organisation of education systems".

<sup>179</sup> The Slovak word '*rod*' can be translated as either lineage or gender.

<sup>180</sup> Section 2 paragraph 1 of the Anti-discrimination Act.



- Romanian anti-discrimination legislation applies to a large number of criteria going beyond those provided by the Directives, and the scope of the Anti-Discrimination Ordinance is applicable to areas beyond those spelled out in the Directives.
- In the United Kingdom, discrimination on the grounds of race, national or ethnic origin, nationality and colour, disability, sexual orientation and religion or belief (with some exceptions) are prohibited in all forms and levels of education, in the provision of goods and services, and in the performance of public functions by public authorities (believed to cover social protection, including healthcare and social security). Northern Ireland, but not Great Britain, has broad prohibitions against discrimination on grounds of political opinion.
- In Croatia, the Anti-discrimination Act applies to housing in general without any exceptions and covers racial or ethnic origin, religion or belief, age, disability and sexual orientation.
- Although not an EU member, Norway has committed itself in having high and even higher standards regarding discrimination than the requirements set up at the EU level.<sup>181</sup>

<sup>181</sup> See Government White Paper on Strengthened protection against discrimination in working life, NOU 2003:2 *Skjerpert vern mot diskriminering I arbeidslivet*, p. 7.

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# **Chapter 3**

## **Exceptions to the principle of equal treatment and positive action**

The Directives are based on a dichotomy between direct discrimination, which cannot be justified, and indirect discrimination, which is open to objective justification. Most countries have complied with this approach, although there are some states where it may be argued that national law continues to permit the justification of direct discrimination (e.g. **Romania**<sup>182</sup>).

#### **Justification of direct discrimination in Slovenia**

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

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

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

#### **A. Genuine and determining occupational requirements**

##### **Article 4 Racial Equality Directive and Employment Equality Directive**

*“Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.”*

Most prominently, both Directives allow national legislation to provide an exception where the characteristic is a “genuine and determining occupational requirement”. Pursuant to Recital 18 of the Racial Equality Directive, in very

<sup>182</sup> With regard to housing and access to goods and services justifications are allowed by the law (Article 10, Act 324/2006 on the amendment of Government Ordinance 137/2000 regarding the prevention and punishment of all forms of discrimination, 20 July 2006) if such a “restriction is objectively justified by a legitimate purpose and the methods used to reach such a purpose are adequate and necessary”. The possibility of allowing justifications in cases of direct discrimination regarding housing and access to goods and services is therefore in breach of Directive 2000/43/EC.

limited circumstances, a difference of treatment may be justified where a characteristic related to racial or ethnic origin constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission. All EU Member States and candidate countries, except the **Netherlands, Croatia, the FYR of Macedonia and Iceland**, have chosen to include such an exception within their national legislation, and this applies to many or all discrimination grounds. In some cases, the precise wording of national legislation varies from that found within the Directives (e.g. **Italy** and **Romania**). This creates the risk that the exception is wider than permitted, but this will depend on subsequent interpretation by national courts.

The **Netherlands** specifies that only *external racial appearances* may constitute a genuine occupational requirement.<sup>183</sup> This means that 'race' per se is not regarded as a permissible ground for a given distinction; only physical differences (skin colour, hair type, etc.) may form the basis for a distinction, to the exclusion of sociological differences.

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

## **B. Armed forces and other specific occupations**

### **Article 3 (4) Employment Equality Directive**

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

A few countries have included an express exemption for the armed forces in relation to both age and disability: **France, Greece, Ireland, Italy, Slovakia, the United Kingdom and Norway**.<sup>184</sup> Others have simply maintained age and capability requirements in their regulations on the armed forces without expressly declaring an exemption from the equal treatment principle, e.g. **Bulgaria, Portugal, Romania and Spain**. Military service requires candidates not to be older than a certain fixed age in, for instance, **Slovenia** and the **FYR of Macedonia**. But in **Slovenia**, the Police Act states that employment with the police is not possible if an individual invokes conscientious objection in the armed forces, which might unjustifiably constitute exclusion on grounds of religion or belief. Professional soldiers must retire by the age of 60 in **Poland**. The exception regarding armed forces has not been adopted in **Finland, Hungary, Lithuania and Luxembourg**. In several states, the exceptions seem to be wider than provided for in Article 3(4). For example, **Greek and Irish**<sup>185</sup> law provides exemptions on the basis of age in respect of the police, the prison service or any emergency service.

<sup>183</sup> Article 2(4)(b) General Equal Treatment Act, as inserted by the 2004 EC Implementation Act.

<sup>184</sup> **Norway** does not contain any specific exception with regard to disability, only to age.

<sup>185</sup> Section 37, Employment Equality Act 1998-2004.

### C. Nationality

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

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

Article 3(2) of both Directives provides that "The Directive does not cover difference of treatment based on nationality..." Nevertheless, in several Member States nationality is an expressly protected ground in anti-discrimination national law, including **Belgium, Bulgaria, the Netherlands, Portugal, Romania and Spain**.<sup>186</sup> A number of Member States have express exclusions from the scope of their implementing legislation which apply to discrimination based on nationality: **Greece, Italy, Luxembourg and Malta**.

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

	Law	Article
<b>AUSTRIA</b>	Federal Equal Treatment Act <sup>187</sup>	§§ 17(2) and 31(4)
<b>BELGIUM</b>	Federal Racial Equality Act	Art. 4, 4°
<b>BULGARIA</b>	Protection Against Discrimination Act	Arts. 4(1) and 7(1.1)
<b>CROATIA</b>	No	-
<b>CYPRUS</b>	The Combating of Racial and other forms of Discrimination (Commissioner) Law N. 42(I)/2001	Arts. 3(1)(a); 3(1)(b) and 5(a)
<b>CZECH REPUBLIC</b>	No	-
<b>DENMARK</b>	No	-
<b>ESTONIA</b>	No	-
<b>FINLAND</b>	Non-Discrimination Act	S. 6 (1)
<b>FRANCE</b>	No <sup>188</sup>	-
<b>FYR of MACEDONIA</b>	Prevention and Protection Against Discrimination Act	Art. 3
<b>GERMANY</b>	No	-
<b>GREECE</b>	No	-
<b>HUNGARY</b>	Act on Equal Treatment and the Promotion of Equal Opportunities	Art. 8
<b>ICELAND</b>	No	-
<b>IRELAND</b>	Employment Equality Act	S. 6(2)(h)
	Equal Status Act	S. 3(2)(H)
<b>ITALY</b>	No <sup>189</sup>	Art. 43
<b>LATVIA</b>	No	-
<b>LIECHTENSTEIN</b>	No <sup>190</sup>	-
<b>LITHUANIA</b>	No	-

<sup>186</sup> In EU law discrimination on grounds of nationality is prohibited under Article 18 TFEU.

<sup>187</sup> Difference of treatment based on nationality is generally regarded as discrimination on the basis of ethnicity unless the difference is based on immigration laws or other legally demanded requirements.

<sup>188</sup> The term "nation" is referred to as a proxy for nationality in the penal code.

<sup>189</sup> Nationality is protected under the Legislative Decree n° 286 Consolidated Text of Provisions on the Regulation and the Condition of Foreign Citizens of 25 July 1998.

<sup>190</sup> Nationality is mentioned in the Penal code (Art. 283).

	Law	Article
<b>LUXEMBOURG</b>	No	-
<b>MALTA</b>	No	-
<b>NETHERLANDS</b>	General Equal Treatment Act	Art. 1
<b>NORWAY</b>	No <sup>191</sup>	-
<b>POLAND</b>	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment	Art. 1 and 3
<b>PORTUGAL</b>	Principle of Equal Treatment Act	Art. 3(2)
<b>ROMANIA</b>	Ordinance on the Prevention and Punishment of All Forms of Discrimination	Art. 2
<b>SLOVAKIA</b>	Act on Equal Treatment in Certain Areas and Protection against Discrimination	S. 2 para 1
<b>SLOVENIA</b>	No <sup>192</sup>	-
<b>SPAIN</b>	No <sup>193</sup>	Art. 23.1
<b>SWEDEN</b>	No <sup>194</sup>	-
<b>TURKEY</b>	No <sup>195</sup>	-
<b>UNITED KINGDOM</b>	(UK) Equality Act	S. 9(1)(b)
	(NI) Race Relations Order	Art. 5

#### D. Family benefits

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

It is necessary to distinguish between a number of different situations that can arise here. First, there are situations where employment-related benefits are limited to those who are married. In the **Netherlands, Belgium and Spain**, same-sex couples can get married, so here limiting benefits to married couples does not result in discrimination on the grounds of sexual orientation. In other states, such as the **United Kingdom**, national legislation on the recognition of same-sex partnerships has had the impact of requiring marital benefits to be extended to registered partners. However, this is not an automatic consequence of same-sex partnership legislation. In 2006, the **German** Constitutional Court ruled that it was lawful to restrict supplementary payments to married civil servants and to exclude those in (same-sex) registered partnerships.<sup>196</sup> The compatibility of such practices with the Directive was tested in a preliminary reference case judged on 1 April 2008 by the European Court of Justice in *Maruko*.<sup>197</sup> Consequently, the **German** Constitutional

<sup>191</sup> Under the Anti-Discrimination Act, national origin is a protected ground. National origin includes also stateless persons, as it is not focusing on which nationality, but national origin other than Norwegian.

<sup>192</sup> Discrimination on the basis of nationality is not explicitly prohibited in national law, nevertheless the Constitution, the Act implementing the Principle of Equal Treatment and the Employment Relationship Act if they do not list nationality as a protected ground, do include “any other personal circumstance”. Therefore judicial interpretation is required in order to determine whether nationality could be a protected ground.

<sup>193</sup> Nationality is protected under the Organic Law 4/2000 on Rights and Liberties of Aliens in **Spain** and their Social Integration.

<sup>194</sup> Judicial interpretation might be required as nationality is part of a person’s ethnicity and ethnicity is a protected ground according to the Discrimination Act (Ch. 1 Sec. 5 point 3).

<sup>195</sup> National is explicitly mentioned in the Criminal code (Art. 3(2)).

<sup>196</sup> BVerwG, 2 C 43.04, 26 January 2006.

<sup>197</sup> Case C-267/06, *Maruko*, [2008] ECR I-1757.

Court has clarified that both same-sex couples living in a life partnership and married spouses have to be treated equally with regard to social benefits, thereby overruling the previous case law.<sup>198</sup>

There remain many states where restricting work-related benefits to married employees is likely to be regarded as lawful. In some states (**Ireland, Italy and Austria**), this is made clear in legislation or in guidance accompanying legislation. In other states, the issue has not been expressly addressed in national legislation, but it is the view of the national experts that courts would interpret the law as permitting benefits to be officially restricted to married employees (e.g. **Greece, Latvia, Lithuania, Poland** and the **FYR of Macedonia**).

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

##### **Article 2(5) of the Employment Equality Directive**

*"This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others."*

Article 2(5) is reproduced in legislation in **Cyprus, Greece** and **Malta**, and in **Italy** it is largely incorporated.

In the **United Kingdom** anti-discrimination legislation typically includes an exception for action taken for the purpose of safeguarding national security or protecting public safety or public order which are justified by that purpose. In **Portugal**, even though the laws implementing the Directives do not include any specific exceptions concerning public security, these exceptions may be considered implicit.

#### **F. Other exceptions**

In some states, national legislation includes exceptions which are not expressly specified in the Directives. Some of these may be incompatible with the Directives, but it is difficult to be certain in advance of case law testing their scope. For example, in **Lithuania**, the Equal Treatment Act provides exceptions that relate to knowledge of the state language, participation in political activities and enjoyment of different rights on the basis of citizenship. The Anti-discrimination Act in **Croatia** contains a rather controversial exception regarding regulation of "the rights and obligations arising from family relations when it is stipulated by the law, particularly with the aim of protecting the rights and interests of children, which must be justified by a legitimate aim, the protection of public morality and the favouring of marriage in line with the provisions of the Family Act".

In the **FYR of Macedonia**, the Anti-discrimination Act provides three exceptions regarding measures aimed at stimulating employment, protecting the distinguishing characteristics of the identity of ethnic, religious and linguistic minorities, and favouring persons and groups in a disadvantaged position. The **Irish** Equal Status Act also contains a number of exceptions and exemptions to the non-discrimination rule that could be problematic with regard to the Directives.

<sup>198</sup> **German** Federal Constitutional Court (Bundesverfassungsgericht), 7 July 2009, 1 BvR 1164/07.



## G. Positive action

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

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

The scope for positive action is often a matter clarified through case law. In 2002, the Supreme Court of **Cyprus** declared void and unconstitutional a set of legal provisions granting priority to employment in the public sector to people with disabilities on the basis of a quota system.<sup>199</sup> In **Croatia**, the Constitutional Act on the Rights of Ethnic Minorities<sup>200</sup> provides for positive action for proportionate representation of members of ethnic minorities in the state administration, the judiciary and local authority bodies and administrations, and the Judiciary Act<sup>201</sup> provides for positive measures with respect to ethnic origin, for instance regarding the nomination of judges. These provisions were challenged before the Constitutional Court as discriminatory. The Constitutional Court<sup>202</sup> held that such advantages constitute special positive measures intending to favour a certain group with the aim of eliminating factual inequality and differentiation of such people based on their characteristics without being automatic and unconditional. It concluded that such measures were not discriminatory as long as they were justified, permitted and proportionate. In **Turkey**, amendments to the Constitution introduced in 2011 the principle of positive action<sup>203</sup> and other legislation also provide for such measures in a number of areas including education. Discussions are, however, still new in the field.

A number of states have introduced legal duties to promote equality. In some cases, there are broad obligations to advance equality in national constitutions (e.g. **Greece** (Article 116(2)) or **Spain** (Article 14)). The **FYR of Macedonia** has developed a set of positive actions, as a result of the armed conflict in 2001 and the signing of the Ohrid Framework Agreement (OFA). The OFA was signed, inter alia, with the aim of enhancing the situation of minority communities in the country, and of reflecting multi-ethnicity in the public sphere, including by adopting non-discrimination measures. This agreement was reflected in the Constitution via amendments,<sup>204</sup> and numerous laws that relate to equality on grounds of ethnic origin were also changed. These changes regulate, inter alia, the use of language and the provision of 'fair' representation in the public administration and public institutions. In **Norway**, a pilot project introduced a moderate quota system in favour of non-ethnic Norwegians in 12 state-owned companies. In addition, as of January 2009, employers, public authorities and employer/employee organisations are under a legal obligation to make active, targeted and systematic efforts and to report annually on their efforts to promote equality and prevent discrimination on grounds of disability, ethnicity, religion etc.<sup>205</sup> The obligation comprises pay and working conditions, promotion, development opportunities and protection against harassment. The annual report and budget must list all measures carried out throughout the year to fulfil the duty of making active efforts. The obligation is enforced by the Equality and Anti-Discrimination Ombud. Other states have included more detailed obligations in national legislation. In **Bulgaria**, the Protection against Discrimination Act places

<sup>199</sup> Supreme Court decision no. 55(I) 1997.

<sup>200</sup> *Ustavni zakon o pravima nacionalnih manjina*, Official Gazette 155/02.

<sup>201</sup> Article 78(7) and (8), *Zakon o sudovima*, Official Gazette 150/2005, 16/2007 and 113/08.

<sup>202</sup> Constitutional Court decisions no. U-I-2767/2007, 31 March 2009 and no. U-I-402/2003 and U-I-2812/2007, 30 April 2008.

<sup>203</sup> The new Article 10 of the Constitution stipulates that positive action taken for children, elderly people, people with disabilities, widows and orphans of martyrs, invalids and veterans shall not be considered as a violation of the principle of equality.

<sup>204</sup> Constitution of the Republic of Macedonia. Website of the *Official Gazette of the Republic of Macedonia*: [www.slvesnik.com.mk/WBStorage/Files/USTAV-eng.pdf](http://www.slvesnik.com.mk/WBStorage/Files/USTAV-eng.pdf). Amendments IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII and XVIII.

<sup>205</sup> Anti-Discrimination Act, section 3a.

a duty on all authorities to take measures whenever necessary to equalise opportunities for disadvantaged groups and to guarantee participation by ethnic minorities in education to accomplish the objectives of the Act.<sup>206</sup> The Act requires authorities to take such measures as a priority for the benefit of victims of multiple discrimination.<sup>207</sup> In **Finland**, the Non-Discrimination Act compels all public authorities to foster equality, including by drawing up plans on ethnic equality. **Swedish** law obliges employers to take measures designed to ensure full equality with regard to ethnic background.

#### Positive obligation to pay due regard in the United Kingdom

Since April 2011, all public authorities in Britain have been under positive obligation to have due regard to the need to 'eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the 2011 Equality Act, advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; [and] foster good relations between persons who share a relevant protect characteristic and persons who do not share it'.

In the absence of any particular process prescribed by the law, the *Essential Guide to the Public Sector Equality Duty* gives a suggested approach to help public authorities to comply with the equality duty. Public authorities are required to:

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

Moreover, certain public authorities are also required to publish equality information and equality objectives with regard to their specific equality duties to better perform the general equality duty for the purpose of the Equality Act 2010. The equality duty is monitored and enforced by the Equality and Human Rights Commission, which is the independent regulator of equality and human rights legislation.

Disability is the ground for which the most positive action measures are probably already in place. These can be found in the great majority of countries. There is, for example, a quota system for the employment of disabled people in **Austria**, **Belgium** (mostly public sector only), **Bulgaria**, **Cyprus** (in the wider public sector), the **Czech Republic**,<sup>208</sup> **France**, **Germany**, **Greece**, **Italy**, **Lithuania**, **Malta**, **Poland**, **Portugal**, **Romania**, **Slovenia**, **Spain** and **Turkey**.<sup>209</sup> However, alternatives to employing disabled people, such as paying a fee or tax, are almost always offered. In **Liechtenstein**, Article 20 of the Act on Equality of People with Disabilities envisages the integration of workers with disabilities into the labour market. In other words, local authorities are entitled to support pilot projects to explore incentives for employing people with disabilities, including in the private sector. In **Iceland**, there is no quota system but the Act on the Affairs of

<sup>206</sup> Article 11(1).

<sup>207</sup> Article 11(2).

<sup>208</sup> Although positive action is barely used in the **Czech Republic**.

<sup>209</sup> However, figures in 2011 show that while the total number of people with disabilities working in the public administration should be 44,189, only 20,829 civil servants with disabilities are effectively employed.

Persons with Disabilities provides assistance when necessary to workers with disabilities, and priority should be given for positions in the public sector if their qualifications are equivalent to other applicants.

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

<b>AUSTRIA</b>	National minorities (use of language, etc.), people with disabilities (in the workplace).
<b>BELGIUM</b>	Quotas for people with disabilities in public bodies.
<b>BULGARIA</b>	Race, ethnicity and Roma (education, healthcare, social assistance, housing and employment), disability (education, accessibility of buildings, infrastructure, information and communications, vocational training and employment, self-employment), age (social inclusion, education, healthcare).
<b>CROATIA</b>	Ethnicity and Roma (in the judiciary and state administration, education).
<b>CYPRUS</b>	Disability (employment).
<b>CZECH REPUBLIC</b>	Disability (mandatory quota system in employment for disabled workers).
<b>DENMARK</b>	Disability (employment).
<b>ESTONIA</b>	Disability (employment and education), ethnic minorities (education).
<b>FINLAND</b>	Positive duty on authorities to promote equality.
<b>FRANCE</b>	Disability and age (employment).
<b>FYR of MACEDONIA</b>	Ethnicity including Roma and language (employment and education), age (social protection and housing).
<b>GERMANY</b>	Disability (social inclusion/integration including employment), older and foreign workers (integration).
<b>GREECE</b>	Disability (safety and health in the working environment, integration into occupation and employment).
<b>HUNGARY</b>	Disability (employment, education), age (employment), maternity (employment), ethnic origin/social status (education).
<b>ICELAND</b>	Disability (public employment).
<b>IRELAND</b>	Disability (employment in the public sector), Travellers (education, employment, health).
<b>ITALY</b>	Disability.
<b>LATVIA</b>	Disability (employment).
<b>LIECHTENSTEIN</b>	Age and disability (housing).
<b>LITHUANIA</b>	Disability (education, employment, integration), Roma and ethnic minorities (integration).
<b>LUXEMBOURG</b>	-
<b>MALTA</b>	Disability (employment).
<b>NETHERLANDS</b>	Disability (integration, social policies), ethnic minorities (employment).
<b>NORWAY</b>	National origin, ethnicity, disability (employment). <sup>210</sup>
<b>POLAND</b>	Ethnic origin (education, employment, healthcare, living conditions, security), age (employment), disability (employment and education).
<b>PORTUGAL</b>	Disability (inclusion, employment and accessibility), race, ethnic origin or nationality (inclusion).
<b>ROMANIA</b>	Roma (attendance and access to higher education for students).
<b>SLOVAKIA</b>	Social and economic disadvantage/disadvantage resulting from disability and age (employment and occupation, social security and social advantages, healthcare, provision of goods and services including housing and education), disability (employment, education, social security), age (employment, social security), marital and family status, pregnancy, motherhood, early parenthood (employment), ethnicity (employment, social and community work, healthcare and housing).
<b>SLOVENIA</b>	Disability (employment), age (employment), Italian and Hungarian minorities (local self-government, representation in the National Assembly, special rights concerning language, culture, broadcasting), ethnicity including Roma (political representation, education).
<b>SPAIN</b>	Disability (employment), Roma (development plan).
<b>SWEDEN</b>	Not specified.
<b>TURKEY</b>	Disability (employment).
<b>UNITED KINGDOM</b>	Race (education, training and welfare, under-representation in employment, membership among under-represented racial groups – GB: England, Wales and Scotland (EWS) and NI), age (employment – EWS and NI), disability (employment, education, access to goods, facilities and services – EWS), religion or belief (employment – EWS and NI, access to goods and services – EWS), sexual orientation.

<sup>210</sup> Few positive action measures also target age and sexual orientation in the employment field.

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# **Chapter 4**

## **Access to justice and effective enforcement**

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

#### A. Judicial and administrative procedures

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

*“Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under [these Directives] are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.”*

In no state are discrimination disputes resolved purely in the courts. The vast majority of states combine judicial proceedings – which may be civil, criminal, labour and/or administrative – with non-judicial proceedings. Mediation or conciliation proceedings may be available as a mandatory part of the court proceedings, as in **France, Portugal, Spain** and **Sweden**, or separately, as for example in **Hungary, Slovakia, Croatia** and the **FYR of Macedonia**.<sup>211</sup> The **Romanian** Mediation Act, as amended in 2009, provides that judges are obliged to inform the parties to all civil cases of the possibility of using mediation and its advantages.<sup>212</sup> However, mediation remains optional in **Romania**. Some national proceedings are exclusively for private or public sector complaints, while others deal with both.

Some non-judicial proceedings are general but provide an effective forum for discrimination cases, whereas others have been established especially for discrimination cases as an alternative, complementary dispute resolution procedure to the normal courts. Among the general non-judicial procedures are inspectorates, ombudsmen and human rights institutions. In **Turkey**, besides proceedings before judicial or administrative courts, victims of discrimination can file their complaints to the Human Rights Boards that have been established in every province and district and to the Human Rights Inquiry Commission of the **Turkish** Grand National Assembly. Their decisions are, however, not legally binding.

#### Legal actions in the private sector

Labour inspectorates are charged with enforcing employment law, including equal treatment provisions, in **Finland, Hungary, Latvia, Lithuania, France, Greece, Poland, Portugal, Romania, Slovakia** and **Spain**. In addition, in **Lithuania** employment dispute commissions, regulated by the Employment Code, are the primary bodies mandated to resolve employment disputes. The responsibility for establishing an employment dispute commission in a company, agency or organisation rests with the employer. They are made up of an equal number of representatives of employers and employees. The employment dispute commission can award compensation to an individual in cases of discrimination that have breached the Labour Code. In **Spain** victims can also submit complaints to the Education Inspectorate, and in **Hungary** and **Slovakia** they can complain to the Consumer Protection Inspectorate.

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

<sup>211</sup> Although there is no record that mediation has been used in discrimination cases.

<sup>212</sup> **Romanian** Act 370/2009 amending Act 192/2006 on Mediation (26 November 2009).

Some countries propose conciliation, such as **Austria** or **Latvia** where the Ombudsman's Office examines and reviews complaints of human rights violations and attempts to resolve conflicts through conciliation, which, if unsuccessful, is followed by non-binding recommendations. Similarly, the **Estonian** Chancellor of Justice provides an impartial conciliation procedure upon application by the victim. In the context of discrimination by natural or legal persons in private contexts, the decision of the Chancellor of Justice is legally binding, while the Chancellor of Justice (in cases of discrimination by public institutions) and Commissioner for Gender Equality and Equal Treatment (public and private domain) are empowered to conduct ombudsman-like procedures with non-legally binding results. Participation in the conciliation procedure before the Chancellor of Justice is not compulsory. In **Liechtenstein**, the ordinary courts are entitled to designate an arbitration board to reach an agreement between the conflicting parties instead of initiating a trial in the courts. In **Malta**, the National Commission for Persons with Disability can investigate complaints alleging failure to comply with the 2000 Equal Opportunities (Persons with Disability) Act and, where appropriate, provide conciliation in relation to such complaints. By virtue of the 2007 Equal Treatment of Persons Order, the remit of the National Commission for the Promotion of Equality for Men and Women has been extended to cover the promotion of equal treatment irrespective of racial or ethnic origin within the meaning of the provisions of the Order, which continue to be exercised with the assistance of the National Commission for the Promotion of Equality (NCPE). The Discrimination Tribunal may confirm a settlement between the parties or prohibit the continuation of conduct that is contrary to the prohibition of discrimination or victimisation. The Tribunal may also order a party to fulfil its obligations by imposing a conditional fine. It may also issue a statement on how non-discrimination law is to be interpreted at the request of the Ombudsman for Minorities, a court of law, a public authority or an NGO. Proceedings before the Discrimination Tribunal are free of charge and do not require the use of a legal counsel. The Ombudsman may issue statements on any discrimination case submitted to him/her, where necessary forward the complaint to the pertinent authorities and, if agreed to by the complainant, provide legal assistance and lead conciliation proceedings.

Some countries provide for the equality bodies the possibility to impose fines. For instance, in **Bulgaria** the Protection against Discrimination Commission can make a finding of discrimination and order preventative or remedial action; it can also impose financial sanctions, but it cannot award compensation to a victim. In addition, the procedure is universally applicable to both the public and private sectors. The **Portuguese** High Commissioner for Immigration and Intercultural Dialogue (ACIDI) can act as a mediator to try to avoid formal legal procedures. The High Commissioner can also initiate administrative procedures and decide whether fines should be imposed. Respondents have the right to appeal to the courts against the fines imposed. Neither the victim nor associations have the right to appeal or to intervene in the appeal procedure. By contrast, the Equality Tribunal in **Norway** has a limited competence restricted to the issuance of administrative orders. It can order the payment of a coercive fine only if the time limit foreseen to comply with the order is exceeded. Except for this coercive power (which has never been used in practice), the Equality Ombud and the Equality Tribunal cannot award compensation to victims.

In **Hungary**, the Equal Treatment Authority can take action against any discriminatory act and can impose severe sanctions on people and entities violating the prohibition of discrimination. The Ombudsman for Civil Rights and the Ombudsman for the Rights of National and Ethnic Minorities can also investigate cases of discrimination by any public body. **Austria** and the **Netherlands** both have Equal Treatment Commissions which can issue non-binding opinions. These do not preclude applicants from seeking binding court judgments on the same case, in which case the courts are obliged to take the Commission's opinion into consideration and give clear reasons for any dissenting decisions. In the **FYR of Macedonia**, the new Anti-discrimination Act provides for an administrative procedure before the Commission for Protection against Discrimination which can issue opinions and recommendations. If an opinion is not implemented, the Commission can initiate a procedure before the competent authority.<sup>213</sup>

<sup>213</sup> However, the Act does not specify which authority.

In **Romania**, a victim of discrimination or any interested NGO can choose between filing a complaint with the National Council for Combating Discrimination and/or filing a civil complaint for civil damages with a court of law unless the act is criminal, in which case Criminal Code provisions apply. The two venues (the national equality body and civil courts) are not mutually exclusive, and the plaintiff can choose to use them simultaneously, which in practice creates difficulties for the parties, the equality body and the judiciary. Moreover, an action before the equality body does not suspend the period of prescription (time limit) for filing a civil case. In **Finland**, non-employment-related complaints of discrimination on the grounds of ethnic origin can be submitted to the Ombudsman for Minorities and/or the Discrimination Tribunal.

There are special court procedures in a number of countries. **Spain** has an emergency procedure in the social (labour) courts for actions for the defence of fundamental rights and civil liberties. The **United Kingdom's** employment tribunals adjudicate the full range of employment disputes, including those on discrimination; each tribunal has a legally qualified chairperson and two lay members. In **Italy**, the 2003 decrees transposing the Anti-discrimination Directives and subsequent national law provided a special procedural regime for discrimination cases. This procedure was abolished on 2 September 2011 and rules under the Code of Civil Procedure now apply to discrimination cases at first instance. Under these provisions, a simplified procedure is followed for discrimination cases but is not as informal as in the past. The judge issues an order but an application for review may be filed with a court of appeal, as it can in ordinary cases. If an order is not appealed, it has the same binding force as a final judgment. The new procedural regime entered into force on 6 October 2011.

In **Ireland**, a specialised Equality Tribunal has an investigative role in hearing complaints. The procedure is informal. Complainants may represent themselves and costs may not be awarded against either party. Hearings are held in private. In 2004 the jurisdiction for dismissal cases was transferred to the Equality Tribunal, which now has the power to award remedies, including a specific power to order reinstatement. The option of mediation is provided for in Section 78 of the Employment Equality Act 1998-2008. A mediated settlement agreed by the parties becomes legally binding and its terms can be enforced at the Circuit Court.<sup>214</sup> The Equality Authority may provide assistance in the enforcement procedures.<sup>215</sup> In **Poland** a 'compensation complaint' procedure has been operating under the Labour Code since 1 January 2004:<sup>216</sup> victims of discrimination are entitled to initiate judicial proceedings and seek compensation. The Labour Court determines the compensation to be awarded, taking into consideration the type and gravity of the discrimination. This specific remedy was intended to avoid the need to use more general legal remedies such as Article 415 of the Civil Code (general compensation clause), though use of general remedies is not excluded.

### Legal actions in the public sector

Complaints with regard to the public sector are commonly dealt with separately from the private sector. In **Italy**, cases concerning public employees are heard in the civil courts. In **Croatia**, civil procedures are the same for employment in the private and public sectors, with the exception of the obligation for a plaintiff wishing to file a claim against the State to send a request to the State Attorney's office for amicable settlement. In **Lithuania**, complaints about administrative acts and acts or omissions by civil servants and municipal employees in the field of public administration, including social protection, social advantages, education, and access to and supply of goods and services which are available to the public, can be filed with an administrative disputes commission or the administrative courts. Cases of alleged discrimination by public institutions in **Latvia** can be filed with the same public institution that has treated the person differently, with a higher institution, with an administrative court, or with the public prosecutor's office. In **France**, the

<sup>214</sup> Section 91(2), Employment Equality Act 1998-2008.

<sup>215</sup> Section 67(1)(b)(iii) Employment Equality Act 1998-2008.

<sup>216</sup> Article 18, 3d.



administrative courts hear complaints from civil servants and contractual employees in the public sector and from citizens bringing actions against the State. In the **Netherlands**, if the discrimination occurs in public employment, ordinary administrative law procedures apply. In **Liechtenstein** employment disputes in the private sector are referred to the ordinary courts, whereas discrimination complaints in the public sector are examined by an administrative court, with the constitutional court acting in last instance.

### **Obstacles to effective access to justice**

Although the number of complaints submitted to courts or equality bodies has been gradually rising, the still relatively low volume of case law on discrimination in most countries may well point towards barriers to justice, real and perceived. Transposition of the Directives will go some way towards improving this situation due to the Directives' enforcement provisions (see below) and the increased likelihood of civil procedures being used over the criminal law procedures which have traditionally been used but which pose difficulties in terms of proof and the prerogative of the state prosecutor.

Notwithstanding transposition, however, a number of deterrents and potential barriers to litigation can be identified. First, some experts are concerned that the complexity of discrimination law may be deterring victims of discrimination in, for instance, **Austria** and the **United Kingdom** from bringing cases. Skilled, experienced assistance to victims can help counter this, but this type of aid remains limited in availability (in contrast to the professional advice and representation usually available to respondents). In **Norway**, fees related to the representation by a legal counsel in courts are high and it is difficult to obtain free legal aid in discrimination cases. In **Croatia**, similarly to many countries, the plaintiff is not obliged to instruct a lawyer, but due to the complexity of the legislation and procedures, the help of a lawyer is *de facto* necessary. Procedures to access free legal aid are too complicated, and the lawyers' fee paid by the State is symbolic.

Insufficient financial means to pursue a case is a second barrier cited in a number of states and is closely related to lack of adequate representation. In the **Czech Republic** and **Lithuania**, for example, legal aid is provided in very limited circumstances and therefore is of very little effect. In **Slovakia**, the ceiling for entitlement to free legal aid (or against a symbolic contribution) is quite low and hence a relatively large number of people cannot afford legal services. In addition, NGOs cannot claim in courts the reimbursement for the expenses which cannot be borne by the victims or their own resources, in contrast to attorneys, limiting further access to free legal aid.<sup>217</sup> At the same time, court fees may be too high to encourage victims to initiate a legal action, for instance in the **Netherlands** and **Slovakia**.

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

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

<sup>217</sup> Amendment to the Civil Procedure Act in 2011, Act no. 332/2011 Coll.

to the burden of proof and dismissed the case. In accordance with its remit, when the Danish Institute for Human Rights does not agree with the Board's decisions, it may request free legal aid so as to access the courts. In the present case, the Institute agreed to provide its assistance as it considered that the burden of proof imposed on the complainant had been adequately fulfilled. The Institute subsequently applied to the State for free legal support in order to have the scope of the burden of proof tried in court. In July 2010, free legal aid was granted. Accordingly, the complainant can now choose a lawyer and have the case brought to court free of cost.

Another potential barrier is posed by short time limits for bringing a case. The Directives leave it to the national legislature to set any time limits it deems appropriate (Article 7(3) of the Racial Equality Directive, Article 9(3) of the Employment Equality Directive). In all countries, individuals can bring cases after the employment relationship has ended, provided the time limits for submitting a claim are respected. In the **Netherlands**, an applicant who wishes to contest the lawfulness of the termination of an employment contract (discriminatory dismissal/victimisation dismissal) under civil law must do so within two months of termination of the employment contract. Under **Germany's** General Equal Treatment Act there is a time limit of two months for claims, beginning either with the receipt of the job application by the employer or knowledge of the disadvantageous behaviour. In **Ireland**, the Equal Status Act 2000-2008 requires a complainant to notify the respondent in writing within two months of the date of the incident (or the date of the last incident) of the nature of the complaint and the intention to pursue the matter with the Equality Tribunal if there is no satisfactory response. Even with the possibility of an extension, if there is reasonable cause that prevented the complainant from sending the notification within the normal time period, there is concern that such short time limits can be problematic for victims, especially people with literacy difficulties, people with inadequate command of the state's official language and disabled people. In **Croatia**, employees must file their complaints with their employer within 15 days. The employer has 15 days to decide on the complaint and if the employee is not satisfied with this decision, a claim can be filed with the court within 15 days. In **Hungary**, for certain types of legal dispute (such as disputes concerning the termination of an employment relationship under Article 202 of the Labour Code), claims have to be initiated within 30 days of the injurious measure; in **Sweden** if the claim aims to have a dismissal declared void, the time limit for filing is a matter of weeks from the act of dismissal or – in certain cases – one month after the termination of the employment. Furthermore, the length and the complexity of procedures may act as deterrents to those seeking redress, as is said to be the case for instance in **Austria, Cyprus, Estonia, Slovakia** and **Croatia**, and there are serious concerns in **Hungary** and **Slovenia** that some judicial proceedings take over three years to complete. In **Portugal**, lengthy procedures may be explained by the poor institutional mechanisms between the ACIDI, the general inspectorates and the public prosecutor.

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

#### **Deadline for implementing accessibility to public spaces and transport extended in Turkey**

The Turkish Parliament has extended the implementation deadline for facilitating access to public spaces (including court buildings) as well as public and private transport by people with disabilities to 2015. The Persons with Disabilities Law (no. 5378) adopted in 2005 required all public buildings, public infrastructure and public places as well as public and private transportation vehicles operated by municipalities to be made physically accessible by July 2012. Close to the deadline, two MPs from the Justice and Development Party presented a proposal for an extension to 7 July 2015, saying that measures

needed to be adopted to ensure the effective implementation of the law. The bill was introduced and expeditiously adopted on 4 July. At the time of writing the text still required the President's approval.

The Minister for Family and Social Policy stated the government would establish a council composed of academics and civil society representatives to identify measures to be adopted within one year in every city and district in order to provide disabled people with access to public spaces and services. She committed the government to monitoring the process and sanctioning failures to comply with the law.

In the **Netherlands** there are no specific rules requiring courts or the equality body to be accessible. Physical access to courts and other public buildings is not guaranteed in **Slovakia**. Access to public buildings is not always guaranteed in practice in, for instance, **Hungary, Portugal** and **Slovakia**, despite legal requirements. While the provision of information in Braille or sign language is required in **Lithuania** and **Portugal**, it is not mandatory in the **Czech Republic, Malta** or **Slovakia**. In **Ireland**, sign language interpretation in the court system is required in the context of criminal actions, but there is no corresponding provision for civil actions. In **Estonia** and **Hungary**, sign language is available in the courts, but Braille is rare. A further barrier in **Estonia** is that in practice courts usually reject complaints in Russian, in spite of the claimants' right to interpretation in court. In **Cyprus**, legal documents are not made available in Braille in the courts. No countries mention specific procedural rules for individuals with learning disabilities. The **French** Disability Act creates a structure which centralises all administrative procedures to enforce the rights of disabled people. For instance, a claim referee will forward a disabled person's claim to the competent authority or jurisdiction. In **Slovenia**, the 2010 Act on Equal Opportunities of People with Disabilities ultimately introduces the obligation to make courts accessible for people with disabilities and to make the court's writings accessible either in scripts or in any other way chosen by the individual concerned (such as Braille).

Finally, the infrequency of litigation may itself be a deterrent to victims of discrimination as the impression may prevail that success is improbable. The more that cases are reported in the media, the more knowledgeable victims will become about their rights and options for upholding these rights. There is a tendency for the media to report on high-profile cases involving racial or ethnic and religious discrimination rather than age or disability cases. The media are likely to report even less in countries where cases are not made public. For instance, in **Turkey** only a selection of Court of Cassation and Council of State rulings is published. Likewise, in **Italy** and the **FYR of Macedonia**, there is no systematic publication of decisions by either the judges or the equality body. Little information is available in **Liechtenstein** regarding court cases, especially from the first instance (ordinary instance) courts which are competent to decide upon civil and criminal discrimination claims.

## **B. Legal standing and associations**

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

*"Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of [these Directives] are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under [these Directives]."*

Under the directives, EU Member States have some discretion as to how this clause is implemented in terms of the type of assistance that can be provided by associations to victims, and therefore national legal orders present many different patterns that are difficult to compare. Being able to 'support' a victim is more common than the power to engage in proceedings 'on behalf' of a victim.



## Entities which may engage in procedures

No special regulations on the engagement of associations in discrimination procedures are found in **Denmark**, **Finland** and the **United Kingdom**. Individual lawyers (working for organisations) may represent – and thereby “engage in support of” – a victim in court upon his or her authorisation, and trade unions and employers’ organisations can represent their members. In **Iceland**, court procedures must be carried out in person or by a mandated representative, which can be a lawyer or an association. In the **FYR of Macedonia**, the Labour Act grants the right to engage in judicial or other proceedings only to trade unions, but the new Anti-discrimination Act extends this to all organisations and institutions dealing with equality issues. Similarly in **Liechtenstein**, trade unions and equality organisations may act as representative provided that a specific proxy is given by the complainant. Under **Swedish** procedural law, anyone can engage in proceedings or support a complaint. Trade unions have legal standing where one of their members is involved. NGOs have the right to bring actions in their own name as a party provided that their statutes envisage the possibility of taking into account their members’ interests, depending on their own activities and the circumstances of the case and on condition that consent is given. **Greek** procedural law permits NGOs and trade unions with a legitimate interest in ensuring the principle of equal treatment to represent people before any court or administrative authority, as long as they have that person’s written consent (Article 13(3), Act 3304/2005). The organisation must act before the court through an authorised lawyer.

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

In **Croatia**, the right to intervene is given to bodies, organisations, institutions, associations or other people engaged in the protection of the right to equal treatment related to the group whose rights are at issue in the proceedings. In **Bulgaria**, public interest NGOs and trade unions may join proceedings brought by a victim in their support, and do not formally need the complainant’s consent for this, or else they may represent complainants, for which consent is necessary.<sup>218</sup> Furthermore, they can initiate proceedings themselves without an individual complainant where the rights of many parties are affected.<sup>219</sup> Trade unions and public interest NGOs can also join such *actio popularis* proceedings brought by other associations in an *amicus curiae* capacity. NGOs and trade unions can intervene in support of class actions.

In **Ireland**, an individual or body may be authorised by an individual complainant to represent them before the Equality Tribunal or Labour Court (Article 77(11), Employment Equality Act 1998-2008). In **Estonia**, staff members of associations of workers and other entities with a legitimate interest may represent or advise victims of discrimination in criminal, civil and administrative procedures if they meet certain criteria. Associations and other entities have a right to

<sup>218</sup> In practice, however, if the complainant and NGO are not in communication, it would be difficult for the NGO to learn about the case in order to file a motion to join it.

<sup>219</sup> Article 72(3), Protection against Discrimination Act.

involvement in discrimination disputes in private employment as well as in the framework of the conciliation procedure before the Chancellor of Justice, where a person who has a legitimate interest in ensuring compliance with the equal treatment guarantee may also act as a representative (Article 23(2) of the Chancellor of Justice Act). Representation of victims by legal entities (such as NGOs) is also allowed under the **Slovakian** Anti-discrimination Act. The legal entity has to be given the authority to do so under a separate law (e.g. as is the case for the National Centre for Human Rights) or has to deal with discrimination. Additionally, a 15 October 2008 amendment to the Code of Civil Procedure offers the opportunity to “a legal entity whose activity is the protection of rights under a special law”, to join a pending court proceeding. The **Slovak** Anti-discrimination Act is one such ‘special law’. This means that the national equality body (the **Slovak** National Centre for Human Rights) or an NGO that seeks to protect the victims of discrimination can intervene as a third party in a court proceedings.

In **Germany**, under the General Equal Treatment Act, anti-discrimination associations are entitled to support claimants in court proceedings, provided that they fulfil certain criteria (such as having at least 75 members and operating permanently rather than on an ad hoc basis to support one claim). In **Luxembourg**, under the General Discrimination Act of 28 November 2006, for associations to assist a victim of discrimination before the courts they must have legally existed for five years and be recognised by the Ministry of Justice as being nationally representative in the field of anti-discrimination. In **Norway**, organisations must bear the “purpose, wholly or partly, to oppose discrimination according to the grounds as prohibited by law”.

In **Austria**, although anyone can represent alleged victims of discrimination in informal proceedings before the Equal Treatment Commission, for court proceedings only one statutory organisation, the Litigation Association of NGOs against Discrimination, has been given third-party intervention rights in the courts on behalf of the complainant, with his or her consent (Section 62 of the Equal Treatment Act). All specialised NGOs can join this Association, but non-members are not granted any special procedural rights. If they want to intervene they have to prove their legal interest in the case. An NGO, the **Austrian** National Council of Disabled Persons, has been given a similar right of intervention in disability cases, in addition to the Litigation Association’s own right to act.

### Legal standing in court of organisations for discrimination cases

NGOs/trade unions have legal standing in court for discrimination cases		
	Law	Article
<b>AUSTRIA</b>	Federal Equal Treatment Act (with limitations) <sup>220</sup>	§ 62
<b>BELGIUM</b>	Federal Racial Equality Act	Art. 30 and 32
	General Anti-discrimination Federal Act	Art. 29
<b>BULGARIA</b>	Protection Against Discrimination Act	Art. 71(2) and (3)
<b>CROATIA</b>	Anti-Discrimination Act	Art. 24
<b>CYPRUS</b>	Act on Equal Treatment Irrespective of Race or Ethnic Origin	Art. 12
	Act on Equal Treatment and Occupation	Art. 14
	Act on Persons with Disabilities	Art. 9D
<b>CZECH REPUBLIC</b>	Civil Procedure Code	Section 26
<b>DENMARK</b>	Administration of Justice Act (with restrictions) <sup>221</sup>	Chapter 25 and Section 260
<b>ESTONIA</b>	Labour Conflict Resolution Act	Art. 14 (2')
<b>FINLAND</b>	No	-

<sup>220</sup> This right is only granted for the Litigation Association of NGOs against Discrimination. The right to intervention and/or representation varies depending of the provinces.

<sup>221</sup> The Act includes restrictions.

NGOs/trade unions have legal standing in court for discrimination cases		
	Law	Article
<b>FRANCE</b>	Labour Code <sup>222</sup>	Art. 1134-2 and 1134-3
	Code of Penal Procedure	Art. 2-8
	New Code of Civil Procedure.	Art. 31
<b>FYR of MACEDONIA</b>	Prevention and Protection against Discrimination Act	Art. 39 and 41
<b>GERMANY</b>	General Equal Treatment Act <sup>223</sup>	Art. 23
<b>GREECE</b>	Equal Treatment Act <sup>224</sup>	Art. 13.3
<b>HUNGARY</b>	Act on Equal Treatment and the Promotion of Equal Opportunities	Art. 3, 18 and 20
	Act CXL of 2004 on the General Rules of the Proceedings and Services of Public Administrative Authorities	Art. 169/D
<b>ICELAND</b>	Civil Procedure Act	Arts. 16 and 25(3)
<b>IRELAND</b>	Employment Equality Act	S. 77(4)
	Equal Status Act	s. 25A
<b>ITALY</b>	Legislative Decree no. 215 on the Implementation of Directive 43/2000 <sup>225</sup>	Art. 5
	Legislative Decree no. 216 on the Implementation of Directive 78/200	Art. 5
	Law no. 67 on Measures for the Judicial Protection of Persons with Disabilities who are Victims of Discrimination <sup>226</sup>	Art. 4
<b>LATVIA</b>	Law on Organisations and Foundations	Art. 10 (3)
<b>LIECHTENSTEIN</b>	Code of Civil Procedure	Art. 26 and 28
<b>LITHUANIA</b>	Equal Treatment Act	Art. 12 para 2
<b>LUXEMBOURG</b>	Equal Treatment Act	Art. 7
<b>MALTA</b>	Equal Opportunities (Persons with Disability) Act	Art. 33A
<b>NETHERLANDS</b>	Civil Code	Art. 3:305a
<b>NORWAY</b>	Act on Civil Procedures/Dispute Resolution Act	s. 1-4(1)
<b>POLAND</b>	Code of Civil Procedure	Art. 61§4
<b>PORTUGAL</b>	Law 3/2011 forbidding any discrimination in access to and exercise of self-employment and transposing into national law Directives 2000/43/EC, 2000/78/EC and 2006/54/EC	Art. 8
<b>ROMANIA</b>	Ordinance on the Prevention and Punishment of All Forms of Discrimination	Art. 28(1) and (2)
<b>SLOVAKIA</b>	Act on Equal Treatment in Certain Areas and Protection against Discrimination	S. 10
	Civil Procedure Act	Art. 26 para 2
<b>SLOVENIA</b>	Civil Procedure Act <sup>227</sup>	Art. 199
<b>SPAIN</b>	Act on Fiscal, Administrative and Social Measures <sup>228</sup>	Art. 31
<b>SWEDEN</b>	Discrimination Act	Ch. 6, S. 2
<b>TURKEY</b>	No	-
<b>UNITED KINGDOM</b>	No	-

<sup>222</sup> For cases relating to employment.

<sup>223</sup> Organisations can support plaintiffs but not represent them.

<sup>224</sup> Organisations in **Greece** have legal standing under certain restrictions.

<sup>225</sup> Regarding race and ethnicity, legal standing is recognized to organisations that are included in a list approved by a joint Decree of the Ministries of Labour and Welfare.

<sup>226</sup> Similarly, regarding disability, legal standing is granted to organisations identified by a joint Decree of the Ministries of Labour and Equal Opportunities.

<sup>227</sup> Organisations need to ask for and be granted status of a third party intervener by the court.

<sup>228</sup> Organisations do have the possibility to engage in civil and administrative proceedings but not in labour proceedings or in pre-judicial matters.

**To engage 'on behalf of'**

Few states allow associations to engage in proceedings 'on behalf of' victims of discrimination. **Spanish** Act 62/2003 transposing the Directives (Article 31) provides that in cases outside employment, "legal entities legally authorised to defend legitimate collective rights and interests may engage on behalf of the complainant, with his or her approval, in any judicial procedure in order to make effective the principle of equal treatment based on racial or ethnic origin". There is no corresponding provision for employment-related cases, in which only trade unions and employers' organisations can engage. With complainants' consent, trade unions can appear in court in the name and interest of their members. Furthermore, the Constitution entitles any natural or legal person invoking a legitimate interest to be party to proceedings relating to the violation of fundamental rights and freedoms, and entitles legal entities with a legitimate interest to engage in administrative procedures. In **Latvia**, the 2006 amendments to the Organisations and Foundations Act extended the power to bring a case before state institutions and courts on behalf of a victim (with their consent) to organisations and foundations whose aims are the protection of human rights and individual rights. **Icelandic** law provides that only individuals, associations or institutions which bear the rights or duties under national law can be party to a court case.<sup>229</sup> In **Lithuania**, under the latest amendments to the Equal Treatment Act adopted in June 2008, associations whose field of activity encompasses representation of victims of discrimination on a particular ground of discrimination in the courts have the right to engage on behalf or in support of complainants, with their approval, in judicial and administrative procedures. In **Finland**, representation by individual lawyers was governed by the general procedural rules. As of 1 January 2013, only lawyers who have been granted a special authorisation to act as a legal attorney can represent victims in courts. However, according to the exception laid down in Section 2 of the Judicial Procedure Code, lawyers working for bodies such as the Ombudsman for Minorities and social partners (trade unions and employer organisations) do not need to apply for such authorisation.

In **Romania**, NGOs with a legitimate interest in combating discrimination can appear in court as parties and may engage, either on behalf of or in support of the plaintiff, in any judicial and/or administrative discrimination procedure based on a request or mandate given by the victim. When the discrimination concerns a community or a group of people, the **Romanian** Anti-discrimination Ordinance provides legal standing for NGOs even without the approval of the alleged victims of discrimination. In **Norway** there is no specific requirement regarding the form or the content of the victim's consent. In **Poland** general rules under the Civil Procedure Code allow non-profit social organisations to bring a claim on behalf of individuals or join such labour and administrative proceedings. They can also act as *amicus curiae* and present their opinion to the court.<sup>230</sup> Organisations whose statutory objectives include equality protection and protection against discrimination by unfounded direct or indirect violation of the rights and duties of citizens may, in the case of claims in this field and with the consent of the citizens, institute actions on behalf of the citizens. With the consent of the plaintiff, they may join proceedings at any stage. The **Irish** Equality Authority has been granted the right to intervene in a case before the High Court as *amicus curiae* in order to give evidence in relation to the Racial Equality Directive. Following a legal challenge, this right was subsequently upheld by the **Irish** Supreme Court.<sup>231</sup> In **Slovenia**, only law firms can represent victims in courts, and this concretely means that NGOs can intervene only if they engage an entity entitled to go to courts, most frequently a qualified lawyer. In **Finland**, the right to bring a case before the Discrimination Tribunal is reserved to the victim or the Ombudsman for Minorities. The **Hungarian** Equal Treatment Act allows 'social and interest representation organisations' as well as the Equal Treatment Authority to engage on behalf of the victim in proceedings initiated due to alleged infringement of the principle of equal treatment and to engage in administrative procedures. Furthermore, social and interest representation organisations, the Equal Treatment Authority and the Public Prosecutor can bring *actio popularis* claims, provided that the violation of the principle of

<sup>229</sup> Civil Procedure Act no. 91/1991/, Article 16(1).

<sup>230</sup> Article 63, Code of Civil Procedure.

<sup>231</sup> Supreme Court [2006] IESC 57.

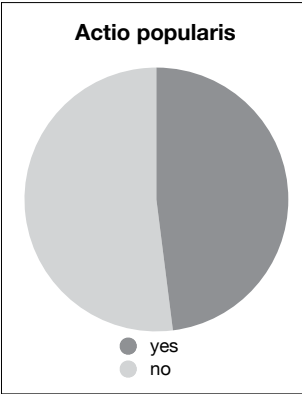


equal treatment was based on a characteristic that is an essential feature of the individual, and that the violation affects a larger group of persons that cannot be determined accurately. **Turkish** law does not fully guarantee the right of associations, organisations or other legal entities with a legitimate interest to engage in judicial or administrative procedures in support of victims of discrimination.

**Collective redress**

The European Commission has been assessing the need of a common EU approach to collective redress. In a working document published in 2011,<sup>232</sup> it recognised that collective redress is necessary where the same breach affects a large number of persons, in particular when individual actions fail to reach effective redress, in terms of stopping unlawful conduct and securing adequate compensation. Collective redress may therefore constitute an efficient instrument for effective access to justice. Such action is not covered by the two Anti-discrimination Directives but can be divided into class action or group action (claims on behalf of an undefined group of claimants or identified claimants and multiple claims) and *actio popularis*. In many countries, there is no specific procedure for discrimination cases but consumer protection law envisages group action, which can be relevant in the field of access to goods and services. However, in practice, application of these provisions is subject to judicial interpretation.

*Actio popularis* is a very useful tool as it allows organisations to act in the public interest on their own behalf, without a specific victim to support or represent. *Actio popularis* is permitted by national law for discrimination cases in 16 countries (**Austria, Bulgaria, Croatia, France, the FYR of Macedonia, Germany,**<sup>233</sup> **Hungary, Liechtenstein,**<sup>234</sup> **Malta, the Netherlands, Norway, Portugal, Romania, Slovakia, Spain**<sup>235</sup> and **Turkey**). In **Turkey** for example, the new Procedural Act adopted on 12 January 2011 introduced *actio popularis* claims. According to Article 113, associations and other legal entities may initiate a ‘group action’ to protect their interests or the interests of their members or the sector they represent “for the determination of the rights of the related parties on their behalf, removal of the illegal situation or the prevention of any future breach of their rights.” However, general rules concerning the shifting of the burden of proof apply.



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

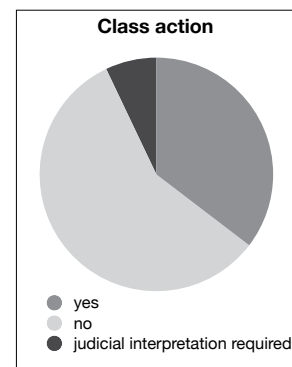
<sup>232</sup> Commission Staff Working Document Public Consultation: *Towards a coherent European approach to collective redress*, 4 February 2011.

<sup>233</sup> This possibility exists only on the basis of disability law.

<sup>234</sup> This possibility is nevertheless restricted. Articles 27 to 29 and 31 of the Act on Equality of People with Disabilities entitle associations for people with disabilities to make legal claims on their own behalf for accessibility provision in public buildings, for accessibility of public roads and traffic areas, and for accessibility on public transport systems.

<sup>235</sup> *Actio popularis* is possible in **Spain** only in criminal proceedings.

Class actions (possibility given to organisation to act in the interest of more than one individual victim for claims arising from the same event) are permitted by law for discrimination cases in 12 countries: **Bulgaria, Denmark, the FYR of Macedonia, Hungary,**<sup>236</sup> **Iceland,**<sup>237</sup> **Malta, the Netherlands, Norway, Poland, Portugal, Slovakia and Slovenia.** In **France** where class action is only permitted for housing cases, a draft law was tabled in 2006 but it has not progressed further. Judicial interpretation is required in two countries: **Italy** and **Lithuania.** In **Italy,** the government included in the finance law a provision<sup>238</sup> introducing class action to obtain financial compensation for wrongs perpetrated against groups of consumers.<sup>239</sup> In **Lithuania,** both the Code of Civil Procedure<sup>240</sup> and the Law on Administrative Procedure<sup>241</sup> could theoretically authorise organisations to engage in class actions but this would need to be tested and interpreted. Group litigation is possible under **Austrian** law but it does not formally establish the possibility for class action.



Neither *actio popularis* nor class action are permitted in the following countries: **Belgium, Cyprus, the Czech Republic, Estonia, Finland, Greece, Ireland, Latvia, Luxembourg, Sweden** and the **United Kingdom,** as well as **Italy** and **Lithuania** for which judicial interpretation is required regarding class action.

### Legitimate interest

According to the Court of Justice, Member States are not precluded "from laying down, in their national legislation, the right of associations with a legitimate interest in ensuring compliance with that directive, or for the body or bodies designated pursuant to Article 13 thereof, to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant. It is, however, solely for the national court to assess whether national legislation allows such a possibility".<sup>242</sup> In practice, this gives considerable discretion to Member States in the criteria they set for determining which legal entities can have a legitimate interest and which cannot. Further administrative provisions or formal requirements often reduce the scope for organisations to act. The **French** Act of 16 November 2001 permits representative trade unions and NGOs which have been established legally for at least five years and whose statutes mention combating against discrimination or slavery to intervene in an action brought by any apprentice, trainee, job applicant or employee who alleges they have been a victim of discrimination. Any person with a legitimate interest in the dismissal or granting of a civil action has legal standing before the civil courts, and NGOs working to combat discrimination on the grounds of ethnic origin, race or religion may be civil parties in some criminal actions. Although there is no specific provision in the Code of Administrative Justice, NGO interventions are common practice before administrative courts, provided that the

<sup>236</sup> The **Hungarian** legal system does not prevent associations from obtaining authorisations from more than one victim and launching a single case, but in such a case the claims of each victim will be examined individually.

<sup>237</sup> The Civil Procedure Act provides for a form of class action. Three or more individuals with claims against a party stemming from the same incident or situation can establish an 'action association' which can bring the case on the plaintiffs' behalf.

<sup>238</sup> Law no. 244 for the formation of the annual and pluri-annual balance of the State. *Legge 24 Dicembre 2007, n. 244, Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2008)*, in *Gazzetta Ufficiale n. 300, del 28 dicembre 2007, Article 2, commi 445-449.*

<sup>239</sup> After having been frozen for some time since its adoption in 2007, this legislation entered into force, in a slightly modified form, on 1 January 2010. Although this law does not mention anti-discrimination, it might be possible to bring class action in the anti-discrimination field.

<sup>240</sup> Article 49 of the code of Civil Procedure.

<sup>241</sup> Article 49 paragraph 3 of the Law on Administrative Procedure.

<sup>242</sup> Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, [2008] ECR I-5187.

purpose of the NGO corresponds to the subject matter of the case. However, the scope of the law is narrow and does not include employment cases for instance.

The **Hungarian** 'social and interest representation organisations' referred to above include any social organisation or foundation whose objectives, as set out in its articles of association or statutes, include the promotion of equal social opportunities for disadvantaged groups or the protection of human rights. This includes the minority self-governments of particular national and ethnic minorities and trade unions for matters related to employees' material, social and cultural circumstances and living and working conditions (Article 3(f) Equal Treatment Act). In **Belgium**, the Centre for Equal Opportunities and Opposition to Racism, officially recognised associations, associations which have had a legal personality for at least three years and state as their objective the defence of human rights or the fight against discrimination, and workers' and employers' organisations may engage in discrimination proceedings. However, where the victim of the alleged discrimination is an identifiable (natural or legal) person, an action brought by such bodies will only be admissible if they prove that the victim has consented to the action.

In **Italy**, associations and bodies active in the fight against discrimination can engage in proceedings in cases of discrimination on the grounds of race and ethnicity in support or on behalf of complainants if they are included in a list approved by a joint decree of the Ministries of Labour and of Welfare and Equal Opportunities.<sup>243</sup> Such organisations are listed on the basis of criteria set out in the joint decree, which include establishment for one year and having promotion of equal treatment and combating discrimination as their only or primary aim. With regard to all the grounds of discrimination dealt with in Directive 2000/78/EC, standing to litigate – previously limited by Decree 216/2003 to trade unions – has now been extended to other organisations and associations representing the rights or interests affected. **Portuguese** associations may engage in judicial or other procedures in support of a complainant as they have the right to legal standing in civil and criminal cases concerning race discrimination and in some administrative proceedings. In particular, Act 18/2004 provides that "associations whose objective is the defence of non-discrimination based on racial or ethnic origin have the right to engage in judicial procedures on behalf or in support of the interested persons, with their approval" (Article 5).

### C. Burden of proof

As a result of the difficulties inherent in proving discrimination, Article 8 of the Racial Equality Directive and Article 10 of the Employment Equality Directive lay down that people who feel they have faced discrimination must only establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination.<sup>244</sup> The burden of proof will then shift to the respondent, who must prove that there has been no breach of the principle of equal treatment. This does not affect criminal cases (Article 8(3)/10(3)), and Member States can decide not to apply it to cases in which courts have an investigative role (Article 8(5)/10(5)). Thus, for example, in **France** the burden of proof is not shifted in administrative procedures which are inquisitorial in nature. Nevertheless, the Council of State (the supreme administrative court) held in 2009 that, while in discrimination cases it is the responsibility of the petitioner to submit the facts in order to presume a violation of the principle of non-discrimination, the judge must actively ensure that the respondent provides evidence that all elements which could justify the decision are based on objectivity and devoid of discriminatory objectives. **Portuguese** law states that the principle does not apply to criminal procedures nor to actions in which, in terms of the law, it is up to the court to carry out the investigation. In the **Netherlands**, the

<sup>243</sup> Joint Decree of the Ministries of Labour, Social Affairs and of Equal Opportunities of 16 December 2005, no. 215 (Establishment of the list of associations having standing to litigate in support or on behalf of victims of discrimination based on racial or ethnic grounds). Published in *Gazzetta Ufficiale serie generale* no. 9, on 12 January 2006.

<sup>244</sup> The shift of burden of proof was originally developed under gender legislation (see Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex).

burden of proof is shifted in court proceedings, while this is not necessary in procedures before the Equal Treatment Commission, although the Commission nevertheless does apply the shift in the burden of proof on a voluntary basis. This rule applies for all forms of discrimination, including harassment. In contrast, in **Bulgaria**, the shift of the burden of proof is applicable to both judicial proceedings and proceedings before the equality body; it is also uniformly applicable to all forms of discrimination, including harassment and victimisation.

A minority of states appear to have failed to transpose the burden of proof provision in line with the Directives. In **Latvia** the shift of the burden of proof applies only to employment, natural persons who are economic operators and access to goods and services (Consumer Protection Act, Article 3(1)(5)). The provision on the burden of proof in the **Austrian** federal Equal Treatment Act lowers the burden for the plaintiff but in a way that is not considered to comply satisfactorily with the Directives. However, the Supreme Court has provided an interpretation in line with the Directive by ruling that, "If discriminatory infringements are successfully established, it is for the respondent to prove that he or she did not discriminate". In **Poland**, before the adoption of the new Equal Treatment Act in 2010, the burden of proof only shifted in employment cases. Article 14 of the Act eventually introduced the shift of the burden of proof in all compensation proceedings dealing with the principle of equal treatment enshrined in the Act. In the **FYR of Macedonia**, the shift of the burden of proof was recently and partially introduced in the Labour Act, the Social Protection Act and the Child Protection Act, but for the latter only in administrative procedures and litigation. However, the Anti-discrimination Act places the burden to a great extent on the complainant, as he or she must submit "facts and evidence from which the act or action of discrimination can be established"<sup>245</sup> contrasting with the Directives, which merely require the establishment of the facts. **Turkish** law provides for a shift in a limited number of cases, as does **Icelandic** law, where the shift applies to gender discrimination cases only. In **Liechtenstein**, the plaintiff must establish the discrimination claim as 'credible'. Moreover, against allegations of direct discrimination defendants must bring forward a 'crucial' reason justifying the difference in treatment. In **Iceland** gender legislation provides for a shift of the burden of proof. In **Norway**, the rule of shared burden of proof applies to all grounds of discrimination, as well as reasonable accommodation, harassment, victimisation and instructions to discriminate.

#### Provisions on burden of proof in Romania

The Romanian 2006 amendments to the Anti-discrimination Ordinance introduced the concept of 'sharing the burden of proof' by means of which "the person concerned has the obligation to prove the existence of facts which allow the presumption of the existence of direct or indirect discrimination, and the person against whom a complaint has been filed has the duty to prove that the facts do not amount to discrimination".<sup>246</sup> The equality body's interpretation was not always in compliance with the Directives, and some courts interpreted the concept in a manner that placed an unreasonable burden on the victim. A draft proposal to amend the Anti-discrimination Ordinance was submitted to the Senate. The Head of the Senate's Legal Committee put forward several amendments, including a new definition of the burden of proof, which were approved in a report by the Joint Legal and Human Rights Committees.

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

<sup>245</sup> Act on the Prevention of and Protection against Discrimination [Закон за спречување и заштита од дискриминација], Official Gazette of the Republic of Macedonia, No.50/10. Articles 25 (para. 2), 38.

<sup>246</sup> Article 20 (6) of Governmental Ordinance 137/2000.

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

The meaning of this phrase, “facts from which it may be presumed that there has been direct or indirect discrimination” was one of several questions on the burden of proof put before the European Court of Justice in the Case of C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v NV Firma Feryn* decided by the Court on 1 July 2008.

There are different types of evidence for plaintiffs to establish facts from which it may be presumed that there has been direct or indirect discrimination, including statistics, situation testing (**Belgium, Hungary, the Netherlands, Romania and Sweden**): questionnaires, audio or video recording (**Slovakia**), expert opinions or inferences drawn from circumstantial evidence (such as, in **France**, where the chronological order of relevant events, the foreign physical appearance or a foreign surname<sup>247</sup> were accepted as means of proof in discrimination cases on grounds of racial or ethnic origin).

#### **Dutch Equal Treatment Commission accepts recording as means of proof in a discrimination by association case<sup>248</sup>**

The case concerned a man employed on a six-month temporary contract which had been renewed once for a further six months. He later received a positive performance appraisal two weeks before the second term expired. During the same period, he called in sick several times, as a result of stress at home due to the fact that he had to take on his paralysed wife’s care and household chores. During a meeting with the company director, he was told that his situation at home had influenced the decision not to renew his contract for a second time. The entire conversation was recorded on the employee’s phone, without the director’s consent.

Before the Equal Treatment Commission (ETC), the company alleged that the recording was unlawful and that the decision not to renew the contract was based on financial motives, as the company’s annual profit had declined by one third compared to the previous year. The ETC held that recordings can be used as proof of discrimination, in particular because collecting proof is generally extremely difficult for victims. In this case, sufficient evidence was brought forward to shift the burden of proof onto the defendant. Disability did not need to constitute the sole motive for dismissal or non-extension of a contract, and other factors, such as financial reasons, could be taken into consideration. The ETC concluded that there was discrimination by association on the ground of disability.

#### **D. Victimisation**

Member States must ensure that individuals are protected from any adverse treatment or adverse consequences in reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment (Article

<sup>247</sup> See *Airbus Operations SAS* no. K10-15873 where the Court of Cassation inferred discrimination from the list of staff surnames of the company.

<sup>248</sup> Opinion 2011-90 of 15 June 2011.



9, Racial Equality Directive; Article 11, Employment Equality Directive). There is still a major inconsistency with this principle in a number of states, where protection is restricted to the employment field and thereby fails to protect against victimisation in the areas outside employment protected by the Racial Equality Directive (**Latvia, Luxembourg and Spain**). According to **Danish** law, “the protection applies to a person who files a complaint regarding differential treatment of her/himself and to a person who files a complaint of differential treatment of another person”, and it is a prior condition that a causal link can be established between the victimisation and the employee’s request for equal treatment. In **Italy**, amendments to the Anti-discrimination Decrees were introduced to extend protection against victimisation to “any other person” beyond the complainant.<sup>249</sup> In both **Croatia** and the **FYR of Macedonia**, anti-discrimination acts prohibit placing in a less favourable position a person who has reported discrimination or filed a complaint or who has witnessed discrimination. **Icelandic** law,<sup>250</sup> as well as **Turkish** labour law, merely prohibits the dismissal of an employee who seeks judicial redress. In **Liechtenstein** a complainant or a witness is protected against reprisals for initiating a complaint or a legal action related to a violation of anti-discrimination law.

In **Belgium**, the General Federal Anti-discrimination Act and the Federal Racial Equality Act extend protection against reprisals for victims filing a complaint to any witness in the procedure. Similar protection from victimisation is provided in fields other than employment by Article 16 of the General Federal Anti-discrimination Act; in this context too, protection extends to witnesses. In **Bulgaria**, protection is accorded for victimisation by presumption and by association as well. Action for protection against discrimination may include, but is not limited to, bringing proceedings before the equality body or a court, in either the capacity of victim or as a third party, or testifying in proceedings. In the **United Kingdom** it is not required that the perpetrator of the victimisation should have been involved in the initial complaint. For example, an employer who refuses to employ a person because he or she complained of discrimination or assisted a victim of discrimination in a previous job would still be liable for victimisation. The **United Kingdom** provision on victimisation is, however, problematic in that the definition of victimisation requires the complainant to show less favourable treatment than a real or hypothetical comparator, while the Directives do not require a comparator. Case law has demonstrated how difficult it is to find an appropriate comparator.<sup>251</sup> Furthermore, protection against victimisation in the **United Kingdom** is retrospective only: the law does not require preventative measures as are implicitly required by the Directives. Finally, the Equality Act 2010 did not extend to post-employment acts of victimisation. In contrast, **Slovenian** protection against victimisation is proactive: upon finding discrimination in the original case, the Advocate of the Principle of Equality should order in writing the legal person in which discrimination allegedly occurred to apply appropriate measures to protect the person who faced discrimination, or persons assisting the victim of discrimination, from victimisation or adverse consequences of the complaint. In the event that an alleged offender does not obey the Advocate’s order, the inspector has the duty to prescribe appropriate measures that protect the person from victimisation. In **Lithuania**, the provision in the Equal Treatment Act repeats the wording of the Directives, stating that an employer is obliged to take necessary measures to ensure that employees are protected against dismissal or other adverse treatment which could occur as a reaction to a complaint within the organisation or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment. Before the latest amendments of June 2008, it had limited protection to employees who directly filed a complaint against discrimination. In **Romania**, protection against

<sup>249</sup> Legislative Decree of 8 April 2008, no. 59 (later converted into an ordinary law by the Act of 6 June 2008, no. 101, converting into an Act, with modifications, the Legislative Decree of 8 April 2008, containing urgent provisions for the implementation of EU obligations and the execution of judgments of the Court of Justice of the European Communities, published in Official Journal no. 132 of June 7, 2008 (*Legge 6 giugno 2008, n. 101, ‘Conversione in legge, con modificazioni, del decreto-legge 8 aprile 2008, n. 59, recante disposizioni urgenti per l’attuazione di obblighi comunitari e l’esecuzione di sentenze della Corte di giustizia delle Comunità europee.’ pubblicata nella Gazzetta Ufficiale n. 132 del 7 giugno 2008*).

<sup>250</sup> Victimisation is only explicitly prohibited under the Gender Equality Act.

<sup>251</sup> See, for example, *Aziz v. Trinity Taxis* [1989] QB 463 and *Chief Constable of the West Yorkshire Police v. Khan* [2001] IRLR 830. However, this is no longer an issue with the adoption of the Equality Act.

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

**French** Act no. 2008-496 has introduced specific protection against victimisation applicable to the entire scope of civil remedies for direct or indirect discrimination covered by the Directives. In particular, it provides that no one having testified in good faith about discriminatory behaviour or having reported it can be treated in an unfavourable manner and that "Unfavourable measures cannot be taken against a person because he or she was a victim of discrimination or because of his or her refusal to submit to discrimination prohibited by Article 2". This law clarifies that protection extends to victims and non-victims but does not provide any indication as to the burden of proof applicable to claims of victimisation.

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

<b>AUSTRIA</b>	Federal Equal Treatment Act	§§ 27, 36
<b>BELGIUM</b>	Federal Racial Equality Act	Arts. 14 and 15
	General Federal Anti-discrimination Act	Arts. 16 and 17
<b>BULGARIA</b>	Protection Against Discrimination Act	Art. 5 and § 1.3-4 Additional Provisions
<b>CROATIA</b>	Anti-discrimination Act	Art. 7
<b>CYPRUS</b>	Act on Equal Treatment in Employment and Occupation	Art. 10
	Act on Equal Treatment irrespective of Race or Ethnic Origin	Art. 11
	Act on Persons with Disabilities	Art. 7
<b>CZECH REPUBLIC</b>	Anti-discrimination Act	S. 4, para 3
<b>DENMARK</b>	Act on Prohibition of Differential Treatment in the Labour Market	s. 7, subsection 2
	Ethnic Equal Treatment Act	s. 8
<b>ESTONIA</b>	Equal Treatment Act	Art. 3
<b>FINLAND</b>	Non-Discrimination Act	s. 8
<b>FRANCE</b>	Act on the Adaptation of National Law to Community Law in Matters of Discrimination	Art. 3
<b>FYR of MACEDONIA</b>	Prevention and Protection against Discrimination Act	Art. 10
<b>GERMANY</b>	General Equal Treatment Act	Art. 16
<b>GREECE</b>	Equal Treatment Act	Art. 15
<b>HUNGARY</b>	Act on Equal Treatment and the Promotion of Equal Opportunities	Art. 10, para 3
<b>ICELAND</b>	<sup>252</sup>	-
<b>IRELAND</b>	Employment Equality Act	ss. 14, 74(2) and 98
	Equal Status Act	ss. 38A
<b>ITALY</b>	Legislative Decree no. 215 on the Implementation of Directive 43/2000	Art. 4
	Legislative Decree no. 216 on the Implementation of Directive 78/2000	Art. 4
<b>LATVIA</b>	Labour Law <sup>253</sup>	Art. 9

<sup>252</sup> Victimisation is only defined and prohibited in Gender law.

<sup>253</sup> Victimisation is also dealt with in the following laws: the 1995 Law on Social security, Art.34(2), the 1999 Law on Consumer Protection, Art. 3(1) and the 2009 Law on Prohibition of Discrimination against Natural Persons who are Economic Operators, Art. 7.



<b>LIECHTENSTEIN</b>	Act on Equality of People with Disabilities	Art. 23§4
<b>LITHUANIA</b>	Equal Treatment Act	Art. 7, para 8
<b>LUXEMBOURG</b>	Equal Treatment Act	Art. 4
<b>MALTA</b>	Employment and Industrial Relations Act	Art. 28
	Equal Treatment of Persons Order	Art. 7
<b>NETHERLANDS</b>	General Equal Treatment Act	Arts. 8(1) and 8(a)
	Equal Treatment on the Grounds of Disability and Chronic Disease Act	Arts. 7(a) and 9
	Equal Treatment in Employment on the Ground of Age Act	Arts. 10 and 11
<b>NORWAY</b>	Anti-Discrimination Act on Prohibition of Discrimination based on Ethnicity, Religion, etc.	s. 9
	Working Environment Act	s. 2-5
	Anti-Discrimination and Accessibility Act on Prohibition of Discrimination on the Basis of Disability	s. 8
<b>POLAND</b>	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment	Art. 17
<b>PORTUGAL</b>	Labour Code	Art. 129 (1)(a)
<b>ROMANIA</b>	Ordinance on the Prevention and Punishment of All Forms of Discrimination	Art. 2(7)
<b>SLOVAKIA</b>	Act on Equal Treatment in Certain Areas and Protection against Discrimination	s. 2a, paras 8 and 10
<b>SLOVENIA</b>	Act Implementing the Principle of Equal Treatment	Art. 3 (2)
<b>SPAIN</b>	Royal Legal Decree 1/1995, Workers' Statute	Art. 17.1
<b>SWEDEN</b>	Discrimination Act.	Ch. 2, ss. 18-19
<b>TURKEY</b>	Labour Law <sup>254</sup>	Art. 18
<b>UNITED KINGDOM</b>	(UK) 2010 Equality Act	s. 27
	(NI) The Race Relations Order (RRO)	Art. 4
	(NI) Fair Employment and Treatment Order	Art. 3(4)
	(NI) Employment Equality (Sexual Orientation) Regulations	Reg. 4
	(NI) Disability Discrimination Act	s. 55
	(NI) Employment Equality (Age) Regulations	Reg. 4

## E. Sanctions and remedies<sup>255</sup>

Infringements of anti-discrimination laws must be met with effective, proportionate and dissuasive sanctions, which may include compensation being paid to the victim (Article 15, Racial Equality Directive, Article 17, Employment Equality Directive). The concept of effective, proportionate and dissuasive remedies was first developed in the Court of Justice's case law on sex discrimination. Due to the parallels of EU sex discrimination law with the Racial Equality and Employment Equality Directives, this case law is of relevance to the latter Directives. The meaning of the concept must be determined in each concrete case in the light of individual circumstances.

<sup>254</sup> Although the prohibition of victimisation is not comprehensive enough.

<sup>255</sup> A thematic report on this topic produced by the European Network of Legal Experts in the Non-discrimination Field provides a more detailed analysis, cf. the thematic study by Christa Tobler, *Remedies and sanctions in EC non-discrimination law, effective, proportionate and dissuasive sanctions and remedies, with particular reference to upper Limits on compensation to victims of discrimination*. Some of the findings of this study are reproduced in this section.

**One of the largest awards in race discrimination claim in the UK<sup>256</sup>**

Elliott Browne, aged 55, was unfairly dismissed from his position as a director at Central Manchester University NHS Foundation. He had worked for the National Health Service for 34 years and had been subjected to race discrimination over a period of years. The pay-out of almost £1 million (EUR 1,110,186) reflected the discriminatory treatment which he suffered, and his eventual dismissal, resulted in serious damage to his health. The large majority of the payment related to future loss of earnings and pension. Despite evidence that Black employees comprised 2% of the Trust's workforce but 25% of those dismissed for disciplinary reasons the Trust denied that Mr Browne had been discriminated against and announced its intention to appeal.<sup>257</sup>

This case, illustrates the damage that discrimination can do to a person's career and well-being. In another case involving a woman subjected to harassment and false allegations by colleagues at Mid Yorkshire Hospitals NHS after she took maternity leave, the court awarded in December 2011 £4,4 million (EUR 5,3 million) for loss of earnings and pension.

In practice, a wide range of possible remedies exist depending, for example, on the type of law (e.g. civil, criminal, or administrative remedies), the punitive or non-punitive character of the remedies, their orientation as backward- or forward-looking (the latter meaning remedies seeking to adjust future behaviour) and the level at which they are intended to operate (individual/micro or group/macro level). Remedies may be available through various, possibly complementary, enforcement processes (administrative, industrial relations and judicial processes). Depending on such features, the remedies offered by a particular legal order will reflect different theories of remedies (e.g. remedial, compensatory, punitive and preventive justice) and also different concepts of equality (e.g. an individual justice model, a group justice model or a model based on equality as participation). It follows that a comprehensive enforcement approach is very broad indeed. This approach addresses not only procedural aspects and the substance of remedies (relief and redress for the victims of discrimination) but also broader issues such as victimisation, compliance, mainstreaming and positive action, as well as other innovative measures such as corrective taxation. Financial compensation to the victim may include compensation for past and future loss (most common), compensation for injury to feelings, damages for personal injury such as psychiatric damage, or exemplary damages to punish the discriminator (much less common).

As a whole, no single national enforcement system appears to be truly all-encompassing. Essentially, they are all mostly based on an individualistic and remedial – rather than a preventative – approach. **Irish** law provides a broad range of remedies, including compensation awards, reinstatement and re-engagement, as well as orders requiring employers to take specific courses of action. In particular, there is case law relating to compliance with these orders: the creation of an equal opportunities policy; reviewing recruitment procedures; reviewing sexual harassment procedures; formal training of interview boards; review of customer service practices; and equality training for staff. In **Spain** penalties have been established in the employment field for all the grounds (Directive 2000/78/EC) and for the ground of disability in all fields (Act 49/2007), but not in the other fields covered by Directive 2000/43/EC on grounds of racial or ethnic origin, except in criminal law.

In some Member States the specialised body is empowered to issue sanctions in cases where they have found discrimination. The **Bulgarian** Protection against Discrimination Commission has powers to impose financial sanctions

<sup>256</sup> [2012] EqLR 186 (February 2012).

<sup>257</sup> Employment Tribunal decision, *Browne v Central Manchester University NHS Foundation*, case nos. ET/2407264/07, ET/2405865/08, ET/2408501/08.

between the equivalents of EUR 125 and EUR 1,250, amounts that would be dissuasive to the majority.<sup>258</sup> These sanctions are administrative fines and are not awarded to the victim as compensation but go to the state budget. The **British** Commission for Equality and Human Rights<sup>259</sup> and the Equality Commission for Northern Ireland are able to use their powers of formal investigation to investigate organisations they believe to be discriminating and, where they are satisfied that unlawful acts have been committed, they can serve a binding ‘compliance notice’ requiring the organisation to stop discriminating and to take action by specified dates to prevent discrimination from recurring. They also have the power to enter into (and to enforce via legal action if necessary) binding agreements with other bodies who undertake to avoid discriminatory acts and to seek an injunction to prevent someone committing an unlawful discriminatory act.

#### **Lack of appropriate mechanisms to monitor compliance with decisions in Romania**

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

#### **Interesting administrative remedies are found in Portugal and Hungary. The following remedies are available in Portugal in all cases of discrimination:**

- publication of the decision;
- censure of the perpetrators of discriminatory practices;
- confiscation of property;
- prohibition of the exercise of a profession or activity which involves a public prerogative or depends on authorisation or official approval by the public authorities;
- removal of the right to participate in trade fairs;
- removal of the right to participate in public markets;
- prohibition of access to their premises for the perpetrators;
- suspension of licences and other authorisations; and
- removal of the right to the benefits granted by public bodies or services.

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

- oblige the perpetrator to discontinue the infringement and refrain from further infringement;

<sup>258</sup> Article 78-80 of the Protection against Discrimination Act.

<sup>259</sup> The Equality Act 2006 established a new single equalities and human rights body for Great Britain (England, Wales and Scotland), the Commission for Equality and Human Rights (CEHR), which came into formal existence in October 2007 and now calls itself the Equality and Human Rights Commission (EHRC). The EHRC has taken over the powers and functions of the three previous GB equality commissions – the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission – and has new functions in relation to sexual orientation, religion or belief and age, as well as in relation to human rights in general.

- oblige the perpetrator to make restitution in a statement or by some other suitable means and to make, at the perpetrator's own expense, an appropriate public apology;
- oblige the perpetrator to restore the state preceding the infringement, and to eliminate or deprive of its infringing nature any consequence of the infringement, at the perpetrator's own expense;
- oblige the perpetrator to pay any annual saving achieved as a result of the infringement into the Public Education Development Fund;
- oblige the maintainer to define the catchment area of the school in a way that meets the legal requirements aimed at reducing segregation; or
- forbid for a definite period of time or until certain conditions are met the admission of new pupils or students, provided that their education can be provided in another educational institution within the perimeter of the same settlement.<sup>260</sup>

For certain cases, the Court of Justice of the European Union's case law contains specific indications regarding the European Union legal requirements in relation to remedies. Thus, in the case of discriminatory dismissal, the remedy (or remedies) granted must in all cases include either reinstatement or compensation. Furthermore, where compensation is chosen as a remedy it must fully make good the damage. Upper limits are not acceptable, except for situations where the damage was not caused through discrimination alone.

In **Finland**, the law specifies an upper limit of EUR 16,430;<sup>261</sup> but this is only theoretical as it can be exceeded for special reasons, such as if the breach of equal treatment laws took place over an extended period of time; if the respondent is indifferent to requirements posed by law; if the breach was particularly severe; or if the complainant felt particularly offended by the breach. Statutory upper limits on compensation for non-pecuniary damages seem to apply in **Malta** for disability cases (EUR 465).<sup>262</sup>

There appear to be no limits either in relation to pecuniary or non-pecuniary damages in the national laws of **Bulgaria**, the **Czech Republic**, **Denmark**, **France**, **Italy**, **Luxembourg**, the **Netherlands**, **Poland**, **Portugal**, **Romania**, **Slovakia**, **Slovenia**, **Spain**, the **United Kingdom**, **Croatia**, the **FYR of Macedonia**, **Iceland**, **Liechtenstein**<sup>263</sup> and **Norway**. In **Estonia**, the Public Service Act (Article 135) was amended in December 2008 to the effect that the upper limit of compensation provided for illegal termination of employment or service does not apply if there has been a discriminatory termination as specified in the Equal Treatment Act or the Gender Equality Act.

In **Latvia**, there is no maximum amount for damages under civil law, but the Reparation of Damages caused by State Administrative Institutions Act sets maximum amounts of non-pecuniary damages for material harm at LVL 5,000 (around EUR 8,000), or LVL 7,000 (around EUR 10,000) in cases of grievous bodily harm, and LVL 20,000 (around EUR 24,000) if life has been endangered or grievous harm has been caused to health. The maximum amount of damages for non-material (i.e. non-pecuniary) harm is set at LVL 3,000 (around EUR 4,800) or LVL 5,000 (around EUR 8,000) in cases of grave moral harm and LVL 20,000 (around EUR 24,000) if life has been endangered or grievous harm has been caused to health. It is as yet unclear whether the courts would award damages for both personal and moral harm in cases of discrimination. The definitions of personal and moral harm permit cases of discrimination to be brought under both, and the law permits applications for several kinds of damages at the same time. **Austrian** law specifies an upper limit of EUR 500 in cases of non-recruitment or non-promotion if the employer proves that the victim would not have been recruited or promoted anyway. Of the countries where limits do exist, **Ireland** is particularly interesting because

<sup>260</sup> Article 84, paragraph 14 of the Public Education Act.

<sup>261</sup> TyA 59/2010, section 1.

<sup>262</sup> Article 24 of the Equal Opportunities (Persons with Disability) Act.

<sup>263</sup> No upper limit for disability under the Act on Equality of People with Disabilities.

there are no comparable statutory limits on compensation for discrimination on grounds of sex. In **Poland**, there is a minimum level of compensation which is linked to the minimum wage. Articles 5 and 21 of the **Turkish** Labour Law provide that an employee may ask compensation for the actual damage suffered, in addition to a compensation of up to four months' wages.

#### **Possible trend to increase amount of compensation awarded in Denmark<sup>264</sup>**

The Board of Equal Treatment found a violation of the Ethnic Equal Treatment Act in a case where the claimant was denied access to a nightclub twice because of his ethnic origin. The claimant was awarded a compensation of DKK 10,000 (approximately EUR 1,333). This amount is significantly greater than in any other previous cases. According to the Board, discrimination in nightclubs and bars constitutes a continuing problem about which a great number of complaints are brought to the equality body. In order to impose effective sanctions, compensation must reach a certain dissuasive amount and therefore the level of compensation has been raised.

The following examples illustrate sanctions in a number of Member States which can hardly be regarded as effective or dissuasive remedies. In **France**, judges are still very conservative when calculating pecuniary loss, and amounts awarded remain rather low. In **Sweden**, damages for violations of non-discrimination legislation range between EUR 1,700 and EUR 11,000, depending on the circumstances. In **Slovakia**, an inconsistent and varying approach is taken to financial compensation. **Dutch** courts are generally reluctant to grant damages for non-pecuniary loss. In a number of early cases concerning discrimination in access to services in **Hungary**, the amount of compensation was consistently around EUR 400. This is twice the monthly minimum wage, so not very dissuasive. However, average amounts have risen, with discrimination based on racial or ethnic origin being punished with non-pecuniary damages of around EUR 2,000 in some cases. Punitive damages do not exist, but a so-called 'fine to be used for public purposes' may be imposed by the court if the amount of damages that can be imposed is insufficient to mitigate the gravity of the actionable conduct. This fine is, however, payable to the State and not to the victim. In **Norway**, the fact that the Equality Ombud and the Equality Tribunal cannot award compensation to victims has been widely criticised and sanctions can hardly be considered as effective or dissuasive.

On initial examination, with the exception of the **United Kingdom** (and recently **Ireland** for employment cases<sup>265</sup>), these figures seem relatively low. This, coupled with the length of time it can take to obtain a decision (for instance in **Ireland** it takes an average of 18 months for a case to be completed after it has been assigned to an Equality Officer), throws doubt on the effectiveness of remedies and even whether they in actual fact make good the loss. Their dissuasiveness is also questionable, in particular with regard to the issue of whether such sums will deter larger employers. **Spanish** legislation provides criteria based on company turnover to determine the level of penalty in some cases. This approach presents an interesting option.

<sup>264</sup> Board of Equal Treatment decision no 14 / 2011 of 4 February 2011 J. no. 2500050-10.

<sup>265</sup> In 2011, the Equality Tribunal awarded EUR 25,000 for harassment and discriminatory treatment in conditions of employment on grounds of race, Equality Tribunal DEC-E2011-016 of 1 February 2011. In a victimisation case, the victim was granted EUR 41,486, Equality Tribunal DEC-E2011-117. In 2010, the average award was EUR 17,775, with the highest award being EUR 100,000.

Chris | 1989



# Chapter 5

## The role of equality bodies compared<sup>266</sup>

<sup>266</sup> Please also see the complete tables for the specialised bodies in the annex.

**Article 13, Racial Equality Directive:**

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

All EU Member States have now designated a specialised body for the promotion of equal treatment irrespective of racial or ethnic origin, as required by Article 13 of the Racial Equality Directive. However, in **Finland**, the Ombudsman for Minorities seems not to be in compliance with the Racial Equality Directive with regard to dealing with matters falling within the field of employment. In **Turkey**<sup>267</sup> there is no single specialised body which would be able to fulfil all three functions under Article 13(2) of the Racial Equality Directive. No body or institution has been officially designated in the transposition process to comply with the Directive. There is no specialised body in **Iceland**. As far as EEA countries are concerned, only **Norway** has a specialised body for the promotion of equal treatment irrespective of racial or ethnic origin, in accordance with Article 13 of the Racial Equality Directive.<sup>268</sup> **Liechtenstein** has established the Office of Equal Opportunities to deal with gender equality, but it is also mandated to cover other grounds of discrimination including disability, sexual orientation, racial and ethnic origin.

Some Member States have set up completely new bodies such as **France**,<sup>269</sup> **Germany**,<sup>270</sup> **Greece**,<sup>271</sup> **Hungary**,<sup>272</sup> **Italy**,<sup>273</sup> **Romania**,<sup>274</sup> **Slovenia**,<sup>275</sup> **Spain** and **Poland**. Bodies that already existed but which have been given the functions designated by Article 13 include the **Cypriot** Ombudsman, the **Estonian** Chancellor of Justice, the **Lithuanian** Equal Opportunities Ombudsperson, the **Maltese** Equality Commission, the **Slovak** National Centre for Human Rights and the **Croatian** Ombudsman. In **Latvia** the National Human Rights Office was re-organised in 2007 as the Ombudsman's Office with increased competences after the Parliament appointed the Ombudsman on 1 March 2007. In some states, Article 13 functions are fulfilled by, or shared between, a number of organisations (e.g. **Greece**). A new trend has arisen with the merging of existing institutions into one single body to exercise different competences in a variety of areas. The **French** Equal Opportunities and Anti-Discrimination Commission was merged in 2011 with several other statutory authorities to become the Defender of Rights. In the **Netherlands**, a new law created the Human Rights Institute in November 2011,<sup>276</sup> incorporating the Equal Treatment Commission. A bill was also introduced by the Minister for Justice, Equality and Defence in **Ireland** to merge the **Irish** Equality Authority and the Human Rights Commission.

<sup>267</sup> The draft law tabled in March 2010 foresees the creation of an equality body.

<sup>268</sup> Equality and Anti-discrimination Ombuds. Decisions may be appealed before the Equality Tribunal.

<sup>269</sup> The **French** Equal Opportunities and Anti-discrimination Commission (HALDE) was set up by law on 30 December 2004. The HALDE has been incorporated into a new institution named the Defender of Rights, effective since 1 May 2011 (Act no. 2011-333 of 29 March 2011 creating the Defender of Rights).

<sup>270</sup> The Federal Anti-discrimination Agency.

<sup>271</sup> The Equal Treatment Committee and Equal Treatment Service, which share the task of promoting the principle of equal treatment with the Ombudsman, the Work Inspectorate and the Economic and Social Committee. However, a recent report of the National Commission of Human Rights recommends the merger of all existing equality bodies into the Ombudsman.

<sup>272</sup> Equal Treatment Authority.

<sup>273</sup> National Office against Racial Discrimination.

<sup>274</sup> National Council on Combating Discrimination (NCCD).

<sup>275</sup> Advocate of the Principle of Equality and Council of the Government for the Implementation of the Principle of Equal Treatment. In April 2012, the Government Office for Equal Opportunities was abolished and incorporated into the Ministry of Labour, Family and Social Affairs.

<sup>276</sup> Staatsblad 2011, 573, to enter into force in autumn 2012.



The minimum requirement on Member States is to have one or more bodies for the promotion of equality irrespective of racial and ethnic origin. A large number of states went further than the Directive's wording, either in terms of the grounds of discrimination that specialised bodies cover, or in terms of the powers that they have to combat discrimination. The Directive left Member States with a wide degree of discretion with regard to how to set up their specialised bodies, creating differentiated levels of protection throughout the EU. Although there are undeniably pros, such as strategic litigation and cost-effectiveness, multiple-ground bodies may face the challenge of implementing different standards of protection for different grounds of discrimination. Interpretations given by national courts of concepts may differ between the grounds protected, and specialised bodies may find it tricky to find the right balance between horizontal implementation of non-discrimination provisions and the particular features of specific grounds, with the danger of creating a hierarchy among them.

### Specialised bodies designated by law in compliance with Article 13

	Specialised body designated by law in compliance with Article 13	Does this body cover other grounds than race or ethnic origin as specified by Article 13? If so, which ones?
<b>AUSTRIA</b>	Equal Treatment Commission – ETC (Act on the Equal Treatment Commission and the Office for Equal Treatment, §§ 1, 2, 8-23)	Gender, ethnic affiliation, religion, belief, age, sexual orientation
	National Equality Body – NEB (Act on the Equal Treatment Commission and the office for Equal Treatment, §§ 3-7)	Gender, ethnic affiliation, religion, belief, age, sexual orientation
<b>BELGIUM</b>	Centre for Equal Opportunities and Opposition to Racism (Act establishing the Centre for Equal Opportunities and Opposition to Racism <sup>277</sup> , Art. 1) <sup>278</sup>	Alleged race, colour, descent, ethnic and national origin, nationality, age, sexual orientation, civil status, birth, wealth/income (fortune in French), religious or philosophical belief, actual or future health condition, disability, physical characteristic, political opinion, genetic characteristic and social origin
<b>BULGARIA</b>	Protection Against Discrimination Commission, (Protection Against Discrimination Act, (Art. 40))	Sex, national origin, human genome, nationality, origin, religion or faith, education, beliefs, political affiliation, personal or public status, disability, age, sexual orientation, family status, property status, or any other ground provided for by law or international treaty to which the Republic of Bulgaria is a party
<b>CROATIA</b>	People's Ombudsman (Anti-discrimination Act, Art. 12)	Racial or ethnic affiliation or colour, gender, language, religion, political or other belief, national or social origin, property, trade union membership, education, social status, marital or family status, age, health condition, genetic heritage, gender identity and expression, sexual orientation
<b>CYPRUS</b>	Equality Authority and Anti-discrimination Authority (Act on the Combating of Racial and Other Forms of Discrimination (Commissioner, Art. 5 and 7))	Race/ethnic origin, religion or belief, age, sexual orientation, disability, colour, political or other beliefs, national origin <sup>279</sup>

<sup>277</sup> Further amended by the General Anti-Discrimination Federal Act.

<sup>278</sup> The situation is still patchy regarding equality bodies at the regional/community level. The Centre for Equal Opportunities and Opposition to Racism will most probably be soon entrusted with the monitoring and implementation of some of the legislative instruments adopted by the Regions and the Communities. In order to empower the Centre for Equal Opportunities to play this role, a 'protocol of collaboration' (cooperation agreement) has to be concluded between the Federal Government and the Government of each Region and Community concerned. Two protocols of collaboration were signed in 2009, with the Walloon Region and the French-speaking Community. Such a Protocol is under discussion with the Region of Brussels-Capital and the French Community Commission (COCOF). There is presently no protocol with the Flemish Community/Region. Moreover, the German-speaking Community has not yet designated an equality body in relation to its anti-discrimination law but it has initiated some contact with the Centre.

<sup>279</sup> The Equality and Anti-Discrimination Authorities also cover the ground of nationality as included in the **Cypriot** Constitution and in international conventions ratified by the Republic of **Cyprus**.

	Specialised body designated by law in compliance with Article 13	Does this body cover other grounds than race or ethnic origin as specified by Article 13? If so, which ones?
<b>CZECH REPUBLIC</b>	Public Defender of Rights (Act on Public Defender of Rights, Art. 21b)	Sex, race, ethnic origin, sexual orientation, age, disability, religion, belief or other conviction, 'nationality'
<b>DENMARK</b>	Danish Institute for Human Rights (Ethnic Equal Treatment Act, Section 10)	No
<b>ESTONIA</b>	Commissioner for Gender Equality and Equal Treatment (Equal Treatment Act, Art 15-22)	Sex, ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation. <sup>280</sup>
	Chancellor of Justice (Chancellor of Justice Act, Art. 19-35-16)	Public sector: all grounds; private sector: sex, race, ethnic origin, colour, language, origin, religious, political or other belief, property or social status, age, disability, sexual orientation or other ground of discrimination provided for by the law
<b>FINLAND</b>	Ombudsman for Minorities (Non-discrimination Act, Section 11(2)) <sup>281</sup>	Nationality
<b>FRANCE</b>	Defender of Rights (Institutional Act creating the Defender of Rights, Art. 4 para 3 <sup>o</sup> )	Sex, pregnancy, origin, appearance of origin, race, ethnic and national origin, nationality, wealth/income, morals, sexual orientation, age, family situation, genetic characteristics, physical appearance, last name, health, disability, union activities, religion, political and religious convictions
<b>FYR of MACEDONIA</b>	Commission for Protection against Discrimination (Prevention and Protection against Discrimination Act, Art. 16-24 and 25-33) <sup>282</sup>	Sex, race, colour, gender, membership of a marginalised group, ethnic affiliation, language, citizenship, social origin, religion or religious belief, other beliefs, education, political affiliation, personal or social status, mental or physical impairment, age, family or marital status, property status, health condition, any other ground prescribed by law or ratified international treaty
<b>GERMANY</b>	Federal Anti-discrimination Agency (General Equal Treatment Act, Art. 20-30)	Race or ethnic origin, sex, religion or belief (Weltanschauung), disability, age, sexual identity
<b>GREECE</b>	Ombudsman (Law 2477/1997, Art. 1 and Equal Treatment Act, Art 191) <sup>283</sup>	Racial or ethnic origin, religion or other beliefs, disability, age or sexual orientation, gender and human rights in general
	Labour Inspectorate (Act 2639/1998, Art. 6) <sup>284</sup>	Racial or ethnic origin, religion or other beliefs, disability, age or sexual orientation
	Equal Treatment Committee (Anti-discrimination Act) <sup>285</sup>	Racial or ethnic origin, religion or other beliefs, disability, age or sexual orientation
<b>HUNGARY</b>	Equal Treatment Authority (Act on Equal Treatment and the Promotion of Equal Opportunities, Art. 14 and Act CXL of 2004 on the General Rules of the Proceedings and Services of Public Administrative Authorities, Art. 169/B)	Sex, racial affiliation, colour of skin, nationality, membership of a national or ethnic minority, mother tongue, disability, health condition, religion or belief, political or other opinion, family status, maternity (pregnancy) or paternity, sexual orientation, sexual identity, age, social origin, financial status, part-time nature of employment relationship or other legal relationship connected with labour, or the fixed period thereof, membership of an interest representation organisation, other situation, attribute or condition of a person or group

<sup>280</sup> With regard to official employment, the following grounds can be added: level of language proficiency, duty to serve in defense forces, marital or family status, family-related duties, social status, representation of employees' interests or membership of an employees' organization.

<sup>281</sup> Role limited to discrimination in the employment field.

<sup>282</sup> The Ombudsman also plays a role against discrimination on the grounds of sex, race, colour, national, ethnic, social, political, religious, cultural, language, property, social background, disability and origin.

<sup>283</sup> The Ombudsman covers discrimination by public sector bodies.

<sup>284</sup> The Labour Inspectorate covers discrimination in the private sector and in the field of employment for the 5 grounds protected by the Directives.

<sup>285</sup> The Equal Treatment Committee covers discrimination in any field with the exception of the public sector and does not deal with employment and occupation for the 5 grounds protected in the two Directives.

	Specialised body designated by law in compliance with Article 13	Does this body cover other grounds than race or ethnic origin as specified by Article 13? If so, which ones?
<b>ICELAND</b>	No specific body <sup>286</sup>	-
<b>IRELAND</b>	Equality Authority Equality Tribunal (Equal Status Act, s. 2 and 39)	Gender, age, race, religion, family status, disability, marital status, sexual orientation, membership of the Traveller community
<b>ITALY</b>	National Office against Racial Discrimination – UNAR (Legislative Decree no. 215 on the Implementation of Directive 2000/43/EC, Art. 7)	No <sup>287</sup>
<b>LATVIA</b>	Ombudsman, (Ombudsman Act, Art. 11.2))	Grounds not specified, hence any ground
<b>LIECHTENSTEIN</b>	Office for Equal Opportunities (Act on Equality between women and men, Art. 19)	Race, ethnicity, gender, sexual orientation, disability, religion, social disadvantage
<b>LITHUANIA</b>	Equal Opportunities Ombudsperson (Act on Equal Opportunities, Articles 10 - 17 and Equal Treatment Act, Articles 14, 15)	Age, disability, sexual orientation, race, ethnicity, origin, religion, beliefs or convictions, language and social status
<b>LUXEMBOURG</b>	Centre for Equal Treatment (Equal Treatment Act, Art. 8-17)	Race, ethnic origin, religion or belief, disability, age, gender, sexual orientation
<b>MALTA</b>	National Commission for the Promotion of Equality for Men and Women (Equality for Men and Women Act, Art. 11)	Gender, equal treatment irrespective of racial or ethnic origin <sup>288</sup>
<b>NETHERLANDS</b> 289	Equal Treatment Commission (General Equal Treatment Act, Art 11-21)	Race, religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality and civil status, disability and chronic disease, age, working time and type of labour contract
	The NGO Art. 1 <sup>290</sup> (Law on Local Anti-Discrimination Bureaus, Art. 2a)	Race, religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality and civil (or marital) status, disability and chronic disease, age or any other ground
<b>NORWAY</b>	Gender Equality and Anti-Discrimination Ombud <sup>291</sup> Anti-Discrimination Tribunal (Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal, Section 1).	Gender, ethnicity, national origin, descent, skin colour, language, religion or belief, disability, age, sexual orientation, political opinion and membership of a trade union
<b>POLAND</b>	Commissioner for Civil Rights Protection ('Ombud') (Act on the Commissioner for Civil Rights Protection, Art. 1)	The Act on the Commissioner for Civil Rights Protection does not mention any protected grounds
<b>PORTUGAL</b>	ACIDI (High Commissioner for Immigration and Intercultural Dialogue) (Decree-law 167/2007, Art. 1)	Nationality
<b>ROMANIA</b>	National Council on Combating Discrimination (Government Ordinance 137/2000 on the Prevention and Punishment of All Forms of Discrimination, Art. 16-25)	Race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, age, disability, chronic disease, HIV positive status, membership of a disadvantaged group or any other criterion
<b>SLOVAKIA</b>	Slovak National Centre for Human Rights (Act No. 308/1993 on the Establishment of the Slovak National Centre for Human Rights, Section 1 paras 2a, e, f, g, h and Section 1 paras 3 and 4)	Sex, religion or belief, race, affiliation to a nationality or an ethnic group, disability, age, sexual orientation, marital status and family status, colour of skin, language, political or other opinion, national or social origin, property, lineage/gender or other status, unfavourable health condition, family duties, membership or involvement in a political party or a political movement, a trade union or another association

<sup>286</sup> The Parliamentary Ombudsman may deal with equality/discrimination in relation to administrative procedure.

<sup>287</sup> Although in some cases the **Italian** body also deals with nationality.

<sup>288</sup> And any issue relating to discrimination according to Equal Treatment of Persons Order, Article 10 (2).

<sup>289</sup> In the **Netherlands**, no specialised equality bodies are designated by the law. There are two bodies that count as such as they are officially recognised in e.g. parliamentary papers.

<sup>290</sup> This NGO includes around 430 local anti-discrimination bureaus.

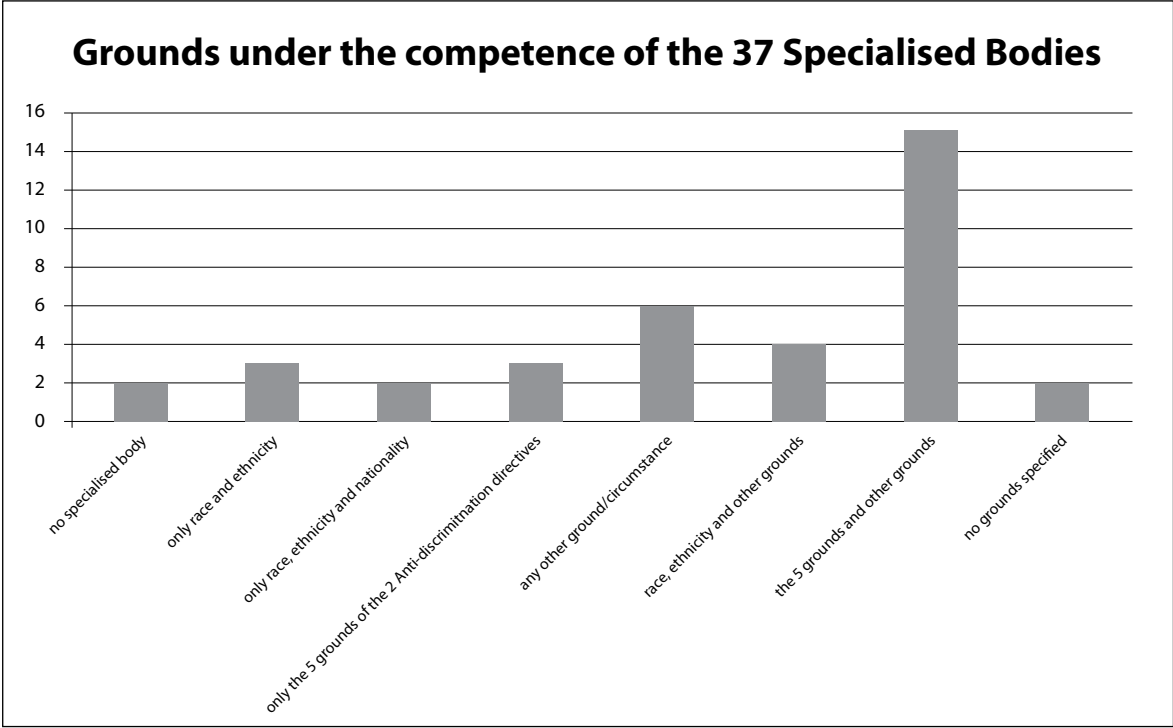
<sup>291</sup> The Equality and Anti-Discrimination Tribunal is the appeal instance of the Gender and Anti-Discrimination Ombud.

	<b>Specialised body designated by law in compliance with Article 13</b>	<b>Does this body cover other grounds than race or ethnic origin as specified by Article 13? If so, which ones?</b>
<b>SLOVENIA</b>	Advocate of the Principle of Equality <sup>292</sup> (Act Implementing the Principle of Equal Treatment, Art. 11.19a)	Gender, ethnicity, race or ethnic origin, religion or belief, disability, age, sexual orientation, or other personal circumstance
<b>SPAIN</b>	Council for the Promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin (Act 62/2003, of 30 December on Fiscal, Administrative and Social Measures, Art. 33)	No
<b>SWEDEN</b>	Equality Ombudsman (Discrimination Act, Ch. 4 and the whole of the Equality Ombudsman Act)	Sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation, age
<b>TURKEY</b>	No specialised body	-
<b>UNITED KINGDOM</b>	Equality and Human Rights Commission (UK Equality Act, S. 1-43)	Ethnic origin, national origin, colour, nationality (including citizenship), sexual orientation, religion, belief, disability, age, sex (including gender reassignment, marriage/civil partnership status, pregnancy)
	Equality and Human Rights Commission for Northern Ireland (ECNI) (Northern Ireland Act, Part VII, s. 73-74)	Ethnic origin, national origin, colour, nationality (including citizenship), sexual orientation, religion, belief, disability, age, sex (including gender reassignment, marriage/civil partnership status, pregnancy)

<sup>292</sup> The tasks performed by the Advocate might not be seen as independent as the Advocate is a civil servant working for the Ministry.

Out of the 33 countries included in this report, all but **Iceland** and **Turkey** do have a specialised body which at least deals with race and ethnicity. Four countries, **Austria**, **Estonia**, the **Netherlands** and the **United Kingdom** have two specialised bodies. **Greece** has three specialised bodies. In **Ireland** and **Norway**, the Equality Authority and the Gender Equality and Anti-Discrimination Ombud respectively are accompanied by another institution, namely the Equality Tribunal for **Ireland** and the Anti-Discrimination Tribunal for **Norway**.<sup>293</sup> This makes a total of 37 bodies.

Of these 37 bodies, in three countries (**Denmark**, **Italy** and **Spain**) the specialised bodies only deal with race and ethnicity. In **Finland** and **Portugal**, the specialised bodies deal with race, ethnicity and nationality. In **Germany**, **Greece**<sup>294</sup> and **Luxembourg**, the specialised bodies only deal with the five grounds protected by both anti-discrimination directives. In **Bulgaria**, the **FYR of Macedonia**, **Estonia**,<sup>295</sup> **Hungary**, **Romania** and **Slovenia**, the list of grounds includes “any other circumstances” or “any other status”. In the **FYR of Macedonia**, for example, there is a list of grounds not mentioning sexual orientation but mentioning any other ground prescribed by law or ratified international treaty. In **Austria**,<sup>296</sup> **Liechtenstein**, Malta and the **Netherlands**,<sup>297</sup> the grounds protected include race and one or more other grounds that are not necessarily identical to the other four protected by the Employment Equality Directive. In 14 countries, 15 bodies deal with race and ethnicity and more other grounds than only religion and belief, disability, age and sexual orientation.<sup>298</sup> In **Latvia** and **Poland** no grounds are specified under the competencies of the body.



<sup>293</sup> For these two countries, only one specialised body has been counted on the national level.  
<sup>294</sup> The Labour Inspectorate and the Equal Treatment Committee.  
<sup>295</sup> The Chancellor of Justice.  
<sup>296</sup> Both the Equal Treatment Commission and the National Equality Body.  
<sup>297</sup> The second **Dutch** body, the NGO 'Art.1'.  
<sup>298</sup> These 15 bodies include **Belgium**, **Croatia**, **Cyprus**, the **Czech Republic**, **Estonia** (the Commissioner for Gender Equality and Equal Treatment), **France**, **Greece** (the Ombudsman), **Ireland**, **Lithuania**, the **Netherlands** (the Equal Treatment Commission), **Norway**, **Slovakia**, **Sweden** and the **United Kingdom** (the Equality and Human Rights Commission and the Equality and Human Rights Commission for Northern Ireland).

Suzanne | 1990

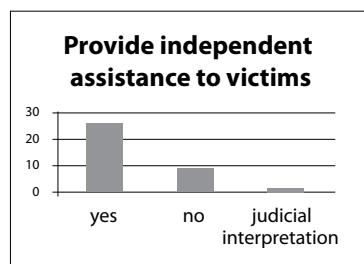


## Article 13, Racial Equality Directive:

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

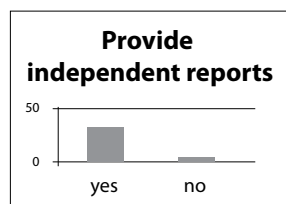
- without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
- conducting independent surveys concerning discrimination,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

In terms of the powers of specialised bodies, it is notable that the respective bodies provide assistance to victims of discrimination in a variety of ways. Member States ensure that "associations, organisations or other legal entities" may engage in support of complainants in judicial or administrative proceedings, but such engagement is not required by the Directive. Some specialised bodies provide assistance in the form of support in taking legal action – the **Belgian, Finnish, Hungarian, Irish, Italian, Slovak, Swedish, British, Northern Irish, Norwegian** and **Croatian** bodies can do this. Others give their – usually non-binding – opinion on complaints submitted to them, e.g. the **Austrian** and **Dutch** Equal Treatment Commissions, the **Danish** Board of Equal Treatment, the **Hungarian** Equal Treatment Authority, the **Latvian** Ombudsman's Office, the **Greek** Ombudsman and Equal Treatment Committee, and the **Slovenian** Advocate of the Principle of Equality.<sup>299</sup> Such proceedings do not preclude the victim from subsequently taking legal action before the courts with a view to obtaining a binding remedy.



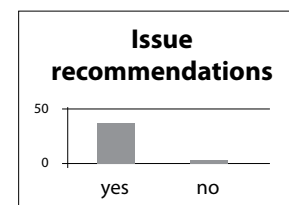
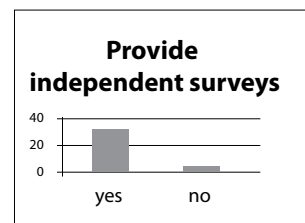
Out of the 37 specialised bodies, 26 do provide independent assistance to victims, nine do not<sup>300</sup> and two countries would require judicial interpretation. Judicial interpretation is required in **Bulgaria**, in order to assess whether the Protection against Discrimination Commission can do so or not, and in **Poland**, as under the Constitution and the new law the Ombud's competencies are limited regarding conflicts between private parties.

Of the 37 specialised bodies, 32 provide independent surveys and five do not. These are: the **Estonian** Chancellor of Justice, the **Greek** Labour Inspectorate and Equal Treatment Committee and the **Slovenian** and **Spanish** bodies.



Similarly, 32 specialised bodies provide independent reports; the same five bodies that do not provide independent surveys do not produce independent reports either.

Specialised bodies should also have the task to provide independent recommendations. This is the case for 35 of those specialised bodies, but not in **Romania** and **Spain**. Issuing recommendations is not specifically provided for in the law, but the **Romanian** national equality body does so in practice.



<sup>299</sup> The Office for Equal Opportunities was abolished on 1 April 2012 and has been transferred, including the Advocate of the Principle of Equality, to the Ministry of Labour, Family and Social Affairs. New rules concerning the nomination and budget of the Advocate are not yet known.

<sup>300</sup> These bodies are the **Austrian** Equal Treatment Commission, **Cyprus** (although in practice both the Equality Authority and the Anti-Discrimination Authority do inform victims of their rights), the **Estonian** Chancellor of Justice (that nevertheless does so in practice), the three **Greek** bodies, **Lithuania**, the **Dutch** Equal Treatment Commission and **Spain**.

Although the Directive does not require it, a number of specialised bodies (e.g. in **Austria, Bulgaria, Cyprus, France, Hungary, Ireland, Lithuania, Romania** and **Sweden**) can investigate complaints of discrimination and can usually compel compliance with their investigations from all persons involved. In **France**, the Defender of Rights concludes an investigation by adopting a decision (known as a 'deliberation') which may propose recommendations, suggest mediation or present observations to the courts. The Protection against Discrimination Commission in **Bulgaria** has the power to impose sanctions, including fines, and 'soft' penalties, such as public apology or publication of its decision. The **Hungarian** Equal Treatment Authority can apply sanctions on the basis of an investigation. In **Ireland**, the Equality Authority may serve a 'non-discrimination notice' following an investigation. This notice may set out the conduct that gave rise to the notice and what steps should be taken to prevent further discrimination. Non-compliance with this notice may result in an order from either the High Court or the Circuit Court requiring compliance.

### Equality body's authority challenged in Cyprus

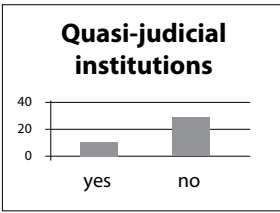
As the national specialised body, the Cypriot Ombudsman (Commissioner for Administration) can impose limited fines, including fines for non-compliance with its recommendations within a specified time period (subject to appeal to the Supreme Court of Cyprus). Furthermore, it can issue orders, published in the Official Gazette, to end the situation which directly produced the discrimination within a specified time limit and in a specified manner. The Commissioner's reports can be used to obtain damages in a regional court or an employment tribunal. The two equality authorities set up under the Ombudsman are further empowered to impose small fines which cannot exceed CYP 350 (EUR 598) for discriminatory behaviour, treatment or practice; CYP 250 (EUR 427) for racial discrimination concerning the enjoyment of a right or freedom; CYP 350 (EUR 598) for non-compliance with the recommendation within the specified time limit; and CYP 50 (EUR 85.44) daily for continuing non-compliance after the deadline set by the equality body<sup>301</sup>. Generally speaking, the fines are very low and offer little deterrent to potential perpetrators, and they are hardly ever imposed by the equality body. In addition, no fines have yet been imposed.

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

<sup>301</sup> The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Act No. 42(1)/ 2004 (19 March 2004), Sections 18, 26(1).

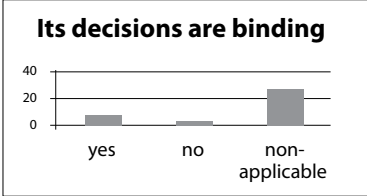


Most bodies can arrange for conciliation between the parties and most can review and comment on legislative proposals and the reform of existing laws.



Some specialised bodies are also quasi-judicial institutions, the decisions of which are ultimately binding. Of the 37 bodies, 10 are quasi-judicial institutions: **Austria**,<sup>302</sup> **Bulgaria, Denmark, Estonia**,<sup>303</sup> **Hungary, Ireland, Lithuania, the Netherlands**,<sup>304</sup> **Norway** and **Romania**. Some bodies, such as the **Macedonian** Commission for Protection against Discrimination, can issue opinions or recommendations regarding the complaints it receives.

Among these 10 bodies, only seven issue binding decisions. This is the case for the **Bulgarian, Danish, Estonian, Hungarian, Irish, Lithuanian** and **Romanian** bodies. Nevertheless, in some countries, such as the **Netherlands**, decisions from the Equal Treatment Commission are very much respected by both parties.



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

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

- The French Defender of Rights has the role of legal adviser ('auxiliaire de justice'), whereby criminal, civil and administrative courts may seek its observations in cases under adjudication. In addition, its powers have been extended to include the right to seek permission to submit its observations on civil, administrative and criminal cases.
- In the case of an investigation of a complaint which results in a finding of direct intentional discrimination (a criminal offence), the French Defender of Rights can propose a transaction pénale – a kind of negotiated criminal sanction – to a perpetrator, who can either accept or reject it. This could be a fine or publication (for instance a press release). If the proposed negotiated criminal sanction is rejected, or having been accepted there is a subsequent failure to comply with it, the Authority can initiate a criminal prosecution, in place of the public prosecutor, before a criminal court.
- The Dutch Equal Treatment Commission has the power to advise organisations (including governmental bodies) whether their employment practices contravene non-discrimination law.
- The Hungarian Equal Treatment Authority may initiate an actio popularis with a view to protecting the rights of persons and groups whose rights have been violated.
- The Irish Equality Authority enjoys legal standing to bring complaints to the Equality Tribunal relating to patterns of discrimination, discriminatory advertising or the contents of a collective agreement. The Equality Authority may also carry out equality reviews, i.e. an audit of the level of equality that exists in a particular business or industry. Based on the results of this audit, an equality plan will be developed. The plan will consist of a programme of actions to be undertaken in employment or business to further the promotion of equality of opportunity. Where there are more than 50 employees, the Authority may instigate the review itself and produce an action plan. If there is a failure to implement the action plan, the Equality Authority may issue a notice detailing what steps

<sup>302</sup> The Equal Treatment Commission.

<sup>303</sup> The Chancellor of Justice.

<sup>304</sup> The Equal Treatment Commission.

are required for its implementation. Non-compliance with this notice may result in an order from either the High Court or Circuit Court requiring compliance.

- In Slovakia, if a breach of the principle of equal treatment violates the rights, interests protected by the law or freedoms of a higher or non-specified number of persons, or if public interest is seriously endangered by such violation, the right to invoke the protection of the right to equal treatment is also vested in the Slovak National Centre for Human Rights or in NGOs active in the field of anti-discrimination. The latter can request that the entity breaching the principle of equal treatment refrain from such conduct and, where possible, rectify the illegal situation (the list of these two options is exhaustive).<sup>305</sup>

Finally, some concerns in relation to particular countries may be highlighted. There is concern that some specialised bodies are too close to government, thereby jeopardising the independence of their work. For instance, the **Italian** National Office against Racial Discrimination operates as a department of the Ministry for Immigration and Integration. The **Slovenian** Advocate of the Principle of Equal Treatment does not have its own budget, but is actually funded through the Government Office for Equal Opportunities,<sup>306</sup> and irregularities in the appointment mechanism established in 2009 cast doubts on the Advocate's independence. The Authority's President in **Hungary** is appointed by the Prime Minister and his or her appointment may be withdrawn at any time without any justification. Some members of the Commission for Protection against Discrimination also work in the executive and legislative branches of the government of the **FYR of Macedonia**. Finally, the **Spanish** Council for the Promotion of Equal Treatment and Non-Discrimination on the Grounds of Racial or Ethnic Origin is attached to the Equality Ministry through its Anti-discrimination Directorate General. It is not part of the Equality Ministry's hierarchal structure and representatives of all ministries with responsibilities in the areas referred to in Article 3(1) of the Racial Equality Directive have a seat on it.<sup>307</sup> Moreover, the word 'independent' is not included in the Act defining the Council's functions, although it does appear in a Royal Decree redefining these functions. This text is, however, purely rhetorical as the Council cannot de jure and de facto exercise its functions fully independently.

**Official report casts doubts on independence and effective functioning of the Slovak equality body<sup>308</sup>**

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

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

<sup>305</sup> Although this provision is very progressive, no entity entitled to file the *actio popularis* has done so as yet.

<sup>306</sup> The Office for Equal Opportunities was abolished on 1 April 2012, see above footnote 275.

<sup>307</sup> Royal Decree 1262/2007 (modified by Royal Decree 1044/2009) details the composition of the Council.

<sup>308</sup> See [http://www.rokovania.sk/File.aspx/ViewDocumentHtml/Mater-Dokum-133077?prefixFile=m\\_](http://www.rokovania.sk/File.aspx/ViewDocumentHtml/Mater-Dokum-133077?prefixFile=m_).

In addition, the bodies established in order to govern and monitor the equality body were deemed inappropriate and inefficient.

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

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

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

Independence, but also effectiveness, is greatly affected by the recent budgetary cuts faced by many equality bodies due to the economic crisis. In 2011 this concerned, for instance, **Ireland, Hungary** (which also faced difficulties in the past in carrying out tasks other than its quasi-judicial functions<sup>309</sup>) and the **United Kingdom**. Financial cuts in previous years had already affected **Ireland, Latvia, Romania** and the **UK**. In addition, new problems have arisen due to the fact that the national equality body is severely under-equipped and understaffed, such as in **Austria** or **Cyprus**. In **Poland**, anti-discrimination legislation recently adopted did not envisage any extra resources for the Ombudsman in spite of the allocation of additional competences related to discrimination. In **Bulgaria**, the government tabled a bill to reduce the members of the equality body from nine to five, and then to seven after many protests were made. At time of writing, the bill introduced in April 2010 was still waiting for a second hearing before the parliament.

<sup>309</sup> As also highlighted in the fifth **Hungarian** Country Report under the International Covenant for Civil and Political Rights published in October 2010 by the UN Human Rights Committee.

Emile | 1970



# **Chapter 6**

## **Implementation and compliance**

## A. Dissemination of information and social and civil dialogue

### Article 10, Racial Equality Directive, Article 12, Employment Equality Directive

#### *"Dissemination of information*

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

### Article 11, Racial Equality Directive, Article 13, Employment Equality Directive

#### *"Social dialogue*

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

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

### Article 12, Racial Equality Directive, Article 14, Employment Equality Directive

#### *"Dialogue with non-governmental organisations*

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

Of all of the Directives' articles, it is those on the dissemination of information and social and civil dialogue that have seen the least formal implementation by Member States and candidate countries and probably the most varied response. To some extent, this is due to the vagueness of these articles and the interpretation by some governments that they are not bound to transpose these provisions into law but simply to take some steps towards achieving their objectives. The impression prevails that the provisions have been insufficiently implemented in at least **Bulgaria, Cyprus, Estonia, Greece, Latvia, Luxembourg, Poland, Slovenia, Spain**, the **FYR of Macedonia** and **Turkey**, and, with particular regard to Directive 2000/78/EC, **Portugal** and **Italy**. More generally, it seems that the duty to disseminate information and establish mechanisms for dialogue is not a high priority at the national level.

### Dissemination of information and awareness-raising

Information dissemination activities include ministerial publications providing basic information on the principle of equal treatment, information campaigns through the media and the organisation of seminars as in, for instance, **Austria, Bulgaria, Malta** and **Portugal**. In **Hungary**, a National Network for Equal Opportunities has an office in each county and in Budapest. It organises research and conferences, produces and disseminates information materials, maintains contacts with civil society and establishes networks of civil society organisations. In **Romania**, the National Council

on Combating Discrimination has carried out national awareness-raising campaigns, cultural events, summer schools, courses and training, round tables discussing public policies, and affirmative measures targeting children, students, teachers, civil servants, police officers, gendarmes, judges, lawyers, NGO representatives, doctors and healthcare workers. In **Croatia**, noteworthy initiatives have included research on citizens' attitudes to discrimination and their knowledge of the newly adopted Anti-discrimination Act, which was conducted by the Ombudsman's office in cooperation with the Centre for Peace Studies (an NGO).

### **Enhancing the Equal Treatment Authority effectiveness and accessibility in Hungary**

The Social Renewal Operative Program 5.5.5 (TÁMOP project) is financed by the European Social Fund and the Hungarian State with a duration of 46 months, starting in 2009.<sup>310</sup> The total TÁMOP project budget is HUF 911 million (EUR 3,141,000).

As the first element of the project, an equal treatment referee system was established in September 2009. The 20 referees (lawyers, attorneys at law) are seated in the so-called Houses of Opportunities (a regional equal opportunities network) in every county and in the capital. They are forwarding discrimination complaints, provide assistance to the complainants in formulating their petitions and operate as a kind of filtering system. In 2010, 1226 complainants were served by the system,<sup>311</sup> whereas in 2011, 2,936 persons turned to the referees for assistance.<sup>312</sup>

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

The second element consists of trainings held by the specialised body for teachers, social workers and the media, combined with workshops with NGOs and public administration staff members. A training module has been developed and by the end of 2010, 152 persons,<sup>313</sup> in 2011 another 463 persons<sup>314</sup> accomplished the Authority's training, which is a combination of sensitisation and legal knowledge transfer.

As it was also mentioned above, seven researches and a final study constitutes the third element of the project: four researches has dealt with discrimination in the field of employment, one has analysed clients' awareness of their rights and the remaining two will look into discriminatory practices within the system of public administration. In the framework of the project surveys have been and will be conducted testing the social attitudes towards non-discrimination and diversity.

The project also contains a travelling exhibition of works of young people related to the issue of non-discrimination. The exhibition's aim is to raise the awareness of youth about this problem.<sup>315</sup>

<sup>310</sup> For the project grant see [http://www.nfu.hu/megjelent\\_a\\_tamop\\_5\\_5\\_5\\_kiemelt\\_projekt](http://www.nfu.hu/megjelent_a_tamop_5_5_5_kiemelt_projekt).

<sup>311</sup> [http://www.egyenlobanasmod.hu/data/2010tevekenysege\\_szamok\\_tukreben.pdf](http://www.egyenlobanasmod.hu/data/2010tevekenysege_szamok_tukreben.pdf).

<sup>312</sup> [http://www.egyenlobanasmod.hu/data/EgyenloBanasmodHatosag\\_2011\\_jogtudatossag.pdf](http://www.egyenlobanasmod.hu/data/EgyenloBanasmodHatosag_2011_jogtudatossag.pdf).

<sup>313</sup> [http://www.egyenlobanasmod.hu/data/2010tevekenysege\\_szamok\\_tukreben.pdf](http://www.egyenlobanasmod.hu/data/2010tevekenysege_szamok_tukreben.pdf).

<sup>314</sup> [http://www.egyenlobanasmod.hu/data/EgyenloBanasmodHatosag\\_2011\\_jogtudatossag.pdf](http://www.egyenlobanasmod.hu/data/EgyenloBanasmodHatosag_2011_jogtudatossag.pdf).

<sup>315</sup> <http://www.egyenlobanasmod.hu/tamop/#vandorkiallitas>.

Information should be disseminated in a way that is accessible to all people with disabilities and in languages understood by minorities in that country. In **Finland**, for instance, a leaflet on the Non-Discrimination Act has been produced by the Ministry of Labour and the SEIS-project,<sup>316</sup> and made available in Braille and both in print and on the internet in Finnish, Swedish, English, Sami, Russian, Arabic and Spanish. **French** television campaigns and websites are adapted for the visually and hearing impaired. In contrast, information is not provided in a manner that caters for disabled people's needs in some countries including **Bulgaria**, the **Czech Republic**, **Hungary**, **Latvia**, **Portugal**, **Slovakia** and, to some extent, **Poland**.<sup>317</sup>

The mandates of specialised bodies in most countries include awareness-raising activities, for instance in **Denmark**, **Estonia**, **France**, **Ireland**, **Romania**, **Sweden** and the **United Kingdom**. Where the body only has competences relating to race and ethnic origin, however, other arrangements must be made for the grounds of religion and belief, age, disability and sexual orientation. This is a shortcoming for example in **Italy**, where the National Office against Racial Discrimination has begun to disseminate information but no particular measures are planned for the other grounds.

European Union campaigns and project funding must be acknowledged for their role in many countries in raising awareness. Although some activities had been carried out previously, the designation of 2007 as the European Year of Equal Opportunities for All resulted in various activities being organised at national level in each Member State, aimed at raising awareness and promoting debate on the benefits of diversity for European societies. The National Commission for the Promotion of Equality for Men and Women, in collaboration with the European Commission delegation in **Malta**, organised a media campaign entitled A National Campaign Promoting Equal Opportunities for All as a follow-up to the European Year of Equal Opportunities for All 2007. This campaign sought to highlight the six grounds of discrimination recognised by the EU.<sup>318</sup> In **Croatia**, the Government Office for Human Rights was proactive in attracting EU and other funds in order to speed up implementation of the law and develop a network of stakeholders.

A small number of Member States, including **Malta**, **Poland** and **Portugal**, have included in their legislation an obligation on employers to inform employees of discrimination laws. **Malta** goes further, specifying that, "any person or organisation to whom these regulations apply" should bring the laws to the attention of the organisation's members or to any other persons who may be affected by the organisation's actions.<sup>319</sup> Implementation of the obligation on employers in **Poland** is monitored by the National Labour Inspectorate.

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

### Social and civil dialogue

Few countries have put in place permanent structures specifically for dialogue with civil society and the social partners on equality issues. In **Bulgaria**, the Protection against Discrimination Commission has signed a partnership agreement with one of the two principal trade unions. **Slovenian** law requires the government and competent ministries to

<sup>316</sup> 'STOP – Finland Forward without Discrimination', funded by the Community Action Programme to Combat Discrimination.

<sup>317</sup> The website of the Ministry of the Interior and Administration was designed in a way that made it accessible to people with visual impairments using Intelligent Web Reader software.

<sup>318</sup> The five grounds included in the two Anti-discrimination Directives and gender.

<sup>319</sup> Regulation 12 of Legal Notice 461 of 2004.



co-operate with NGOs that are active in the field of equal treatment and with the social partners (Article 8 of the Act Implementing the Principle of Equal Treatment). In **Belgium**, a specific taskforce has been operational within the Federal Public Service (Ministry) of Employment since July 2001 (cellule entreprise multiculturelle), with the active cooperation of the Centre for Equal Opportunities and Opposition to Racism, in order to establish more systematic links with the social partners.

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

- In Slovakia, cooperation between the Government and NGOs was shown in the process of amending the Anti-discrimination Act. An NGO representative was invited to become a member of the body commissioned to prepare the amendment that resulted into the Act being finally adopted in spring 2008. The process was transparent and democratic, and led to a relatively satisfactory result.
- In Hungary, the legislative conceptual paper and draft law were sent to NGOs and posted on the Ministry of Justice's website with a call for comments.
- In Ireland, the Department of Justice, Equality and Law Reform produced a discussion document on the employment issues that arose from the Directives and invited submissions from other government departments, the social partners, the Equality Tribunal and the Equality Authority.
- In Croatia, the Ombudsman's Office invited the social partners, civil society organisations dealing with human rights, organisations protecting the rights of various marginalised and minority groups, churches and religious organisations to provide their input regarding implementation of the Anti-discrimination Act in February 2010.
- In the UK, well over 10,000 copies of the draft text were sent to a diverse range of organisations, including employers' organisations, public and private sector employers, trade unions, NGOs with a particular interest in any of the areas of discrimination within the Directives, lawyers' organisations, academics and others in the United Kingdom during the first consultation in early 2000. Consultations on anti-discrimination legislation are now standard practice in the United Kingdom.
- In the Netherlands, the proposal for a General Equal Treatment Act, incorporating four distinct equal treatment laws, was subject in 2010 to an online consultation and the Equal Treatment Commission was asked for its advice.

A different problem emerged in Denmark and Finland: a lack of public debate was attributable to the fact that the actors who would normally generate public discussion were participants in the committees charged with considering implementation of the Directives and felt they could not discuss the issues until that (lengthy) process was over.

**Finland** has a good record of government co-operation with NGOs and social partners through advisory bodies on youth issues, disability, rehabilitation and Roma affairs. An Advisory Body on Minority Issues has been set up which will develop a means of co-operation between the government and NGOs in matters relating to the supervision and monitoring of the implementation of equal treatment legislation. Key ministries, the association of municipalities, social partners and five NGOs are represented on the board of the advisory body. In **Romania**, the national equality body works closely with NGOs representing various vulnerable groups and consults with the main NGOs when developing its programmes in the relevant areas. In **Spain** a Strategic Plan for Citizenship and Integration designed to promote the integration of immigrants was adopted in February 2007 and renewed for 2010-2014. One of the key points of the Plan is equal treatment and combating all forms of discrimination. The Plan is implemented through a number of action programmes in collaboration between various levels of government and NGOs.

There appear to be more instances of structured dialogue for disability than for the other grounds of discrimination. The **Latvian** National Council for the Affairs of Disabled Persons brings together representatives of NGOs and state institutions to promote the full integration of disabled people in political, economic and social life based on the principle of equality. In **Spain**, structures for dialogue include the Advisory Commission on Religious Freedom and the National Disability Council, which represents disabled people's associations of various kinds. Its functions include issuing reports on draft regulations on equal opportunities, non-discrimination and universal accessibility. At local level in **France**, Commissions for the Promotion of Equality (COPEC) bring together all the interested parties in a given administrative area (*département*) under the authority of the *Préfet* (the local representative of the central government) to generate co-operation and dialogue. The Disability Act of 2005 created *département*-level Commissions for the Rights and Autonomy of the Disabled, which are competent for all decisions relating to the support of disabled people. Their members are representatives of public authorities, NGOs, trade unions and social partners and at least 30% are representatives of people with disabilities. The same law creates an obligation on the social partners to hold annual negotiations on measures necessary for the professional integration of people with disabilities.

As with the dissemination of information, it is often the role of the specialised equality bodies to generate dialogue with the social partners and civil society. This is the case for the **Belgian** Centre for Equal Opportunities and Opposition to Racism, the **Estonian** Chancellor of Justice, the **Irish** Equality Authority and the **Italian** National Office against Racial Discrimination (for racial and ethnic origin only).

General structures for social dialogue may be used for dialogue on equality issues in the **Czech Republic, Denmark, Lithuania, Malta, Poland, Portugal, Slovakia, Sweden, the United Kingdom** and **Norway**. However, there is significant variation in their effectiveness in practice. The **United Kingdom** has a good record of governmental agencies and ministerial departments co-operating with non-governmental organisations.

Specific structures dealing with Roma have emerged over the past few years. For instance, in the framework of the National Implementation Strategy coordinated by the **Portuguese** equality body, an advisory group for the integration of Roma communities, composed of public entities, NGOs and Roma community representatives will be set up. In **France**, the National Consultative Commission on the Travellers was set up in 2009 to discuss draft legislation and policy which concern Travellers. **Spanish** Royal Decree 891/200550 set up a collegiate participatory and advisory body (the National Roma Council) the overriding purpose of which is to promote the participation and cooperation of Roma associations in the development of general policy and the promotion of equal opportunities and treatment for the Roma population. Of its 40 members, half come from the central government and the other half are representatives of Roma associations. In **Norway**, the Roma National Association is used as a dialogue point for organised interaction with the Equality Ombud and key ministries such as the Ministry for Children, Equality and Social Inclusion, the Ministry of Education and the Ministry of Labour.

## B. Ensuring compliance

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

Few countries have systematically ensured that all existing legal texts are in line with the principle of equal treatment. In transposing the two Directives, only the relevant ministries in **Finland** seem to have reviewed legislation in their respective administrative fields. They did not find any discriminatory laws, regulations or rules, and it was therefore deemed unnecessary to abolish any laws. In the **United Kingdom**, government departments reviewed the legislation for which they were responsible to ensure that any legislation which was contrary to the Directives' principles of equal treatment in relation to disability, religion or belief and sexual orientation, and most recently age, was repealed or amended. However, independent experts in other countries have identified laws that were discriminatory, for example, Article 175 of **Portugal's** Criminal Code, which punished homosexual acts with persons aged 14 to 16 or the instigation of such acts, while the same type of acts were not punished if the 14-to-16-year-old was of the opposite sex. In the new Criminal Code (Act 59/2007 of 4 September 2007) Article 175 has been replaced by Article 173 (sexual acts with adolescents). This article does not violate the above-mentioned principle.

In most countries therefore, discriminatory laws are likely to be repealed following a complaint before the courts. In most countries, the constitutional equality guarantee already acts as a filter for discriminatory laws, with the constitutional court having the power to set aside any unconstitutional provisions. However, proceedings before constitutional courts for this purpose can be lengthy, requiring the prior exhaustion of all other remedies. On this basis it is questionable whether this is sufficient to fulfil this provision of the Directives. Aside from constitutional clauses, there are often clauses in primary legislation which allow lower courts to declare void laws that are in breach of the principle of equal treatment. For instance, in **France**, the Constitution, Civil Code and Labour Code all ensure that provisions and clauses which breach the 'superior rule' of equality are void. In **Lithuania**, the Labour Code provides that courts can declare invalid acts adopted by state institutions, municipalities or individual officials if they are contrary to the law. In **Romania**, as the principle of equality is clearly guaranteed in the Constitution, any contrary provisions would be unconstitutional and illegal under the Anti-discrimination Ordinance as *lex specialis*. Following the decisions of the **Romanian** Constitutional Court which limited both the mandate of the NCCD<sup>320</sup> and of the civil courts in relation to discrimination generated by legislative rules,<sup>321</sup> only the Constitutional Court may tackle rules containing provisions contrary to the principle of equality. As legal standing before the Constitutional Court is limited by the Constitution to specifically mentioned categories (courts of law or the Ombudsman), the **Romanian** legal framework currently has a *de facto* gap in protection against discrimination induced by legislative provisions.

Article 26 of the **Greek** Anti-discrimination Act states: "Once in force, this Act repeals any legislation or rule and abrogates any clause included in personal or collective agreements, general terms of transactions, internal enterprise regulations, charters of profit or non-profit organisations, independent professional associations and employee or employer associations opposed to the equal treatment principle defined in this Act".

In **Cyprus**, the Equal Treatment Act stipulates the repeal of any contrary provisions. It seems that a recommendation by the equality body, following an investigation and a finding that a law or practice is discriminatory, can normally trigger the repeal of discriminatory laws, but this is not necessarily always the case. In **Ireland**, there is concern that the Equal Status Act 2000-2008 remains subordinate to other legislative enactments, because Section 14(a)(i) provides that nothing in that Act will prohibit any action taken under any enactment.

In some jurisdictions, an entire agreement is invalidated if it includes a discriminatory clause. However, legislation which can annul individual discriminatory rules in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations is more common

<sup>320</sup> **Romania** / Curtea Constituțională / Decision 997 of 7 October 2008 finding that Article 20(3) of the Anti-discrimination Act, defining the mandate of the NCCD in relation to discrimination triggered by legislative provisions, is unconstitutional.

<sup>321</sup> **Romania** / Curtea Constituțională / Decision 818 (3 July 2008) published in the Official Gazette 537 of 16 July 2008.

among the Member States. This is the case in the **Netherlands** where the main equal treatment acts stipulate that 'agreements' which are in contravention of the equal treatment legislation are void. General labour law is relied on to this end in many countries, including **Hungary**, where Articles 8 and 13 of the Labour Code provide that an agreement (individual or collective) that violates labour law regulations is void. If annulled or successfully contested the agreement is invalid (Article 9) and, if invalidity results in loss, compensation must be paid (Article 10). Similar general labour law provisions are found in **Latvia** (Article 6 of the Labour Act), **Poland** (Article 9.2 of the Labour Code) and **Estonia** (Article 4(2) of the Collective Agreements Act, which provides that the terms and conditions of a collective agreement which are "less favourable to employees than those prescribed in a law or other legislation" are invalid, unless exceptions are explicitly permitted).

There are provisions in some Member States which specifically render discriminatory provisions in contracts or collective agreements etc. void. In **Spain**, Article 17(1) of the Workers' Statute declares void any discriminatory clauses in collective agreements, individual agreements and unilateral decisions of discriminatory employers. The **Finnish** Non-Discrimination Act provides that a court may, in a case before it, change or ignore terms in contracts or collective agreements that are contrary to the prohibition provided in Section 6 (on discrimination) or Section 8 (on victimisation) of the Act (Section 10). The Employment Contracts Act also has a special provision concerning employment contracts: a provision of a contract which is plainly discriminatory is to be considered void (Section 9(2)).

Significantly, the **Irish** Employment Equality Act 1998-2004 provides that all employment contracts are deemed to have an equality clause that transforms any provisions of the contracts that would otherwise give rise to unlawful discrimination (Section 30). All discriminatory provisions in collective agreements are deemed void and it is not possible to opt out of the terms of the equality legislation (Section 9). While it is the case that discriminatory clauses are not valid, the reality is that this fact may only be established through litigation. Where the Equality Tribunal holds that the clause in question is contrary to the legislation, that part of the collective agreement or contract cannot be enforced and must be modified. In **Malta**, Regulation 12 of Legal Notice 461 of 2004 provides that any provisions in individual or collective contracts or agreements, internal rules of undertakings, or rules governing registered organisations that are contrary to the principle of equal treatment, will, on entry into force of these regulations, be considered void. The **UK** Equality Act 2010 contains specific provisions to this effect for each of the relevant grounds.





# Conclusion

The transposition of the Racial Equality and Employment Equality Directives has immensely enhanced legal protection against discrimination on the grounds of racial and ethnic origin, religion and belief, age, disability and sexual orientation across Europe. As part of the negotiations preceding EU membership, candidate countries must screen their own legislation for full compliance with EU law, including the two landmark Directives. It is encouraging to note how much additional protection national law provides compared to EU law in certain instances and that the levelling up of protection across grounds has continued in a few countries. However, this seventh comparative overview<sup>322</sup> has revealed that, although huge progress has been made and significant gaps have been plugged, a small number of shortcomings still appear to remain in the legislation of some Member States and candidate countries and it is now imperative that any remaining problems are resolved, especially 10 years after the adoption of the Directives.

Ultimately it is up to the courts to decide whether national law is inconsistent with European law and to ensure effective implementation. Case law at national level is now becoming more frequent, although the number of cases in some countries remains very low or focuses on some grounds in particular to the detriment of the others. Unfortunately, in several countries public access to case law is not available or decisions are not published on court websites, which makes it difficult to monitor discrimination cases. On a positive note, there has been a large increase in the number of preliminary references lodged at the Court of Justice, especially on the grounds of age, but it remains to be seen how these rulings will be applied at national level. Given the ambiguities in the text of the Directives, and therefore also in many national provisions, judicial interpretation is more than welcome to clarify important boundaries.

A challenge identified in many countries is the application of anti-discrimination laws in practice. Most countries have outlawed discrimination on at least some grounds for some time, yet the number of cases brought by victims seeking to assert their equality rights remains rather low. Polls regularly show that the discrepancy between the levels of discrimination experienced and discrimination reported needs to be seriously addressed. Victims still have difficulty in recognising a discriminatory situation. Awareness is low not only among the public but also among the members of the legal professions, although for the latter change has slowly started, thanks to training organised on the national level. Some countries have made some slight progress regarding positive action and dissemination of information on anti-discrimination laws, but much more remains to be done to increase dialogue among governments, civil society and the social partners across all grounds and to raise awareness among the public. In addition, most Member States have delegated the responsibilities as regards dissemination of information regarding anti-discrimination legislation and awareness-raising to national specialised bodies without necessarily granting them the adequate resources.

The hope was expressed in the preceding six editions of this publication that the detail added to the law in many countries, and in particular specific procedural rights in the remedies and enforcement rules, would change this situation. Although much of this machinery has been put in place by many states, initial observations indicate a possible correlation between countries with low levels of case law and countries which transposed the Directives by simply 'lifting' wording from the Directives for their national laws. Certain procedural difficulties that affect access to justice and effective enforcement also stem from the short limitation periods foreseen in legislation, lengthy procedures, high costs and failures in the provision of legal aid, as well as barriers in the form of language, access for people with disabilities and issues relating to legal standing or legitimate interest. The law remains complex and remedies often inadequate. Further work is needed to ensure the credibility and admissibility of methods of proof, such as statistical evidence (which touches on the issue of data collection) and, to a lesser extent, situation testing or inferences drawn from circumstances. In addition, effective access to justice could be solved through class action, which would constitute an adequate solution to redress situations where ridiculously low compensation sums are awarded to victims; to

<sup>322</sup> Six previous issues of this publication compared the situation in the 27 Member States. They were completed in September 2005, November 2006, July 2007, November 2009, November 2010 and November 2011.



address issues related to the fact that victims have to bear all the costs; and to counter the problem of limited access to free legal aid. Along the same lines, *actio popularis*, if and when generally permitted, could constitute an ideal vehicle for bringing legal action to court in cases of, for instance, hate speech against a particular vulnerable group when there is no specific victim identified but where the public interest is nevertheless harmed. Finally, when a decision is rendered by courts or equality bodies, sanctions are not always observed by respondents and recommendations are not always followed by public authorities.

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

Marya | 1993



# **Annex 1**

## **Signature/ratification of international conventions**

	European Convention on Human Rights	Protocol 12, ECHR	Revised European Social Charter	Framework Convention on the Protection of National Minorities	International Covenant on Civil and Political Rights	International Convention on Economic, Social and Cultural Rights	Convention on the Elimination of All Forms of Racial Discrimination	Convention on the Elimination of Discrimination against Women	Convention on the Rights of the Child	ILO Convention No. 111 on Discrimination	Convention on the Rights of Persons with Disabilities
-: not signed, not ratified /: signed X: ratified											
AUSTRIA	X	/	/	X	X	X	X	X	X	X	X
BELGIUM	X	/	X	/	X	X	X	X	X	X	X
BULGARIA	X	-	X	X	X	X	X	X	X	X	/
CROATIA	X	X	/	X	X	X	X	X	X	X	X
CYPRUS	X	X	X	X	X	X	X	X	X	X	X
CZECH REPUBLIC	X	/	/	X	X	X	X	X	X	X	X
DENMARK	X	-	/	X	X	X	X	X	X	X	X
ESTONIA	X	/	X	X	X	X	X	X	X	X	/
FINLAND	X	X	X	X	X	X	X	X	X	X	/
FRANCE	X	/	X	-	X	X	X	X	X	X	X
FYR of MACEDONIA	X	X	X	X	X	X	X	X	X	X	X
GERMANY	X	/	/	X	X	X	X	X	X	X	X
GREECE	X	/	/	/	X	X	X	X	X	X	/
HUNGARY	X	/	X	X	X	X	X	X	X	X	X
ICELAND	X	/	/	/	X	X	X	X	X	X	/
IRELAND	X	/	X	X	X	X	X	X	X	X	/
ITALY	X	/	X	X	X	X	X	X	X	X	X
LATVIA	X	/	/	X	X	X	X	X	X	X	X
LIECHTENSTEIN	X	/	-	X	X	X	X	X	X	<sup>323</sup>	-
LITHUANIA	X	-	X	X	X	X	X	X	X	X	X
LUXEMBOURG	X	X	/	/	X	X	X	X	X	X	X
MALTA	X	-	X	X	X	X	X	X	X	X	/
NETHERLANDS	X	X	X	X	X	X	X	X	X	X	/
NORWAY	X	-	X	X	X	X	X	X	X	X	/
POLAND	X	-	/	X	X	X	X	X	X	X	/
PORTUGAL	X	/	X	X	X	X	X	X	X	X	X
ROMANIA	X	X	X	X	X	X	X	X	X	X	X
SLOVAKIA	X	/	X	X	X	X	X	X	X	X	X
SLOVENIA	X	X	X	X	X	X	X	X	X	X	X
SPAIN	X	X	/	X	X	X	X	X	X	X	X
SWEDEN	X	-	X	X	X	X	X	X	X	X	X
TURKEY	X	/	X	-	X	X	X	X	X	X	X
UNITED KINGDOM	X	-	/	X	X	X	X	X	X	X	X

<sup>323</sup> Liechtenstein is not an ILO member.



Bernd | 1984



# **Annex 2**

## **Main national specific anti-discrimination legislation**

The information in these tables is based on the updated executive summaries and country reports for the European Network of Legal Experts in the Non-discrimination Field which contain information valid as at 1 January 2012. This is a non-exhaustive list which contains only the main pieces of anti-discrimination legislation in each country and it does not include references to other specific legislation. Inclusion of national legislation in the tables does not imply that it complies with Directives 2000/43/EC and 2000/78/EC.<sup>324</sup>

	<b>Constitutional anti-discrimination provisions</b>	<b>Main specific anti-discrimination legislation</b>	<b>Grounds covered</b>
<b>AUSTRIA</b>	Article 7 Federal Constitutional Act (B-VG), Article 2 Basic Law	Federal Equal Treatment Act, as last amended by Federal Law Gazette I 140/2011	Gender, ethnic affiliation, religion, belief, age, sexual orientation
		Equal Treatment Act, as last amended by Federal Law Gazette I 7/2011	Gender, ethnic affiliation, religion, belief, age, sexual orientation
		Equal Treatment Commission and Office for Equal Treatment Act, as last amended by Federal Law Gazette I 7/2011	Gender, ethnic affiliation, religion, belief, age, sexual orientation
		Federal Disability Equality Act, as last amended by Federal Law Gazette I 7/2011	Disability
		Employment of People with Disabilities Act, as last amended by Federal Law Gazette I 7/2011	Disability
		Styrian Equal Treatment Act, as last amended by Styrian Provincial Law Gazette 81/2010	Gender, race or ethnic origin, religion or belief, disability, disability of a relative, age, sexual orientation
		Viennese Service Order, as last amended by Viennese Provincial Law Gazette 22/2011	Gender, race, ethnic origin, religion, belief, disability, age, sexual orientation
		Viennese Anti-discrimination Act, as last amended by Viennese Provincial Law Gazette 44/2010	Race, ethnic origin, religion, belief, age, sexual orientation, sexual identity, gender, pregnancy, maternity, disability
		Lower Austrian Anti-discrimination Act, as last amended by the Lower Austrian Provincial Law Gazette 113/2011	Gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
		Lower Austrian Equal Treatment Act, as last amended by Lower Austrian Provincial Law Gazette 109/2011	Gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
		Carinthian Anti-discrimination Act, as last amended by the Carinthian Provincial Law Gazette 11/2010	Gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
		Vorarlberg Anti-discrimination Act as last amended by the Vorarlberg Provincial Law Gazette 49/2008	Gender, ethnic affiliation, religion, belief, disability age, sexual orientation
		Upper Austrian Anti-discrimination Act as last amended by the Upper Austrian Provincial Law Gazette 60/2010	Gender, ethnic affiliation, religion, belief, disability age, sexual orientation
		Burgenland Anti-discrimination Act, as last amended by the Burgenland Provincial Law Gazette 17/2010	All grounds in the two Directives
		Tyrolian Equal Treatment Act as last amended by the Tyrolian Provincial Law Gazette 39/2008	All grounds in the two Directives
Tyrolian Anti-discrimination Act, as last amended by the Tyrolian Provincial Law Gazette 41/2008	All grounds in the two Directives		
Salzburg Equal Treatment Act, as last amended by the Salzburg Provincial Law Gazette 66/2011	All grounds in the two Directives		

<sup>324</sup> Please note that in most countries protection against discrimination is also granted in the Labour and Penal Codes. These have not been indicated unless there is no other protection in national law. Regarding disability and age, specific legislation has been indicated in the tables where specific anti-discrimination law did not include these two grounds, and has been included in footnotes where anti-discrimination law also covered them.



	<b>Constitutional anti-discrimination provisions</b>	<b>Main specific anti-discrimination legislation</b>	<b>Grounds covered</b>
<b>BELGIUM</b>	Articles 10 and 11 of the Constitution	Racial Equality Federal Act <sup>325</sup> , as last amended by Act of 10 May 2007	Alleged race, colour, descent, ethnic and national origin
		General Anti-discrimination Federal Act, as last amended by the Act of 30 December 2009	All grounds in the two Directives and additional grounds
		Flemish Region / Community: Decree establishing a Framework Decree for a Flemish Equal Opportunities and Equal Treatment Policy of 10 July 2008	All grounds in the two Directives and additional grounds
		Wallonia-Brussels Federation: Decree on the Fight Against Certain Forms of Discrimination of 12 December 2008	All grounds in the two Directives and additional grounds
		Walloon Region: Decree on the Fight Against Certain Forms of Discrimination, including between Women and Men, in the fields of Economy, Employment and Vocational Training, as last amended on 12 January 2012	All grounds in the two Directives and additional grounds
		German-speaking Community: Decree on the Guarantee of Equal Treatment in the Labour Market, as last amended on 25 June 2007	All grounds in the two Directives and additional grounds
		Region of Brussels-Capital: Ordinance related to the Fight Against Discrimination and Equal Treatment in the Employment field, as last amended on 9 December 2010	All grounds in the two Directives and additional grounds
		Region of Brussels-Capital: Ordinance related to the Promotion of Diversity and the Fight Against Discrimination in the Civil Service of the Region of Brussels Capital of 4 September 2008	All grounds in the two Directives and additional grounds
		Commission communautaire française (COCOF): Decree on the Fight Against certain forms of discrimination and on the implementation of the principle of equal treatment, as last amended on 13 September 2010	All grounds in the two Directives and additional grounds
		Commission communautaire française (COCOF): Decree on Equal Treatment between Persons in Vocational Training of 22 March 2007	All grounds in the two Directives (open list of prohibited criteria)
<b>BULGARIA</b>	Article 6 (2) of the Constitution	Protection against Discrimination Act of 13 September 2003, as last amended in 2011	All grounds in the two Directives and additional grounds
<b>CROATIA</b>	Article 14 of the Constitution	Anti-discrimination Act of 9 July 2008	All grounds in the two Directives and additional grounds
<b>CYPRUS</b>	Article 28 of the Constitution	Act on Equal Treatment Irrespective of Race or Ethnic Origin 59(I) /2004 of 31 March 2004, as last amended in 2006	Racial and ethnic origin
		Act on Equal Treatment in Employment and Occupation 58 (1)/2004 of 31 March 2004, as last amended in 2009	Racial and ethnic origin, religion or belief, age, sexual orientation
		Act on Persons with Disabilities 127(I)/2000 of 31 March 2004, as last amended in 2007	Disability
<b>CZECH REPUBLIC</b>	Article 3.1 of the Charter of Fundamental Rights and Freedoms (part of the Constitutional order)	Anti-Discrimination Act 198/2009 of 17 June 2009	All grounds in the two Directives and sex
		Employment Act 435/2004 of 13 May 2004	No grounds explicitly

<sup>325</sup> Initially Federal Act Criminalising Certain Acts inspired by Racism or Xenophobia of 30 July 1981.

	<b>Constitutional anti-discrimination provisions</b>	<b>Main specific anti-discrimination legislation</b>	<b>Grounds covered</b>
<b>DENMARK</b>	None	Act on Prohibition of Discrimination due to Race etc., Act 289 of 9 June 1971, as last amended in 1987	Race, skin colour, national or ethnic origin, religion/belief, sexual orientation
		Act on Prohibition of Differential Treatment in the Labour Market, Act 31 of 12 January 2005, as last amended in 2008	Ethnicity, race, national and social origin, religion, belief, age, disability, sexual orientation, political opinion
		Ethnic Equal Treatment Act, Act 374 of 28 May 2003, as last amended in 2008	Race and ethnicity
		Prohibition of Direct and Indirect Discrimination on the Grounds of Age and Disability Act, Act 1417 of 22 December 2004	Age and disability
<b>ESTONIA</b>	Article 12 of the Constitution	Chancellor of Justice Act of 25 February 2002, as last amended in 2005	All grounds in the two Directives and additional grounds
		Equal Treatment Act of 11 December 2008, as last amended in 2009	All grounds in the two Directives
<b>FINLAND</b>	Article 6 of the Constitution	Non-Discrimination Act 21/2004 of 20 January 2004, as last amended in 2009	All grounds in the two Directives and additional grounds
		Province of Åland: Provincial Prevention of Discrimination Act 66/2005, Discrimination Ombudsman Act, Provincial Decree on the Discrimination Board	All grounds in the two Directives
<b>FRANCE</b>	Preamble to the Constitution, Article 1 of the Constitution	Act on the Fight Against Discrimination, Act 2001-1006 of 16 November 2001	All grounds in the two Directives <sup>326</sup> and additional grounds All grounds in the two directives and additional grounds
		Act on the Adaptation of National Law to Community Law in Matters of Discrimination, Act 2008-496 of 27 May 2008	All grounds in the two Directives
<b>FYR of MACEDONIA</b>	Article 9 of the Constitution (for nationals only)	Prevention and Protection against Discrimination Act of 8 April 2010	Gender, language, citizenship, social origin, personal or social status, property status, health condition, mental or physical impairment <sup>327</sup> , age, family or marital status, race, colour of skin, belonging to a marginalised group, ethnic affiliation, national origin, religion, political and religious beliefs, property and social status and any other ground prescribed by law or ratified international treaties
<b>GERMANY</b>	Article 3, German Basic Law	Act Implementing European Directives Putting into Effect the Principle of Equal Treatment including the General Equal Treatment Act (General Equal Treatment Act) of 14 August 2006, as last amended in 2009	All grounds in the two Directives and additional grounds (belief not in civil law)
<b>GREECE</b>	Article 5.2 of the Constitution	Act on Punishing Actions or Activities Aiming at Racial Discrimination, Act 927/1979 of 22 June 1979, as last amended in 1984	Racial or ethnic origin and religion
		Act on the Implementation of the Principle of Equal Treatment regardless of Racial or Ethnic Origin, Religion or other Beliefs, Disability, Age or Sexual Orientation (Equal Treatment Act), Act 3304/2005 of 27 January 2005	All grounds in the two Directives

<sup>326</sup> Please note that there is also specific legislation regarding disability: the Disability Act 2005-102 of 11 February 2005.

<sup>327</sup> Please note that there is also specific legislation on disability: Act on Employment of People with disabilities of 02.06.2000 as last amended in 2009.

	<b>Constitutional anti-discrimination provisions</b>	<b>Main specific anti-discrimination legislation</b>	<b>Grounds covered</b>
<b>HUNGARY</b>	Article XV of the Constitution	Act on Equal Treatment and the Promotion of Equal Opportunities no. CXXXV of 28 December 2003, as last amended in 2012	All grounds in the two Directives <sup>328</sup> and additional grounds
		Government Decree on the Equal Treatment Authority and Detailed Provisions of its Proceedings, Decree 362/2004 of 26 December 2004	All grounds in the two Directives and additional grounds
<b>ICELAND</b> <sup>329</sup>	Article 65 of the Constitution		
<b>IRELAND</b>	Article 40.1 of the Constitution	Employment Equality Act 1998-2007 of 18 October 1999, as last amended in 2008	All grounds in the two Directives and additional grounds
		Equal Status Act 2000-2008 of 26 April 2000, as last amended in 2008	All grounds in the two Directives and additional grounds
<b>ITALY</b>	Article 3 of the Constitution	Legislative Decree no. 215 transposing Directive 2000/43/EC of 9 July 2003, as last amended in 2011	Racial and ethnic origin
		Legislative Decree no. 216 transposing Directive 2000/78/EC of 9 July 2003, as last amended in 2011	Religion or belief, age, disability <sup>330</sup> , sexual orientation
<b>LATVIA</b>	Article 91 of the Constitution	Labour Law of 20 June 2001, as last amended in 2010	All grounds in the two Directives and 'any other circumstances'
<b>LIECHTENSTEIN</b>	<sup>331</sup>	Act on Equality of People with Disabilities of 25 October 2006, as last amended in 2011 <sup>332</sup>	Disability
<b>LITHUANIA</b>	Article 29 of the Constitution	Equal Treatment Act of 18 November 2003, as last amended in 2008	All grounds in the two Directives and additional grounds
<b>LUXEMBOURG</b>	Article 10bis of the Constitution (for nationals only)	Equal Treatment Act of 28 November 2006, as last amended in 2008	All grounds in the two Directives <sup>333</sup>
<b>MALTA</b>	Article 45 of the Constitution	Employment and Industrial Relations Act of 2 December 2002, as last amended in 2011	Marital status, pregnancy or potential pregnancy, sex, colour, disability <sup>334</sup> , religious conviction, political opinion or membership of a trade union or of an employers' association
		Equal Treatment in Employment Regulations, 2004, Legal Notice 461 of 2004 issued under the Employment and Industrial Relations Act of 5 November 2004, as further amended	All grounds in the two Directives and additional grounds
		Equal Treatment of Persons Order, Legal Notice 85 of 3 April 2007	Race and ethnic origin

<sup>328</sup> Please note that there is also specific legislation on disability: the Act on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities, Act XXVI of 16 March 1998.

<sup>329</sup> There is no comprehensive anti-discrimination law in **Iceland**, protection might be granted through diverse pieces of specific legislation among which the following ones: the Act on the Affairs of Persons with Disabilities No. 59/1992 of 2 June 1992 as last amended in 2012, the Act on the Affairs of the Elderly No. 125/1999 of 31 December 1999 as last amended in 2012, the Act Amending Laws relating to the Judicial Status of Homosexual Persons No. 65/2006 of 14 June 2006.

<sup>330</sup> Please note that there is also specific legislation on disability: Law no. 67 on Measures for the Judicial Protection of Persons with Disabilities Victims of Discrimination of 1st March 2006 as last amended in 2011.

<sup>331</sup> The only anti-discrimination clause that exist in the Constitution of **Liechtenstein** (Art. 31) regards women and men.

<sup>332</sup> Please note that the Penal code also includes provisions regarding all the grounds in the two directives and additional grounds.

<sup>333</sup> Please note that there is specific legislation on disability: the Disabled Persons Act of 12 September 2003.

<sup>334</sup> Please note that there is specific legislation on disability: the Equal Opportunities (Persons with Disabilities) Act 2000.

	<b>Constitutional anti-discrimination provisions</b>	<b>Main specific anti-discrimination legislation</b>	<b>Grounds covered</b>
<b>NETHERLANDS</b>	Article 1 of the Constitution	General Equal Treatment Act of 1994, as last amended in 2011	All grounds in the two Directives and additional grounds <sup>335</sup>
<b>NORWAY</b>	None	Anti-Discrimination Act on Prohibition of Discrimination based on Ethnicity, Religion, etc of 3 June 2005, as last amended in 2008	Ethnicity, national origin, descent, skin colour, language, religion or belief
		Working Environment Act of 12 June 2005, as last amended in 2012	Age, sexual orientation, political affiliation, membership of a trade union, part-time/temporary worker
		Anti-Discrimination and Accessibility Act on Prohibition of Discrimination on the Basis of Disability of 24 June 2008, as last amended in 2011	Disability
<b>POLAND</b>	Article 32 of the Constitution	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment of 3 December 2010	All grounds in the two Directives and additional grounds
<b>PORTUGAL</b>	Article 13, n°2 of the Constitution	Principle of Equal Treatment Act 18/2004 of 11 May 2004,	Race and ethnic origin
		Act 134/99 on Prohibition of Discrimination based on Race, Colour, Nationality or Ethnic Origin of 2 April 1976, as last amended in 2005	Race, colour, nationality, ethnic origin
		Act 38/2004 on Prevention and the Rehabilitation and Participation of Disabled People of 18 August 2004	Disability
<b>ROMANIA</b>	Articles 4 and 16 of the Constitution	Government Ordinance 137/2000 on the Prevention and Punishment of All Forms of Discrimination of 31 August 2000, as last amended in 2006	All grounds in the two Directives <sup>336</sup> and additional grounds
<b>SLOVAKIA</b>	Article 12 of the Constitution	Act on Equal Treatment in Certain Areas and Protection against Discrimination no. 365/2004 of 20 May 2004, as last amended in 2011	All grounds in the two Directives and additional grounds
<b>SLOVENIA</b>	Article 14 of the Constitution	Implementing the Principle of Equal Treatment Act of 22 April 2004, as last amended in 2007	All grounds in the two Directives <sup>337</sup> and additional grounds
		Employment Relationship Act of 24 April 2002, as last amended in 2007	All grounds in the two Directives and additional grounds
<b>SPAIN</b>	Article 14 of the Constitution	Fiscal, Administrative and Social Measures Act no. 62/2003, of 30 December 2003	All grounds in the two Directives <sup>338</sup>
		Royal Legal Decree 5/2000, Act on Infractions and Sanctions on the Social Order of 4 August 2000, as last amended in 2011	All grounds in the two Directives and additional grounds
<b>SWEDEN</b>	Chapter 1, Sec 2 and Chapter 2, S. 15 of the Constitution	Discrimination Act (2008:567) of 5 June 2008, as last amended in 2011	All grounds in the two Directives and additional grounds

<sup>335</sup> Please note that specific legislation on age and disability also exist: the Equal Treatment in Employment on the Ground of Age Act of 17 December 2003 as last amended in 2004 and the Equal Treatment on the Grounds of Disability and Chronic Disease Act of 3 April 2003 as last amended in 2009.

<sup>336</sup> Please note that there is specific legislation on Disability: the Act 448/2006 on the Promotion and Protection of the Rights of Persons with Disabilities.

<sup>337</sup> Please note that there is specific legislation on disability: the Act on Equal Opportunities of People with Disabilities of 16 November 2010.

<sup>338</sup> Please note that there is specific legislation on disability: the Act 49/2007 on Offences and Sanctions in the Field of Equality for Disabled People of 26 December 2007 as last amended in 2011.

	<b>Constitutional anti-discrimination provisions</b>	<b>Main specific anti-discrimination legislation</b>	<b>Grounds covered</b>
<b>TURKEY<sup>339</sup></b>	Article 10 of the Constitution		
<b>UNITED KINGDOM</b>	No written constitution	UK Equality Act of 16 February 2006	All grounds in the two Directives including sex
		Northern Ireland: Race Relations Order of 19 March 1997, as last amended in 2003	Racial grounds including ethnic origin, colour, nationality, national origin, membership of the Irish Traveller Community
		Northern Ireland: Disability Discrimination Act of 8 November 1995, as last amended in 2006	Disability
		Northern Ireland: Employment Equality (Sexual Orientation) Regulations of 1 December 2003	Sexual orientation
		Northern Ireland: Fair Employment and Treatment Order of 16 December 1998, as last amended by Fair Employment and Treatment Regulations in 2003.	Religion belief, political opinion and belief
		Northern Ireland: Employment Equality (Age) Regulations of 1 October 2006	Age
		Northern Ireland: Northern Ireland Act 1998	All grounds in the two Directives and political opinion, racial group, marital status, gender and dependent status
		Northern Ireland Equality Act (Sexual Orientation) 2006	Sexual orientation
		Great Britain - England, Wales and Scotland (plus NI in a few sections): Equality Act of 8 April 2010	All grounds in the two Directives and additional grounds

<sup>339</sup> Please note that anti-discrimination provisions can be found in the Labour code for the grounds of Language, race, gender, political opinion, philosophical belief, religion and sect or any such considerations and in the Criminal code for the grounds of Language, race, colour, gender, disability, political opinion, philosophical belief, religion and sect or any such considerations.

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**Annex 3**  
**National specialised bodies**  
**(only federal law/bodies**  
**are indicated)**

Country	Specialised body designated by law in compliance with Article 13	Does this body cover other grounds than race or ethnic origin as specified by Article 13? If so, which ones?	Provides independent assistance to victims	Provides independent surveys	Provides independent reports	Issues recommendations	Is a quasi-judicial body	Its decisions are binding
AUSTRIA	Equal Treatment Commission –ETC (Act on the Equal Treatment Commission and the Office for Equal Treatment, §§ 1, 2, 8-23)	Gender, ethnic affiliation, religion, belief, age, sexual orientation	No	Yes	Yes	Yes	Yes	No
	National Equality Body –NEB (Act on the Equal Treatment Commission and the office for Equal Treatment, §§ 3-7)	Gender, ethnic affiliation, religion, belief, age, sexual orientation	Yes	Yes	Yes	Yes	No	N/A
BELGIUM	Centre for Equal Opportunities and Opposition to Racism (Act establishing the Centre for Equal Opportunities and Opposition to Racism <sup>340</sup> , Art. 1) <sup>341</sup>	Alleged race, colour, descent, ethnic and national origin, nationality, age, sexual orientation, civil status, birth, wealth/income (fortune in French), religious or philosophical belief, actual or future health condition, disability, physical characteristic, political opinion, genetic characteristic, social origin	Yes	Yes	Yes	Yes	No	N/A
BULGARIA	Protection Against Discrimination Commission (Protection Against Discrimination Act, (Art. 40))	Sex, national origin, human genome, nationality, origin, religion or faith, education, beliefs, political affiliation, personal or public status, disability, age, sexual orientation, family status, property status, or any other ground provided for by law or international treaty to which the Republic of Bulgaria is a party	Judicial interpretation required <sup>342</sup>	Yes	Yes	Yes	Yes	Yes
CROATIA	People's Ombudsman (Anti-discrimination Act, Art. 12)	Racial or ethnic affiliation or colour, gender, language, religion, political or other belief, national or social origin, property, trade union membership, education, social status, marital or family status, age, health condition, genetic heritage, gender identity and expression, sexual orientation	Yes	Yes	Yes	Yes	No	N/A

<sup>340</sup> Further amended by the General Anti-Discrimination Federal Act.

<sup>341</sup> The situation is still patchy regarding equality bodies at the regional/community level. The Centre for Equal Opportunities and Opposition to Racism will most probably be soon entrusted with the monitoring and implementation of some of the legislative instruments adopted by the Regions and the Communities. In order to empower the Centre for Equal Opportunities to play this role, a 'protocol of collaboration' (cooperation agreement) has to be concluded between the Federal Government and the Government of each Region and Community concerned. Two protocols of collaboration were signed in 2009, with the Walloon Region and the French-speaking Community. Such a Protocol is under discussion with the Region of Brussels-Capital and the French Community Commission (COCOF). There is presently no protocol with the Flemish Community/Region. Moreover, the German-speaking Community has not yet designated an equality body in relation to its anti-discrimination law but it has initiated some contact with the Centre.

<sup>342</sup> Judicial interpretation is required of the Protection against Discrimination Act.



Country	Specialised body designated by law in compliance with Article 13	Does this body cover other grounds than race or ethnic origin as specified by Article 13? If so, which ones?	Provides independent assistance to victims	Provides independent surveys	Provides independent reports	Issues recommendations	Is a quasi-judicial body	Its decisions are binding
CYPRUS	Equality Authority and Anti-discrimination Authority (Act on the Combating of Racial and Other Forms of Discrimination (Commissioner, Art. 5 and 7))	Race/ethnic origin, religion or belief, age, sexual orientation, disability, colour, political or other beliefs, national origin <sup>343</sup>	No <sup>344</sup>	Yes	Yes	Yes	No <sup>345</sup>	N/A
CZECH REPUBLIC	Public Defender of Rights (Act on Public Defender of Rights, Art. 21b)	Sex, race, ethnic origin, sexual orientation, age, disability, religion, belief or other conviction, 'nationality'	Yes	Yes	Yes	Yes	No	N/A
DENMARK	Danish Institute for Human Rights (Ethnic Equal Treatment Act, Section 10)	No	Yes	Yes	Yes	Yes	Yes	Yes
ESTONIA	Commissioner for Gender Equality and Equal Treatment (Equal Treatment Act, Art 15-22)	Sex, ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation <sup>346</sup> .	Yes, required regarding additional grounds	Yes, required regarding additional grounds	Yes, required regarding additional grounds	Yes	No	N/A
	Chancellor of Justice (Chancellor of Justice Act, Art. 19-35-16)	Public sector: all grounds; private sector: sex, race, ethnic origin, colour, language, origin, religious, political or other belief, property or social status, age, disability, sexual orientation or other ground of discrimination provided for by the law	No <sup>347</sup>	No	No	Yes	Yes	Yes
FINLAND	Ombudsman for Minorities <sup>348</sup> (Non-discrimination Act, Section 11(2) )	Nationality	Yes	Yes	Yes	Yes	No	N/A

<sup>343</sup> And also all rights guaranteed in the ECHR and all its protocols, the International Convention for the Elimination of All forms of Discrimination, the Convention against Torture and Other Forms of Inhumane or Humiliating Treatment, the International Covenant on Civil and Political Rights and the Framework Convention on the Protection of National Minorities.

<sup>344</sup> In practice, the Equality Authority and the Anti-discrimination Authority do inform victims of their rights.

<sup>345</sup> In practice the Equality Authority and the Anti-Discrimination Authority do issue recommendations that are seriously taken into account by the parties.

<sup>346</sup> With regard to official employment, the following grounds can be added: level of language proficiency, duty to serve in defense forces, marital or family status, family-related duties, social status, representation of employees' interests or membership of an employees' organization.

<sup>347</sup> In practice, the Chancellor informs victims of their rights.

<sup>348</sup> Role limited to discrimination in the employment field.

Country	Specialised body designated by law in compliance with Article 13	Does this body cover other grounds than race or ethnic origin as specified by Article 13? If so, which ones?	Provides independent assistance to victims	Provides independent surveys	Provides independent reports	Issues recommendations	Is a quasi-judicial body	Its decisions are binding
<b>FRANCE</b>	Defender of Rights (Institutional Act creating the Defender of Rights, Art. 4 para 3 <sup>49</sup> )	Sex, pregnancy, origin, appearance of origin, race, ethnic and national origin, nationality, wealth/income, morals, sexual orientation, age, family situation, genetic characteristics, physical appearance, last name, health, disability, union activities, religion, political and religious convictions	Yes	Yes	Yes	Yes	No	N/A
<b>FYR of MACEDONIA</b>	Commission for Protection against Discrimination (Prevention and Protection against Discrimination Act, Art. 16-24 and 25-33) <sup>349</sup>	Sex, race, colour, gender, membership of a marginalised group, ethnic affiliation, language, citizenship, social origin, religion or religious belief, other beliefs, education, political affiliation, personal or social status, mental or physical impairment, age, family or marital status, property status, health condition, any other ground prescribed by law or ratified international treaty	Yes	Yes	Yes	Yes	No	No
<b>GERMANY</b>	Federal Anti-discrimination Agency (General Equal Treatment Act, Art. 20-30)	Race or ethnic origin, sex, religion or belief (Weltanschauung), disability, age, sexual identity	Yes	Yes	Yes	Yes	No	N/A
<b>GREECE</b>	Ombudsman <sup>350</sup> (Law 2477/1997, Art. 1 and Equal Treatment Act, Art 191)	Racial or ethnic origin, religion or other beliefs, disability, age, sexual orientation, gender. human rights in general	No	Yes	Yes	Yes	No	N/A
	Labour Inspectorate <sup>351</sup> (Act 2639/1998, Art. 6)	Racial or ethnic origin, religion or other beliefs, disability, age, sexual orientation	No	No	No	Yes	No	N/A
	Equal Treatment Committee <sup>352</sup> (Anti-discrimination Act)	Racial or ethnic origin, religion or other beliefs, disability, age, sexual orientation	No	No	No	Yes	No	N/A

<sup>349</sup> The Ombudsman also plays a role against discrimination on the grounds of sex, race, colour, national, ethnic, social, political, religious, cultural, language, property, social background, disability and origin.

<sup>350</sup> The Ombudsman covers discrimination by public sector bodies.

<sup>351</sup> The Labour Inspectorate covers discrimination in the private sector and in the field of employment for the 5 grounds protected by the Directives.

<sup>352</sup> The Equal Treatment Committee covers discrimination in any field with the exception of the public sector and does not deal with employment and occupation for the 5 grounds protected in the two Directives.

Country	Specialised body designated by law in compliance with Article 13	Does this body cover other grounds than race or ethnic origin as specified by Article 13? If so, which ones?	Provides independent assistance to victims	Provides independent surveys	Provides independent reports	Issues recommendations	Is a quasi-judicial body	Its decisions are binding
<b>HUNGARY</b>	Equal Treatment Authority (Act on Equal Treatment and the Promotion of Equal Opportunities; Art. 14 and Act CXL of 2004 on the General Rules of the Proceedings and Services of Public Administrative Authorities, Art. 169/B)	Sex, racial affiliation, colour of skin, nationality, membership of a national or ethnic minority, mother tongue, disability, health condition, religion or belief, political or other opinion, family status, maternity (pregnancy) or paternity, sexual orientation, sexual identity, age, social origin, financial status, part-time nature of employment relationship or other legal relationship connected with labour, or the fixed period thereof, membership of an interest representation organisation, other situation, attribute or condition of a person or group	Yes <sup>353</sup>	Yes	Yes	Yes	Yes	Yes
<b>ICELAND</b>	No specific body <sup>354</sup>	-	-	-	-	-	-	-
<b>IRELAND</b>	Equality Authority and Equality Tribunal (Equal Status Act, S. 2 and 39)	Gender, age, race, religion, family status, disability, marital status, sexual orientation, membership of the Traveller community	Yes	Yes	Yes	Yes	Yes <sup>355</sup>	Yes
<b>ITALY</b>	National Office against Racial Discrimination –UNAR (Legislative Decree no. 215 on the Implementation of Directive 2000/43/EC, Art. 7)	No <sup>356</sup>	Yes	Yes	Yes	Yes	No	N/A
<b>LATVIA</b>	Ombudsman, (Ombudsman Act, Art. 11.2))	Grounds not specified, hence any ground	Yes	Yes	Yes	Yes	No	N/A
<b>LIECHTENSTEIN</b>	Office for Equal Opportunities (Act on Equality between Women and Men, Art. 19)	Race, ethnicity, gender, sexual orientation, disability, religion, social disadvantage	Yes	Yes	Yes	Yes	No	N/A
<b>LITHUANIA</b>	Equal Opportunities Ombudsperson (Act on Equal Opportunities, Articles 10-17 and Equal Treatment Act, Articles 14, 15)	Age, disability, sexual orientation, race, ethnicity, origin, religion, beliefs or convictions, language, social status	No	Yes	Yes	Yes	Yes	Yes
<b>LUXEMBOURG</b>	Centre for Equal Treatment (Equal Treatment Act, Art. 8-17)	Race, ethnic origin, religion or belief, disability, age, gender, sexual orientation	Yes	Yes	Yes	Yes	No	N/A
<b>MALTA</b>	National Commission for the Promotion of Equality for Men and Women (Equality for Men and Women Act, Art. 11)	Gender <sup>357</sup>	Yes	Yes	Yes	Yes	No	N/A

<sup>353</sup> However, the Equal Treatment Authority focuses on its quasi-judicial function.

<sup>354</sup> The Parliamentary Ombudsman may deal with equality/discrimination in relation to administrative procedure.

<sup>355</sup> Only the Equality Tribunal.

<sup>356</sup> Although in some cases the **Italian** body also deals with nationality.

<sup>357</sup> And any issue relating to discrimination according to Equal Treatment of Persons Order , Article 10 (2).

Country	Specialised body designated by law in compliance with Article 13	Does this body cover other grounds than race or ethnic origin as specified by Article 13? If so, which ones?	Provides independent assistance to victims	Provides independent surveys	Provides independent reports	Issues recommendations	Is a quasi-judicial body	Its decisions are binding
<b>NETHERLANDS</b> <sup>358</sup>	Equal Treatment Commission (General Equal Treatment Act, Art 11-21)	Race, religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality and civil status, disability and chronic disease, age, working time and type of labour contract	No	Yes	Yes	Yes	Yes	No
	The NGO 'Art. 1' <sup>359</sup> (Law on Local Anti-Discrimination Bureaux, Art. 2a)	Race, religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality and civil (or marital) status, disability and chronic disease, age or any other ground	Yes	Yes	Yes	Yes	No	N/A
<b>NORWAY</b>	Gender Equality and Anti-Discrimination Ombud <sup>360</sup> (Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal, Section 1).	Gender, ethnicity, national origin, descent, skin colour, language, religion or belief, disability, age, sexual orientation, political opinion, membership of a trade union	No <sup>361</sup>	Yes	Yes	Yes	Yes	No
<b>POLAND</b>	Commissioner for Civil Rights Protection ('Ombud') (Act on the Commissioner for Civil Rights Protection, Art. 1)	The Act on the Commissioner for Civil Rights Protection does not mention any protected grounds	Yes <sup>362</sup>	Yes	Yes	Yes	No	N/A
<b>PORTUGAL</b>	ACIDI (High Commissioner for Immigration and Intercultural Dialogue) (Decree-law 167/2007, Art. 1))	Nationality	Yes	Yes	Yes	Yes	No	N/A
<b>ROMANIA</b>	National Council on Combating Discrimination (Government Ordinance 137/2000 on the Prevention and Punishment of All Forms of Discrimination, Art. 16-25)	Race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, age, disability, chronic disease, HIV positive status, membership of a disadvantaged group or any other criterion	Yes	Yes	Yes	No <sup>363</sup>	Yes	Yes

<sup>358</sup> In the **Netherlands**, no specialised equality bodies are designated by the law. There are two bodies that count as such as they are officially recognised in e.g. parliamentary papers.

<sup>359</sup> This NGO includes around 430 local anti-discrimination bureaus.

<sup>360</sup> The Equality and Anti-Discrimination Tribunal is the appeal instance of the Gender and Anti-Discrimination Ombud.

<sup>361</sup> The Ombud's role is provide guidance to victims of discrimination on the content of the law and not to give assistance in the form of legal counseling or legal aid.

<sup>362</sup> Judicial interpretation is required as under the **Polish** Constitution and the new law, the competences of the Ombud are limited when it comes to conflicts between private parties.

<sup>363</sup> Issuing recommendations is not specifically provided for in the law, but the national equality body does so in practice.

Country	Specialised body designated by law in compliance with Article 13	Does this body cover other grounds than race or ethnic origin as specified by Article 13? If so, which ones?	Provides independent assistance to victims	Provides independent surveys	Provides independent reports	Issues recommendations	Is a quasi-judicial body	Its decisions are binding
<b>SLOVAKIA</b>	Slovak National Centre for Human Rights (Act No. 308/1993 on the Establishment of the Slovak National Centre for Human Rights, S. 1, paras 2a, e, f, g, h and S. 1, paras 3 and 4))	Sex, religion or belief, race, affiliation to a nationality or an ethnic group, disability, age, sexual orientation, marital status and family status, colour of skin, language, political or other opinion, national or social origin, property, lineage/gender or other status, unfavourable health condition, family duties, membership or involvement in a political party or a political movement, a trade union or another association	Yes	Yes	Yes	Yes	No	N/A
<b>SLOVENIA</b> <sup>364</sup>	Advocate of the Principle of Equality (Act Implementing the Principle of Equal Treatment, Art. 11.19a))	Gender, ethnicity, race or ethnic origin, religion or belief, disability, age, sexual orientation, other personal circumstance	Yes	No	No	Yes	No	N/A
<b>SPAIN</b>	Council for the Promotion of Equal Treatment of all Persons without Discrimination on the Grounds of Racial or Ethnic Origin (Act 62/2003, of 30 December on Fiscal, Administrative and Social Measures, Art. 33)	No	No	No	No	No	No	N/A
<b>SWEDEN</b>	Equality Ombudsman (Discrimination Act, Ch. 4 and the whole of the Equality Ombudsman Act)	Sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation, age	Yes	Yes	Yes	Yes	No	N/A
<b>TURKEY</b>	No	-	-	-	-	-	-	-
<b>UNITED KINGDOM</b>	Equality and Human Rights Commission (UK Equality Act, S. 1-43)	Ethnic origin, national origin, colour, nationality (including citizenship), sexual orientation, religion, belief, disability, age, sex (including gender reassignment, marriage/civil partnership status, pregnancy)	Yes	Yes	Yes	Yes	No	N/A
	Equality and Human Rights Commission for Northern Ireland (ECNI), (Northern Ireland Act, Part VII, S. 73-74)	Ethnic origin, national origin, colour, nationality (including citizenship), sexual orientation, religion, belief, disability, age, sex (including gender reassignment, marriage/civil partnership status, pregnancy)	Yes	Yes	Yes	Yes	No	N/A

<sup>364</sup> The tasks performed by the Advocate might not be seen as independent as the Advocate is a civil servant working for the Ministry.



European Commission

**Developing Anti-Discrimination Law in Europe**

**The 27 EU Member States, Croatia, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared**

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









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