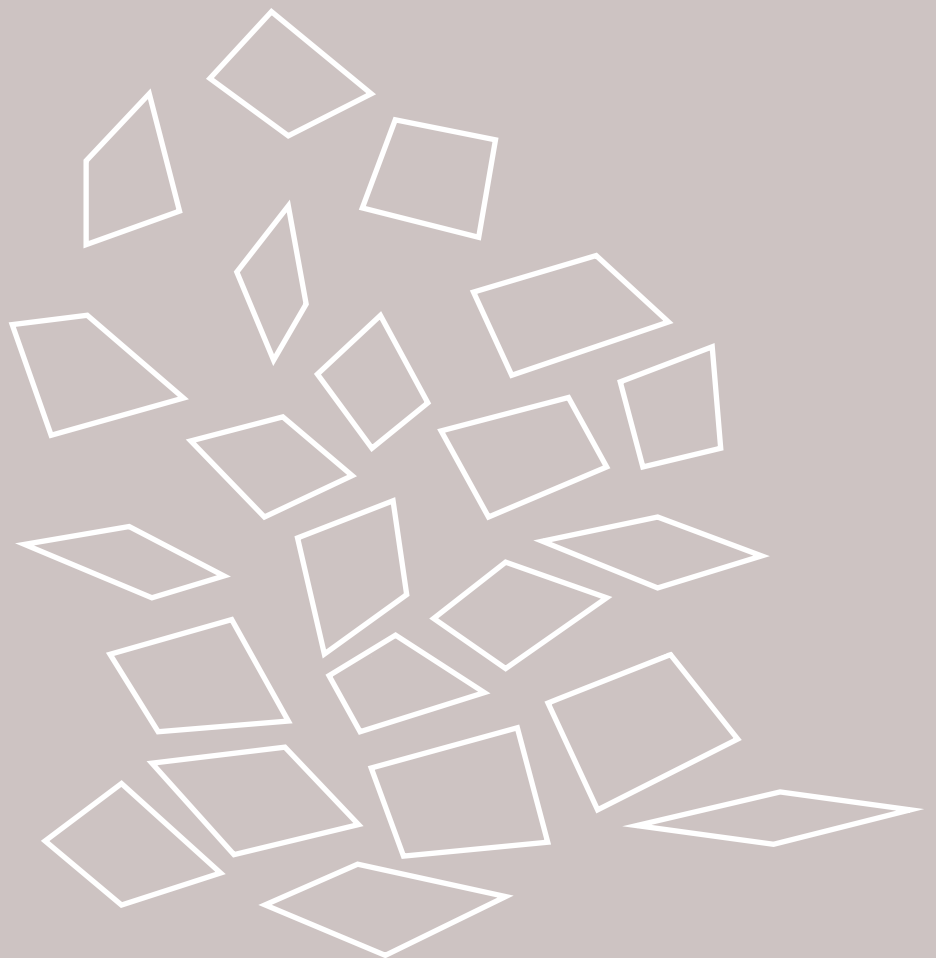




European network of legal experts in  
gender equality and non-discrimination

# A comparative analysis of non-discrimination law in Europe

2017



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# **A comparative analysis of non-discrimination law in Europe 2017**

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

Prepared by Isabelle Chopin and Catharina Germaine  
for the European network of legal experts in gender equality  
and non-discrimination

November 2017

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## Preface

Seventeen years ago, a major and unprecedented evolutionary change occurred in the European Union with the adoption in 2000 of two pieces of EU legislation in the field of anti-discrimination: the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC). The transposition and implementation of these legal provisions into the national legal systems of the 28 Member States is described in a series of annually updated country reports produced by the European network of legal experts in gender equality and non-discrimination. In addition, the network also includes candidate countries (the Former Yugoslav Republic of Macedonia, Montenegro, Serbia and Turkey) and the EEA countries (Iceland, Liechtenstein and Norway).

The European network of legal experts in gender equality and non-discrimination was created in 2014, through a call for tenders from the European Commission to create a new single network following the work completed by the European network of legal experts in the non-discrimination field (managed by the Migration Policy Group and Human European Consultancy) and the European network of legal experts in the field of gender equality (managed by Utrecht University). This new network is managed by the Human European Consultancy, the Migration Policy Group and Utrecht University. The network reports annually on the national legislation of these countries compared with the anti-discrimination standards set by the EU.

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 that closely follows the provisions of the two directives, although the countries included in the network do not all have the same compliance obligations. The 35 reports cover national law, the establishment of enforcement mechanisms, jurisprudence and the adoption of other measures. They contain information current as of 1 January 2017.\* 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.equalitylaw.eu](http://www.equalitylaw.eu).

This comparative analysis, drafted by Isabelle Chopin and Catharina Germaine (Migration Policy Group), compares and analyses the information set out in the 2017 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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\* Where major changes in legislation have been adopted at national level after the cut-off date of 1 January 2017, they have been included and this has been indicated accordingly.

## Introduction

The objective of this report is to compare and contrast anti-discrimination law in the 28 EU Member States, four EU candidate countries (namely the Former Yugoslav Republic of Macedonia, Montenegro, Serbia and Turkey) and the EEA countries (Iceland, Liechtenstein and Norway), based on the 2017 updates of the country reports written by the European network of legal experts in gender equality and non-discrimination. The state of play and the major developments are summarised in this publication. The report presents the general trends in European anti-discrimination policy and points out some of the remaining dilemmas in the application of anti-discrimination legislation. It gives an overview of the main substantive issues in both directives: the grounds of discrimination, the definition of grounds and scope, exceptions to the principle of equal treatment and positive action, access to justice and effective enforcement, and Equality Bodies.

All Member States were required to review and amend their existing legislation to comply with the requirements of the directives. The Racial Equality Directive and the Employment Equality Directive had to be transposed into national law by 19 July 2003 and 2 December 2003 respectively in the (then) 15 EU Member States. Countries acceding the EU after this date had to transpose both directives by the date of their accession: 1 May 2004 for 10 new Member States, 1 January 2007 for Bulgaria and Romania, and finally 1 July 2013 for Croatia. The Former Yugoslav Republic of Macedonia, Montenegro, Serbia and Turkey entered the transposition process and they must 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. 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. However, the report could potentially be used as one of the instruments for making such an assessment. Ambiguities in the directives became apparent in the transposition process. This report will not seek to clarify these gaps, although, where appropriate, the report makes some suggestions to that effect.

This synthesis overview of the national situation in 35 countries is complemented by the comprehensive country reports. Readers can turn to these country reports for detailed and nuanced information about the law of a particular country, current as of 1 January 2017.

# 1 PROTECTED GROUNDS OF DISCRIMINATION

## 1.1 Introduction to the transposition of the anti-discrimination directives

Two ground-breaking Council directives were adopted in 2000, prohibiting discrimination on grounds of racial or ethnic origin, religion or belief, age, disability and sexual orientation. The directives presented profound challenges to the existing national approaches to combating discrimination based on these grounds across Europe and aimed to ensure that all individuals living in the EU, regardless of their nationality, could benefit from effective legal protection against such discrimination. All Member States were required to review and amend their existing legislation to comply with the requirements of the directives, while 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 requires Member States to prohibit certain forms of discrimination, namely direct and indirect discrimination, harassment and instructions to discriminate, on the grounds of racial or ethnic origin. It covers a wide range of areas: 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 is limited to protection in employment and occupation as well as vocational training, and prohibits direct and indirect discrimination as well as harassment and instructions to discriminate, on the grounds of religion or belief, age, sexual orientation and disability.

The European Union's commitment to the principle of non-discrimination was reaffirmed in December 2000 in the Charter of Fundamental Rights, 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'. Since the entry into force of the Lisbon Treaty in December 2009, the Charter has the same binding legal value as the Treaties.

Even though all Member States have transposed the two directives into their national law, a number of discrepancies remain in the different national anti-discrimination legislations. For example, the methods of transposition differ greatly between countries, from those where one single legal instrument contains the entire anti-discrimination legal framework to those where a large number of provisions are spread throughout national law in areas such as labour law, criminal law and administrative law.

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 that it considers to have failed to fulfil their Treaty obligations, for instance by failing to transpose the Racial Equality Directive or the Employment Equality Directive. The Commission may initiate proceedings for non-communication of transposition or for non-conformity where the transposition, or eventually the implementation, is incomplete or incorrect. Since the deadline for transposition, the Commission has scrutinised the compliance of national law to this end and has initiated infringement proceedings against a number of Member States for non-conformity with one

or both of the directives. In several cases, these proceedings led to judgments of the CJEU finding that the Member States were indeed in breach of EU law. Most recently, in 2013, the Court found that Italy had failed to correctly transpose Article 5 of the Employment Equality Directive on the duty to provide reasonable accommodation for people with disabilities.<sup>1</sup>

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

## 1.2 Grounds of discrimination

The Racial Equality Directive requires Member States to prohibit discrimination on the ground of racial or ethnic origin in the fields of employment, social protection including social security, healthcare, education, and supply of and/or access to goods and services, including housing. In addition, the Employment Equality Directive requires the prohibition of discrimination to be extended in the field of employment to the grounds of religion or belief, disability, age and sexual orientation. Neither directive contains any definition of any 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.

Most countries have chosen not to define the grounds of discrimination in their implementing legislation (for instance, **Croatia**, the **Former Yugoslav Republic of Macedonia**, **France**, **Hungary**, **Lithuania**, **Luxembourg**, **Poland**, **Romania**, **Serbia** and **Slovenia**). A small group of countries have included definitions of at least some of the grounds either within the legislation itself or in accompanying documentation, such as an explanatory memorandum. This group includes **Bulgaria**, the **Czech Republic**, **Denmark**, **Estonia**, **Finland**, **Germany**, **Greece**, **Ireland**, **Montenegro**, 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 **Denmark** and the **UK**, which does not have a written constitution). Constitutional provisions are generally either not directly applicable or they have vertical effect only in litigation involving the state as the respondent. However, constitutional provisions are deemed to be applicable to horizontal relations as well in **Bulgaria**, **Cyprus**, **Denmark**, **Estonia**, **Greece**, **Iceland**, **Liechtenstein**, **Luxembourg**, the **Netherlands**, **Norway**, **Serbia**, **Slovenia**, **Spain** and **Turkey**. Horizontal direct effect remains theoretical or largely debatable in a minority of countries (for instance, **Belgium**, **Croatia**, the **Former Yugoslav Republic of Macedonia**, **Montenegro**, **Poland** and **Portugal**). In **France**, constitutional provisions are indirectly applicable against private parties by way of the 'exception of constitutionality' procedure requesting a referral to the Constitutional Council.

General constitutional equality guarantees apply in most countries, 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. Therefore, most countries have adopted specific legislative provisions listing exhaustively the areas to which discrimination legislation applies.

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**

<sup>1</sup> For further information, please see section 1.2.3.1 below.

and **Luxembourg**). Although anti-discrimination provisions still exist in various pieces of legislation in some countries (e.g. **Bulgaria** and **Latvia**), this method has largely been replaced by more general anti-discrimination provisions and legislation.<sup>2</sup> Similarly, there has been a discernible move towards multiple-ground equal treatment bodies.

Some countries, such as **Sweden** and the **UK**, having in past years opted for a single act, have taken the opportunity to clarify existing provisions and to fill the gaps and inconsistencies caused by a patchy legal framework. In **Finland**, the anti-discrimination legal framework was more recently reformed with the entry into force on 1 January 2015 of a new Non-Discrimination Act,<sup>3</sup> with the aim of extending to all protected grounds the protection already existing on the ground of ethnic origin.

In contrast, similar attempts to adopt a single comprehensive instrument have failed in some countries, such as **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 of following up on the proposal. Similarly, in the **Netherlands**, a previous Government was working on a general equal treatment act in which four distinct laws (the General Equal Treatment Act, the Equal Treatment for Men and Women in Employment Act, the Disability Discrimination Act and the Age Discrimination Act), as well as several Civil Code provisions, would be integrated into a single act. A consultation was held in 2010, but no progress has been made since. However, in January 2016 a revised Dutch national action programme against discrimination was presented, bringing together under a single umbrella the various programmes and plans to combat discrimination and rendering anti-discrimination policy more strategic and comprehensive.<sup>4</sup>

In the majority of Member States, including **Belgium, Bulgaria, Croatia, France, Hungary, Poland, Romania, Spain** and **Sweden**, national anti-discrimination law includes other prohibited grounds in addition to those required by the directives. In **France**, for instance, several new protected grounds were added in 2016, including 'loss of autonomy', 'expressing oneself in a language other than French' and economic vulnerability as well as gender identity. In contrast, however, age and sexual orientation are not explicitly mentioned in **Turkish** legislation and, whereas the Law on Prevention and Protection against Discrimination in the **Former Yugoslav Republic of Macedonia** covers additional grounds not provided for in the directives, it does not include sexual orientation.<sup>5</sup> In **Iceland**, only some fragmented general law provisions stemming from the constitutional equality provision provide protection against discrimination on the grounds covered by the directives and a comprehensive anti-discrimination law is still to be adopted.

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

- 
- 2 After the cut-off date of this report, on 16 June 2017, a single comprehensive anti-discrimination act was adopted in Norway, to enter into force on 1 January 2018 (Non-Discrimination Act of 16 June 2017, No. 51 – 2017-06-16-51).
  - 3 Finland, The Non-Discrimination Act (1325/2014), <http://www.finlex.fi/fi/laki/ajantasa/2014/20141325>.
  - 4 The Netherlands, *Nationaal Actieprogramma tegen discriminatie* (National action programme against discrimination), Tweede Kamer, 2015-2016, 30 950, no. 84.
  - 5 Former Yugoslav Republic of Macedonia, Law on Prevention and Protection against Discrimination, Official Gazette of the Republic of Macedonia No.50/10, 44/2014; Constitutional Court Decision: U. No 82/2010.

**Table 1: Grounds protected on the national level in various laws, whether at the federal or regional level**

<b>AUSTRIA</b>	Gender, ethnic affiliation, race, colour, language, descent or national or ethnic origin, religion, belief, age, sexual orientation, disability, disability of a relative, sexual identity, gender, pregnancy, parenthood, class, estate or property, social standing.
<b>BELGIUM</b>	Alleged race, colour, origin, ethnic and national origin, nationality, age, sexual orientation, civil status, birth, property, religious or philosophical belief, actual or future state of health, disability, physical or genetic characteristics, political opinion, language, social origin, trade union opinion ( <i>conviction syndicale</i> ), gender (including pregnancy, childbirth, maternity), gender reassignment, gender identity and gender expression.
<b>BULGARIA</b>	Sex, race, national origin, ethnicity, human genome, nationality, origin, religion or faith, education, beliefs, political affiliation, personal or social 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 origin 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, <sup>1</sup> disability, genetic heritage, gender identity and expression, sexual orientation, birth, other characteristics.
<b>CYPRUS</b>	Community, race, racial and ethnic origin, religion, language, disability, special needs, age, sexual orientation, sex, political or other conviction, national or social descent, birth, colour, wealth, social class, or any other ground.
<b>CZECH REPUBLIC</b>	Race, colour, ethnic origin, nationality (in Czech <i>národnost</i> ), sex, sexual orientation, age, disability, religion or belief.
<b>DENMARK</b>	Race, age, disability, skin colour, creed or religious conviction, religion, belief, sexual orientation, political opinion, national, social and ethnic 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, representation of the interests of employees or membership of an organisation of employees, political or other opinion, property, financial or social status, genetic risks, other grounds.
<b>FINLAND</b>	Sex, origin, age, disability, religion, belief, conviction, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health or other personal characteristics.
<b>FRANCE</b>	Mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed to an ethnic origin, nation, race or specific religion, physical appearance, last name, family situation, union activities, political and philosophical opinions, age, health, disability, genetic characteristics, loss of autonomy, place of residence, capacity to express oneself in a language other than French, economic vulnerability.
<b>FORMER YUGOSLAV REPUBLIC of MACEDONIA</b>	Race, colour, sex, gender, belonging to a marginalised group, ethnic affiliation, language, citizenship, social origin, religion or religious conviction, faith, political and religious belief, political or other position, other forms of belief, education, culture, political affiliation, personal or social status, mental or physical disability, type of illness, age, family or marital status, national or social origin, national and social background, citizenship, national belonging, ethnic belonging, belonging to a marginalised group, position of the family, kindred, property status, health condition, language, sexual orientation, belonging to a national or ethnic minority, material position, birth origin, other personal circumstances, other status, any other ground prescribed by law or ratified international treaty.
<b>GERMANY</b>	Sex, parentage, race, ethnic origin, language, homeland and origin, faith, religion, belief, religious or political opinions, political or union activities or attitudes, nationality, disability, age, political or union activities or attitudes, background, relationships, sexual identity. <sup>2</sup>
<b>GREECE</b>	Racial or ethnic origin, descent, colour, religious or other beliefs, disability or chronic illness, age, family or social status, sexual orientation and gender identity or characteristics.
<p>1 The ADA introduced the health condition as a separate prohibited ground for discrimination with the aim to protect persons with certain health conditions (e.g. persons infected with HIV) that do not constitute disability.</p> <p>2 As the guarantee includes an open-textured general principle, other grounds are potentially included as well.</p>	

<b>HUNGARY</b>	Sex, racial affiliation, colour of skin, nationality, belonging to a national or ethnic minority, mother tongue, disability, health condition, religion or belief, political or other opinion, family status, maternity (pregnancy) or paternity, sexual orientation, sexual identity, age, social origin, financial status, part-time nature of employment, legal relationship or other legal relationship relating to employment or the fixed period thereof, belonging to an interest representation organisation, other situation, attribution or condition of a person or group.
<b>ICELAND</b>	Sex, race, colour, religion, opinion, national origin, sexual orientation, financial status, parentage, gender identity, other status. <sup>3</sup>
<b>IRELAND</b>	Gender, age, race, religion, civil status, family status, disability, sexual orientation, membership of the Traveller community, housing assistance.
<b>ITALY</b>	Race and ethnic origin, religion or belief, disability, age, sexual orientation, sex, nationality, national origin, language, political opinion, personal and social condition.
<b>LATVIA</b>	Race, ethnic origin, colour, skin colour, age, disability, health condition, state of health, religious, political or other conviction, religious and political belief, national and/or social origin, gender, property status, family status, marital status, sexual orientation, occupation, place of residence, other circumstances.
<b>LIECHTENSTEIN</b>	Gender, disability, sexual orientation, race, national origin, ethnicity, language, religion or belief.
<b>LITHUANIA</b>	Age, gender, disability, sexual orientation, race, ethnicity, ethnic origin, origin, citizenship, nationality, religion, beliefs, convictions, views, language, social status, marital and family status, intention to have a child (children), membership of political parties and non-governmental organisations, and any other characteristics that are not connected to work-related characteristics.
<b>LUXEMBOURG</b>	Race, racial or ethnic origin, religion or belief, age, disability, sexual orientation, gender, family situation, state of health, customs, political or philosophical opinions, trade union activities, actual or supposed membership of an ethnic group, nationality, specific religion.
<b>MALTA</b>	Race, racial or ethnic origin, place of origin, political or other opinions, colour, creed, sex, marital status, pregnancy or potential pregnancy, sex, disability on the basis of physical, intellectual, sensory and/or mental impairment, religious conviction, membership of a trade union or an employers' association, language, national or social origin, association with a national minority, property, birth or other status, sexual orientation, pregnancy or maternity leave, family responsibility, gender reassignment, age, religion or belief, gender identity, gender expression and sex characteristics.
<b>MONTENEGRO</b>	Disability, sex, nationality, race, religion, language, ethnic or social origin, sexual orientation, political or other beliefs, financial status, other personal characteristics.
<b>NETHERLANDS</b>	Sex (including pregnancy), religion, belief, political opinion, race, nationality, hetero- and homosexual orientation, civil (marital) status, employment duration, permanent/fixed-term contracts, age, disability, chronic illness, any other ground
<b>NORWAY</b>	Gender, ethnicity, national origin, descent, skin colour, language, religion, belief, disability, age, sexual orientation, gender identity, gender expression, life stance, lifestyle, political views, membership of trade unions, part-time/temporary work.
<b>POLAND</b>	Gender, race, ethnic origin, nationality, citizenship, <sup>4</sup> religion, belief, political opinion, disability, state of health, age, sexual orientation, belonging to a national or ethnic minority, membership of a trade union, employment for a definite or indefinite period of time, part-time or full-time employment, civil (marital) and family status.
<b>PORTUGAL</b>	Ancestry, gender, race, language, place of origin, religion, political or ideological convictions, education, economic situation, social condition, sexual orientation, age, gender identity, civil status, family situation, genetic heritage, reduced capacity to work, disability or chronic disease, nationality, ethnic origin, membership of a trade union.
<b>ROMANIA</b>	Race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, gender, age, handicap, non-contagious chronic disease, HIV-positive status, belonging to a disadvantaged group, political adherence, property, social origin, any other criterion.
<p><sup>3</sup> 'Other status' has been interpreted to cover ethnic origin, age, and disability as well.</p> <p><sup>4</sup> Since the entry into force of the Act of 29 April 2016, which transposed EU Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, 'citizenship' is included in the Equal Treatment Act for limited categories of people only.</p>	

<b>SERBIA</b>	Race, racial affiliation, skin colour, ancestry, citizenship, nationality, national affiliation or ethnic origin, language, religious or political beliefs, other belief, gender, gender identity, sexual orientation, social background, culture, financial status, birth, genetic characteristics, pregnancy, health condition, health, disability, marital and family status, family commitments, previous convictions, age, appearance, membership of political, trade union and other organisations, other real or presumed personal characteristic.
<b>SLOVAKIA</b>	Sex, race, skin colour, language, belief, religion, political affiliation or conviction, national or social origin, nationality or ethnic origin, property, lineage/gender, affiliation with nationality or an ethnic group, disability, age, sexual orientation, marital status and family status, political or other opinion, the reason of reporting criminality or other anti-social activity, trade union activities, unfavourable state of health and genetic features or any other status.
<b>SLOVENIA</b>	Gender, ethnicity, race or ethnic origin, language, religion or belief, disability, age, sex, sexual orientation, gender, gender identity or gender expression, social standing, economic situation, education, national and social origin, origin, skin colour, health condition, family status, membership of a trade union, financial situation, ethnic roots, language, political or other opinion or other belief, social status, property status, birth, education, social position, national, racial, religious, or ethnic affiliation, any other personal characteristic.
<b>SPAIN</b>	Race or ethnic origin, religion or belief, age, disability, sexual orientation, gender, marital status, origin, social condition, political ideas, ideology, affiliation to a trade union, use of official languages in Spain, family ties with other workers in a company, nationality, any other condition or personal or social circumstance.
<b>SWEDEN</b>	Sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation, age, part-time workers, fixed time workers, workers taking parental leave.
<b>TURKEY</b>	Race, language, colour, gender, disability, political opinion/thought, philosophical belief/opinion, religion, sect, denomination, nationality, national origin, ethnic origin, social origin, birth, economic or other social status, family, class, profession, regional differences, health, age.
<b>UNITED KINGDOM</b>	Northern Ireland: sex (incl. gender reassignment, married/ civilly partnered status, pregnancy), colour, nationality (including citizenship), ethnic origins, national origins, disability, sexual orientation, religion or belief, age, race, belonging to the Irish Traveller community, political belief.
	Great Britain (England, Wales and Scotland): sex (incl. gender reassignment, married/ civilly partnered status/ pregnancy), colour, nationality (including citizenship), ethnic origins, national origins, disability, sexual orientation, religion or belief, age.

### 1.2.1 Racial or ethnic origin

Several issues can arise in relation to the definition of ‘racial or ethnic origin’. While the Racial Equality Directive requires Member States to prohibit discrimination on the ground of ‘racial or ethnic origin’, national anti-discrimination law in many countries uses a slightly different terminology, by prohibiting discrimination on grounds such as ‘ethnicity’ or ‘ethnic affiliation’. In addition, in several countries, national law prohibits discrimination on other grounds that are arguably linked to or of relevance for ‘racial or ethnic origin’.<sup>6</sup> Such grounds include nationality or national origin, language, colour and membership of recognised national minorities. There are also undeniable links between the grounds of racial or ethnic origin on the one hand and religion or belief on the other.

#### **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.

There have been debates around the use of the term ‘race’ within anti-discrimination legislation. Despite the clear statement made in Recital 6 of the directive, 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’. For this reason, they have avoided using these terms altogether

<sup>6</sup> See the table in the previous section, immediately above.



in transposing legislation. For example, the **Swedish** 2008 Discrimination Act defines 'ethnicity' (Chapter 1, Section 5(3)), as 'national or ethnic origin, skin colour or similar circumstance'. In **Finland**, the term used in the repealed Non-Discrimination Act, 'ethnic or national origin', has been replaced in the new Non-Discrimination Act with the word 'origin'. The definition in the Government proposal includes ethnic origin, national origin, societal origin, race and colour of skin.<sup>7</sup> **German** anti-discrimination legislation includes the term 'race' but its inclusion generated heated criticism and opposition. **Belgian** law refers to 'alleged race', while in **France**, various legal provisions refer to 'real or assumed' (*vraie ou supposée*) race or ethnic origin. However, in May 2013 the French National Assembly adopted in first reading a bill removing the words 'race' and 'racial' from all national legislation, including legislation that ratifies international treaties or transposes the Racial Equality Directive.<sup>8</sup>

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'. This can be the case when national laws implementing the Racial Equality Directive list such characteristics as separate grounds of discrimination. For instance, the **Hungarian** Fundamental Law refers to 'race' and 'colour', while the Equal Treatment Act also mentions 'racial affiliation', 'belonging to a national minority' and 'nationality' (not in the sense of citizenship). It is also often unclear whether the concepts of ethnic/national minority found within specific laws regulating the protection of national minorities will be relied upon when national courts interpret anti-discrimination legislation in countries such as **Austria, Hungary, Poland** and **Slovenia**.

The boundary between ethnic origin and religion can also be 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. 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>9</sup>

The following examples show how some Member States are dealing with this close interconnection between race and religion. In the **Netherlands**, case law has recognised the possibility for discrimination against Jews,<sup>10</sup> and in certain circumstances Muslims,<sup>11</sup> to be challenged as racial discrimination. In the **United Kingdom**, discrimination against Sikhs<sup>12</sup> or Jews<sup>13</sup> has been accepted as discrimination on racial grounds (specifically, ethnic origin). The UK Equality Act also requires the Government to introduce secondary legislation to make caste an aspect of 'race' as a protected ground.<sup>14</sup> Meanwhile the Employment Appeal Tribunal accepted in December 2014 that discrimination on the basis of caste could fall within discrimination on the basis of ethnic origin.<sup>15</sup> Due to the historical background of Nazi ideology in **Germany**, anti-Semitism is regarded as discrimination on the grounds of race and not of religion. In **Sweden**, national courts do not always specify whether the relevant ground in a specific case is religion or ethnicity, considering that the scope of protection is the same for both grounds. For instance, in a case where a Muslim woman is being discriminated against for wearing a burqa or a niqab, the court would

7 Finland, *Government Proposal on the Non-Discrimination Act 19/2014*, p.66, available at: <http://www.finlex.fi/fi/esitykset/he/2014/20140019>.

8 France, Bill No 139, 16 May 2013. Since its adoption by the National Assembly in 2013, the bill has been pending before the Senate.

9 European Court of Human Rights (ECtHR), *Timishev v Russia*, Applications 55762/00 and 55974/00, 13 December 2005, paragraph 55.

10 Dutch Equal Treatment Commission, Opinion 1998/48.

11 Dutch Equal Treatment Commission, Opinion 1998/57.

12 UK, *Mandla v Dowell Lee* [1983] UKHL 7, 2 AC 548.

13 UK, Employment Appeal Tribunal, *Seide v Gillette Industries Ltd.* [1980], IRLR 427.

14 Although a Government regulation to this effect entered into force on 25 June 2013, it has still not been implemented.

15 UK, Employment Appeal Tribunal, *Chandhok v Tirkey*, [2015] IRLR 195. Available at: [http://www.bailii.org/uk/cases/UKCAT/2014/0190\\_14\\_1912.html](http://www.bailii.org/uk/cases/UKCAT/2014/0190_14_1912.html).

generally avoid investigating whether this practice, in the specific case at hand, is rooted in religion or in ethnicity (as it is clearly rooted in one of the two or both).<sup>16</sup>

### 1.2.2 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 or a general conceptual definition), nor has it ever been defined at the international level.

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

Some countries (for example, the **Czech Republic** and **Spain**) provide guidance as to what religion is not, through legislation regulating the freedom of religion. Further guidance on the meaning of ‘religion or belief’ is provided in some states by explanatory documentation accompanying legislation or by court rulings, such as in **Austria, Belgium, France, Ireland, the Netherlands**,<sup>18</sup> and the **United Kingdom**. In **Germany**, the Constitutional Court has developed extensive case law in this regard.

There are some interesting examples of guidance on the definition of religion. According to the guidelines to the **Danish** Act on the Prohibition of Discrimination in the Labour Market etc., ‘religion’ is understood as formally approved or recognised religions.<sup>19</sup> In practice however, it is not necessary to demonstrate membership in a formally recognised religious community to be able to avail oneself of the provisions of the act. The **Montenegrin** Law on the Prohibition of Discrimination, as amended in 2014, provides for a definition of discrimination on the basis of religion or belief as ‘any act contrary to the principle of freedom of religion’, meaning ‘any unequal treatment, differentiation, or placing in an unequal position of a person on the basis of religion or personal beliefs, as well as affiliation or non-affiliation to a religious community’.<sup>20</sup>

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

*‘The protected characteristic of religion or religious or philosophical belief ... [has] a broad definition in line with the freedom of thought, conscience and religion guaranteed by Article 9 of the European Convention on Human Rights. The main limitation for the purposes of Article 9 is that the religion must have a clear structure and belief system. Denominations or sects within a religion can be considered to be a religion or belief, such as Protestants and Catholics within Christianity ...*

*The criteria for determining what is a “philosophical belief” are that it must be genuinely held; be a belief and not an opinion or viewpoint based on the present state of information available; be a belief as to a weighty and substantial aspect of human life and behaviour; attain a certain level of cogency, seriousness, cohesion and importance; and be worthy of respect in a democratic society, compatible*

16 Håssleholm Municipal Court, case T-1370-13, *Equality Ombudsman v. Polop AB*, judgment of 8 April 2015.

17 European Commission (2014), 2: *Report from the Commission to the European Parliament and the Council – Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘Racial Equality Directive’) and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (‘Employment Equality Directive’)*, SWD (2014) 5 final accompanying COM (2014) 2 final, 17 January 2014, available at <http://eur-lex.europa.eu/>.

18 Dutch anti-discrimination law refers to the term *levensovertuiging* (philosophy of life) as 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).

19 *Vejledning om forskelsbehandlingsloven* (Guidance on the Act on the prohibition of discrimination in the labour market etc. No. 9237 of 6 January 2006). See: <https://www.retsinformation.dk/Forms/R0710.aspx?id=30653>.

20 Montenegro, Law on Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), Official Gazette of Montenegro, No. 46/10, 18/14, Article 17.

*with human dignity and not conflict with the fundamental rights of others. So, for example, any cult involved in illegal activities would not satisfy these criteria...*

*The Baha'i faith, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism are all religions for the purposes of this provision.'*<sup>21</sup>

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

Most of the controversy around the implementation of the provisions of the Employment Equality Directive on religion or belief centres on the extent of any exceptions provided for organised religions (e.g. churches) and organisations with an ethos based on religion or belief (e.g. religious schools). Under Article 4(2) of the Employment Equality Directive, Member States can maintain national legislation or practices that 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.

It is important to distinguish between national legislation that does not apply to religious organisations and national legislation that does apply, but provides certain exceptions. For example, the **Dutch** (then) Equal Treatment Commission found in 2012<sup>22</sup> that a church, when renting out houses owned by the church, cannot make distinctions between potential tenants based on their religion as this activity falls outside the internal affairs of the church, placing them within the scope of national anti-discrimination law.

Not all countries chose to explicitly include the Article 4(2) exception: this is the case in **Finland, France, Iceland, Liechtenstein, Montenegro, Portugal, Romania, Serbia** and **Sweden**. Although the **Romanian** Anti-discrimination Law (Ordinance 137/2000) does not include specific provisions on an exemption for employers with an ethos based on religion or belief to comply with the Employment Equality Directive, the provisions of Article 4<sup>1</sup> on genuine and determining occupational requirements and articles 23-26 of the Law 489/2006 on Religious Freedom and the General Status of Religious Denominations, on the employment of own employees, can be interpreted to allow ethos or religion-based exceptions. In a similar manner, in **Finland**, the Non-Discrimination Act does not provide for an exception for employers with an ethos based on religion or belief, but the Government proposal cites article 4(2) and additionally, it states that 'setting such a requirement cannot lead to discrimination on another ground.' Likewise, **Serbian** legislation does not include provisions based on Article 4(2), but Article 18(2) of the Law on the Prohibition of Discrimination contains a similar exception that is unclear and appears to provide a blanket exemption from the prohibition of discrimination for religious officials, contrary to the directive. In contrast, the following states have adopted provisions in national law which seek to rely on Article 4(2): **Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, the Former Yugoslav Republic of Macedonia, Germany, Greece, Hungary, Italy, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Slovakia, Slovenia, Spain, Turkey** and the **United Kingdom**. In **Norway**, although the exception is not specific in the current revised legal text, it follows from the legal preparatory works.

Some states have provided exceptions that appear to go beyond the strict terms of the directive (e.g. **Hungary**),<sup>23</sup> appear to be too wide (e.g. **Italy**), or remain ambiguous (e.g. the **UK**). Meanwhile, in **Bulgaria**,

21 Great Britain, Equality Act 2010, *Explanatory Notes*, paragraphs 51-53. Available at: [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).

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

23 For more detail on the Hungarian legislation, see the textbox at the end of this section.

there is an inconsistency between the directive and the wording of the Protection Against Discrimination Act: rather than defining the occupational requirement as one that is 'genuine, legitimate and justified', the act uses the phrase 'genuine and determining', making it arguably stricter than under the directive. In **Ireland**, the relevant provision of the Employment Equality Acts 1998-2015 (Section 37) was heavily criticised as it did not refer to the terms 'legitimate' or 'proportionate' as required by the directive. In December 2015, the provision was amended so that institutions that are maintained in whole or in part by public funds may only rely upon this exception if the favourable treatment on the ground of religion constitutes a genuine, legitimate and justified occupational requirement having regard to the institution's ethos, and the means of achieving that aim are appropriate and necessary.<sup>24</sup> The **Slovenian** provisions do not seem to be precise enough and it is thus unclear whether the exceptions apply to religious teachers, all teachers or all school staff.

#### German court refers case on employer with religious ethos to the CJEU

In March 2017, the German Federal Labour Court referred a case to the CJEU for a preliminary ruling concerning the interpretation of the exception for employers with an ethos based on religion. The claimant before the referring court has no religious affiliation but applied – without success – for a position advertised by an employer affiliated with the Protestant Church in Germany and bound by its internal regulations on employment. Although the vacancy advertisement specified a protestant confession as a hiring criterion, the unsuccessful applicant claimed financial compensation based on a violation of the principle of non-discrimination.

The first instance court found the complaint to be well-founded as discrimination had taken place, although the second instance court dismissed the claim. The Federal Labour Court then referred three questions to the CJEU for a preliminary ruling.

The first question concerns whether employers themselves can determine whether a certain religious affiliation is a genuine, legitimate and justified requirement for a certain position or whether the courts can review the compliance of such a requirement with Article 4(2) of the Employment Equality Directive. The background of this question is an interpretation of the directive that considers the competence of employers with a religious affiliation to delineate the content of professional requirements to be protected by freedom of religion. The second question concerns whether Section 9.1 of the General Act on Equal Treatment (AGG) on justification of unequal treatment on religious ground is applicable in this case. The provision reads: 'A difference of treatment on the grounds of religion or belief of employees of a religious community, facilities affiliated to it (regardless of their legal form) or organisations which have undertaken conjointly to practice a religion or belief, shall not constitute discrimination where such grounds constitute a justified occupational requirement for a particular religion or belief, having regard to the ethos of the religious community or organisation in question and by reason of their right to self-determination'. Finally, the third question concerns the clarification of the criteria that should determine whether a requirement is genuine, legitimate and justified.

#### 1.2.2.2 Specific issues relating to religion or belief – Religious symbols and dress codes<sup>25</sup>

There has been a serious increase in case law relating to dress codes and religious symbols since the adoption of the directives,<sup>26</sup> indicating that the manifestation of religious belief through dress or symbols is one of the key issues in the practical implementation of the directives. Such cases have been reported by experts in **Belgium, Denmark, France, Germany, Greece, Italy, the Netherlands, Spain, Sweden** and the **United Kingdom**.

24 Ireland, Equality (Miscellaneous Provisions) Act 2015, No. 43 of 2015, adopted on 10 December 2015, Section 11, available at: <http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/pdf>.

25 For a detailed analysis of the legal issues surrounding the wearing of religious clothing and symbols in employment, see also the thematic report *Religious clothing and symbols in employment – A legal analysis of the situation in the EU Member States*, by Erica Howard for the European network of legal experts in gender equality and non-discrimination (2017).

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

**Erica Howard, Religious clothing and symbols in employment:<sup>27</sup>**

'The debates about the wearing of religious clothing and symbols (at work) do not occur in a vacuum, they have taken and are taking place against the background of discussions in many European countries about immigration and the integration of immigrant communities in their host societies. In the last 4 or 5 decades, many European countries have seen the arrival of migrants from all over the world, often from different religions than the mainly Christian population of Europe although, for some EU Member States, this has not happened until much more recently. Not only do the migrants have a different religion, they also often practice this religion in a much more public way. This, together with the events of 9/11, the bombings in Madrid and London, the recent attacks in France, Belgium, Spain and the UK and other acts of terrorism linked to Islamic religious motives, have led to especially Muslims being seen as a threat to European societies. This, in turn, has led to debates about the integration, or lack of integration, of Muslims and other migrants into their host society. For many, the visible expression of religion or belief through religious clothing and symbols in the public space, especially the wearing by Muslim women of face-covering veils (niqab or burqa)<sup>28</sup> or headscarves (hijab), is seen as a sign of not wanting to integrate and be part of that society.<sup>29</sup> This has led to calls for bans on the wearing of such clothing or symbols in public spaces or at certain public or private work places.'

Issues related to religious symbols or dress worn by public employees or students in public schools are very closely linked to the principles of secularity and neutrality of the state. States greatly vary in their approach to this topic. In **Sweden** for instance, further to a hotly debated case regarding a student who wore a niqab during training to become a day care teacher,<sup>30</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, requiring schools to accommodate Muslim pupils. In **Germany**, the Federal German Constitutional Court ruled that a general ban of such religious symbols was not reconcilable with the fundamental right to freedom of religion and the equality guarantee of the Basic Law.<sup>31</sup> The court attempts to balance interests of religious freedom and accommodation and public interests (such as integration and the individual development of pupils), as illustrated by some of its recent decisions. For example, in one case the court highlighted that the wearing of headscarf is by now common in Germany and a necessary consequence of pluralist society, thus, a kindergarten teacher employed by a public authority can wear such a garment.<sup>32</sup> In another case, public interest prevailed over religious freedom as the complainant did not show that the burkini is not sufficient to comply with religious rules on the concealment of the body and the court decided that she could not be excused from swimming lessons.<sup>33</sup> In **Turkey**, a regulation related to the general attire of staff in public administration has occasionally been invoked to prohibit the wearing of the Islamic headscarf in the public sector.<sup>34</sup> However, in 2014 the Constitutional Court found

27 Howard, E. (2017), *Religious clothing and symbols in employment – A legal analysis of the situation in the EU Member States*, European network of legal experts in gender equality and non-discrimination for the European Commission (in press).

28 The niqab is a veil that covers the head and face with the exception of the eyes. The burqa is a loose robe that covers the female form from head to toe with the exception of the hands and with gauze covering or a slit for the eyes. It must be noted that very few women in Europe wear a burqa; the vast majority of women wearing face-covering veils in Europe wear the niqab or similar type veils. See on this: Brems, E. (2014), 'Introduction to the Volume', in Brems, E. (ed.) *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge, Cambridge University Press) p. 3. There are other names for Islamic headscarves and face covering veils, but this report will use the term 'hijab' or (Islamic) headscarf for the headscarf which leaves the face free, while the terms 'niqab' and 'burqa' will be used for veils or clothing that covers the whole or part of the face.

29 The furore about the wearing of the 'burkini' in France in the summer of 2016 is an example of this. A burkini (a portmanteau made up from the words 'burqa' and 'bikini') is a piece of women's clothing for swimming that is in two pieces and that covers the whole body except the face, hands, and feet. See on the burkini issue: Hochman, T. (2016) *Islam on the Beach – The Burkini Ban in France*: <http://verfassungsblog.de/islam-on-the-beach-the-burkini-ban-in-france/> and Howard, E. (2016) *What (Not) to Wear on a French Beach this Summer*: <https://mdxminds.com/2016/08/31/what-not-to-wear-on-a-french-beach-this-summer/>.

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

31 German Federal Constitutional Court, 1 BvR 471/10, 27 January 2015.

32 Federal German Constitutional Court, 1 BvR 354/11, 18 October 2016.

33 Federal German Constitutional Court, 1 BvR 3237/13, 8 November 2016.

34 Turkey, Regulation concerning the attire of personnel working at public institutions, Official Gazette No 17849, 25 October 1982.

that the decision of a lower court to bar a lawyer from a courtroom on the basis of her headscarf violated her freedom of religion and constituted discrimination on the ground of religious belief.<sup>35</sup>

In the private sphere, many employers impose dress codes, which sometimes refer to religious neutrality, thereby prohibiting employees from wearing religious symbols or dress. Two cases involving employees dismissed due to their refusals to comply with such dress codes were pending before the CJEU in 2016.<sup>36</sup>

### Secularity and neutrality of private employers – the headscarf cases

The *Achbita*<sup>37</sup> and *Bougnaoui*<sup>38</sup> cases were referred by French and Belgian national courts in 2015 for a preliminary ruling by the Court of Justice of the EU. Both cases concern the ability of employers in the private sphere to prohibit employees from wearing conspicuous religious dress or symbols and provide a unique opportunity for the CJEU to offer further guidance on this controversial issue.

Ms Achbita worked as a receptionist and signalled after several years of employment that she intended to wear a headscarf during working hours, which was not permitted under the company's unwritten, but commonly known<sup>39</sup> neutrality rule. Ms Bougnaoui wore a headscarf from the beginning of her employment and was in face-to-face contact with clients as a design engineer. In her case, a client asked that she not wear her headscarf during her on-site assignment. Both women were ultimately dismissed.

The Advocate Generals' opinions were delivered in both cases in 2016 and the conclusions took two different directions.<sup>40</sup> In the *Achbita* case, AG Kokott took the view that the company ban cannot be classified as direct discrimination, but it might constitute an indirect discrimination. Noting that 'legitimate aims' within the meaning of the Directive must in any case include 'the aims expressly recognised by the EU legislature itself', the Advocate General found that compliance with the ban at hand in the present case may amount to a genuine and determining occupational requirement. In that case, the measure would appear to be proportionate and necessary in this specific situation to achieve that aim. In the *Bougnaoui* case, AG Sharpston concluded that the dismissal constituted direct discrimination on the ground of religion, to which none of the derogations under the Employment Equality Directive applied. She also offered an analysis assuming that there was a hypothetical company rule imposing a neutral dress code on all employees, which could then involve indirect rather than direct discrimination. However, in her assessment, although the employer's business can constitute a legitimate aim, the proportionality assessment raised more complex issues and '(i)n the last resort; the business interest in generating maximum profit should then (...) give way to the right of the individual employee to manifest his religious convictions'.<sup>41</sup>

35 Turkish Constitutional Court, the Individual Application of Tugba Arslan, Application no: 2014/256, 25 June 2014, available at: <http://www.kararlaryeni.anayasa.gov.tr/BireyselKarar/Content/d6210a91-8f0a-4a2f-bcb8-5b56407fb522?wordsOnly=False>.

36 The judgments were delivered in both cases after the cut-off date of this report, on 17 March 2017. CJEU, Case C-157/15, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV* and Case C-188/15, *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v. Micropole SA*.

37 CJEU, Case C-157/15, *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, Opinion of Advocate General Kokott delivered on 31 May 2016 and Grand Chamber Judgment of 14 March 2017 (delivered after the cut-off date of this report).

38 CJEU, Case c-188/15, *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v. Micropole SA*, Opinion of Advocate General Sharpston delivered on 13 July 2016 and Grand Chamber Judgment of 14 March 2017 (delivered after the cut-off date of this report).

39 It is contested on national level to what extent the neutrality policy was in fact 'commonly known' within the company before the case surfaced.

40 For a more detailed analysis of the opinions, please see the *European Equality Law Review* Issues 2016/2, p.62, and 2017/1, p. 49.

41 The judgments in both cases were delivered after the cut-off date of the report on 14 March 2017. In both cases, the court followed the two differing AG opinions, with the existence of a general company neutrality policy as a decisive factor. For a more detailed analysis of each of the judgments, please see the *European Equality Law Review* Issue 2017/2, p. 58 and p. 59 respectively.

### 1.2.3 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>42</sup> All legislation, policies and programmes at EU level must comply with the Convention's provisions on disability rights, within the limits of EU responsibilities. Countries that have ratified the Convention should take action in the following areas: access to education, employment, transport, infrastructure and buildings open to the public, and granting the right to vote, improving political participation and ensuring full legal capacity of all people with disabilities.

In 2006, the CJEU provided its first decision on the meaning of 'disability' in the case of *Chacón Navas*, distinguishing disability from sickness.<sup>43</sup> In 2013, the CJEU eventually rendered another landmark decision on the concept of 'disability', while also referring explicitly to the obligations of EU Member States following the ratification by the EU of the UN CRPD.<sup>44</sup> The Court underlined the importance of interpreting the Employment Equality Directive in a manner that is consistent with the UN Convention, and held that the concept of 'disability' must be understood as:

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

The Court also noted that the impairment must be 'long-term' and that a curable or incurable illness which leads to the required degree of limitation does fall within the concept of 'disability'. An illness that does not cause such a limitation, however, does not constitute a 'disability' within the meaning of the directive.<sup>45</sup>

The majority of national legislation contains many examples of definitions of disability (e.g. **Austria, Belgium, Croatia, Cyprus, the Czech Republic, Estonia, the former Republic of Macedonia, France, Germany, Iceland, Latvia, Lithuania, Luxembourg, Norway, Poland, Portugal, Serbia, Slovakia, Slovenia, Spain and Turkey**) but these often 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 of the **Former Yugoslav Republic of Macedonia** mirroring *Chacón Navas* or *HK Danmark (Ring and Skouboe Werge)*.<sup>46</sup> In **Serbia**, there is legal uncertainty due to the fact that the country does not have a single, comprehensive definition of disability, which is instead defined in several laws, by-laws and policy documents. In **Montenegro**, the Law on the Prohibition of Discrimination of Persons with Disabilities was adopted in 2015, containing a definition of persons with disabilities that is in line with CJEU case law.<sup>47</sup> In practice however, the definition generally used for all relevant purposes can be found in the Law on Professional Rehabilitation and Employment of Persons with Disabilities, and does not embrace the social model of defining disability.<sup>48</sup>

42 For the full list of countries that have signed/ratified the Convention, please see Annex 2.

43 CJEU, Case C-13/05 *Chacón Navas v Euresit Colectividades SA*, Judgment of 11 July 2006, [2006] ECR I-6467 Paras. 43-45. See commentary by Lisa Waddington (2007), *Common Market Law Review* 44 (2), p. 487.

44 CJEU, joined cases C-335/11 and C-337/11, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, judgment of 11 April 2013, ECLI:EU:C:2013:222. Commentary by Lisa Waddington (2013) in *European Anti-discrimination Law Review*, Issue 17, page 11.

45 CJEU, joined cases C-335/11 and C-337/11, *HK Danmark (Ring and Skouboe Werge)*, judgment of 11 April 2013, ECLI:EU:C:2013:222, paras 39-42.

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

47 Montenegro, Law on the Prohibition of Discrimination of Persons with Disabilities, Official Gazette of Montenegro 35/15, 44/15, adopted on 26 June 2015, Article 2(2).

48 Montenegro, Law on Professional Rehabilitation and Employment of Persons with Disabilities, Official Gazette of Montenegro 49/08, 73/10 and 39/11, adopted on 29 July 2008, Article 3.

A tentative assessment of national definitions of disability as compared with the CJEU's *HK Danmark* ruling indicates that the definitions of disability applied in most of the EU Member States for the purpose of anti-discrimination appear *a priori* in line with the ruling. Some discrepancies exist in countries such as **Cyprus, Poland**<sup>49</sup> and **Slovakia**. However, in **Slovakia**, a Supreme Court case clarified that CRPD is part of the Slovak legal order and takes precedence over national legislation.<sup>50</sup> **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>51</sup> – the existence of an impairment or limitation is sufficient, regardless of the implications this may have for the individual's professional life. This national definition is also broader in material scope as 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.

The definitions of disability in a number of countries fail to make reference to the interaction with various barriers, only focusing on the limitations and impairments of the person concerned. These countries' definitions would thereby not be fully consistent with the case law of the CJEU and with Article 1 of the UN CRPD (**Austria, Bulgaria, Cyprus, the Czech Republic, Estonia, Ireland, Latvia, Liechtenstein, Norway, Romania, Sweden**<sup>52</sup> and the **United Kingdom**). In **Denmark**, the preparatory work of the anti-discrimination legislation referred to a definition of disability based on social security legislation, which does not take into account the interaction with various barriers in any way. However, the case law of the Supreme Court since 2013 consistently uses the definition adopted by the CJEU.<sup>53</sup> Nevertheless, the burden of proof rests with the employee to demonstrate that he/she has a disability, and in practice the Board of Equal Treatment and the courts rely heavily on the need for a medical impairment in this regard.<sup>54</sup> In **Germany**, even though the definition of disability in Section 2 of Social Code IX differs from the case law of the CJEU and Article 1 of the UN CRPD, the Federal Labour Court considered the issues arising from these divergences and adopted an interpretation fully incorporating and even going beyond CJEU jurisprudence, through a reference to inclusion in society – and not only in working life.<sup>55</sup> Similarly in **Romania**, the National Council for Combating Discrimination discussed the concept of disability and opted for an inclusive use of the term—an approach that might be interpreted as being in line with CJEU case law.<sup>56</sup>

Some countries, including **Estonia, Hungary, Lithuania** and **Malta**, go beyond the employment field by referring to everyday activities or all aspects of social life and, likewise, **Sweden, Iceland** and **Norway** do not restrict the scope of relevant impairment to professional activities only.

#### **Belgian court finds that a difference of treatment due to (perceived) obesity amounts to direct discrimination on the ground of disability<sup>57</sup>**

The claimant had applied to a driving school for a position as a driving instructor. The driving school invited the claimant for an interview but after the interview he received an email from the driving school rejecting his application. The email stated that the claimant's 'physical profile' did not match with the

49 However, the ratification by Poland of the UN CRPD implies that the provisions of the convention may be relied upon directly before national courts or administrative bodies.

50 Decision of the Supreme Court of the Slovak Republic, No. 7Sžo/83/2014, 24 September 2015.

51 Bulgaria, Integration of Persons with Disabilities Act, 2004, Sections 1.1 and 1.2 Additional Provisions.

52 However, in Sweden, although the definition is not per se compatible with the social model of disability, it is irrelevant in practice as Swedish courts consider whether the alleged discriminator believed that the allegedly discriminated person did or not have a disability, rather than examining whether the elements of the definition are fulfilled or not.

53 Denmark, Supreme Court decision of 13 June 2013, printed in U2013.2575H. See also, more recently, Supreme Court decision 25/2014, delivered on 23 June 2015 and printed in U2015.3301H.

54 See, for example, Denmark, Supreme Court decision No. 104/2014, delivered on 11 August 2015 and printed in U2015.3827H as well as Board of Equal Treatment decision No. 39/2015 of 25 March 2015.

55 Germany, BAG, 19.12.2013, 6 AZR 190/12, para. 43ff.

56 Romania, National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*), Decision 509, file no. 433/2012, *FEDRA v. SC SECOM SRL*, 26 November 2012.

57 Belgium, Labour Tribunal of Liège, 20 June 2016, <http://www.UNIA.be/en>.



company, and asked whether he had considered losing weight considering that being overweight is a handicap for this kind of position. The claimant contacted the national equality body UNIA, which attempted to reconcile the parties. Following the failure of the conciliation attempts however, the claimant brought the case to court, with the support of UNIA.

In its judgment, the Labour Tribunal of Liège explicitly referred to the *Kaltoft* case of the Court of Justice of the EU,<sup>58</sup> and held that although obesity is not a protected ground as such, it is seen as a disability when it constitutes a barrier to participate in professional life on the same basis as other workers. The tribunal underlined that it is not important in the present case whether the claimant effectively suffers from morbid obesity (which is a disability) as the driving school clearly implied that this was how it perceived the claimant. The tribunal finally concluded that the claimant had thus been the victim of direct discrimination on the grounds of disability and – in any case and undoubtedly – ‘physical characteristic’, which is a protected ground in national law.

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>59</sup> and **Germany**,<sup>60</sup> impairments must be likely to last for more than six months in order to amount to disabilities, while in the **United Kingdom**<sup>61</sup> the impairment should last or be likely to last for at least 12 months. In contrast, other states require the impairment to be indefinite in duration (**Cyprus**<sup>62</sup> and **Sweden**).<sup>63</sup>

It is not yet clear whether the Court regards the formula provided in *Chacón Navas* and *HK Danmark* as an exhaustive definition of disability. In particular, this definition leaves no space for the protection of those assumed to be disabled or likely to have a future disability. These scenarios are anticipated in some national legislation. For instance, **Irish** legislation covers discrimination on grounds that exist at the present moment, grounds that previously existed and grounds that may exist in the future.<sup>64</sup> **Dutch** law covers ‘an actual or assumed disability or chronic disease’,<sup>65</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>66</sup> **UK** law also protects individuals with respect to past disabilities. **Swedish** law does not consider the claimant’s concrete abilities themselves, but rather the discriminator’s perception of these abilities. Therefore, it is irrelevant for the outcome of a case whether the claimant experiences any symptoms or not.<sup>67</sup>

### 1.2.3.1 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>68</sup> This provision has been implemented very unevenly across the Member States. In its landmark decision *HK Danmark*, the CJEU provided further clarification on the concept of reasonable accommodation as defined by the Employment

58 CJEU, Judgment in *Kaltoft*, C-354/13, ECLI:EU:C:2014:2463.

59 Austria, Federal Disability Equality Act. BGBl I No. 82/2005, Para. 3.

60 Germany, Social Code IX, 2001, Section 2 and Federal Disability Equality Act, 2002, Section 3.

61 Great Britain, Equality Act, 2010, Schedule 1.

62 Cyprus, Law on Persons with Disabilities, No. 127(I)/2000.

63 Sweden, Discrimination Act, 2008:567, Chapter 1, Section 5(4). The Swedish term used (*‘varaktig’*) could be best translated as ‘durable’ and does not necessarily imply that the impairment must be permanent.

64 Ireland, Employment Equality Acts 1998-2015, Section 2(1).

65 Netherlands, Act on equal treatment on the grounds of disability or chronic disease, 3 April 2006, Article 1(b).

66 Slovakia, Act on equal treatment in certain areas and on protection against discrimination and on amending and supplementing certain acts, as amended, No 365/2004, Section 2a(11)(d).

67 See, for example, Swedish Labour Court, case 2005 No. 32, *Sveriges Civilingenjörsförbund and MK v. T&N Management AB*, judgment of 30 March 2005.

68 Directive 2000/78/EC, Article 5.

Equality Directive. The Court held that in this regard the directive must be interpreted in accordance with the UN CRPD as ‘referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers’.<sup>69</sup> Reasonable accommodation may therefore include both material and organisational measures such as adapted working hours.

In many countries, judicial interpretation is still scarce or lacking regarding the limits and scope of the duty to provide reasonable accommodation. The following states have legal provisions that approximate to the reasonable accommodation duty found within the directive: **Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, the Former Yugoslav Republic of Macedonia, France, Greece, Hungary, Ireland, Italy,**<sup>70</sup> **Latvia, Lithuania,**<sup>71</sup> **Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia,**<sup>72</sup> **Spain, and the United Kingdom.** These vary considerably, from states that provide a basic duty with little elaboration on how this should be implemented (e.g. **Lithuania**) or how a disproportionate burden must be assessed (e.g. **Croatia, the Former Yugoslav Republic of Macedonia, and Latvia**) to states with more extensive guidance on the practical application of the reasonable accommodation duty (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 and 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. Since the adoption in 2014 of an amendment to the Law on Persons with Disabilities, this duty is now also absolute outside employment, as long as the burden is not disproportionate or unjustified.<sup>73</sup> In **Bulgaria**, the Protection Against Discrimination Act makes provision for reasonable accommodation for persons with disabilities in employment and education in Articles 16 and 32 respectively. In **Belgium**, the duty to provide reasonable accommodation applies in the entire material scope of the directives, i.e. going far beyond the limits of employment. In the **Netherlands**, since the extension in June 2016 of the material scope of the Disability Discrimination Act, the duty to provide reasonable accommodation applies in the fields of education and goods and services,<sup>74</sup> in addition to the field of employment and vocational training. In **Sweden**, the Discrimination Act was amended in 2014 to introduce a new form of discrimination under the heading ‘inadequate accessibility’. This new provision protects persons with disabilities from being ‘disadvantaged through a failure to take measures for accessibility to enable the person to come into a situation comparable with that of persons without this disability where such measures are reasonable on the basis of accessibility requirements in laws and other statutes, and with consideration to the financial and practical conditions, the duration and nature of the relationship or contact between the operator and the individual, and other circumstances of relevance’.<sup>75</sup> The duty to provide reasonable accommodation has not been included in national legislation in **Iceland**<sup>76</sup> and **Liechtenstein**.<sup>77</sup> In **Turkey**, the new Law on the Human Rights and Equality Institution

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

70 The Italian legislation states that public employers ‘shall apply this provision without any additional burden and with human, financial and instrumental resources already available’. See textbox below.

71 However, the wording of the Equal Treatment Act lacks precision and seems to be softer than that of the Employment Equality Directive. Lithuania has also ratified the UN Convention on the Rights of Persons with Disabilities but its provisions do not seem sufficiently precise to be directly applicable by national courts.

72 The 2010 Act on Equal Opportunities of People with Disabilities establishes the duty to provide reasonable accommodation in conformity with the directive, although it uses the inaccurately translated term ‘appropriate accommodation’ instead of ‘reasonable accommodation’.

73 Cyprus, Law amending the Law on Persons with Disabilities N. 63(I)/2014, 23 May 2014. Available at [http://www.cylaw.org/nomoi/arith/2014\\_1\\_063.pdf](http://www.cylaw.org/nomoi/arith/2014_1_063.pdf).

74 Some specific restrictions still apply to public transport (Article 7 DDA) and housing (Articles 6a-c DDA).

75 Sweden, Discrimination Act, as amended by Act 2014:958, of 8 July 2014, Chapter 1, Section 4(3).

76 The Act on the Affairs of People with Disabilities No 59/1992 provides however that assistance in employment should be given when necessary, including adapting the working environment to the worker’s needs.

77 However, Article 7(3) of the Act on Equality of People with Disabilities states that indirect discrimination has occurred if no attempts have been made to accommodate the situation of the person concerned.

of Turkey provides a different definition than the earlier Law on Persons with Disabilities and imposes less stringent obligations on employers.

#### Italy amends reasonable accommodation legislation following CJEU ruling

Italy had implemented the Employment Equality Directive without adopting any provisions regarding the duty to make reasonable accommodation. Following infringement proceedings initiated by the European Commission in 2011, the Court of Justice (CJEU) ruled on 4 July 2013 that Italy had therefore failed to correctly transpose Article 5 of the directive.<sup>78</sup>

The Court rejected the Italian Government's argument that the duty to provide reasonable accommodation was already in force in Italy when the directive was adopted, through the existence of several laws covering the rights of persons with disabilities.<sup>79</sup> Although these existing laws provide for measures of aid and support, social integration and protection of people with disabilities, the Court found that none of them established a general duty to provide reasonable accommodation, that is, to offer effective solutions to eliminate 'the various barriers that hinder the participation of disabled people in professional life', as required by the directive. The Court also rejected the Government's argument concerning the lack of a definition of the concept of 'disability' in the directive, by noting that Member States must respect both the previous ruling of the CJEU in this regard, *HK Danmark*, and the UN Convention on the Rights of Persons with Disabilities, both of which provide definitions of 'disability'.

Only days before the CJEU delivered its ruling, Italy eventually amended its existing legislation to transpose Article 5 of the directive, by adding a new Article 3, paragraph 3-bis to Legislative Decree 216/2003.<sup>80</sup> The additional provision does not define reasonable accommodation or offer employers any sort of guidance. It does, however, state that when public employers provide reasonable accommodation, they 'shall apply this provision without any additional burden and with human, financial and instrumental resources already available'.

There are concerns regarding the extent of the duty to provide reasonable accommodation in several countries. In **France**,<sup>81</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>82</sup> In **Hungary**, the duty of reasonable accommodation has not been implemented entirely. Concerns are particularly serious with regard to access to employment as Act XXCI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities contains the obligation to accommodate the needs of people with disabilities in the course of recruitment and to adapt the working environment for current employees, but does not seem to prescribe that reasonable effort should be made to adapt the workplace to special needs with a view to actually employing a person with a disability. In **Germany**, there is no specific provision imposing a general duty to provide reasonable accommodation on employers and it is considered that the provision of reasonable accommodation falls under the contractual obligation of employers to take proper care of the legitimate needs of their employees.<sup>83</sup> However, there is no general regulation of reasonable accommodation that covers all areas within the material scope of the directive, including, among others, job applicants. A similar situation exists in **Malta**, where reasonable accommodation is restricted to employees and does not cover job seekers. In **Romania**, Act 448/2006 on the Promotion and Protection of the Rights of Persons with

78 CJEU, *Commission v Italy*, C-312/11, 4 July 2013, ECLI:EU:C:2013:446.

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

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

81 See France, Administrative Supreme Court (*Conseil d'État*) decisions in the *Perreux* case of 30 October 2009 and the *Bleitrach* case of 30 October 2010.

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

83 Germany, Civil Code, Section 241.2.

Disabilities establishes in general terms duties to facilitate access to various public and private services and facilities and in labour relations, but does not provide for reasonable accommodation as a duty for employers. In **Montenegro**, national law imposes no legal duty on employers to provide individualised reasonable accommodation for job seekers or employees with disabilities, although the UN CRPD is directly applicable. In **Serbia**, there is no legal duty to provide reasonable accommodation under the Law on the Professional Rehabilitation and Employment of Persons with Disabilities, although action in connection with the promotion of employment of people with disabilities to ensure technical, professional and financial support for the adjustment of work tasks and/or the workplace is encouraged. Under the law, it constitutes discrimination when: an employer refuses to carry out a technical adaptation of the workplace that enables a person with disability to carry out their work effectively; the costs of adaptation are not borne by the employer; or the costs of adaptation are not excessive in relation to the gain to the employer. This provision gives the right to reasonable accommodation to workers, but it is not clear if this right extends to job applicants as well. However, the Committee on the Rights of Persons with Disabilities noted that these provisions are not sufficient and recommended that Serbia review its legislation in order to adequately guarantee the provision of reasonable accommodation in the workplace.<sup>84</sup>

#### Maintained salary as reasonable accommodation causing different treatment among employees

The claimant became disabled through a back injury and was moved to a new position. His salary was maintained even though the salary for the new position would usually be lower. The claimant believed that this position and salary were long term, but the following year the employer notified the claimant that his continued employment would be at a lower rate of pay. The claimant was dismissed after he refused to accept this. The Employment Tribunal found that this was discriminatory on grounds of disability, and that a reasonable adjustment would have been to continue to pay the claimant at the higher rate.

In August 2016, the UK Employment Appeal Tribunal upheld this finding.<sup>85</sup> By failing to continue to pay at the higher rate, the employer had failed to reasonably accommodate the employee's disability. The tribunal rejected the employer's argument that other workers would be unhappy if the claimant's salary remained higher than that of his colleagues who executed the same tasks. This rejection was partly based on the fact that the additional pay was easily affordable for the company.

The tribunal acknowledged that this decision involves an element of positive discrimination as the claimant was treated more favourably than others by being paid at a higher rate than the job would usually warrant.

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, the Czech Republic, Denmark, Estonia, France,**<sup>86</sup> **Germany, Greece, Ireland, Italy** (public employers), **Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain and Turkey**). 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, the Czech Republic, Estonia, Finland, France, Germany, Ireland, Liechtenstein,**<sup>87</sup> **Malta, Norway, Slovenia, Spain, Turkey** and the **United Kingdom**;

84 Committee on the Rights of Persons with Disabilities (2016), *Concluding observations on the initial report of Serbia*, CRPD/C/SRB/CO/1, 23 May 2016, para. 53.

85 UK Employment Appeal Tribunal, decision of 26 August 2016, *G4S Cash Solutions v Powell*, UKEAT/0243/15/RN, available at: [http://www.bailii.org/uk/cases/UKEAT/2016/0243\\_15\\_2608.html](http://www.bailii.org/uk/cases/UKEAT/2016/0243_15_2608.html).

86 French law does not refer to a disproportionate 'burden' but rather 'disproportionate costs', thus focusing entirely on the financial aspects of the situation. See France, Article 5213-6 paragraph 2 of the Labour Code.

87 Although Liechtenstein lacks a duty for employers to provide reasonable accommodation, Article 7(2) of the Act on Equality of People with Disabilities specifies the extent of the duty to avoid indirectly discriminating by failing to attempt to accommodate the situation of an employee with disability.

- the scale and financial resources of the organisation or undertaking: **Austria, Estonia, Finland, Ireland, Liechtenstein, Malta, Norway, Spain, Slovakia, Slovenia** and the **United Kingdom**; and
- the possibility of obtaining public funding or any other assistance: **Austria, the Czech Republic, Estonia, Finland, France, Germany, Greece, Ireland, Liechtenstein, Malta, the Netherlands, Norway, Poland, Portugal, Spain, Slovakia** and the **United Kingdom**.

In **Portugal**, pending the adoption of a law detailing the rules of financial assistance to be provided by the State, an entitlement to reasonable accommodation exists only if the State covers 100 % of the costs.

One form of reasonable accommodation can be the reduction of working time, although as **Danish** case law shows, the extent of the employer's duty to provide such accommodation depends to a large extent on the circumstances of each case. For example, in April 2016, the Supreme Court found that it would be disproportionate to require an employer to split the disabled worker's full-time position into two part-time positions considering that this would amount to an important organisational change within a small team of only three people.<sup>88</sup> However, also in 2016, the Eastern High Court found in another case that an employer who had not examined closely the option of providing the disabled worker with a 'flexible job' with reduced working hours to accommodate her disability had failed to meet the duty to provide reasonable accommodation. The claimant in this case was awarded compensation amounting to 12 months' salary (EUR 67 550).<sup>89</sup>

#### Refusal to modify working hours and tasks of employee with multiple sclerosis amounts to failure to provide reasonable accommodation

The claimant was an employee in a funeral company and had multiple sclerosis. In January 2013, he provided his employer with a medical certificate requesting modifications of his schedules and the nature of his tasks because of medical problems, and later informed the employer that he had multiple sclerosis. No agreement was found between the parties regarding the requested modifications and the claimant was dismissed. He was told that the reason for his dismissal was that his quality of work had been insufficient for several months. The claimant brought a case of alleged discrimination before the Labour Tribunal of Mons and Charleroi.

In the ruling of 9 March 2015, the tribunal ruled in favour of the claimant, concluding that the dismissal amounted to direct discrimination as it could not be excluded that the claimant's dismissal was linked to his disease. Furthermore, it considered that the defendant did not justify in which extent the requested modifications of the applicant's schedule and working tasks were not reasonable and constituted a disproportionate burden. Therefore, the defendant had failed to provide reasonable accommodation. The defendant was ordered to pay EUR 17 319.48 as compensation for damages corresponding to six months' salary.<sup>90</sup>

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 **Poland**, failure to provide reasonable accommodation results in discrimination only where there is a 'traditional' employment contract (covered by the Labour Code) and there is no provision regarding other forms of employment. In some countries, there is still no case law that could lead to the conclusion that such an approach is being taken (e.g. **Estonia, 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<sup>91</sup> explicitly provides that an employer's failure to adopt reasonable accommodation measures amounts to unlawful discrimination and is punishable with a fine or imprisonment, like all

88 Belgium, Labour Tribunal of Mons and Charleroi, decision of 9 March 2015.

89 Denmark, Eastern High Court, judgment in case No. B-477-15 of 30 June 2016.

90 Belgium, Labour Tribunal of Mons and Charleroi, decision of 9 March 2015.

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

other forms of discrimination.<sup>92</sup> In 2015, the Cypriot equality body found that the failure of an employer, the state TV company, to meet its duty to provide reasonable accommodation to an employee using a wheelchair amounted to direct discrimination.<sup>93</sup> **Irish** case law holds that a failure to provide reasonable accommodation amounts to discrimination.<sup>94</sup> The courts did not, however, state whether it is a form of direct or indirect discrimination. In **Greece**, failure to meet the duty to provide reasonable accommodation was found to amount to direct discrimination, although the court in this case did not explicitly mention this duty.<sup>95</sup> In **Lithuania**, some guidance was provided in 2014 when the Vilnius County Court found that the failure of an employer to evaluate a disabled employee's realistic possibilities for continuing to work or to consider adjusting his working conditions constituted direct discrimination on the ground of disability.<sup>96</sup> In **Denmark**, although the statutory definition of the duty to provide reasonable accommodation is vague, there have been a number of court and equality body cases specifying the limits of this duty. This rich body of case law shows that the employer needs to prove that such accommodation would impose a disproportionate burden,<sup>97</sup> that it is only if the employer knows or ought to know about the employee's disability that the duty can apply,<sup>98</sup> and that the size of the employer's business is relevant for assessing the reasonableness of accommodations.<sup>99</sup>

In **Croatia** and **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 in an individual case amounts to 'inadequate accessibility,' which constitutes a separate form of discrimination. In contrast, failure to provide reasonable accommodation constitutes indirect discrimination in **Austria**, the **Czech Republic**, and **Denmark**. In **Slovakia**, failure to provide reasonable accommodation constitutes a violation of the principle of equal treatment (which is broader than the prohibition of discrimination 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. Indeed, in 2015 the Supreme Court held in a case on the right to inclusive education of a child with a disability that a refusal to provide reasonable accommodation is a form of discrimination.<sup>100</sup> In **Belgium** and 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 making a distinction,<sup>101</sup> although it is not specified whether this would be direct, indirect or a third form of prohibited distinction.

#### The employer's awareness of the disability as a precondition for the duty to provide reasonable accommodation – the Danish *Werge* case

The Danish *Ring and Skouboe Werge* cases were referred to the CJEU (C-335/11 and C-337/11), giving rise to its landmark judgment in *HK Danmark*, which provided guidance on the concept of disability and on the duty to provide reasonable accommodation.<sup>102</sup> Following the CJEU ruling, the Danish Maritime

92 Available (in Greek) at: [www.ombudsman.gov.cy/Ombudsman/Ombudsman.nsf/All/669E5CF7773B0F07C2257E7E003EB897?OpenDocument](http://www.ombudsman.gov.cy/Ombudsman/Ombudsman.nsf/All/669E5CF7773B0F07C2257E7E003EB897?OpenDocument).

93 Equality Authority (2015), *Report on discriminatory treatment of employee at CyBC on the ground of his disability*, File No. A.K.I. 31/2014, 5 March 2015.

94 Labour Court, *Michal Wojcik and Sodexo Ireland Ltd*, Decision No. EDA1517 of 23 November 2015, <https://www.workplace-relations.ie/en/Cases/2015/November/EDA1517.html>.

95 Court of First Instance of Athens, Decision 2048/2008.

96 Vilnius County Court, decision No 2A-557-640/2014 of 27 February 2014.

97 See, for instance, Maritime and Commercial Court, Judgment in case No. F-9-12 of 29 April 2015.

98 See, for instance, Supreme Court, Judgment in case No. 104/2014 of 11 August 2015. Printed in U2015.3827H.

99 See, for instance, Board of Equal Treatment, Decision 125/2015 of 26 August 2015.

100 Decision of the Supreme Court of the Slovak Republic, No. 7Sžo/83/2014, 24 September 2015.

101 See: Netherlands, Equal Treatment Commission (Commissie Gelijke Behandeling (CGB)), ETC 2004-140, where it held: 'It concerns a sui generis form of (making a) distinction, which does not yet occur in the other equal treatment laws'.

102 CJEU, joined cases C-335/11 and C-337/11, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*,

and Commercial Court delivered two judgments on 31 January 2014.<sup>103</sup> The Danish court found that the adaptation of the workplace with a height-adjustable desk as well as part-time employment constituted reasonable accommodation. The two claimants were each awarded compensation equal to 12 months' salary.

One of the cases (*Werge*) was appealed and the Supreme Court delivered its judgment on 23 June 2015.<sup>104</sup> The Supreme Court observed that it is a precondition for the employer's obligation to establish reasonable accommodation that the employer knows or ought to know about the disability. The parties of the case had been e-mailing each other during the sickness absence of the employee, but the note from the specialist doctor with the long-term prognosis was not sent to the employer. On that basis, the Court did not find that the employer at the time of the dismissal knew or ought to have known about the fact that the illness had caused a disability. In conclusion, there was no basis for ascertaining that the employer had failed to provide reasonable accommodation. Thus, the Supreme Court overruled the judgment by the Danish Maritime and Commercial Court and acquitted the employer.

Although 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 practice, there are quite a few examples, notably from the private sector, where people with a specific religion can benefit from reasonable accommodation, such as not working on religious holidays or adapting working hours during Ramadan. In **Germany** for instance, as mentioned above, the Federal Constitutional Court has provided guidance in several recent judgments on the limits of freedom of religion, for example in the field of education, and on the duty of schools to remain religiously neutral without impeding pupils' religious beliefs.<sup>105</sup> Similarly in **Denmark**, without explicitly mentioning the concept of reasonable accommodation, case law has confirmed that requiring nutritional assistant students of Muslim faith to taste pork meat as part of their training amounts to indirect discrimination on the ground of religion.<sup>106</sup>

**Table 2: 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>	Act on the Employment of People with Disabilities, § 7c/4-7.	No
<b>BELGIUM</b>	General Anti-discrimination Federal Act, Arts 4(12) and 14.	No
<b>BULGARIA</b>	Protection Against Discrimination Act, Art. 16. <sup>5</sup>	For religion <sup>6</sup>
<b>CROATIA</b>	Anti-discrimination Act, Art. 4(2). <sup>7</sup>	For religion <sup>8</sup>
<p>5 Protection can also be found in the Integration of Persons with Disabilities Act, Art.24; Labour Code, Art. 314; Civil Servant Act, Art. 30; Healthy and Safe Work Conditions Act, Art.16 (1.4); and the Integration of Persons with Disabilities Act (Articles 17-18, 20, 24).</p> <p>6 Bulgaria, Protection against Discrimination Act, Article 13 (2).</p> <p>7 Protection can also be found in the Act on Professional Rehabilitation and Employment of Persons with Disability.</p> <p>8 Croatia, Act on Holidays, Remembrance Days and Non-Working Days of 30 April 1996 (Article 3), Health Care Act (Article 22), Act on the Legal Status of Religious Communities (Articles 14, 15, 16).</p>		

judgment of 11 April 2013, ECLI:EU:C:2013:222. Commentary by Lisa Waddington (2013) in *European Anti-discrimination Law Review*, issue 17, page 11.

103 The Maritime and Commercial Court, Judgments No. F-13-06 and No. F-19-06 of 31 January 2014. See U.2014.1223S for the printed judgment No. F-19-06.

104 Supreme Court, Judgment in case No. 25/2014 of 23 June 2015. Printed in U2015.3301H.

105 See, for example, Germany, Federal German Constitutional Court, 1 BvR 3237/13, 8 November 2016 on the participation of a Muslim girl in co-educational swimming classes.

106 Western High Court, Decision No. B-1213-13 printed in U2015.2984V of 5 May 2014.

	RA provided for people with disabilities	RA extended to other grounds than disability
	Law	
CYPRUS	Law on Persons with Disability N. 127(I)/2000, Art. 5(1A).	No <sup>9</sup>
CZECH REPUBLIC	Anti-discrimination Act, Section 3 (2).	No
DENMARK	Act on Prohibition of Discrimination in the Labour Market etc., Section 2(a).	For religion <sup>10</sup>
ESTONIA	Equal Treatment Act, Art. 11.	No
FINLAND	Non-discrimination Act, Section 15.	No
FRANCE <sup>11</sup>	Labour Code, Art L5121-13.  Law no 2005-102 for equal rights and opportunities, participation and citizenship of disabled persons of 11 February 2005, Arts 24 V and 32.	Race or ethnic origin <sup>12</sup> and possibly religion <sup>13</sup>
FORMER YUGOSLAV REPUBLIC of MACEDONIA	Law on Prevention and Protection Against Discrimination, Arts 5(12), 8.	For race or ethnic origin <sup>14</sup> , religion or belief <sup>15</sup> and age <sup>16</sup>
GERMANY	Social Code IX, Sec. 81.4.	Age <sup>17</sup> , possibly religion <sup>18</sup>
GREECE	Equal Treatment Law 4443/2016, Art. 5.	No
HUNGARY	Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities, Art. 15. <sup>19</sup>  Act I of 2012 on the Labour Code, Art.51	No
ICELAND	Not explicitly. <sup>20</sup>	No
IRELAND	Employment Equality Acts 1998-2015, S. 16.	No
ITALY	Legislative Decree 216/2003, Art. 3(3-bis).	No

9 Although there is no legal duty to provide reasonable accommodation on any ground other than disability, the Equality Body has repeatedly raised the issue of exemption from religious classes and religious practices at schools and the need for schools to maintain neutrality in order to respect religious diversity.

10 Section 81(5) of the Road Traffic Act and Paragraph 2 of a government circular (Bkg 1998 No. 518) exempt male Sikhs from wearing a crash helmet when riding a motorbike since they have to wear their turban outside at all times.

11 Non-registered disabled people, non-salaried disabled workers and disabled people who are members of the professions, magistrates who are not considered as civil servants and are covered by Ordinance no. 58-1270 of 22 December 1958, public agents working in Parliament, contractual public agents who hold one of the various statuses which are excluded from the application of Law no. 84-16 of 11 November 1984 on the status of contractual public agents in Article 3, para. 5, are not covered by the above-mentioned texts implementing reasonable accommodation into French Law (Articles 24 IV and 32 of Law No. 2005-102 for equal rights and opportunities, participation and citizenship of disabled persons, of 11 February 2005).

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

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

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

15 Limited accommodation is granted in respect of race/ethnicity and religion according to the Law on Holidays of the Republic of Macedonia (Arts 1 and 2) and the Law on Execution of Sanctions Art. 141.

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

17 Social Code XII, Articles 70 and 71.

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

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

20 National law does not explicitly require employers 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.



	RA provided for people with disabilities	RA extended to other grounds than disability
	Law	
<b>LATVIA</b>	Labour Law, Art. 7(3).	No
<b>LIECHTENSTEIN</b>	Act on Equality of People with Disabilities, Arts 7, 11-14.	No
<b>LITHUANIA</b>	Law on Equal Treatment, Art. 7(9).	No
<b>LUXEMBOURG</b>	Law of 28 November 2006, Art. 20.	No
	Law of 12 September 2003 on disabled persons, Art. 8.	No
<b>MALTA</b>	Equal Opportunities (Persons with Disabilities) Act, Art 7.	No
	Equal Treatment in Employment Regulations, Art. 4A.	No
<b>MONTENEGRO</b>	.. <sup>21</sup>	No
<b>NETHERLANDS</b>	Disability Discrimination Act, Art. 2.	No
<b>NORWAY</b>	Anti-discrimination and Accessibility Act on Prohibition against Discrimination on the Basis of Disability, S.26.	No
	The Working Environment Act on Working environment, working hours and employment protection, etc., S. 4-6. <sup>22</sup>	No
<b>POLAND</b>	Act on Vocational and Social Rehabilitation and Employment of Persons with Disabilities, Art. 23a.	No
<b>PORTUGAL</b>	Labour Code, Art. 86(1).	No
<b>ROMANIA</b>	Law on the protection and promotion of the rights of persons with a handicap, Art. 5(4).	For religion <sup>23</sup>
<b>SERBIA</b>	The Law on the Prevention of Discrimination against Persons with Disabilities, Art. 22(4).	No
	The Law on the Professional Rehabilitation and Employment of Persons with Disabilities, Arts 11(4) and 23(3).	No
<b>SLOVAKIA</b>	Anti-discrimination Act, Section 7.	Yes <sup>24</sup>
<b>SLOVENIA</b>	Act on Equal Opportunities of People with Disabilities, Art. 3(3).	No
<p>21 Although the Law on Professional Rehabilitation and Employment of Persons with Disabilities provides a general duty to adapt workplaces and working operations to the needs to persons with disabilities (Article 15), no duty to provide individualised measures of reasonable accommodation exists in Montenegro.</p> <p>22 The WEA chapter 13 on non-discrimination does not cover disability as a protected ground, as protection against disability in working life is found in the AAA. However, WEA Sections 4-6 oblige the employer to protect the continued physical and psychological working environment of people with reduced functional ability, and thus gives a duty to provide reasonable accommodation.</p> <p>23 Art. 134(1) letter F of the Labour Code in relation to observance of religious celebrations of the employees grants two vacation days for two religious celebrations each year, to be taken according to the faith of the employee, under the condition that the faith of the employee is a state recognised religion.</p> <p>24 Section 2(3) of the Anti-discrimination Act states that compliance with the principle of equal treatment involves the adoption of measures to prevent discrimination. From this principle it can be deduced that the duty to provide reasonable accommodation applies to all other areas and grounds that are regulated by the existing laws prohibiting discrimination.</p>		

	RA provided for people with disabilities	RA extended to other grounds than disability
	Law	
SPAIN	General Law on the Rights of Persons with Disabilities and their Social Inclusion, Art. 2.m	For religion <sup>25</sup>
	Law 31/1995, of 8 November 1995, on prevention of occupational risks, Arts 14, 15 and 25.	No
SWEDEN	Discrimination Act, Ch. 1 Sec. 4 p.3, in conjunction with Ch. 2 Sec. 1.	For all grounds, to a limited extent <sup>26</sup>
TURKEY	Law on the Human Rights and Equality Institution of Turkey (no. 6701), Art. 5(2)	No
	Law on Persons with Disabilities, Arts. 4/A and 14(4)	No
UNITED KINGDOM	(GB) Equality Act, S. 20.	No
	(NI) Disability Discrimination Act 1995, S.4A	No
<p><sup>25</sup> Spain, Law 24/1992, of 10 November, adopting the cooperation agreement between the State and the Federation of Evangelical Religious Entities of Spain, Article 12.1; Law 25/1992, of 10 November, adopting the cooperation agreement between the State and the Jewish Communities of Spain, Articles 12.1 and 2, Law 26/1992, of 10 November, adopting the cooperation agreement between the State and the Islamic Commission of Spain, Articles 12.1 and 2.</p> <p><sup>26</sup> There is no direct duty to apply reasonable accommodation within the Discrimination Act to grounds other than disability, but the justification test of indirect discrimination may require reasonable accommodation.</p>		

### 1.2.3.2 Specific provisions on disability – health and safety

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 with regard to disabled people. 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** and the **Netherlands**.

In other countries, there is no explicit provision under the anti-discrimination legislation, but exceptions can be found under other pieces of legislation. In **Portugal**, it is the employer who assesses the measures that are needed to protect the health and safety of employees with disabilities and the Labour Code allows employers to exclude a disabled person if the work will pose a risk to that person's health and safety. However, a disabled person can challenge this decision before the labour courts. In **Bulgaria**, under the Healthy and Safe Working Conditions Act, employers have a duty to assign to their employees only tasks that are compatible with their capabilities.<sup>107</sup> Furthermore, in view of the specific dangers for employees with a reduced work capability<sup>108</sup> and under a number of other laws and pieces of secondary legislation governing specific fields, health requirements exist for access to employment in those fields, such as transportation (including aviation) and other risk-intensive occupations.

Lastly, some countries do not provide specific exceptions in relation to disability in the context of the health and safety provisions of the directive, but consider that a general exception with a legitimate aim is relevant in these situations. This is the case in **Romania**, where the general exception of objective and justified limitation, allowed by Article 4<sup>1</sup> of the Anti-discrimination Law, could be applicable.

### 1.2.4 Sexual orientation

The introduction of legal protection against discrimination for the first time on the ground of sexual orientation proved to be controversial and was challenging for many of the states. Very few countries have defined sexual orientation within anti-discrimination legislation. In **Bulgaria**, sexual orientation is defined under the Protection against Discrimination Act as 'heterosexual, homosexual or bisexual orientation',

<sup>107</sup> Bulgaria, Healthy and Safe Working Conditions Act, Article 16 (1.2a).

<sup>108</sup> Bulgaria, Healthy and Safe Working Conditions Act, Article 16 (1.3).

(Section 1.9 Additional Provisions). In 2014, the Supreme Administrative Court implicitly defined sexual orientation as being innate, delegitimising sexual orientation choice.<sup>109</sup> A similar approach is adopted in **Ireland** and **Sweden**. **British** legislation refers to ‘a sexual orientation towards (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of either sex’.<sup>110</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 as being part of each individual’s autonomous personality. This is understood to go beyond sexual orientation and also encompasses protection against discrimination for transsexual people.<sup>111</sup> In the **Netherlands**, the concept of sexual orientation has not been interpreted in a way that covers transsexuality and transvestism, and discrimination on these grounds is regarded as sex discrimination. Similarly, in **Austria** ‘sexual orientation’ is generally considered to cover heterosexuality, homosexuality and bisexuality, while transsexuality is seen to be covered by gender. In **Malta**, although there is no legal definition of the term sexual orientation, the new Gender Identity, Gender Expression and Sex Characteristics Act provides for definitions of the terms gender identity and gender expression. Similarly, the Explanatory Report of the new **Greek** Equal Treatment Law 4443/2016 does not define the term sexual orientation, but clarifies the terms gender identity (referring to transgender persons) and gender characteristics (referring to intersex persons). Although **Belgian** anti-discrimination legislation does not contain a definition of sexual orientation, it is worth mentioning that the Inter-federal plan to fight homophobic and transphobic violence, which was adopted in 2013, defines sexual orientation as ‘heterosexuality, homosexuality and bisexuality’. It further specifies that ‘[s]exual orientation is not a choice. Sexual orientation is defined on the basis of the gender of individuals for whom an individual has both physical and emotional attraction and affection’.<sup>112</sup>

In **France**, ‘sexual identity’ was introduced as an additional protected ground in 2012 to cover transgender identity.<sup>113</sup> In 2016, the term ‘sexual identity’ was replaced by that of ‘gender identity’, which is now one of the protected grounds under French law.<sup>114</sup> Similarly, **Swedish** anti-discrimination law protects the ground of ‘transgender identity or expression’ in addition to that of sexual orientation.

Although explicitly mentioned in the **Hungarian** Equal Treatment Act of 2003, the provision prohibiting discrimination in the Fundamental Law of **Hungary** does not list sexual orientation among the grounds explicitly protected from discrimination. However, it can be considered that all the grounds covered by the directives fall within the open-ended list of grounds protected by the Constitution.

Regarding candidate countries, anti-discrimination provisions in the **Former Yugoslav Republic of Macedonia**<sup>115</sup> and **Turkey** do not explicitly mention sexual orientation as a protected ground, while anti-discrimination law in **Montenegro** and **Serbia** explicitly lists sexual orientation as well as gender identity among the protected grounds. As far as EEA countries are concerned, national legislation in **Liechtenstein** gives no definition of sexual orientation. **Norway** provides a definition similar to that used in many countries, as sexual orientation covers heterosexual, homosexual and bisexual orientation. The revision and harmonisation of Norwegian anti-discrimination legislation that took place in 2013 did not include any changes to this definition, although gender identity and gender expression were explicitly included as separate protected grounds of discrimination in the Sexual Orientation Anti-discrimination Act.<sup>116</sup> Although **Iceland** has no general anti-discrimination legislation, the Penal Code was amended in

109 Supreme Administrative Court, Decision No 9467 of 7 July 2014.

110 Great Britain, Equality Act 2010, Section 12. In Northern Ireland, the Employment Equality (Sexual Orientation) Regulations 2003 provide a similar definition (Reg 2(2)).

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

112 Belgium, *Inter-federal plan to fight homophobic and transphobic violence*, 31 January 2013, available at: [http://igvm-iefh.belgium.be/sites/default/files/adviesories/plan\\_daction\\_interfederal\\_violences\\_homophobes\\_transphobes\\_fr.pdf](http://igvm-iefh.belgium.be/sites/default/files/adviesories/plan_daction_interfederal_violences_homophobes_transphobes_fr.pdf).

113 France, Law No. 2012-954 of 6 August 2012 on Sexual Harassment.

114 France, Law No. 2016-1547 of 18 November 2016 on the modernisation of the justice system in the 21st century.

115 It is, however, mentioned as a ground protected from discrimination in other laws, such as for instance the Law on Labour Relations, Official Gazette of the Republic of Macedonia, No 62/2005, as last amended in 2015, Article 6.

116 Norway, Sexual Orientation Anti-discrimination Act (SOA) of 21 June 2013 No 59, in force on 1 January 2014.

2014 to prohibit discrimination in the provision of goods and services on the grounds of sexual orientation and gender identity.<sup>117</sup>

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>118</sup>

#### Turkish court finds discrimination in employment on the ground of sexual orientation

In December 2015, the Civil Court of First Instance in Istanbul issued its ruling on an employment discrimination claim filed in 2010. The case was brought by a football referee who had been dismissed from his profession by the Turkish Football Federation due to his sexual orientation. In addition to dismissing the claimant, the Federation had leaked his medical report (which exempted the claimant from military service due to a 'psychosocial disability') to the media, causing significant media attention surrounding the claimant and making it impossible for him to find new employment.

The court held that the dismissal was in violation of the Constitutional non-discrimination provision and ordered the Federation to pay the claimant EUR 950 (TRY 3 000) in compensation for pecuniary damage as well as EUR 6 300 (TRY 20 000) for non-pecuniary damage.<sup>119</sup> This is the first court judgment finding employment discrimination on the basis of sexual orientation in the private sector and the first time a Turkish court awards compensation to a claimant under private law on the basis of discrimination on the ground of sexual orientation.

Another key issue relates to partners' benefits (see the *Maruko* case<sup>120</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). This issue is further examined below in section 3.4 related to family benefits.

Clarifying the scope of the term 'sexual orientation' is challenging as in many states, there are few or no examples of cases of discrimination on the grounds of sexual orientation being brought before the courts. Issues around confidentiality or fear of victimisation may deter some individual victims from initiating proceedings. Moreover, in some states the wider political climate remains unfriendly or openly hostile to equality for lesbian, gay and bisexual people (e.g. the **Former Yugoslav Republic of Macedonia, Poland** and **Lithuania**).

#### 1.2.5 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 Acts 1998-2015 limit their application to 'persons above the maximum age at which a person is statutorily obliged to attend school',<sup>121</sup> while the protection in the field of access to goods and services only applies to those aged above 18.<sup>122</sup> Similarly,

117 Iceland, Act No 13/2014 amending the General Penal Code No 19/1940 as amended.

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

119 20<sup>th</sup> Civil Court of First Instance in Istanbul, Decision No. 2010/399 of 29 December 2015.

120 European Court of Justice, Case C-267/06, *Maruko v Versorgungsanstalt der deutschen Bühnen*, [2008] ECR I-1757.

121 Ireland, Employment Equality Acts 1998-2015, Section 6(3)(a).

122 Ireland, Equal Status Acts 2000-2015, Section 3(3)(a).

in **Denmark** as regards employment, payment and dismissal, persons aged below 18 are not protected against direct discrimination if differential treatment is stipulated in a collective agreement.<sup>123</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.

#### 1.2.5.1 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’.

The directive goes on to list examples of differences that 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>124</sup> the Court of Justice provided an early indication that directly discriminatory practices need to be carefully scrutinised by national courts. That ruling has been followed by an extensive body of case law from the CJEU related to age discrimination, which has greatly affected national implementation. In this context, it is important to underline that the CJEU has consistently ruled since 2010 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>125</sup>

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**, and **Slovenia** have provisions that resemble all or part of Article 6.

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 that would 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 to states that permit compulsory retirement by public and private employers at a specific age.

At the outset, it is important to distinguish between the age at which people become entitled to receive pensions (pensionable age) and the age at which they are required to cease employment (retirement age). Sometimes these are linked in national law. In **Cyprus** and **Malta**, protection against unfair dismissal is lost at pensionable 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>126</sup> By contrast, in the **United Kingdom**, the Employment Equality (Repeal of Retirement Age Provisions) Regulations

123 Denmark, Act on the Prohibition of Discrimination in the Labour Market etc., Section 5(a)(4). Until 1 January 2016, the relevant number of the provision was 5(a)(5).

124 CJEU, Case C-144/04, *Mangold v Helm*; [2005] ECR I-9981. *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 the German Federal Constitutional Court (*Bundesverfassungsgericht*), Decision 2 BvR 2661/06 of 6 July 2010.

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

126 Constitutional Court of Latvia, Case 2003-12-01, Decision of 18 December 2003.

2011 removed the ability of employers to enforce compulsory retirement ages without risk of unfair dismissal claims by amending the Equality Act 2010. Since 1 October 2011, all age-related dismissals have had to be justified by the employer.

The approach in national law to retirement age can be loosely grouped into three categories. First, there are Member States where national law does not impose any compulsory retirement age, nor does it remove protection from unfair dismissal for workers after a certain age. In general, this includes **Estonia**,<sup>127</sup> the **Netherlands**,<sup>128</sup> **Poland** and **Slovakia**. In **Denmark**, retirement ages could be set by collective agreements or individual employment contracts until 1 January 2016, when a law adopted in 2014 entered into force.<sup>129</sup> As of that date, no contracts or collective agreements containing a retirement age can be entered into.<sup>130</sup> In **Germany**, although there is no general mandatory retirement age, there are a number of special regulations regarding maximum ages for specific categories of public servants, both on federal and *Land* level. In addition, both collective agreements and individual employment contracts commonly stipulate that retirement is to coincide with the federal pensionable age of 67 (being phased in).

In a second group of states, retirement ages are specified for public sector employees only. The precise age varies: **Belgium** (65), the **Czech Republic** (70), **Greece** (67), **Iceland** (70), **Latvia** (65 – being phased in), **Lithuania** (65),<sup>131</sup> **Luxembourg** (68), **Norway** (70), **Portugal** (70), **Slovenia** (65), **Spain** (65) and **Turkey** (65). In **Cyprus** different retirement ages apply to different public-sector employees, depending on the profession, the rank and the year of joining the service.<sup>132</sup> In **Bulgaria**, in some sectors, such as the professional army<sup>133</sup> and the police,<sup>134</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. In **Austria**, public employees can be forced to retire when they reach the age of 61.5 but only in circumstances where it is justified by important official reasons. In **Hungary**, the general retirement age of civil servants will be 65 by the year 2022, although civil service can be prolonged under certain circumstances until the age of 70.<sup>135</sup> In 2013, **Hungary** introduced a transitory period for the lowering of the retirement age of legal professionals following the decision of the CJEU<sup>136</sup> that the previous legislation that abruptly lowered the mandatory retirement age without any transition period was in breach of the directive.

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** (68/70), **Croatia** (65), **Liechtenstein** (64), **Italy** (70), **Malta** (65 – being phased in), **Montenegro** (65/67),<sup>137</sup> **Romania** (63/65 – being phased in),<sup>138</sup> **Serbia** (65), **Sweden** (67), and the **Former Yugoslav Republic of Macedonia** (67).<sup>139</sup> In **Ireland**, retirement ages are generally provided for in employment contracts. The case law interpreting the relevant provisions of the Irish Employment Equality Act was contradictory as it sometimes did, but sometimes did not, require a mandatory retirement age imposed by an employer to be justified. In December 2015, the provision was amended to explicitly require (a) that the mandatory retirement age

127 In Estonia, there are exceptions for a small number of categories of military and law-enforcement officials as well as for some specific professions such as judges.

128 However, there is a state pension age (67 – being phased in), at which individuals must begin to collect their state pensions, but they can still work and protection against unfair dismissal is maintained.

129 Denmark, Act No. 1489 of 23 December 2014.

130 In Denmark, the Act on Civil Servants imposes retirement at the age of 70 for certain civil servants working within the judiciary as well as for priests (Sections 34(2) and 43(2) of the Consolidated Act No. 488 of 6 May 2010 as amended).

131 In Lithuania, retirement can however be postponed on a case-by-case basis for a maximum of five years.

132 Cyprus, Law on Pensions No 97(I)/1997 as amended, Article 12.

133 Bulgaria, 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.

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

135 Hungary, Act CXCIX of 2011 on Civil Servants, adopted on 30 December 2013, Article 60(1)(j).

136 CJEU, Case C-286/12, *Commission v Hungary*, ECLI:EU:C:2012:687.

137 The retirement age is 65 for women and 67 for men.

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

139 The retirement age is 62 for women and 64 for men, but an employee who wishes to postpone retirement can do so until the age of 67 respectively.

is objectively and reasonably justified by a legitimate aim and (b) that the means of achieving that aim are appropriate and necessary.<sup>140</sup> In **France**, the retirement age specified for public sector employees (67) can be subject to derogation, while employers in the private sector may impose retirement no earlier than the age of 70. In 2013, the French Administrative Supreme Court found that the retirement age for public sector employees is justified. This measure was found to constitute a proportionate means to reach the legitimate aim of promoting better employment distribution among generations.<sup>141</sup>

#### **Bulgarian Supreme Administrative Court dismisses link between pension entitlement and age**

In 2016, the Supreme Administrative Court (SAC) held in two cases that persons dismissed on the ground of having become entitled to an old age and seniority pension were not discriminated against on the ground of age. The court justified these decisions by noting that under the law, the grounds for the dismissals was not age but the entitlement to a pension, which was independent of age as seniority was also taken into account.<sup>142</sup> The SAC seemed to regard taking seniority into account as quite different from taking age into account, ignoring the link between the two, without elaborating further on the justification for such a finding. It also ignored the fact that age *per se* was also a factor for pension entitlement under the law.

In 2011, the CJEU examined the compatibility with the Employment Equality Directive of a collective agreement providing for the automatic termination of employment contracts at retirement age in the case of *Prigge and Others v Deutsche Lufthansa*.<sup>143</sup> The Court found the relevant provision of the collective agreement to constitute direct discrimination on grounds of age, and that the measure could not be justified under the exception provided in Article 2(5) of the directive regarding public security. The Court also determined that possessing physical capabilities as an airline pilot can fall within the meaning of Article 4(1) of the directive on genuine and determining occupational requirements, and that such capabilities may diminish with age. However, although the objective relating to airline safety therefore was legitimate within the meaning of Article 4(1), the social partners had imposed a disproportionate requirement as both national and international legislation authorised pilots to carry out their professional activities until the age of 65, under certain conditions, while the collective agreement at hand provided for the automatic retirement of airline pilots at the age of 60. Finally, the Court proceeded to the justification test under Article 6 of Directive 2000/78/EC and ruled that air traffic safety did not constitute a legitimate aim related to employment policy, labour market and vocational training.

#### **Lower mandatory retirement age for nurses in Norway**

The case addressed whether the termination of employment as a result of a lower mandatory retirement age, set at 65 years for subordinate nurses in the Nurses Pension Act (Section 6) was in violation of the prohibition against age discrimination in the Working Environment Act (WEA) and the Employment Equality Directive. The lower age limit of 65 years may be extended pursuant to a collective agreement until 67 years if the employee is not entitled to a full pension. Citing the Court of Justice's *Prigge* judgment, the national court found that the possession of certain physical and mental capabilities – capabilities that deteriorate with age – is a regular professional requirement for subordinate nurses who have extensive contact with patients and clients. The age limit is justified by the rigours and strain of the profession, as well as the consideration for patient safety. The age limit is linked to a good pension scheme for nurses, and with the option to continue until 67 years if necessary for the pension plan. The court found that the age limit was justified, and could not see that the nurses as a group are affected in an unreasonable or disproportionate manner by the age limit. The Court also

140 Ireland, Equality (Miscellaneous Provisions) Act 2015, No. 43 of 2015, adopted on 10 December 2015, Section 10, available at: <http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/pdf>.

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

142 Bulgaria, Supreme Administrative Court Decisions No. 611 of 12 July 2016 in case No. 1541/2016 and No. 4418 of 14 April 2016 in case No. 4245/2016.

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

pointed out that this age limit was established by law and that it is thus up to the legislature to change the law. The appeal to the Supreme Court was not accepted.

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 that 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 that aim to protect and promote young employees, or to ensure a balance of age in the workforce. For instance, the **UK** permits age distinctions in the payment of the national minimum wage in order to encourage employers to employ younger workers, which seems controversial under the CJEU case law on age. In **Denmark**, the Act on the Prohibition of Discrimination in the Labour Market etc. provides a general exception allowing collective agreements to establish different conditions of employment, remuneration and dismissal for employees aged below 18. In 2013, the Danish Supreme Court found that this provision is in compliance with the Employment Equality Directive, as it constitutes an appropriate means to ensure the integration of young employees in the labour market.<sup>144</sup> Confusion around the justification issue is clearly noticeable throughout the EU, in particular as regards compulsory retirement and domestic case law also shows that national jurisdictions are not always consistent in finding discrimination.

Minimum and maximum age requirements, in particular in access to employment, seem to be widely permitted. These can be described as direct age requirements, whereas a requirement of a certain number of years of experience constitutes an indirect age requirement. The **Czech Republic** has examples of both direct age requirements (minimum age requirements for employment and self-employed activity and maximum age limits set for certain professions) and indirect age requirements (conditions of pay dependent on years of experience and requirement of a certain education and a minimum period of training for entrance to professions). In **Greece**, the courts generally hold that age limits in the employment field violate the right to professional freedom guaranteed by Article 5 of the Greek Constitution, rather than invoking anti-discrimination law.<sup>145</sup>

#### Discriminatory maximum age limitations for ski instructors in France

In 2012, the national ski instructors' union adopted an internal regulation limiting ski instructors' activity after 62 years of age and favouring young recruits in the distribution of teaching classes in order to favour the activity of young instructors. In its first decision dealing with maximum age limitations imposed in the private sector, the Supreme Court found that the internal regulation violated the anti-discrimination law (Law No. 2008-496 of 27 May 2008) and the Employment Equality Directive. Specifically, the measure did not meet the requirements of Article 6(1)(a) of the directive because it favours the purely individual private interests that are specific to ski schools and their concern to satisfy the requests of their clients, which therefore do not qualify as legitimate aims as provided by the directive and Article L1133-2 of the Labour Code.<sup>146</sup>

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 in a series of decisions over the past 10 years.<sup>147</sup>

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

145 See for instance Decisions 1421/2005, 413/1993 (Plenary), 1844/1994, 3354/1996, 2325/2002 255/2003, 594/2003, 3133/2004, 3444/2004, 3786/2007, 1319/2008, 1146/2010 and 2365/2010. The decisions are all available (in Greek) through the Council of State Portal at: [www.adjustice.gr](http://www.adjustice.gr), last accessed on 10.10.2015.

146 Court of Cassation, No. 13-27142, 17 March 2015, available at: <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000030383142&fastReqId=964259005&fastPos=50> (accessed 6 September 2016).

147 See for instance Cases C-87/06 *Pascual García* [2006]; C-411/05 *Palacios de la Villa* [2007]; 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*



### 1.3 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 **Estonia, Germany**,<sup>148</sup> **Iceland, Italy, Latvia, Liechtenstein, Lithuania, Malta**,<sup>149</sup> **Poland, Portugal, Romania** and the **UK**.<sup>150</sup> In **Poland**, a district court adopted in 2014 the first ever ruling on discrimination by association, relating to an employee who was dismissed after he was seen by his employer when participating in a LGBT rights parade.<sup>151</sup> In **Cyprus**, the Law on persons with disability includes assumption of disability within the definition of disability, thus extending the prohibition of discrimination on this ground to discrimination by assumption. As regards the other grounds and discrimination by association, judicial interpretation is still needed in Cyprus. Similarly, in **Spain**, explicit protection against discrimination by association covers only the ground of disability. Discrimination by assumption is only implicitly included in the Spanish legislation. By contrast, the **Danish** Act on Ethnic Equal Treatment prohibits assumed discrimination (through its official commentary) as well as discrimination by association only on the grounds of racial or ethnic origin,<sup>152</sup> while judicial interpretation is required for the other grounds, which are covered by the Act on the Prohibition of Discrimination in the Labour Market etc. However, the Supreme Court has found that discrimination by association with regards to the ground of disability is prohibited.<sup>153</sup>

#### CJEU rulings in landmark cases *Coleman*<sup>154</sup> and *CHEZ*<sup>155</sup> on discrimination by association

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

The CJEU stated that the purpose of the directive is to prohibit all forms of discrimination in employment and occupation on the protected grounds, namely disability, sexual orientation, age and religion or belief and is not limited to a particular category of person (para. 50). As the Court 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).

This judgment asserts the general principle that discrimination should also be prohibited when it is based on the association of a person with other persons to whom a prohibited discrimination ground applies.

In the *CHEZ* case, delivered on 16 July 2015, the CJEU applied the reasoning from *Coleman* and found that even though the claimant before the referring court, Ms. Nikolova, explicitly stated that she is not

[2009]; C-45/09, *Rosenblatt* [2010] and C-447/09, *Prigge* [2011].

148 However, as for discrimination in employment, the General Equal Treatment Act (Section 7.1) contains an explicit regulation that the prohibition of discrimination extends to assumed characteristics.

149 In Malta, however, the Equal Opportunities (Persons with a Disability) Act 2000 explicitly prohibits assumed discrimination (Article 3(1)(b)) with regards specifically to the ground of disability.

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

151 District Court Warszawa Śródmieście, 9 July 2014, *PTPA on behalf of XY v Company Z*, sygn. VI C 402/13 (first instance). The appeal and the second instance ruling dealt with the effectiveness, dissuasiveness and proportionality of the sanction.

152 Denmark, Act on Ethnic Equal Treatment, commentary to Section 3 and Section 3(1), respectively.

153 Denmark, Supreme Court judgment of 8 October 2014, printed in U2015.16H.

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

155 CJEU, Case C83/14, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, Judgement of 16 July 2015, ECLI:EU:C:2015:480.

of Roma origin, the factor on the basis of which she has suffered less favourable treatment (together with other inhabitants of the same district) remains Roma origin.

The Court indeed noted in analogy with *Coleman*, that ‘the scope of Directive 2000/43 cannot, in the light of its objective and the nature of the rights which it seeks to safeguard, be defined restrictively’, and that this previous case law is ‘in this instance, such as to justify the interpretation that the principle of equal treatment to which that directive refers applies not to a particular category of person but by reference to the grounds mentioned in Article 1 thereof, so that that principle is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds.’ (Para. 56)

Therefore, *CHEZ* provides a further important clarification of the personal scope of the Racial Equality Directive.

The **Bulgarian** Protection against Discrimination Act as well as the **Croatian** Anti-discrimination Act and the recently adopted **Slovenian** Protection against Discrimination Act provide rare examples where both discrimination on perceived or assumed grounds and discrimination by association are explicitly prohibited. The new **Greek** Equal Treatment Law 4443/2016 now also explicitly prohibits both of these specific types of discrimination. In **Sweden**, the Discrimination Act prohibits discrimination which ‘is associated with’ the protected grounds, thereby prohibiting both discrimination by association and by assumption. Similarly, the Non-Discrimination Act adopted by **Finland** in 2014 introduces explicitly the prohibition of discrimination both by assumption and by association.<sup>156</sup> In the **Czech Republic** discrimination on the ground of assumed characteristics – but not on the basis of association – is forbidden.

There are noteworthy specificities in several countries regarding the prohibition of discrimination either by association or by assumption. For instance, in **Croatia**, discrimination based on ‘misconception’<sup>157</sup> is prohibited, although there is still no case law on discrimination based on a perception or assumption of a person’s characteristic. As mentioned earlier, in several states the legislation refers to ‘real or assumed’ race or ethnicity (e.g. **France**) or to a disability that existed in the past or which may exist in the future (e.g. the **Netherlands**). In **Austria**, the explanatory notes to the Equal Treatment Act clearly specify that discrimination also occurs where the ground of discrimination is assumed by the perpetrator. In addition, the Supreme Court held in a landmark decision of 2013 that the attribution by the perpetrator to the victim of a protected characteristic is sufficient,<sup>158</sup> thus confirming the prohibition of discrimination by assumption on the federal level.<sup>159</sup> Regarding discrimination by association, **Austrian** law provides protection to individuals who experience discrimination or harassment due to their close relationship with a person whose sex,<sup>160</sup> ethnic affiliation, religion, belief, age, sexual orientation<sup>161</sup> or disability<sup>162</sup> constitutes the ground for discrimination or harassment. In the Flemish Framework Decree of 10 July 2008 in **Belgium**, the definition of direct discrimination expressly states that it is applicable in cases of discrimination based on an assumed characteristic. On the federal level, the preparatory works of the Racial Equality Federal Act and the General Antidiscrimination Federal Act stated that the law would be interpreted in accordance with the Court of Justice’s ruling in the *Coleman* case, which was pending at the time of adoption of the acts. In **Norway**, perceived or assumed discrimination is covered for all five grounds, provided that it has actually resulted in worse or less favourable treatment. Discrimination by association is covered for all grounds except age.

156 Finland, Non-Discrimination Act (1325/2014), which entered into force on 1 January 2015, Article 8.

157 Croatia, Anti-discrimination Act, 2008, Article 1(3).

158 Supreme Court decision No 9ObA40/13t of 24 July 2013.

159 On provincial level there are however some inconsistencies, see for instance Para 3(1) of the Viennese Anti-Discrimination Act or Para 3 of the Styrian Equal Treatment Act.

160 Austria, Equal Treatment Act, Para. 5/4.

161 Austria, Equal Treatment Act, Paras. 19/4, 21/4.

162 Austria, Federal Disability Equality Act Para. 4/2 and Employment of People with Disabilities Act, Para. 7b/5.

### The Cypriot equality body finds discrimination by association beyond immediate family members

The claimant in the case was an employee in the public sector who was to be transferred to a post in another city, far away from her brother with psychosocial disability of whom she was the primary carer.<sup>163</sup> The policy of the administration was to transfer employees to different districts on rotation. Whilst the system of transfers provided for consideration of employees' family circumstances, the term 'family' did not extend beyond spouses and children, as that would, in the opinion of the competent administrative body, infringe upon the principle of proportionality. The administrative body insisted that any exception to this rule would amount to preferential treatment of an employee in relation to others.

The equality body pointed out that the complainant's brother was in need of 24-hour supervision and care and had been declared by the court as an 'incapable person'; the complainant had been appointed by the court as the person in charge of all his affairs but was also his only close relative in Cyprus and his sole carer, taking care of all his survival needs. The equality body relied on the CJEU decision in the *Coleman* case to establish that the restrictive interpretation given to this legal framework by the administration, by limiting the application of discrimination by association only to spouses and children, was violating the principle established by the CJEU intended to cover any type of discrimination by association with a person with disability under the care of the claimant. The equality body found that any other interpretation of the directive would truly weaken the scope of protection, pointing out several examples of other member states which have extended the principle of discrimination by association to relationships beyond the sphere of the family, covering third persons acting as carers of persons with disabilities. The equality body invited the administration to look at the facts of each case separately before deciding on each transfer and to prioritise the respect of fundamental rights over other considerations.

In the context of the second implementation report on the Racial Equality Directive and the Employment Equality Directive, adopted on 17 January 2014,<sup>164</sup> the Commission referred to the existing national case law and maintained that the directives also prohibit a situation where a person is directly discriminated against on the basis of a wrong perception or assumption of protected characteristics.<sup>165</sup>

## 1.4 Multiple and intersectional 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**, initially, a provision adopted in 2011 explicitly referred for the first time to multiple discrimination, with its application limited to the employment field.<sup>166</sup> This was later completed with an explicit prohibition of multiple discrimination in the new Equal Treatment Law 4443/2016.<sup>167</sup> The Protection against Discrimination Act in **Bulgaria** defines multiple

163 Cyprus, Equality Authority, Report of the Equality Authority regarding the proposed transfer of an Administrative Officer from the district of her permanent residence while she is the primary caretaker of a person with psychosocial disability, 16 October 2015, Ref. A.K.I. 38/2015. Available at [http://www.ombudsman.gov.cy/Ombudsman/Ombudsman.nsf/All/3CC4BBB75B9F6404C2257EF5002290BF/\\$file/AKI\\_38\\_2015\\_16102015.doc?OpenElement](http://www.ombudsman.gov.cy/Ombudsman/Ombudsman.nsf/All/3CC4BBB75B9F6404C2257EF5002290BF/$file/AKI_38_2015_16102015.doc?OpenElement).

164 European Commission (2014), 2: *Report from the Commission to the European Parliament and the Council – Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive')*, COM (2014) 2 final, Brussels, 17 January 2014, available at [http://ec.europa.eu/justice/discrimination/files/com\\_2014\\_2\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/com_2014_2_en.pdf).

165 European Commission (2014), 2: *Report from the Commission to the European Parliament and the Council – Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive')*, COM (2014) 2 final, Brussels, 17 January 2014, p. 10, available at [http://ec.europa.eu/justice/discrimination/files/com\\_2014\\_2\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/com_2014_2_en.pdf).

166 Greece, Act 3996/2011 concerning the general reform of the Labour Inspectorate adopted on 5 August 2011, Article 2(1): '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'.

167 Greece, Equal Treatment Law 4443/2016, Article 2(2)(g).

discrimination as ‘discrimination based on more than one [protected] ground’.<sup>168</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>169</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>170</sup> However, although both the equality body and administrative courts have heard cases where multiple grounds of discrimination were invoked, no rulings have so far discussed any of the implications of a plurality of grounds. In the **United Kingdom**, the only provision on ‘dual discrimination’ (Section 14 of the Equality Act) has not come into force, although there is some case law recognising the relevance of taking into consideration a plurality of grounds.<sup>171</sup> In the **Netherlands**, the Government decided not to follow the then Equal Treatment Commission’s suggestion to include multiple discrimination in the General Equal Treatment Act.<sup>172</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 those grounds. In addition, Section 27(5) states that in cases of multiple discrimination the Federal Anti-discrimination Agency and the competent agents of the federal Government and the Parliament must co-operate. Multiple discrimination constitutes an aggravating circumstance under the **Romanian** Anti-discrimination Law.<sup>173</sup> Under **Austrian** law multiple discrimination must be considered when assessing the amount of immaterial damages.<sup>174</sup> The explanatory notes further clarify that cases of discrimination based on multiple grounds need to be assessed in an overall view and that the claims cannot be separated or cumulated by grounds. In **Croatia**, multiple discrimination is one of four ‘severe’ forms of discrimination, and needs to be considered when the amount of immaterial damages is evaluated.<sup>175</sup> In **Liechtenstein**, Article 23 (in combination with Article 5) of the Act on Equality of People with Disabilities provides that multiple discrimination must be taken into account when deciding on the compensation for immaterial damages. No further clarification is provided in any legal provisions however, and there is no relevant case law. In **Turkey**, multiple discrimination is an aggravating factor to be taken into account in the determination of the amount of the administrative fines. In both **Montenegro**<sup>176</sup> and **Serbia**<sup>177</sup> multiple discrimination is explicitly prohibited as a particularly grave form of discrimination. In the **Former Yugoslav Republic of Macedonia**, multiple discrimination, which is defined as discrimination on several discrimination grounds, also constitutes a severe form of discrimination.<sup>178</sup> In **Slovenia**, multiple discrimination is considered to be a severe form of discrimination, which is relevant for determining the amount of compensation or in determining the amount of the fine for misdemeanour.<sup>179</sup>

However, all existing national provisions have had limited effects in practice and case law remains very scarce. In the few existing cases reported, no specific approach with regard to the comparator had been followed by either the courts or the equality bodies, and the plurality of grounds does not generally have a direct impact on the amounts of compensation awarded. The **Swedish** Labour Court has held that one single omission (to invite an elderly woman for a job interview) that constitutes two types of discrimination, does not raise the level of the discrimination award.<sup>180</sup>

168 Bulgaria, Protection against Discrimination Act, Additional Provisions, § 1.11.

169 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.

170 Article 48(3).

171 See for instance, Employment Appeal Tribunal, *Debique v Ministry of Defence (No.2)*, UKEAT/0075/11/SM.

172 The lower house of the Dutch Parliament (*Tweede kamer*), 2011-2012, 28 481, No 16, p. 4.

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

174 Austria, Federal-Equal Treatment Act, Para. 19a and Equal Treatment Act, Paras. 12/13, 26/13, and 51/10.

175 The four severe forms of discrimination are multiple, repeated, continued and discrimination whose consequences are particularly harmful for the victim (Article 6 of the Anti-discrimination Act).

176 Montenegro, Law on the Prohibition of Discrimination, Article 20, Section 1(1).

177 Serbia Law on the Prohibition of Discrimination, Article 13.

178 Former Yugoslav Republic of Macedonia, Anti-discrimination Law, Article 12.

179 Slovenia, Protection against Discrimination Act, Articles 12, indent 1, 39(3), 45(2).

180 Labour Court 2010 No 91, *The Equality Ombudsman v State Employment Board*, judgement 2010-12-15.

## 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.

### 2.1 Forms of discrimination

#### 2.1.1 Direct discrimination

All examined countries except **Iceland** and **Liechtenstein** have adopted legislation that reflects closely the definition of direct discrimination found within the directives in relation to the relevant grounds.

In most countries, there are common elements to the definitions of direct discrimination:

- 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 opportunity to use a comparator from the past (e.g. a previous employee) or a hypothetical comparator; and
- a statement that direct discrimination cannot be justified.

These elements can be generally found in legislation in **Austria, Belgium, Bulgaria, Croatia**, the **Czech Republic, Cyprus, Denmark, Estonia, Finland**, the **Former Yugoslav Republic of Macedonia, France** (although hypothetical comparison is not covered, in breach of the directives),<sup>181</sup> **Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Montenegro**, the **Netherlands, Norway, Poland** (although the definition of direct discrimination given in the Labour Code is still erroneous with regard to the comparator), **Portugal, Serbia, Slovakia, Slovenia, Spain** (although the law does not determine whether past and hypothetical comparators are covered), **Sweden** and the **United Kingdom**. However, these pieces of legislation do not necessarily apply to the full material scope required by the directives and they may coexist with other legislation containing different definitions of direct discrimination. In **Croatia**, although the definition of direct discrimination contained in the Anti-discrimination Act clearly follows that of the directives, the case law is still not clear, as courts seem to consider discriminatory intent to be a significant element of direct discrimination.<sup>182</sup> Although different from the definitions proposed by Directive 2000/43/EC and Directive 2000/78/EC, the **Romanian** Anti-discrimination Law is in line with the directive since it provides a detailed definition, attempting to cover the whole range of actions and

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181 French courts do however use hypothetical comparisons, see for example in a case relating to discrimination on the ground of origin, Cass. Soc. 3 November 2011, No. 10-20765, *Dos Santos*.

182 People's Ombudsperson (2014), *Ombudsperson's Report for 2014*, p. 21, available at: <http://ombudsman.hr/hr/component/download/send/29-2014/562-izvjesce-pucke-pravobraniteljice-za-2014-godinu> and the Gender Equality Ombudsperson (2010) *Analysis of the case law in the field of anti-discrimination law*, available at: <http://www.prs.hr/index.php/analize-istrzivanja/obrazovanje-4/181-istrzivanje-sudske-prakse-u-podrucju-antidiskriminacijske-zastite-2010>, both accessed 21 October 2016.

omissions leading to discrimination. In **Turkey**, the wording of the definition itself initially seems to be compatible with the directives, but read in conjunction with other articles, sexual orientation is excluded from the grounds on the basis of which direct discrimination is prohibited.

#### New definition of 'unfavourable treatment' in Bulgaria

The Bulgarian Protection Against Discrimination Act was amended in December 2016,<sup>183</sup> and a new definition of 'unfavourable treatment' was thereby adopted. The amendment followed the ruling of the Court of Justice of the EU in the *CHEZ* case<sup>184</sup> and aimed to clarify that less favourable treatment is not restricted to rights provided for under law. The previous definition was rather unclear on this point as it referred to 'any act, action or omission that directly or indirectly affects rights or legitimate interests.'

Following the amendment, unfavourable treatment is defined as 'any act, action or omission that results in less favourable treatment of a person compared to another on [protected] grounds, or that may place a person or persons who have a [protected] characteristic at a particular disadvantage compared to other persons.' Although the definition no longer refers to rights or legitimate interests, it may be argued that it still lacks clarity due to slightly confusing language. Judicial interpretation by the national equality body and courts will now be required to shed further light on the concept.

It is worrying that in a few countries, direct discrimination may under certain circumstances be generally justified in addition to the specific exceptions stipulated by the directives (further examined in section 3 below). In **Hungary**, a general objective justification for direct discrimination applies to the grounds covered by the Employment Equality Directive when the act is 'found by objective consideration to have a reasonable ground directly related to the relevant legal relationship'. However, it is unclear whether this exemption applies in the field of employment.<sup>185</sup> In **Cyprus**, a series of Supreme Court decisions have introduced a theory of 'reasonable discrimination' which amounts to considering that discrimination that is 'reasonable' is lawful.<sup>186</sup> In 2015, the Supreme Court reiterated this theory while recalling however that exceptions to the principle of equality and non-discrimination must be interpreted narrowly, citing CJEU case law in this regard.<sup>187</sup> Although the **Latvian** definition of direct discrimination appears to be in line with the directives, the general justification – applicable in fields such as education, access to and provision of goods and services, social protection and social advantages – does not distinguish between direct and indirect discrimination.

There is no legislation related to direct discrimination on any of the protected grounds in **Iceland**, while in **Liechtenstein**, direct discrimination is explicitly prohibited (and defined) on the ground of disability only.

183 Bulgaria, Law amending and supplementing the Protection from Discrimination Act, adopted on 30 December 2016 and available at: <http://www.parliament.bg/bg/laws/ID/42259>.

184 CJEU, Grand Chamber Judgment of 16 July 2015 in Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashita ot diskriminatsia*.

185 Hungary, Equal Treatment Act, Article 7(2).

186 Cyprus, Supreme Court, *George Mattheou v. The Republic of Cyprus through the Chief of Police and the Minister of Justice and Public Order*, No 1497/2008, 30 April 2012 available at [http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros\\_4/2012/4-201204-1497-08.htm&qstring=%EC%E1%F4%E8%E1%E9%2A%20and%20%E1%F3%F4%F5%ED%EF%EC%2A](http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2012/4-201204-1497-08.htm&qstring=%EC%E1%F4%E8%E1%E9%2A%20and%20%E1%F3%F4%F5%ED%EF%EC%2A). In this case the court rejected a claim for discrimination because it was not proven that the differential treatment was not premised upon 'reasonable discrimination'.

187 Cyprus, *Petros Michaelides v The Republic of Cyprus through the Minister of Labour and Social Insurance*, Supreme Court, Review Jurisdiction, Case No. 2005/2012, 27 January 2016, available at [http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros\\_4/2016/4-201601-2005-2012.htm&qstring=%E4%E9%E1%EA%F1%E9%F3%2A%20and%202016](http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2016/4-201601-2005-2012.htm&qstring=%E4%E9%E1%EA%F1%E9%F3%2A%20and%202016).

**Table 3: Prohibition of direct discrimination in national law (in the case of decentralised states only federal law is indicated)**

	Law	Article	Defined	Definition equivalent to the directives
AUSTRIA	Federal Equal Treatment Act	§§ 13	Yes	Yes
	Equal Treatment Act	§§ 17/1, 18, 31/1	Yes	Yes
	Act on the Employment of People with Disabilities	§ 7b/1	Yes	Yes
	Federal Disability Equality Act	§§ 4/1	Yes	Yes
BELGIUM	Racial Equality Federal Act	Art 12	Yes	Yes
	General Anti-discrimination Federal Act	Art 14	Yes	Yes
BULGARIA	Protection Against Discrimination Act	Art. 4(1)	Yes	Yes
	Integration of Persons with Disabilities Act	Art. 3	Yes	Yes
CROATIA <sup>27</sup>	Anti-discrimination Act	Art. 2(1)	Yes	Yes
CYPRUS	Law on Equal Treatment in employment and occupation 58(I)/2004	Art. 6(1)(a)	Yes	Yes
	Law on Equal Treatment irrespective of Race or Ethnic origin N. 59(I)2004	Art. 5(1)	Yes	Yes
	Law amending the Law on Persons with Disability N. 57(I)/2004	Art. 3(a)	Yes	Yes
CZECH REPUBLIC	Anti-discrimination Law	S. 2(3)	Yes	Yes
DENMARK	Act on Prohibition of Discrimination in the Labour Market etc.	S. 1(2)	Yes	Yes
	Act on Ethnic Equal Treatment	S. 3(2)	Yes	Yes
ESTONIA	Equal Treatment Act	Art. 3(2)	Yes	Yes
FINLAND	Non-Discrimination Act	S. 8	Yes	Yes
FRANCE	Law no 2008-496 of 27 May 2008 relating to the Adaptation of National Law to Community Law in Matters of Discrimination	Art. 1	Yes	No
FORMER YUGOSLAV REPUBLIC of MACEDONIA <sup>28</sup>	Law on Prevention and Protection Against Discrimination	Art. 6(1)	Yes	Yes
GERMANY	General Act on Equal Treatment	Sec. 3.1	Yes	Yes
GREECE	Equal Treatment Law 4443/2016	Art. 2(2)(a)	Yes	Yes
HUNGARY	Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities	Art. 8	Yes	Yes
ICELAND	<sup>-29</sup>	-	-	-
IRELAND	Employment Equality Acts 1998-2015	S. 6(1)	Yes	Yes
	Equal Status Acts 2000-2015	S. 3(1)	Yes	Yes
<p>27 The Labour Code and the Same-sex Life Partnership Act also prohibit direct discrimination, with limited scopes of application.</p> <p>28 The Labour Law (Art. 7(2)), the Law on Child Protection (Art. 14(1)), and the Law on Social Protection (Art. 21(1)) also prohibit direct discrimination.</p> <p>29 Direct discrimination is only defined and prohibited in gender equality law.</p>				

	Law	Article	Defined	Definition equivalent to the directives
ITALY	Legislative Decree No 215/2003 Implementing Directive 2000/43/EC	Art. 2, para. 1 a)	Yes	Yes
	Legislative Decree No 216/2003 on the Implementation of Directive /2000/78/EC	Art. 2, para. 1 a)	Yes	Yes
	Law No 67/2006 on Measures for the Judicial Protection of Persons with Disabilities Victims of Discrimination	Art 2, par. 2	Yes	Yes
LATVIA	Labour Law	Art. 29(5)	Yes	Yes
	Law on Prohibition of Discrimination against Natural Persons -Economic Operators	Art. 4(2)	Yes	Yes
	Consumer Rights Protection Law	Art. 3. <sup>1</sup> (6)	Yes	Yes
	Law on Social Security	Art. 2. <sup>1</sup> (3)	Yes	Yes
LIECHTENSTEIN	Act on Equality of People with Disabilities	Art. 6(1)	Yes	Yes
LITHUANIA	Law on Equal Treatment	Art. 2(7)	Yes	Yes
LUXEMBOURG	Law of 28 November 2006 <sup>30</sup>	Arts 1a and 18	Yes	Yes
MALTA	Equal Treatment in Employment Regulations	Art. 3(2)(a)	Yes	Yes
	Equal Treatment of Persons Order	Art. 2(2)	Yes	Yes
	Equal Opportunities (Persons with Disabilities Act	Arts 3A,5 and 6	No	N/a
	Equality for Men and Women Act	Art. 2	No	N/a
MONTENEGRO <sup>31</sup>	Law on the Prohibition of Discrimination	Art. 2, para.1	Yes	Yes
	Law on the Prohibition of Discrimination of Persons with Disabilities	Art. 2	No	No
NETHERLANDS	General Equal Treatment Act	Art. 1.a and b	Yes	Yes
	Disability Discrimination Act	Art. 1.a and b	Yes	Yes
	Age Discrimination Act	Art. 1.a and b	Yes	Yes
NORWAY	Anti-discrimination Act on Prohibition of Discrimination based on Ethnicity, religion, etc.	S. 6(2)	Yes	Yes
	Working Environment Act	S.13-1	No <sup>32</sup>	Yes
	Anti-discrimination and Accessibility Act on Prohibition against Discrimination on the basis of Disability	S. 5(2)	Yes	Yes
	Sexual Orientation Anti-Discrimination Act	S. 5(2)	Yes	Yes
POLAND <sup>33</sup>	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment	Art. 3	Yes	Yes
PORTUGAL	Law 18/2004 transposing the Racial Equality Directive	Arts 3(3)(a)	Yes	Yes
	Law 46/2006 which prohibits and punishes discrimination based on disability and on a pre-existing risk to health	Art. 3(a)	Yes	Yes
	Labour Code	Art. 23 (1)(a)	Yes	Yes
	Law 3/2011 on the non-discrimination principle in self-employment	Art. 5(2)(a)	Yes	Yes

30 There is a specific law dealing with discrimination in the public sector, namely Law of 29 November 2006.

31 The Labour Law also prohibits direct discrimination, only in the employment field.

32 The definitions are not specified in the WEA Chapter 13 but are discussed in its preparatory works, Ot.prp nr 49 (2004-2005) Chapter 25.

33 The Labour Code also prohibits direct discrimination only in the employment field.



	Law	Article	Defined	Definition equivalent to the directives
ROMANIA	Ordinance (GO) 137/2000 regarding the prevention and the punishment of all forms of discrimination	Art. 2(1)	Yes	Yes
SERBIA	The Law on the Prohibition of Discrimination	Art. 2, para.1	Yes	No <sup>34</sup>
SLOVAKIA	Anti-discrimination Act	S. 2a(2) and 2(1)	Yes	Yes
SLOVENIA	Protection against Discrimination Act	Art. 6(1) and 4(2)	Yes	Yes
	Employment Relationship Act	Art. 6(3)	Yes	Yes
	Act on Equal Opportunities of People with Disabilities	Art. 3	Yes	Yes
SPAIN	Law on Fiscal, Administrative and Social Measures	Art. 28.1.b	Yes	No
	General Law on the Rights of Persons with Disabilities and their Social Inclusion	Art. 2.c	Yes	No
SWEDEN	Discrimination Act	Ch. 1 S. 4 pt. 1	Yes	Yes
TURKEY	Law on the Human Rights and Equality Institution of Turkey (no. 6701), Art. 4(1)(c)	5(1)	Yes	No
	Law on Persons with Disabilities	Arts 4 and 4/A	Yes	Yes
UNITED KINGDOM	(GB) Equality Act	S. 13	Yes	Yes
	(NI) Race Relations Order	Art. 3	Yes	Yes
	(NI) Fair Employment and Treatment Order	Art. 3	Yes	Yes
	(NI) Disability Discrimination Act	S. 3A	Yes	Yes
	(NI) Employment Equality (Age) Regulations	Reg. 3	Yes	Yes
	(NI) Employment Equality (Sexual Orientation) Regulations	Reg. 3	Yes	Yes
34 This definition is almost in line with the definition in the EU directives. However, it is limited to less favourable treatment and does not cover detriment.				

### 2.1.2 Indirect discrimination

A large proportion of states have introduced a definition of indirect discrimination that generally reflects the definition adopted in the directives. This includes **Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, the Former Yugoslav Republic of Macedonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden** and the **United Kingdom**. In **Iceland**, there is no legislation prohibiting indirect discrimination on any of the protected grounds, while in **Liechtenstein** it is only prohibited on the ground of disability. In **Turkey**, as with the definition of direct discrimination, although the wording is compatible with the directives, sexual orientation as a ground is not protected. In **Serbia**, the definition of indirect discrimination can be interpreted as being limited to the actual occurrence of disadvantage, making it impossible to challenge apparently neutral provisions before they incur disadvantages for actual victims.

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>188</sup> In 2015, a Court of Appeal ruled that, in addition, claimants must show not only that the apparently neutral provision, criterion or practice causes a disadvantage, but also the reason for this disadvantage. This additional requirement could create a significant barrier for indirect discrimination claimants in the future.<sup>189</sup> In **Slovenia**, the law requires the individual complainant to be in an ‘equal or similar situation and conditions’ to the comparator for indirect discrimination to be established.<sup>190</sup> In **Bulgaria**, since December 2016 indirect discrimination is defined as ‘placing a person or persons who have a [protected] characteristic, or, who without having such a characteristic, together with the former suffer less favourable treatment, or are placed at a particular disadvantage deriving from an apparently neutral provision, criterion, or practice, unless the provision, criterion, or practice are objectively justified with a view to a legitimate aim and the means to achieving that aim are appropriate and necessary.’<sup>191</sup> The positive change of clarifying that indirect discrimination by association is prohibited is somewhat overshadowed by the unclear language of the new provision, which may impact on its effectiveness.

**Table 4: Prohibition of indirect discrimination in national law (in the case of decentralised states only federal law is indicated)**

	Law	Article	Defined	Definition equivalent to directives
AUSTRIA	Federal Equal Treatment Act	§§ 13	Yes	Yes
	Equal Treatment Act	§§ 17/1, 18, 31/1	Yes	Yes
	Act on the Employment of People with Disabilities	§ 7b/1	Yes	Yes
	Federal Disability Equality Act	§§ 4/1	Yes	Yes
BELGIUM	Racial Equality Federal Act	Art 12	Yes	Yes
	General Anti-discrimination Federal Act	Art 14	Yes	Yes
BULGARIA	Protection Against Discrimination Act	Art. 4(1)	Yes	Yes
	Integration of Persons with Disabilities Act	Art. 3	Yes	Yes
CROATIA <sup>35</sup>	Anti-discrimination Act	Arts 2(2)	Yes	Yes
CYPRUS	Law on Equal Treatment in Employment and occupation 58(I)/2004	Art. 6(1)(b)	Yes	Yes
	Law on Equal Treatment (Racial or Ethnic origin) N. 59(I)2004	Art. 5	Yes	Yes
	Law amending the Law on Persons with Disability N. 57(I)/2004	Art. 3(a)	Yes	Yes
CZECH REPUBLIC	Anti-discrimination Act	Sections 1(3) and 2(2)	Yes	Yes
DENMARK	Act on Prohibition of Discrimination in the Labour Market etc.	S. 1(3)	Yes	Yes
	Act on Ethnic Equal Treatment	S. 3(3)	Yes	Yes
ESTONIA	Equal Treatment Act	Art. 3(4)	Yes	Yes
FINLAND	Non-Discrimination Act	S. 8	Yes	Yes

<sup>35</sup> The Labour Code and the Same-sex Life Partnership Act also prohibit indirect discrimination, with limited scopes of application.

188 Great Britain, Equality Act 2010, Section 19.

189 Court of Appeal [2015] EWCA Civ 609 22 June 2015, available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2015/609.html> accessed 1 June 2016. After the cut-off date of this report, on 5 April 2017, the decision was overturned by the Supreme Court, see *Essop and others v Home Office (UK Border Agency)* [2017] UKSC 27, available at: <http://www.bailii.org/uk/cases/UKSC/2017/27.html>.

190 Slovenia, Protection against Discrimination Act, Article 6(2).

191 Bulgaria, Law amending and supplementing the Protection from Discrimination Act, adopted on 30 December 2016 and available at: <http://www.parliament.bg/bg/laws/ID/42259>.

	Law	Article	Defined	Definition equivalent to directives
FRANCE	Law no 2008-496 of 27 May 2008 relating to the adaptation of National Law to Community Law in matters of discrimination	Art. 1	Yes	Yes
FORMER YUGOSLAV REPUBLIC of MACEDONIA <sup>36</sup>	Law on Prevention and Protection Against Discrimination	Art. 6. (2)	Yes	Yes
GERMANY	General Act on Equal Treatment	Sec. 3.2	Yes	Yes
GREECE	Equal Treatment Law 4443/2016	Art. 2(2)(b)	Yes	Yes
HUNGARY	Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities	Art. 9	Yes	No <sup>37</sup>
ICELAND	- <sup>38</sup>	-	-	-
IRELAND	Employment Equality Acts 1998-2015	S. 22 and 31	Yes	Yes
	Equal Status Acts 2000-2015	S.3(1)(c)	Yes	Yes
ITALY	Legislative Decree No 215/2003 Implementing Directive 2000/43/EC	Art. 2, para. 1, b.	Yes	Yes
	Legislative Decree No 216/2003 on the Implementation of Directive 2000/78/EC	Art. 2, para. 1, b.	Yes	Yes
	Law No 67/2006 on Measures for the Judicial Protection of Persons with Disabilities Victims of Discriminations	Art. 2, para. 3	Yes	Yes
LATVIA	Labour Law	Art. 29(6)	Yes	Yes
	Law on Prohibition of Discrimination against Natural Persons Economic Operators	Art. 4(2)	Yes	Yes
	Consumer Rights Protection Law	Art. 3. <sup>1</sup> (6)	Yes	Yes
	Law on Social Security	Art. 2. <sup>1</sup> (4)	Yes	Yes
LIECHTENSTEIN	Act on Equality of People with Disabilities	Art. 6(2)	Yes	Yes
LITHUANIA	Law on Equal Treatment	Art. 2 (4)	Yes	Yes
LUXEMBOURG	Law of 28 November 2006	Arts 1b and 18	Yes	Yes
MALTA	Equal Treatment in Employment Regulations	Art. 3(2)(b)	Yes	Yes
	Equal Treatment of Persons Order	Art. 2	Yes	Yes
	Equality for Men and Women Act	Art. 2	No	N/A
	Equal Opportunities (Persons with Disabilities) Act	Arts 4 and 5(4)	No	N/A
MONTENEGRO <sup>39</sup>	Law on the Prohibition of Discrimination	Art. 2, para.1	Yes	Yes
	Law on the Prohibition of Discrimination of Persons with Disabilities	Arts 2 and 4	No	No
NETHERLANDS	General Equal Treatment Act	Art. 1.c	Yes	Yes
	Disability Discrimination Act	Art. 1.c	Yes	Yes
	Age Discrimination Act	Art. 1.c	Yes	Yes
<p>36 The Labour Law (Art 7(3)), the Law on Child Protection (Art. 14(2)), and the Law on Social Protection (Art. 21(1)) also prohibit indirect discrimination.</p> <p>37 Not fully, due to an exemption clause.</p> <p>38 Indirect discrimination is only defined and prohibited in gender equality law.</p> <p>39 The Labour Code also prohibits indirect discrimination, only in the employment field.</p>				

	Law	Article	Defined	Definition equivalent to directives
NORWAY	Anti-discrimination Act on Prohibition of Discrimination based on Ethnicity, Religion, etc.	S. 6(2)	Yes	Yes
	Working Environment Act	S. 13-1(1)	No <sup>40</sup>	Yes
	Anti-discrimination and Accessibility Act on Prohibition of Discrimination on the Basis of Disability	S. 5(2)	Yes	Yes
	Sexual Orientation Anti-Discrimination Act	S. 5(2)	Yes	Yes
POLAND <sup>41</sup>	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment	Art. 3	Yes	Yes
PORTUGAL	Law 18/2004 transposing the Racial Equality Directive	Art. 3(3)(b)	Yes	Yes
	Law 46/2006 which prohibits and punishes discrimination based on disability and on a pre-existing risk to health	Art. 3(b)	Yes	Yes
	Labour Code	Art. 23(1)(b)	Yes	Yes
	Law 3/2011 on non-discrimination principle in self-employment	5(2)(b)	Yes	Yes
ROMANIA	Ordinance (GO) 137/2000 regarding the prevention and the punishment of all forms of discrimination	Art. 2(3)	Yes	Yes
SERBIA	The Law on the Prohibition of Discrimination	Art. 7	Yes	No
SLOVAKIA	Anti-discrimination Act	S. 2a(3) and 2(1)	Yes	Yes
SLOVENIA	Protection against Discrimination Act	Arts 6(2) and 4(2)	Yes	Yes
	Employment Relationship Act	Art. 6(3)	Yes	Yes
	Act on Equal Opportunities of People with Disabilities	Art. 3	Yes	Yes
SPAIN	Law on Fiscal, Administrative and Social Measures	Art. 28.1.c	Yes	No <sup>42</sup>
	General Law on the Rights of Persons with Disabilities and their Social Inclusion	Art. 2.d	Yes	No <sup>43</sup>
SWEDEN	Discrimination Act	Ch. 1 S. 4 pt. 2	Yes	Yes
TURKEY	Law on the Human Rights and Equality Institution of Turkey (no. 6701)	Art. 4(1)(d)	Yes	No
	Law on Persons with Disabilities	Art. 4/A	Yes	Yes
UNITED KINGDOM	(GB) Equality Act	S. 19	Yes	Yes
	(NI) Race Relations Order	Art. 3	Yes	Yes
	(NI) Fair Employment and Treatment Order	Art. 3	Yes	Yes
	(NI) Disability Discrimination Act	-	-	-
	(NI) Employment Equality (Age) Regulations	Reg. 3	Yes	Yes
	(NI) Employment Equality (Sexual Orientation) Regulations	Reg. 3	Yes	Yes

40 The definitions are not specified in the WEA Chapter 13 but are discussed in its preparatory works, Proposition to the Odelsting No 104 (2002-2003), section 8.3.5.4, p. 36.

41 The Labour Code also prohibits indirect discrimination, only in the employment field.

42 Even if the definition is not equivalent to this of the directive, it is interpreted as such by the jurisprudence.

43 Even if the definition is not equivalent to this of the directive, it is interpreted as such by the jurisprudence.

### 2.1.3 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 established baseline 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>192</sup> The majority of states have adopted definitions of harassment that appear in line with that contained in the directives. This includes **Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, the Former Yugoslav Republic of Macedonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Montenegro, the Netherlands, Norway, Poland, Portugal, Serbia, Slovakia, Slovenia** and the **United Kingdom**. However, the definition does not explicitly require the conduct to be unwanted in several Member States, including in **Denmark, France, Hungary, the Netherlands, Slovakia** and **Sweden**. In **Austria**, the definition refers to conduct that is ‘unacceptable, undesirable and offensive (indecent)’. In **Bulgaria**, although the wording of the definition in the Protection Against Discrimination Act is in compliance with that of the directives, a ruling of the Supreme Administrative Court from 2016 has caused some doubt in this regard. Indeed, the court has ruled that different treatment had to be established for a finding of harassment, and that such treatment had to be ‘conscious’.<sup>193</sup> It is not yet clear whether this constituted an isolated ruling or whether it indicates a new line in the case law of the court.

In the remaining countries, there is some ambiguity concerning the definition of harassment. In **Spain**, ‘hostile’ and ‘degrading’ are not included in the national definition, which refers to the creation of an intimidating, humiliating or offensive environment only. In **Sweden**, the definition does not require that the behaviour creates any specific type of environment, but only that it violates the dignity of a person. Thus, the definition does not include conduct with the *purpose* of violating a person’s dignity (but without the *effect* of doing so). In **Romania**, harassment is defined in the Anti-discrimination Law, in the Act on Equal Opportunities between Men and Women and in the Criminal Code, but none of the definitions provided are in complete compliance with the definition of harassment set out in the directives. The definition in the Anti-discrimination Law refers only to the effect of the unwanted conduct related to any of the protected grounds, thereby excluding conduct with the purpose (but without the effect) of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In **Iceland** harassment is not prohibited with regard to any of the relevant grounds, while in **Liechtenstein** only harassment on the ground of disability is covered. In **Turkey**, the new Law on the Human Rights and Equality Institution of Turkey (no. 6701) now clearly prohibits harassment on four of the relevant grounds, excluding sexual orientation.

#### UK courts provide clarification on the scope of racial harassment

Two cases decided by equality tribunals in the **United Kingdom** provide some indication of how the concept of harassment in relation to the ground of racial origin can be interpreted on the national level. In October 2012, a tribunal ruled that the repeated use of the words ‘my nigga’ by a white colleague to the claimant, a black man, amounted to harassment related to race regardless of the context and, in particular, of the fact that the claimant had been the first to use those words and that his colleague had not intended to be offensive.<sup>194</sup> According to the tribunal, ‘the phrase is such an insulting phrase to use towards a black person that [it] could not conceive of any circumstances where its use would not violate dignity and create a degrading, humiliating or offensive environment’.

Subsequently, another equality tribunal ruled that the use of the word ‘nigger’ on a single occasion by a younger white colleague to the claimant, an older black man, amounted to racial harassment.<sup>195</sup> By

192 Directives 2000/43/EC and 2000/78/EC, Article 2(3).

193 Bulgaria, Supreme Administrative Court Decision No. 2368 of 1 April 2016 in case No. 7838/2015, p. 2.

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

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

contrast with the tribunal in the previous case, the tribunal did not take the view that the use of the word would always amount to harassment (it had been argued that the word had been 're-appropriated' by some black rap musicians). The tribunal did, however, accept that its use was indefensible in the instant context. The claimant was awarded EUR 5 300 (GBP 4 500) for injury to feelings, which had been compounded by the fact that the word was used to the claimant in front of another employee and that his employers had failed to deal adequately with his complaint.

The directives do not provide specific rules on how to determine whether conduct is such as to violate a person's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment. Several states have sought to clarify this in national legislation. For instance, under **Slovakia's** Anti-discrimination Act, harassment means conduct which results in or can result in the creation of an intimidating, unfriendly, shameful, humiliating, insulting, degrading or offensive environment and that has or can have the purpose or effect of violating a freedom or human dignity. In **Great Britain**, the Equality Act provides that, in deciding whether conduct amounts to harassment, account must be taken of the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. 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. The Government proposal of the Non-Discrimination Act in **Finland** pointed out that talks, gestures, facial expressions, e-mails or presenting inappropriate material can all count as harassment.<sup>196</sup>

#### **Austrian Supreme Court found no post-employment harassment<sup>197</sup>**

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

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

Another area left open by the directives is the responsibility of the employer for acts of harassment by other workers or by third parties such as customers. In many states, employers can be held liable for the actions of their workers to varying degrees. Some countries have chosen to place a specific duty on employers to take action to prevent and redress harassment in the workplace. For example, the 2006 **German** General Equal Treatment Act places employers under a legal duty to prevent discrimination occurring in the workplace. This includes a duty to protect employees from discrimination by third parties.<sup>198</sup> Similarly, **Norway** imposes a special duty on employers to prevent harassment in their areas of responsibility. **Ireland** also prohibits harassment by an employer, a colleague, a client, customer or other business contact of the employer.<sup>199</sup> In addition, employers and service providers are liable for harassment by employees and third parties such as tenants, clients and customers. In **Sweden** harassment by colleagues or third parties is not prohibited as such, although the employer can be held liable for damage caused by his/her failure to investigate and implement measures to prevent harassment between employees.

196 Government proposal on the Non-Discrimination Act, page 78.

197 Supreme Court Decision No 9ObA21/12x of 27 February 2012.

198 Germany, General Equal Treatment Act, Section 12.4.

199 Ireland, Employment Equality Acts 1998-2015, Section 14A.

This duty, however, does not extend to harassment by third parties such as clients. In the **Netherlands**, colleagues cannot be held responsible for harassment whereas the employer or individuals acting on their behalf can be held liable. In **Hungary**, the Equal Treatment Act does not provide protection against harassment committed by colleagues at work. In the **United Kingdom**, the provisions of the Equality Act that dealt with employers' vicarious liability for third-party harassment were repealed in 2013 (Section 40(2) and 40(3)). However, the UK Employment Appeal Tribunal has ruled that a claimant – an Iranian social worker – could rely directly on the Racial Equality Directive to hold his employer liable for harassment by a third party where the employer had failed to take adequate steps to protect him from the abusive conduct of a child in care.<sup>200</sup>

**Table 5: Prohibition of harassment in national law (in the case of decentralised states only federal law is indicated)**

	Law	Article	Defined	Definition equivalent to directives
<b>AUSTRIA</b>	Federal Equal Treatment Act	§ 13	Yes	Yes
	Equal Treatment Act	§ 17/1, 18, 31/1	Yes	Yes
	Act on the Employment of People with Disabilities	§ 7b/1	Yes	Yes
	Federal Disability Equality Act	§ 4/1	Yes	Yes
<b>BELGIUM</b>	Racial Equality Federal Act	Art 12	Yes	Yes
	General Federal Anti-discrimination Act	Art 14	Yes	Yes
	Federal Act on the welfare of workers while carrying out their work	Art. 32 ter 2°	Yes	Yes
<b>BULGARIA</b>	Protection Against Discrimination Act	Art. 5	Yes	Yes
<b>CROATIA</b> <sup>44</sup>	Anti-discrimination Act	Art. 3(1)	Yes	Yes
<b>CYPRUS</b>	Law on Equal Treatment in Employment and occupation 58(I)/2004.	Art. 6(1)(c)	Yes	Yes
	Law on Equal Treatment irrespective of Race or Ethnic origin N. 59(I)2004.	Art. 5(2)(c)	Yes	Yes
	Law amending the Law on Persons with Disability N. 57(I)/2004	Art. 3(b)	Yes	Yes
<b>CZECH REPUBLIC</b>	Anti-discrimination Act	Ss. 1(3) and 2(2)	Yes	Yes
<b>DENMARK</b>	Act on Prohibition of Discrimination in the Labour Market etc.	S. 1(4)	Yes	Yes
	Act on Ethnic Equal Treatment	S. 3(4)	Yes	Yes
<b>ESTONIA</b>	Equal Treatment Act	Art. 3(3)	Yes	Yes
<b>FINLAND</b>	Non-Discrimination Act	S. 8	Yes	Yes
<b>FRANCE</b>	Law no 2008-496 of 27 May 2008 relating to the adaptation of National Law to Community Law in matters of discrimination	Art. 1	Yes	Yes
<b>FORMER YUGOSLAV REPUBLIC of MACEDONIA</b> <sup>45</sup>	Law on Prevention and Protection Against Discrimination	Art. 7 (1)	Yes	Yes
44 The Labour Act also prohibits harassment, without defining it, but only applies in the field of employment.				
45 Also in Labour Law Art. 9(3); and Law on Protection against Harassment in the Workplace Art. 5 (only applicable to harassment in employment; definition not equivalent to that of the directives).				

200 Employment Appeal Tribunal, *Sheffield City Council v Norouzi* [2011] EqLR 1039, [2011] IRLR 897.

	Law	Article	Defined	Definition equivalent to directives
GERMANY	General Act on Equal Treatment	Sec. 3.3	Yes	Yes
GREECE	Equal Treatment Law 4443/2016	Art. 2(2)(c)	Yes	Yes
HUNGARY	Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities	Arts 7, para. 1 and 10, para. 1	Yes	Yes
ICELAND	<sup>46</sup>	-	-	-
IRELAND	Employment Equality Act	Art. 14A	Yes	Yes
	Equal Status Act	Art. 11	Yes	Yes
ITALY	Legislative Decree No 215/2003 Implementing Directive 2000/43/EC	Art. 2 (3)	Yes	Yes
	Legislative Decree No 216/2003 on the Implementation of Directive 2000/78/EC	Art. 2(3)	Yes	Yes
LATVIA	Labour Law	Art. 29(7)	Yes	Yes
	Law on Prohibition of Discrimination of Natural Persons – Economic Operators	Art. 4(6)	Yes	Yes
	Consumer Rights Protection Law	Art. 3. <sup>1</sup> (8)	Yes	Yes
	Law on Social Security	Art. 2. <sup>1</sup> (5)	Yes	Yes
	Law on the Support of Unemployed and Job Seekers	2. <sup>1</sup> (6)	Yes	Yes
LIECHTENSTEIN	Act on Equality of People with Disabilities	Art. 8	Yes	Yes
LITHUANIA	Law on Equal Treatment	Arts 2(1) and (5)	Yes	Yes
LUXEMBOURG	Law of 28 November 2006	Arts 1(3) and 18	Yes	Yes
MALTA	Equal Treatment in Employment Regulations	Art. 3(3)	Yes	Yes
	Equal Treatment of Persons Order	Art. 2(2)(c) and 4	Yes	Yes
	Equal Opportunities (Persons with Disabilities) Act	Art. 5(2)	Yes	Yes
MONTENEGRO <sup>47</sup>	Law on the Prohibition of Discrimination	Art. 7	Yes	Yes
	Law on Prohibition of Harassment at Work	Art. 4	Yes	Yes
NETHERLANDS	General Equal Treatment Act	Art. 1.a	Yes	Yes
	Disability Discrimination Act	Art. 1.a	Yes	Yes
	Age Discrimination Act	Art. 2	Yes	Yes
NORWAY	Anti-discrimination Act on Prohibition of Discrimination based on Ethnicity, religion, etc.	S. 9	Yes	Yes
	Working Environment Act	S.13-1(2)	Yes	Yes
	Anti-discrimination and Accessibility Act on Prohibition against Discrimination on the Basis of Disability	S. 8	Yes	Yes
	Sexual Orientation Anti-Discrimination Act	S. 8	Yes	Yes
POLAND <sup>48</sup>	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment	Art. 3	Yes	Yes

46 Harassment is only defined and prohibited in gender equality law.  
47 The Labour Code also prohibits harassment, only in the employment field.  
48 The Labour Code also prohibits harassment, only in the employment field.



	Law	Article	Defined	Definition equivalent to directives
PORTUGAL	Labour Code	Art. 29(1)(2)	Yes	Yes
	Law 18/2004 transposing the Racial Equality Directive	Art. 3(4)	Yes	Yes
	Law 3/2011 on the non-discrimination principle in self-employment	Art. 5(5)-(6)	Yes	Yes
ROMANIA	Ordinance (GO) 137/2000 regarding the prevention and the punishment of all forms of discrimination (Anti-discrimination Law)	Art. 2(5)	Yes	No <sup>49</sup>
SERBIA	Labour Law	Art, 21, para. 2	Yes	Yes
	The Law on the Prohibition of Discrimination	Art.12	No	N/A
SLOVAKIA	Anti-discrimination Act	S. 2a(4) and 2(1)	Yes	No <sup>50</sup>
SLOVENIA	Protection against Discrimination Act	Arts 8(1), 7, and 4(2)	Yes	Yes
	Employment Relationship Act	Art. 7	Yes	Yes
SPAIN	Law on Fiscal, Administrative and Social Measures	Art. 28.1.d	Yes	Yes <sup>51</sup>
	General Law on the Rights of Persons with Disabilities and their Social Inclusion	Art. 2.f	Yes	Yes
	RLD2/2015 of Workers' Statute	Art. 4.2.e	Yes	Yes <sup>52</sup>
SWEDEN	Discrimination Act	Ch. 1 S. 4 pt. 4	Yes	No <sup>53</sup>
TURKEY	Law on the Human Rights and Equality Institution of Turkey (no. 6701)	4(1)(g)	Yes	No
UNITED KINGDOM	(GB) Equality Act	S. 26	Yes	Yes
	(NI) Race Relations Order	Art. 3	Yes	Yes
	(NI) Fair Employment and Treatment Order	Art. 3A	Yes	Yes
	(NI) Employment Equality (Sexual Orientation) Regulations 2006	Reg. 5	Yes	Yes
	(NI) Disability Discrimination Act	S. 3B	Yes	Yes
	(NI) Employment Equality (Age) Regulations	Reg. 6	Yes	Yes

49 For further details, please see above, section 2.1.3.

50 Judicial interpretation is necessary as it can be argued that the definition of harassment contained in the Anti-discrimination Act is narrower than that contained in the directives, as it must take place 'on [the prohibited] grounds', as compared to the directives where it is sufficient for it to be 'related to' any of the grounds.

51 The words 'hostile' and 'degrading' are not included in the Spanish definition.

52 The words 'hostile' and 'degrading' are not included in the Spanish definition.

53 Judicial interpretation may be required as the definition does not explicitly cover conduct with the purpose (but without the effect) of violating a person's dignity. However, the preparatory works of the Discrimination Act stipulate that the effect of the conduct shall be assessed subjectively from the perspective of the victim, which could indicate that an intent or purpose of violating a person's dignity would in practice always have that effect, therefore falling within the scope of the definition of harassment under Swedish law.

#### 2.1.4 Instructions to discriminate

Article 2(4) of the Racial Equality Directive and of the Employment Equality Directive stipulates that 'an instruction to discriminate (...) shall be deemed to be discrimination'.<sup>201</sup> A similar provision has been included in the national legislation of the great majority of countries, with a small number of exceptions (e.g. **Iceland**). In **Liechtenstein**, only instructions to discriminate on the ground of disability are prohibited.

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

The lack of a definition of instructions to discriminate in the directives leads to some discrepancies among the countries. For example, under **Bulgarian** law, only an intentional instruction to discriminate is regarded as discrimination. In a few countries, a hierarchical relationship between the instructor and the instructed person is required. In **Norway**, a relationship of subordination, obedience or dependency between the instructor and the person receiving instructions must exist, while in **Denmark** the relationship between them must be of a hierarchical nature. Similarly, in **Sweden**, the definition of instructions to discriminate requires that the person receiving the instruction either is in a subordinate or dependent position relative to the instructor or has committed her/himself to performing an assignment for that person. In **Finland**, instructions, guidelines or orders that relate to or create discrimination only constitute discrimination if the one giving the instructions, guidelines or orders has a power to impose these as obligations.<sup>202</sup>

National law varies greatly among the countries regarding the scope of liability for instructions to discriminate. In some countries, only the instructor (and not the instructed discriminator) can be held liable for instructions to discriminate. These include **Estonia, Greece, Liechtenstein, Lithuania**, and the **Netherlands**. However, in a large majority of the countries, both the instructor and the discriminator can be held liable, including **Austria, Belgium, Bulgaria, Croatia, Cyprus**, the **Czech Republic, Finland, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, Montenegro, Norway, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain**, and the **United Kingdom**. In **Denmark**, either the instructor or the discriminator can be held liable, but not both. In **Turkey**, it is only the discriminator who can be held liable, as instructions to discriminate are not explicitly prohibited as a separate form of discrimination. In **Sweden**, there are situations in the employment field where no one can be held liable due to the limited vicarious liability of employers, which only applies to employees in managerial positions.<sup>203</sup>

**Table 6: Prohibition of instructions to discriminate in national law (in the case of decentralised states only federal law is indicated)**

	Law	Article	Defined
AUSTRIA	Federal Equal Treatment Act	§13	Yes
	Equal Treatment Act	§ 17/1, 18, 31/1	Yes
	Act on the Employment of People with Disabilities	§ 7b/1	Yes
	Federal Disability Equality Act	§ 4/1	Yes
BELGIUM	Racial Equality Federal Act	Art. 12	Yes
	General Federal Anti-discrimination Act	Art. 14	Yes
BULGARIA	Protection Against Discrimination Act	Art. 5	No
CROATIA	Anti-discrimination Act <sup>54</sup>	Art. 4(1)	No
CYPRUS	Law on Equal Treatment in Employment and occupation 58(I)/2004	Art. 6(1)(d)	No
	Law on Equal Treatment (Race or Ethnic origin) N. 59(I)/2004	Art. 5(2)(d)	No
	Law amending the Law on Persons with Disability N. 57(I)/2004	Art. 2	No
CZECH REPUBLIC	Anti-discrimination Act	Section 2(2)	Yes
DENMARK	Act on Prohibition of Discrimination in the Labour Market etc.	S.1(5)	Yes
	Act on Ethnic Equal Treatment	S. 3(5)	Yes
54 The law prohibits 'encouragement' to discriminate, which should cover both instructions and incitement, but case law confirming this is still lacking.			

202 Finland, *Government Proposal on the Non-Discrimination Act 19/2014*, p. 69, available at: <http://www.finlex.fi/fi/esitykset/he/2014/20140019>.

203 Sweden, *Discrimination Act*, Chapter 2, Section 1.

	Law	Article	Defined
ESTONIA	Equal Treatment Act	Art. 3(5)	No
FINLAND	Non-Discrimination Act	S. 8	No
FRANCE	Law no 2008-496 of 27 May 2008 relating to the adaptation of National Law to Community Law in matters of discrimination	Art. 1	Yes
FORMER YUGOSLAV REPUBLIC of MACEDONIA	Law on Prevention and Protection Against Discrimination	Art. 9	Yes
GERMANY	General Act on Equal Treatment	Sec. 3.5	Yes
GREECE	Equal Treatment Law 4443/2016	Art. 2(2)(d)	Yes
HUNGARY	Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities	Art. 7(1)	No
ICELAND	<sup>-55</sup>	-	-
IRELAND	Employment Equality Acts 1998-2015	S.2(1), 8, 14 and 15	No
	Equal Status Acts 2000-2015	S. 13 and 42	No
ITALY	Legislative Decree No 215/2003 Implementing Directive 2000/43/EC	Art. 2(4)	No
	Legislative Decree No 216/2003 on the Implementation of Directive 2000/78/EC	Art. 2(4)	No
LATVIA	Labour Law	Art. 29(4)	No
	Law on Prohibition of Discrimination against Natural Persons -Economic Operators	Art. 2. <sup>1</sup> (5)	No
	Consumer Rights Protection Law	Art. 3. <sup>1</sup> (7)	No
	Law on Social Security	Art. 2. <sup>1</sup> (2)	No
LIECHTENSTEIN	Act on Equality of People with Disabilities	Art. 9	Yes
LITHUANIA	Law on Equal Treatment	Arts 2 (1) and (8)	No
LUXEMBOURG	Law of 28 November 2006	Arts 1 and 18	Yes
MALTA <sup>56</sup>	Equal Treatment in Employment Regulations	Art. 3(4)	Yes
	Equal Treatment of Persons Order	Art. 2(2)(c) and 4	Yes
MONTENEGRO	<sup>-57</sup>	-	-
NETHERLANDS	General Equal Treatment Act	Arts 1.a and b	No
	Disability Discrimination Act	Art. 1.a	No
	Age Discrimination Act	Art. 1.a	No
NORWAY	Anti-discrimination Act on Prohibition of Discrimination based on Ethnicity, religion, etc.	S. 11	Yes
	Working Environment Act	S.13-1(2)	Yes
	Anti-discrimination and Accessibility Act on Prohibition against Discrimination on the basis of Disability	S.10	Yes
	Sexual Orientation Anti-Discrimination Act	S. 10	Yes
POLAND <sup>58</sup>	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment	Arts 3 and 9	Yes
<p>55 Protection against instructions to discriminate is only included in gender equality law.</p> <p>56 Instructions to discriminate are also prohibited in the Constitution of Malta (Art. 45), Civil Code (Art.1044) and Criminal Code (Art.42).</p> <p>57 The Criminal Code Art. 370, para 1 prohibits instructions to discriminate but does not provide a definition. The Law on the Prohibition of Discrimination does not prohibit instructions to discriminate but does, in Article 2, para 5, provide a definition.</p> <p>58 The Labour Code also prohibits instructions to discriminate, only in the employment field.</p>			

	Law	Article	Defined
PORTUGAL	Law 18/2004 transposing the Racial Equality Directive	Art. 3(5)	No
	Law 46/2006 which prohibits and punishes discrimination based on disability and on a pre-existing risk to health	5(1)	No
	Labour Code	Art. 23(2)	No
	Law 3/2011 on the non-discrimination principle in self-employment	Art. 5(3)	No
ROMANIA	Ordinance (GO) 137/2000 regarding the prevention and the punishment of all forms of discrimination (Anti-discrimination Law) <sup>59</sup>	Art. 2(2)	No
SERBIA	The Law on the Prohibition of Discrimination	Arts 10 and 13 para. 1	No
SLOVAKIA	Anti-discrimination Act	S. 2a(6) and 2(1)	Yes
SLOVENIA	Protection against Discrimination Act	Arts 9, 7, indent 2 and 4(2)	Yes
	Employment Relationship Act	Art. 6(3)	Yes
SPAIN	Law on Fiscal, Administrative and Social Measures	Art. 28.2	No
SWEDEN	Discrimination Act	Ch. 1 S. 4 pt. 6	Yes
TURKEY	Law on the Human Rights and Equality Institution of Turkey (no. 6701)	Art. 4(1)(b)	Yes <sup>60</sup>
UNITED KINGDOM	(GB) Equality Act	S. 111	No
	(NI) Race Relations Order	Art. 30	No
	(NI) Fair Employment and Treatment Order	Art. 35	No
	(NI) Disability Discrimination Act	S. 16C/28UB	No
	(NI) Employment Equality (Sexual Orientation) Regulations <sup>61</sup>	-	No
	(NI) Employment Equality (Age) Regulations	Reg. 5	No
59 The NCCD interprets the prohibition of the order to discriminate from Art. 2.2 of GO 137/2000 as prohibition of instruction to discriminate.			
60 While the wording of the definition seems to be in line with the directives, sexual orientation is not listed as a protected ground.			
61 Judicial interpretation required.			

## 2.2 Scope of discrimination

### 2.2.1 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>204</sup> Even so, some countries have included nationality in their list of protected grounds (see table in section 3.3 below).

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 many countries both natural and legal

<sup>204</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.

persons are protected against discrimination. Where the law does not expressly distinguish between the two, this is sometimes assumed. This was the case in **Greece** until the entry into force of the new Equal Treatment Law 4443/2016, which clearly covers legal persons for the purpose of protection against discrimination.<sup>205</sup> Legal persons remain categorically unprotected in **Danish** and **Swedish** law,<sup>206</sup> and in **Austria** the federal anti-discrimination legislation is silent on the issue and would require judicial interpretation to determine whether or not legal persons are protected. 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). Similarly, in the **Netherlands**, it is commonly held that legal persons are not protected against discrimination. However, the then Equal Treatment Commission has held in a number of opinions that a group of natural persons that is collectively subject to discrimination, such as a religious organisation or an association of professionals, may benefit from the protection against discrimination.<sup>207</sup> 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 as regards the protection against discrimination. In the **United Kingdom**, legal persons have traditionally not been protected against discrimination. In 2015 however, an Employment Appeal Tribunal held that a limited company can bring a claim for direct discrimination (in the relevant case, on the ground of age), and confirmed that the word 'person' in the Equality Act should be interpreted to include legal persons.<sup>208</sup>

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. The question of liability is particularly relevant in cases of discrimination in employment, as often the employer bears responsibility for the actions of his or her employees, for example, for discrimination against a client or for harassment by one employee against another. For instance, in **Ireland**,<sup>209</sup> the **Netherlands**<sup>210</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. In **Sweden**, a discriminator who is not the employer can only be held liable if he/she has the authority to represent the employer to the (other) employees. In **Montenegro**, the employer is liable for damage caused to an employee by a senior member of staff, employee or group of employees. In **Spain**, however, 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.

#### Uncertain jurisprudence of the Bulgarian Supreme Administrative Court regarding liability of legal persons

The Bulgarian Protection Against Discrimination Act does not distinguish between natural and legal persons with regards to the issue of liability for discrimination, but provides that the ban on discrimination is expressly applicable *erga omnes*.<sup>211</sup> Consistent case law recognised this until 2014, when the Supreme Administrative Court held in two separate decisions that a perpetrator of discrimination can only be a natural person. Acting as final instance of judicial review of the decisions of the national equality body (the Protection Against Discrimination Commission), the court held in

205 Greece, Equal Treatment Law 4443/2016, Articles 8(3) and (4).

206 In Sweden, the Discrimination Inquiry Commission has proposed protection for legal persons in several areas (but not all) covered by non-discrimination legislation. However, this proposal has not been finally accepted.

207 See for instance Equal Treatment Commission Opinions Nos 1996-110, 1998-31 and 1998-45.

208 Employment Appeal Tribunal *EAD Solicitors LLP and others v Abrams* UKEAT/0054/15/DM, 5 June 2015 [http://www.bailii.org/uk/cases/UKEAT/2015/0054\\_15\\_0506.html](http://www.bailii.org/uk/cases/UKEAT/2015/0054_15_0506.html) accessed 7 June 2016.

209 Ireland, Employment Equality Acts 1998-2015. Section 8(1) 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 publishes or displays discriminatory advertising.

210 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.

211 Bulgaria, Protection Against Discrimination Act, Article 6 (1).

these decisions that a legal person can only exceptionally be found to have committed discrimination, in cases where it is expressly provided for by law.<sup>212</sup> According to these decisions, a public authority could not in itself be a perpetrator, but only an individual exercising an authority's competence.

This interpretation was directly contrary to the express provisions of the law and to the long-standing jurisprudence of the same court, and additional rulings in 2016 have gone back to finding public authorities liable for discrimination.<sup>213</sup> It remains unclear however which line of the court's jurisprudence will prevail, causing legal uncertainty.

It is less common to make employers liable for the actions of third parties, such as tenants, clients or customers who discriminate against their employees. In **Portugal**, for instance, employers and providers of services can only be held liable for actions of third parties where a special duty of care is imposed by law or where a special relationship can be established, for example subcontractors.<sup>214</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>215</sup> Under **Croatian** anti-discrimination law, the employer is in general liable for the damages suffered by their employees at work or in connection with work, but it is still uncertain how this provision would be applied in cases of discriminatory actions by third parties against employees.<sup>216</sup> In the **Former Yugoslav Republic of Macedonia**, liability for third-party conduct would depend upon the character of the relationship and future court practice regarding this matter. **Turkish** criminal law does not allow employers to be held liable for employees or third persons, whereas civil law only covers liability for employees. In **Romania**, according to the case law of the national equality body, employers can be held liable for actions of their employees if there is joint responsibility, but not for actions of third parties. The national equality body has used personal liability in determining the degree of responsibility of each party.

Trade unions and other trade or professional organisations are usually not liable for the discriminatory actions of their members. In **Denmark**, however, trade unions are liable if an employee of the trade union discriminates against one of its members, although this liability is restricted to the actions of employees only. In **Norway**, trade unions can be held liable for the actions of their members only if the members operate on behalf of the organisation or if key members give instructions.

### 2.2.2 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.

212 Bulgaria, Supreme Administrative Court, Decision No 5645 in case No 15991/2013 and Decision No 15637 in case No 1925/2014.

213 Bulgaria, Supreme Administrative Court, Decisions No. 17 in case No. 1076/2015; No. 9030 in case No. 4992/2015; No. 4992 in case No. 11652/2015; and No. 5748 in case No. 5495/2015.

214 Portugal, Labour Code, Article 551(3).

215 Netherlands, 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.

216 Croatia, Labour Act, Article 111.

Table 7: 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, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, the Former Yugoslav Republic of Macedonia, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden** and the **United Kingdom**.

The material scope is not fully covered in **Iceland, Liechtenstein, Serbia** and **Turkey**. In addition, in **Latvia**, national law does not clearly cover vocational training outside the employment relationship, on any of the five grounds. In **Lithuania**, it remains doubtful whether the Racial Equality Directive has been implemented correctly in certain fields of application, such as social protection and social advantages. In **Belgium**, the division of responsibilities between the different levels of government still causes discrepancies regarding the implementation of the material scope of the directives.<sup>217</sup>

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 **Hungary**, not all private entities 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 list the fields falling under its scope, but instead lists the public and private entities that 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 entities 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.

In several countries, the material scope of anti-discrimination law goes beyond the requirements of the directives (for a list of examples, see the textbox in section 2.2.2.6 below).

<sup>217</sup> For instance, discrepancies still persist as regards social advantages and access to goods and services in general, which are regional responsibilities.

### 2.2.2.1 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, for all five grounds covered by both directives. A number of countries fall short of this protection, for instance **Liechtenstein**, where only discrimination on the ground of disability is prohibited in the field of employment.

Self-employment and/or occupation are not fully covered in **Greece**,<sup>218</sup> **Lithuania**,<sup>219</sup> **Montenegro** and the **United Kingdom**. The **French** anti-discrimination legislation does not cover certain specific professions in the public sphere such as Parliament officials and magistrates of the court, and the specific legislation regulating these professions contains no comparable anti-discrimination provisions.<sup>220</sup> In the **Netherlands**, the term ‘liberal profession’ has been used instead of self-employment but has at all times been interpreted broadly, in particular by the Equal Treatment Commission, in order to guarantee that not only doctors, architects etc. are covered, but also freelancers, sole traders, entrepreneurs and so on.

In **Germany**, the General Act on Equal Treatment covers employment and working conditions, including pay and dismissals.<sup>221</sup> As regards dismissals however, this act stipulates that only the existing general and particular regulations for dismissal are to be applied. The most important act in this regard is the Law on Protection against Dismissal,<sup>222</sup> which does not contain any prohibition of discrimination. Nevertheless, the Federal Labour Court has held that the General Act on Equal Treatment does apply to situations where no special rules of dismissal are applicable, for instance during a probation period.<sup>223</sup>

#### **CJEU ruling on the employee status of persons with disabilities employed in occupational centres**

The claimant attended a work-based occupational care centre for people with disabilities. He benefited from five weeks of paid holidays each year and when he resigned he requested to be paid, as any salaried employee would, holidays that he had not taken. The centre refused to pay.

In French law, disabled persons attending these centres are not considered as employees and many provisions of the Labour Code do not apply to their occupation. The claimant raised before the court that the minimal holidays claimed were mandatory in application of Directive 2003/88 relating to certain aspects of working time. The claimant’s case was dismissed and he brought it before the Supreme Court, which referred a question to the CJEU for preliminary ruling.

The CJEU found that Directive 2003/88 applied to persons attending such centres as regards its provisions relating to working time, regardless of their worker status in national law. In order to define whether a disabled person with such an occupation is a worker according to EU law, the national judge must take into consideration objective parameters and all circumstances of the context of the work executed and the relation between the parties. Even if the work executed in these centres and its conditions of execution are meant to accommodate a person’s disability, it has an economic value, is a paid activity, provides a person with social security and pursues the production of value. The fact that it is not subject to minimum wage and is in fact paid much less is not relevant.

The CJEU decision did not discuss whether not recognising persons attending such occupational centres as workers was discriminatory. In practice this decision reaches beyond labour law however, since it extends the purview of the protection against discrimination on the ground of disability in employment to disabled persons performing an activity in such occupational centres. Therefore, maintaining their

218 Self-employment is not explicitly included in the scope of the Equal Treatment Law 4443/2016 under Article 3, but the provision can be interpreted in a way that it includes self-employment.

219 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.

220 France, Law No. 83-634 of 13 July 1983 on the rights and obligations of civil servants, Article 3.

221 Germany, General Act on Equal Treatment, Section 2.1.2.

222 Germany, Law on Protection against Dismissal of 25 August 1969 (BGBl. I, 1317). Last amended on 20.04.2013 (BGBl. I, 868).

223 Federal Labour Court, 6 AZR 190/12, 19 December 2013, Para. 22.



present status and working conditions would be in many respects discriminatory on the ground of disability.<sup>224</sup>

Military service is not included in the scope of legislation transposing the directives in **Latvia**, while in the **Czech Republic**, the Law on service by members of the security forces and the Law on career soldiers contain a special anti-discrimination provision, which does not list disability among the protected grounds. Similarly, in **Malta**, the provisions of Legal Notice 461 of 2004 do not apply to the armed forces in so far as discriminatory treatment on the grounds of disability and age is concerned.

The extent to which volunteer work falls within the scope of employment is left open by the directives. The approach at national level in this regard varies among the countries. For instance, in **Ireland** the Equality Tribunal (now the Workplace Relations Commission) has held in one case that volunteer workers are protected by the Employment Equality Act.<sup>225</sup> In this specific case, the claimants were paid an amount for their work in addition to expenses, and tax was deducted. They carried out their work in discharging their duties with materials and supervision provided by the respondent, and there was an obligation to carry out those duties in person, with no option to send a self-selected replacement in case of illness or other unavailability. Unpaid volunteers are however not covered by the Acts.<sup>226</sup> In **Denmark**, the Board of Equal Treatment has held that an unpaid volunteer worker could not bring an action under the Act on the Prohibition of Discrimination in the Labour Market etc., as his tasks could not be considered as paid employment.<sup>227</sup>

#### 2.2.2.2 Social protection

Some concerns remain with regard to the transposition of the Racial Equality Directive in the area of social protection. In **Belgium**, some legislation at the regional level would need to be amended so as to include social protection in the material scope of the prohibition of discrimination.<sup>228</sup> 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. The Ombudsman has given a divergent reading of the issue, concluding that social security and social protection do not fall under the scope of the Equal Treatment Act, whereas healthcare does, since the wording of the act regarding goods and services is broad enough to include healthcare services.<sup>229</sup> In **Ireland**, the Equal Status Acts 2000-2015 do not explicitly refer to 'social protection' or 'healthcare', but do cover access to goods and services, defining the latter as a 'service or facility of any nature which is available to the public generally or a section of the public.'<sup>230</sup> However, the Equality Tribunal (now the Workplace Relations Commission) has interpreted the definition of 'service' to include social protection from the outset.<sup>231</sup> There are no specific provisions referring to social protection on the protected grounds of the directives in **Liechtenstein**. In **Iceland**, the only relevant provision can be found in Article 1 of the Act on the Rights

224 CJEU, No C-316/13, 26 March 2015, available at: <http://curia.europa.eu/juris/celex.jsf?celex=62013CJ0316&lang1=fr&type=TEXT&ancre> (accessed 6 September 2016).

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

226 Ireland, High Court, *An Garda Síochána v Oberoi*, 30 May 2013, IEHC 267, available at: <http://www.courts.ie/Judgments.nsf/0/53FE83D658C8C00480257B9600322FCD>.

227 Board of Equal Treatment, Decision No. 111/2015.

228 The Equal Treatment Ordinance of the Region of Brussels-Capital does not include social protection in its material scope, nor does the Decree on equal treatment between persons in vocational training (*Commission communautaire française [Cocof]*).

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

230 Ireland, Equal Status Acts 2000-2015, Section 2(1).

231 Ireland, Equality Tribunal, *Donovan v Donnellan* DEC-S2001-011, 17.10.2001, available at: <http://www.equalitytribunal.ie/en/Cases/2001/October/DEC-S2001-011.html>; Applied in e.g. *McQuaid v Department of Social Protection*, DEC-S2014-015, 02.10.2014, available at: <https://www.workplacelrelations.ie/en/Cases/2014/October/DEC-S2014-015.html>.

of Patients, which prohibits discrimination between patients in the area of healthcare on the grounds of sex, religion, opinion, ethnic origin, race, colour, property, family origins or other status.<sup>232</sup> In **Turkey**, discrimination in the area of social protection is now clearly prohibited with regard to four of the relevant protected grounds, excluding sexual orientation as a protected ground.

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 sought to rely on Article 3(3) of the Employment Equality Directive in their anti-discrimination legislation, e.g. **Cyprus**, **Greece** and **Italy**. However, in **Cyprus** the mandate of the equality body covers discrimination in the field of social protection for all the grounds of the two directives.<sup>233</sup> In **Italy**, the decree transposing Directive 2000/78/EC applies only to employment and occupation, although the Immigration Decree 1998 also protects against discrimination on the grounds of religion and nationality in this area, and disability is in principle also covered by Act 67/2006.

### 2.2.2.3 Social advantages

Protection against discrimination in social advantages is not provided as required by the Racial Equality Directive in **Iceland**, **Ireland**, **Liechtenstein** and **Serbia**. The **Lithuanian** Law on Equal Treatment does not explicitly state that social benefits fall under the scope of the law, which causes inconsistencies and problems in the practical application of the law. None of the relevant legislation in the **United Kingdom** makes explicit reference to social advantages, although much of what might fall under 'social advantages' would be covered by the general scope of the legislation. In **Belgium**, although federal legislation does prohibit discrimination in this field, full implementation of the Racial Equality Directive would still require some amendments of legislation at the regional level.<sup>234</sup>

The term 'social advantages' is mostly left undefined in national legislation. An exception is the **Netherlands**, where the Explanatory Memorandum to the General Equal Treatment Act indicates 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>235</sup> In the Dutch Government's view, the notion of social advantages refers to advantages of an economic and cultural nature, which may be granted by both private and public entities. These may include student grants and price concessions for public transport and cultural or other events. Advantages offered by private entities include, for example, concessionary prices for the cinema and theatre.

### 2.2.2.4 Education

Among the analysed countries it is only **Iceland**, where national legislation does not prohibit discrimination in the field of education, as formulated in the Racial Equality Directive. Rather, many countries go beyond the requirements of the Racial Equality Directive in the area of education and extend protection against discrimination to all five grounds analysed in this report. For example, in **France**, protection against discrimination in the area of education extends to all grounds covered by French law, including the

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232 Iceland, Act on the Rights of Patients No. 74/1997, 28 May 1997.

233 Cyprus, The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law No 42(I)/2004, Article 6(2)(e). Available at [www.cylaw.org/nomoi/enop/non-ind/2004\\_1\\_42/full.html](http://www.cylaw.org/nomoi/enop/non-ind/2004_1_42/full.html).

234 The Equal Treatment Ordinance of the Region of Brussels-Capital does not include social advantages in its material scope, nor does the Decree on equal treatment between persons in vocational training (*Commission communautaire française [Cocof]*).

235 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.

grounds covered by the Employment Equality Directive. Similar legal frameworks exist in **Finland, Spain, Slovenia** and **Slovakia**, for example.

Nevertheless, establishing an inclusive mainstream education system remains a challenge for many countries, especially when it comes to the situation of children with disabilities and Roma children.

### *Children and pupils with disabilities*

The situation of children with disabilities and their integration into mainstream education as opposed to segregated 'special' schools or classes for children with special educational needs (SEN) is an issue that arises in many countries. The **German** Federal Constitutional Court in the relevant leading case held that a general ban on integrated schooling was unconstitutional. The decision to place a child in a special school for people with disabilities against the will of the parents constituted a breach of the Basic Law, if it was possible for the child to attend an ordinary school without special pedagogical help, if his or her special needs could be fulfilled using existing means, and other interests worthy of protection, especially of third parties, did not weigh against integrated schooling.<sup>236</sup> As a rule, although many countries declare that SEN should be included in mainstream education, implementation of this requirement is often lacking in practice, including in **Bulgaria** and **Croatia**. In **France**, despite a number of measures aimed at providing adequate support for the satisfactory integration of children with SEN, in particular autistic children, it was estimated in 2014 that 20 000 children did not have an adequate solution due to the lack of available facilities.<sup>237</sup> The **Lithuanian** Ombudsman for Children's Rights initiated an investigation in 2016 into the situation of children and pupils with disabilities in education across the country. The results were presented in a report and show issues of concern both of a general nature on the level of municipal coordination of policies related to persons with disabilities as well as more specific problems related to a lack of specialist assistance or of physical accessibility of schools.<sup>238</sup> In the **Czech Republic**, amendments were adopted in 2015 to reform the Schools Act with the aim of ensuring inclusive education for children with special needs. The amendments entered into force as of September 2016, although in practice pupils with disabilities still face difficulties in accessing mainstream schools and some schools raise the criticism of there being insufficient support from the ministry.

### **Slovakian Supreme Court recognises the right to inclusive education and reasonable accommodation of children with disabilities**

In 2015, the Supreme Court decided an important case regarding the right to inclusive education of children with disabilities.<sup>239</sup> The claimant was a child with an intellectual disability and a hearing impairment who was refused enrolment at a mainstream primary school. The local government district upheld the refusal of enrolment<sup>240</sup> on the claimant's appeal. The claimant then initiated a judicial review of both decisions before the Regional Court in Bratislava, but her lawsuit was dismissed in the first instance.<sup>241</sup> She appealed the decision to the Supreme Court.

Before the Supreme Court, the defendant (the local government district that had upheld the decision of the school director) argued that the school did not have adequate staff and technical conditions for a child with special educational needs, and that the child should be enrolled in a 'special school' if its conditions suited the child's needs better.

The Supreme Court quashed the contested decisions and ordered the local government district to continue conducting proceedings in the case. It applied the CRPD and noted that, according to the Slovak Constitution, the CRPD is a part of the Slovak legal order and takes precedence over the national

236 See Federal Constitutional Court, BVerfG 96, 288.

237 [http://social-sante.gouv.fr/IMG/pdf/annexes\\_au\\_rapport\\_zero\\_sans\\_solution\\_.pdf](http://social-sante.gouv.fr/IMG/pdf/annexes_au_rapport_zero_sans_solution_.pdf).

238 Ombudsman for Children's Rights (2016), *The report of Institution of the Ombudsman for Children's Rights, 2016-03-Nr. (6.7.-2014-16)PR*, available in Lithuanian at: <http://www3.lrs.lt/docs2/DFFLQRXU.PDF>.

239 Judgment of the Supreme Court of the Slovak Republic, No. 7Sžo/83/2014, 24 September 2015.

240 Decision of the District Bratislava Rača – Local Office (*Mestská časť Bratislava Rača – Miestny úrad*) No. ŠÚ/VARG/9998/1621/2013 of 8 July 2013.

241 Decision of the Regional Court in Bratislava (*Krajský súd v Bratislave*) No. 1S/208/2013-76 of 3 July 2014.

legislation, and hence it was the duty of the school director and the local government district to interpret the provisions of the Schools Act in accordance with it. The court refuted the defendant's argument regarding the inability of a mainstream school to provide special conditions for a child with special educational needs, mainly because the defendant had not provided any evidence that the school director was actively trying to create special conditions for the claimant.

The court also held that the school had a duty to provide reasonable accommodation and noted that neither the school director, nor the local government district, nor the regional court had specified in what way the burden of providing such accommodation would have been disproportionate or excessive. The court noted that a refusal to provide reasonable accommodation is a form of prohibited discrimination on the ground of disability. The court finally emphasised that the best interest of the child must be the primary perspective, and that in this case inclusive education, accompanied by reasonable accommodation, was in the claimant's best interest.

### *Children and pupils of Roma origin*

Issues also arise in relation to discrimination of children from racial and ethnic minorities in education. Of particular concern is the segregation of Roma children, which constitutes one of the most widespread manifestations of discrimination against the Roma.<sup>242</sup> This issue seems to have constituted one of the European Commission's priorities these past years, as infringement proceedings have been launched against several countries for failure to correctly transpose and/or implement the Racial Equality Directive in this regard.<sup>243</sup> There are Roma in all the countries covered with the apparent exception of **Iceland, Liechtenstein and Malta**.

School segregation of Roma can take different forms which can be loosely divided into three groups: attendance by disproportionate numbers of Roma children in 'special' schools for children with intellectual disabilities; segregated classes or sections for Roma pupils within 'mixed' schools; and the prevalence of 'ghetto-schools'. In general, one or several of these forms of segregation can be found in many European countries, including **Bulgaria, Croatia, Cyprus, the Czech Republic, the Former Yugoslav Republic of Macedonia, Greece, Hungary, Poland, Romania, Serbia and Slovakia**.

First, 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, in **Belgium, Bulgaria, the Czech Republic, Hungary, Poland, Romania, Slovakia and Slovenia**.<sup>244</sup> In January 2013, the ECtHR found discrimination in **Hungary** due to the lack of safeguards accompanying the placement of Roma children as members of a disadvantaged group in remedial schools for children with 'mild mental disabilities'.<sup>245</sup> The operation of the Hungarian education expert panels was again the subject matter of a more recent domestic case in which the court found that the Heves County Pedagogical Service tests Roma pupils' school suitability using diagnostic methods that are not culture-neutral.<sup>246</sup> In the **Czech Republic**, the Schools Act was amended in 2015 not only to ensure inclusive education for pupils with disabilities but also to eradicate school segregation of Roma children. The effective implementation of the reform will depend on the allocation of sufficient (human) resources and awareness raising activities targeting schools as well as special pedagogical centres. In **Lithuania**, the Ombudsman for Children's Rights investigated in

242 A thematic report written in 2014 by Lilla Farkas, ground-coordinator for race and ethnic origin for the European network of legal experts in the non-discrimination field, entitled *Report on discrimination of Roma children in education*, provides a more detailed analysis and state of the art of this issue. It constitutes an update to a previous report by the same author published in 2007, entitled *Segregation of Roma children in education, addressing structural discrimination through the Racial Equality Directive*. The report is available at <http://www.equalitylaw.eu/downloads/1338-discrimination-of-roma-children-in-education-en-final>.

243 Proceedings have been brought against the Czech Republic (2014), Slovakia (2015) and, after the cut-off date of this report, Hungary (2016).

244 See thematic report by Lilla Farkas (2014), *Report on discrimination of Roma children in education*, European network of legal experts in the non-discrimination field.

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

246 Hungary, Eger Regional Court, 12.P.20.166/2014/92, 10 March 2016.

2014 the general situation of Roma children in education with the aim of discovering whether patterns of segregation, in particular in ‘special’ schools, could be discovered. Although the investigation pointed to some complex problems, it concluded that no systemic discrimination or segregation of Roma was taking place.<sup>247</sup> In **Serbia**, although the implementation of the Law on the Fundamentals of the Education System led to a decline in the proportion and overall number of Roma pupils in special education, many Roma pupils are still transferred from mainstream schools to special schools.<sup>248</sup> In **Poland**, the efforts of the Ombud in recent years seem to have yielded some results as the number of Roma pupils in special schools has been steadily decreasing: in 2014/2015, 6.9 % of all Roma pupils were attending special schools.<sup>249</sup>

Secondly, Roma segregation also occurs in some mainstream schools through the existence of segregated classes. This is the case in **Bulgaria, Croatia, the Czech Republic, Greece, Hungary, Romania, Slovakia**. In **Croatia**, the number of Roma-only classes has been increasing continuously since 2004, despite certain measures taken by the Government in recent years to tackle segregation. In **Slovakia**, ‘zero-grade’ classes have been established for children who are not expected to be able to absorb the standard curriculum as a result of their social and linguistic environment. Although formulated neutrally, these measures have in practice been aimed most specifically at Roma children, and Roma children are also their almost exclusive beneficiaries. On 30 June 2015, the Schools Act was amended,<sup>250</sup> introducing some changes with regard to the education of children and pupils coming from ‘socially disadvantaged environments’, and a section relating to the placement of pupils from ‘socially disadvantaged environments’ in ‘special schools’ was repealed as of 1 September 2015.<sup>251</sup> However, the new provision is to some extent a repetition of the previous measures and it still allows for the establishment of ‘specialised classes’ for the education of those pupils who are ‘not likely to successfully manage the content of education in the corresponding year’. Even though the amended act declares that children from socially disadvantaged backgrounds are to be placed into classes together with other children or pupils, this rule still does not apply to zero grade<sup>252</sup> and specialised classes.<sup>253</sup>

There are only a few instances where segregated classes have been challenged under national legal systems, for instance in **Bulgaria, Croatia, Denmark, Greece, Hungary, Romania** and **Slovakia**. In 2003, 57 **Croatian** citizens of Roma origin lodged a complaint before the ECtHR arguing that they had been segregated at primary school on the grounds of their racial or ethnic origin. The ECtHR found that there had been a difference in treatment based on ethnic origin and that such segregation, resulting from a lack of command of the Croatian language, had not been objectively justified, appropriate and necessary.<sup>254</sup>

#### Hungarian court finds ministry responsible for failure to desegregate school

In November 2010, the Supreme Court had established that the Pécsi street school in Kaposvár was ethnically segregated, and that its maintainer, the Municipal Council, had violated the requirement of equal treatment by failing to act against the spontaneously developed segregation by (for instance)

247 Decision of the Ombudsman of the Rights of the Child, 19 August 2014, No 6.1- 2013-329, available in Lithuanian at: <http://www3.lrs.lt/docs2/VAQQPBJE.PDF>

248 Written Comments by the European Roma Rights Centre and Praxis, For Consideration by the Committee on the Rights of the Child at the Concluding Observations of the 74th Session (16 January to 3 February 2017), ERRRC, Praxis, December 2016, p. 2.

249 Poland (2016), *Report for 2015 on the Programme for the Integration of the Roma Community in Poland 2014-2020*, May 2016, available at: <http://mniejszosci.narodowe.mswia.gov.pl/mne/romowie/program-integracji-spol/program-integracji-spol/9928,Sprawozdanie-z-realizacji-Programu-integracji-spolcznosci-romskiej-w-Polsce-na-.html>.

250 By Act No 188/2015.

251 By the Ordinance of the Ministry of Education, Science, Research and Sport of the Slovak Republic No 2013/2015 that changes the Ordinance of the Ministry of Education No 320/2008 on Primary School (*Vyhľadška Ministerstva školstva, vedy, výskumu a športu Slovenskej republiky č. 2013/2015 Z. z., ktorou sa mení vyhláška Ministerstva školstva Slovenskej republiky č. 320/2008 Z. z. o základnej škole v znení vyhlášky č. 224/2011 Z.z.*).

252 Zero grade classes can be established under Section 60(4) of the Schools Act.

253 Slovakia, Schools Act, 245/2008, Section 107(3).

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

re-determining the catchment areas of the local schools. Despite the court decision, the Municipal Council did not take any measures to put an end to the segregation. Consequently, the NGO Chance For Children Foundation (CFCF) initiated another lawsuit into the issue in late 2013. The claimant organisation extended the lawsuit to the Klebelsberg Centre for Management of Educational Institutions (KLIK) which has become the sole maintainer of all primary and secondary schools that were previously managed by municipalities and also the Ministry of Human Resources (as KLIK's supervisory body) requesting that the court not only establish the violation, but also order desegregation through the closing of the school.

In its first instance decision delivered on 11 November 2015, the Kaposvár Regional Court established the violation and declared that the ministry was responsible for the breach of the requirement of equal treatment, due to its failure to instruct the KLIK to put an end to the segregation. However, the court concluded that it was not in a position to order the implementation of the complex desegregation plan devised by the claimant organisation, which was based on the closing of the segregating school.<sup>255</sup>

This decision was partially overturned by the Pécs Appeals Court, which ordered the gradual step-by-step closure of the segregated school, with no further admissions to the school.<sup>256</sup>

Thirdly, in a large number of Member States, residence patterns also lead to a high concentration of Roma children (e.g. **Bulgaria, Cyprus, Hungary, Serbia and Slovakia**) or children from particular ethnic minorities (e.g. **France, the Netherlands, and the United Kingdom**<sup>257</sup>) in certain schools, resulting in so-called 'ghetto schools'. Notably, **France, Slovakia** and the **United Kingdom** have legislation expressly prohibiting segregation in schools between persons of different racial or ethnic groups but concerns have been expressed by various stakeholders about such *de facto* segregation arising from residence patterns. These schools follow the same curriculum but the quality of education and the physical condition of the buildings are often inferior. Some states are considering making attempts to try to remedy this form of *de facto* segregation. The European Court of Human Rights found that **Greece** is discriminating against Roma children due to the practice of segregation in a Roma-only 'ghetto' school, first in 2008<sup>258</sup> and then again – regarding the same school – in 2012.<sup>259</sup> In **Hungary**, the establishment of a new centralised state body for education has not resulted in strengthened action against segregation. A lawsuit from 2010 condemning one of the municipal councils for failing to take action to prevent segregation has recently been extended to the new education state body and the Ministry of Human Resources. The Regional Court responsible has established the violation once again.

In addition, in many states, including **Belgium, Croatia, Cyprus, Finland, Lithuania, Montenegro, Portugal, Turkey** and the **United Kingdom** school absenteeism and disproportionately high drop-out rates are serious issues among the Roma, Sinti and Traveller communities. In the **Former Yugoslav Republic of Macedonia**, only 1 in 10 Roma children completes primary education.<sup>260</sup> 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 %).<sup>261</sup> The fourth **Slovenian** Government report recognises that there is a significant gap between the education levels of Roma and the rest of the population.<sup>262</sup>

255 Kaposvár Regional Court, 11.P.21.553/2013/70, 11 November 2015, [http://cfcf.hu/sites/default/files/MX-M264N\\_20151116\\_142154.pdf](http://cfcf.hu/sites/default/files/MX-M264N_20151116_142154.pdf).

256 Hungary, Pécs Appeals Court, Pf.III.20.004/2016/4., 13 October 2016. Available at: <http://cfcf.hu/sites/default/files/kaposvarllfok.pdf>.

257 Concerns persist as to the concentration of ethnic minority students in particular schools, which reflects the wider issues of divided communities and social segregation.

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

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

260 Macedonia, Institute on Human Rights (2013), *Breaking the Wall of Silence*, <https://www.ihr.org.mk/uploads/publications/pdf/diskriminacijaromi.pdf>.

261 Ivasiuc, A., Duminičă, G., (2010) *O școală pentru toți? Accesul copiilor romi la o educație de calitate*, (A School for Everybody? Access of Roma children to quality education), Bucharest, Vanemonde. The report is available at: [http://www.agentiaimpreuna.ro/files/O\\_scoala\\_pentru\\_toti.pdf](http://www.agentiaimpreuna.ro/files/O_scoala_pentru_toti.pdf).

262 Government of Slovenia (2015), *Četrto poročilo vlade republike slovenije o položaju romske skupnosti v Sloveniji* (Fourth government report on the situation of the Roma community in Slovenia), available at: [www.un.gov.si/si/manjsine/romska\\_skupnost/ustavno\\_pravni\\_polozej/](http://www.un.gov.si/si/manjsine/romska_skupnost/ustavno_pravni_polozej/).

There have been several attempts by governments to address the segregation of Roma pupils.<sup>263</sup> In **Romania**, the Ministry of National Education and Scientific Research issued two orders in 2016,<sup>264</sup> aiming to combat segregation in the education system, but the methodology for their implementation has not yet been developed. The **Former Yugoslav Republic of Macedonia** strategy for the Roma population sets out education as one of the Government's priorities and eight Roma information centres were established to support the implementation of the strategy and to monitor the situation on the ground. In **Norway**, the governmental action plan to improve the Roma situation in Oslo includes elements related to schooling, 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. In May 2016, the **Belgian** National Roma Platform was launched, with the aim of triggering a dialogue with all stakeholders and Roma communities in Belgium. The platform is supervised by a pilot committee of staff of the Federal and regional administrations, NGOs active at the local level and the equality body UNIA. The platform held a meeting in October 2016 specifically on education, where the issues of absenteeism on the one hand and enrolment in special schools on the other were highlighted.<sup>265</sup> Some concrete policy recommendations are expected to come out of this process in 2017. The **Serbian** Ministry of Justice adopted a Rulebook on the criteria and procedures for the admission of Roma pupils to secondary schools<sup>266</sup> as part of the EU accession process, which led to a substantial increase in the number of enrolled pupils, from 420 (2015/2016 academic year) to 1 512 (2016/2017 academic year).<sup>267</sup>

#### 2.2.2.5 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, although almost half of the countries examined do not restrict protection to publicly available goods and services (**Bulgaria, Croatia, Cyprus, the Former Yugoslav Republic of Macedonia, France, Iceland, Ireland, Italy, Latvia, Lithuania,**<sup>268</sup> **Luxembourg, Malta, Montenegro, Poland, Romania, Spain and Turkey**).

An interesting legislative development took place in **Greece** in 2015, where an amendment to the Criminal Code was required to bring into effect the prohibition of discrimination on all grounds during transactions relating to the provision of goods and services. The required amendment was finally adopted,<sup>269</sup> and the scope of protection against discrimination in this field was thus extended to cover, in addition to racial or ethnic origin, the grounds of colour, national origin, descent, religious or other beliefs, sexual orientation, gender identity and disability. The law of 2015 also prohibits the refusal to provide goods in the context of voluntary or humanitarian assistance (and not only in cases where goods or services are provided in exchange for payment). The new Equal Treatment Law 4443/2016 now prohibits discrimination in the access to and supply of goods and services which are available to the public on the grounds of race, colour, national or ethnic origin and descent. Protection extends to further grounds explicitly covered by

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

264 Romania, Ministry of National Education and Scientific Research, Order no. 6158 adopting the action plan on school desegregation, and Framework order no. 6134 for prohibiting school segregation in primary and secondary education, 22 December 2016. Available at: <http://edu.ro/politici-publice-%C3%AEn-educa%C8%9Bie-pentru-prevenirea-combaterea-%C8%99i-interzicerea-segreg%C4%83rii-%C8%99colare>.

265 The minutes of the meeting are available in French at: [https://www.mi-is.be/sites/default/files/documents/plate-forme-des\\_roms\\_education\\_pv\\_fr\\_final.pdf](https://www.mi-is.be/sites/default/files/documents/plate-forme-des_roms_education_pv_fr_final.pdf).

266 Serbia, Rules on the criteria and procedures for admission of students belonging to the Roma national minority to secondary schools under favourable conditions for the achievement of full equality (*Pravilnik o merilima i postupku za upis učenika – pripadnika romske nacionalne manjine u srednju školu pod povoljnijim uslovima radi postizanja pune ravnopravnosti*), Official Gazette of the Republic of Serbia, no. 12/2016, 12 March 2016.

267 Republic of Serbia Council for the Implementation of the Action Plan for Chapter 23 (2016), *Report on the Implementation of the Action Plan for Chapter 23*, p. 206.

268 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.

269 Greece, Law 4356/2015, on civil partnership, exercise of rights, penal and other provisions, adopted on 24 December 2015.

the law, such as language, religious or other beliefs, disability or chronic illness, family or social status, sexual orientation and gender identity or characteristics. Implicitly, it seems to include age as well.

A few legislatures have provided definitions to delineate the circumstances in which discrimination is prohibited. **Swedish** law prohibits discrimination in the supply of goods and services, including housing, which are provided 'outside the private or family sphere', and thus the law does not apply to private transactions. (Similar provisions apply in **Finland** and **Norway**.) In the field of housing, this limitation implies that private persons selling or renting out their property 'on sporadic occasions' are not covered by the Discrimination Act. 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. **Portuguese** law provides that private associations have the right to reserve goods and services only for their members, but membership itself cannot be based on discriminatory criteria. In **Austria**, case law has clarified the meaning of the terms 'available to the public', stating that offers of goods and services are excluded from the principle of equal treatment only when they are 'directed towards a close circle of family and friends'.<sup>270</sup> In **Belgium**, social housing has long been the responsibility of the regions. Since the most recent reform of the Belgian State in 2014, however, private housing has also become the responsibility of the regions. This transfer of competence from the federal to the regional level has caused a lack of protection against discrimination in housing in the region of Brussels-Capital, where no anti-discrimination legislation in this area applies to private actors.<sup>271</sup>

As with education, discrimination against the Roma in the field of housing is a serious issue facing many states. Roma and Travellers often live on the outskirts of cities, in settlements that do not provide a basic standard of living or on parking spots considered illicit by the authorities. Some of these situations can be found in countries such as **Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, the Former Yugoslav Republic of Macedonia, France, Greece, Italy, Lithuania, Poland, Portugal, Romania, and Slovakia**. A case against **Slovenia** is pending currently before the European Court of Human Rights for failure to ensure access to drinking water in some Roma settlements.<sup>272</sup> In recent years, many cases have been reported of forced expulsion and segregation (e.g. in **Greece, Italy, Romania and Turkey**) or in relation to campsites and stopping places for Roma and Travellers (e.g. in **France** and the **UK**). In **France** for instance, the Government has been systematically evicting Travellers and Roma from illegally occupied land since 2012. At that time, a Ministerial Instruction was issued with regards to the dismantling of such sites to ensure humanitarian conditions of the inhabitants' access to education, housing etc. In July 2016, the European Court of Human Rights issued an order to the French Government to suspend the execution of the planned clearance of a campsite where 40 families had been settled for more than two years.<sup>273</sup> The order of the ECtHR was ignored however, and the campsite was dismantled, with only four families receiving social support in accordance with the Ministerial Instruction of 2012. The European Court of Human rights also sent an interim measure to **Italy** in 2016, ordering against the execution of the forced eviction of two Roma women as they were not being provided with any alternative housing. In **Lithuania**, with the specific aim of avoiding such forced evictions, the Vilnius City Municipality adopted an integration to society programme for the Roma community living in the Kirtimai settlement on the outskirts of the city.<sup>274</sup> With regard to housing, the aim of the programme is to provide social housing options to the residents of the settlement and to offer (mainly financial) incentives to encourage voluntary resettlement.

270 Austria, Viennese Court of Commerce, decision 1R 129/10g, 19 January 2011.

271 The relevant Ordinance (modifying the Ordinance of 17 July 2003 creating the Brussels housing code), adopted on 19 March 2009, is only applicable to entities in charge of social housing.

272 ECtHR, Applications No. 24816/14 and 25140/14, *Branko Hudorovič and Aleks Hudorovič v. Slovenia and Ljubo Novak and others v. Slovenia*, lodged on 26 March 2014. For third party intervention of the European Roma Rights Centre see <http://www.errc.org/article/hudorovic-and-others-v-slovenia-third-party-intervention-pending/4423> (last accessed 18 May 2017).

273 ECtHR, *Stefan and others v France*, Application No. 36779/16, decision of 6 July 2016, available at: <http://www.romeurope.org/IMG/pdf/cedh.pdf> (accessed 29 September 2017).

274 Approximately 500 people live in slum-like conditions in the Kirtimai settlement, which is the only one of its kind in the country.



### Italian municipality's handling of Roma settlement amounted to indirect discrimination

Two NGOs, ASGI and Associazione 21 Luglio, brought a case before the Court of Rome to challenge the way the Municipality of Rome was handling a large Roma settlement on the outskirts of the city ('La Barbuta'). The claimant organisations argued that the treatment of the inhabitants of the settlement has caused social exclusion, resulting in racial discrimination as prohibited by the Racial Equality Directive. In a judgment issued on 9 June 2015, the Court of Rome convicted the Municipality of Rome of indirect discrimination, in accordance with Article 2 of Legislative Decree 215/2003 implementing the directive.<sup>275</sup> The Municipality of Rome was ordered: to stop allocating new housing in the settlement and to remove the effects of the housing already allocated there; to publish the judgment in a national newspaper; and to pay half of the legal costs incurred by the two claimants. However, despite this judgment and the universal condemnation both of the 'camps' policy and of the closely related forced eviction policy, local NGOs report that both practices are continuing.<sup>276</sup>

#### 2.2.2.6 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 scope of the two directives is maintained, in most provincial legislation it is levelled up.<sup>277</sup>
- In **Bulgaria**, the Protection against Discrimination Act provides comprehensive protection and prohibits discrimination within a universal material scope.
- In **Croatia**, the Anti-discrimination Act applies to housing in general without any exceptions and covers racial or ethnic origin, religion or belief, age, disability and sexual orientation.
- **Denmark** extends the prohibition of discrimination on the grounds of religion or belief and sexual orientation to the fields of education and access to goods and services including housing.
- The **Finnish** Non-Discrimination Act of 2014 prohibits discrimination in all public and private activities (excluding only private life, family life and practice of religion), on the grounds of origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health or other personal characteristics.
- In **France**, protection against discrimination in the areas of education, social protection, social advantages and access to and supply of goods and services extends to all grounds covered by French law.<sup>278</sup>
- In **Greece**, protection against discrimination in the field of access to goods and services has been extended to all grounds covered by the directives except age.
- **Hungarian** law has practically unlimited material scope, treating all grounds of discrimination equally.
- The scope of the **Italian** Anti-discrimination decrees partially corresponds with other pre-existing legislation still in force, primarily the Immigration Act of 1998. This act offers protection against

275 Court of Rome, *ASGI, Associazione 21 Luglio v. Rome Capital and Italian Government*, 4 June 2016, <http://www.asgi.it/wp-content/uploads/2015/06/Ordinanza-La-Barbuta.pdf>.

276 [http://www.21luglio.org/wp-content/uploads/2015/10/rapporto\\_peccato\\_12pag\\_inglese\\_webweb\\_2\\_ottb.pdf](http://www.21luglio.org/wp-content/uploads/2015/10/rapporto_peccato_12pag_inglese_webweb_2_ottb.pdf).

277 Only Lower Austria has not followed the line.

278 It should however be noted that French law only covers 'belonging to a specific religion' as opposed to 'religion or belief' as covered by the Employment Equality Directive.

discrimination based on race, religion and nationality that mostly overlaps with that of the decrees, covering all the fields specified in the two directives.

- In **Luxembourg**, the General Anti-discrimination Law prohibits discrimination on all the grounds covered by both directives, in all the fields covered by the Racial Equality Directive, levelling up the protection on all grounds.
- In **Malta**, the Equal Opportunities (Persons with Disability) Act provides protection against discrimination on the grounds of disability in the fields of education and access to and supply of goods and services.
- In **Norway**, protection against discrimination in the fields of social protection, social advantages and access to and supply of goods and services covers all grounds of the directives except for age.
- In **Slovakian** law, the right to healthcare is guaranteed equally to every person irrespective of sex, religion or belief, race, affiliation with 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>279</sup> the reason of reporting criminality or other anti-social activity, other status. The Anti-discrimination Act prohibits discrimination in housing on the same grounds.
- 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, age and sexual orientation. The prohibition on discrimination in goods, services and housing applies to all the above-mentioned grounds as well.
- **Romanian** anti-discrimination legislation applies to a large number of criteria going beyond those provided by the directives, and the scope of the Anti-discrimination Law 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) is prohibited in all forms and levels of education, in the provision of goods and services, and in the performance of public functions by public authorities (believed to cover social protection, including healthcare and social security). Northern Ireland has broad prohibitions against discrimination on the ground of political opinion.

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

### 3 EXCEPTIONS TO THE PRINCIPLE OF NON-DISCRIMINATION AND POSITIVE ACTION

The directives are based on a dichotomy between direct discrimination, which cannot be justified, and indirect discrimination, which is open to objective justification. Most countries have complied with this approach, although there are some states where it may be argued that national law continues to permit the justification of direct discrimination (e.g. **Latvia**<sup>280</sup> and **Slovenia** with regard to the ground of race and ethnicity).

#### Justification of direct discrimination in Slovenia

The new Protection against Discrimination Act (PADA) in general does not permit direct discrimination. However, Article 13 (1) states that, despite the general requirement to ensure equal treatment in Article 5 of the PADA, differential treatment based on personal characteristics is not excluded, if such treatment is based on a legitimate goal and if the means for achieving this goal are appropriate, necessary and proportionate. This provision might be read as if direct discrimination on the ground of race and ethnicity is also justified as long as the principle of proportionality is respected, which would not be in line with Article 2 of the Racial Equality Directive.

Parallel to the possibility of objectively justifying indirect discrimination, the directives permit a number of exceptions applicable to the ban on both direct and indirect discrimination. Some of these apply to all grounds of discrimination (e.g. genuine occupational requirements), whereas others are ground-specific (e.g. employers with a religious ethos). This section will examine the implementation of each of these exceptions.<sup>281</sup>

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 approval of 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.

#### 3.1 Genuine and determining occupational requirements

##### Article 4 of the Racial Equality Directive and the Employment Equality Directive

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

Both directives allow national legislation to provide an exception where the characteristic is a 'genuine and determining occupational requirement'. Under Recital 18 of the Racial Equality Directive, in very limited circumstances, a difference of treatment may be justified where a characteristic related to racial or ethnic origin constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided

280 Latvian legislation in fields such as social security, education and access to goods and services does not distinguish between direct and indirect discrimination, thereby causing confusion regarding the limits of the possibility of justifying (indirect) discrimination. See for instance Article 2.<sup>1</sup>(1) of the Law on Social Security.

281 The Employment Equality Directive contains a number of specific exceptions regarding the ground of age as well as a specific exception for employers with an ethos based on religion or belief. These have already been discussed above in Section 1.2.2.1.

by the Member States to the Commission. All countries surveyed, except **Iceland**, have chosen to include such an exception within their national legislation. The **Netherlands** takes an interesting approach by specifying that only *external racial appearances* may constitute a genuine occupational requirement.<sup>282</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. There is no exception relying on Article 4 of the directives in relation to any other ground.

In some countries, the precise wording of national legislation varies from that found within the directives (e.g. **Italy**). This creates the risk that the exception is wider than permitted, but this will depend on subsequent interpretation by national courts. In **Great Britain**, the relevant provision of the Equality Act (Schedule 9, part 1) does not contain the words ‘genuine and determining’, as it is assumed that the objective of such a requirement cannot be legitimate or proportionate if it is not genuine and determining. In **Denmark**, the relevant provision is particularly restrictive, as each employer who wishes to make use of the exception has to obtain a specific dispensation from the Government minister who is responsible for the type of activity exercised by the employer. Such dispensation can only be given once a specific statement has been made by the Minister of Labour with regards to the specific position to be filled.

EEA and candidate countries have also chosen to include the genuine and determining occupational requirements exception in their equality and anti-discrimination legislation. For instance, 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. In **Montenegro**, the Labour Law contains a provision that follows closely the wording of Article 4 of the directives, although it is incorrectly titled ‘Positive discrimination’.

### 3.2 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 states have included an explicit exemption for the armed forces in relation to both age and disability: **Cyprus, Denmark**,<sup>283</sup> **France, Greece, Ireland, Italy, Malta, Slovakia** and the **United Kingdom**. In **Germany**, the Soldiers General Act on Equal Treatment covers all grounds except for age and disability. Similarly, the specific anti-discrimination provisions contained in legislation regulating the security and armed forces in the **Czech Republic** do not cover age and disability as protected grounds. In **Norway**, the Armed Forces’ Employment Act states that officers and enlisted crew are exempt from the prohibition on age discrimination of the Working Environment Act. There is no specific disability-related exception in the legislation, but general health requirements apply.

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, Estonia, Hungary, Latvia, Lithuania, Montenegro, Poland, Portugal, Romania** and **Spain**. Military service requires candidates not to be older than a certain fixed age in, for instance, the **Former Yugoslav Republic of Macedonia** and **Slovenia**, while the limitation in the **Dutch** Age Discrimination Act was only of temporary nature. In several states, the exceptions seem to be wider than provided for in Article 3(4).

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

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

For example, **Greek** and **Irish**<sup>284</sup> law provides exemptions on the basis of age in respect of the police, the prison service or any emergency service.

### 3.3 Nationality

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

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

In addition to the protected grounds covered by the two directives, several Member States have included nationality as an expressly protected ground in national anti-discrimination law, including **Belgium, Bulgaria, Cyprus**,<sup>285</sup> the **Netherlands, Portugal, Romania** and the **United Kingdom**.<sup>286</sup> In **Serbian** anti-discrimination law, citizenship is explicitly listed as a protected ground. In **Spain**, the Organic Law on the Rights and Freedoms of Foreigners in Spain and their Social Integration (OL 4/2000) establishes the principle of non-discrimination and covers direct and indirect discrimination by nationality (as in citizenship). However, the definitions are not similar to those used in Directives 2000/43 and 2000/78 and the provision on indirect discrimination refers only to foreign ‘workers’, not to persons. The terms ‘race’ or ‘ethnic origin’ are considered to include nationality in countries such as **Ireland**, where nationality is explicitly listed as an aspect of the race ground. In **Sweden**, the ground of ethnicity explicitly covers ‘national or ethnic origin, skin colour or any similar circumstance’, which is likely to include nationality as in citizenship. In **Poland**, the Equal Treatment Act was amended in 2016 to include citizenship as a protected ground specifically for workers exercising their freedom of movement within the scope of EU law. A number of Member States have specific exclusions from the scope of their implementing legislation which apply to discrimination based on nationality: **Greece, Italy, Luxembourg** and **Malta**.

**Table 8: Nationality is an explicitly protected ground in anti-discrimination legislation (in the case of decentralised states only federal law is indicated)**

	Law	Article	Equality body has explicit mandate to deal with nationality	If not, does so in practice
<b>AUSTRIA</b>	No	-	No	Yes <sup>62</sup>
<b>BELGIUM</b>	Racial Equality Federal Act	Art. 4, 4°	Yes	N/A
<b>BULGARIA</b>	Protection Against Discrimination Act	Art. 4(1)	Yes	N/A
<b>CROATIA</b>	No	-	No	Yes <sup>63</sup>
<b>CYPRUS</b>	The European Convention for the Protection of Human Rights and Fundamental Freedoms (Twelfth Protocol) (Ratification) Law N.13(III)/2002	Art. 1	Yes	N/A
<b>CZECH REPUBLIC</b>	No <sup>64</sup>	-	No	Yes

62 Difference of treatment based on nationality is generally regarded as discrimination on the basis of ethnicity unless the difference is based on immigration laws or other legally demanded requirements (see Equal Treatment Act, §§ 17/2 and 31/2). Thus, the Equality body will deal with these cases as long as it is regarded as ethnicity.

63 Difference of treatment based on nationality may be regarded as discrimination on the basis of ethnicity, in particular Roma.

64 Nationality as in ‘citizenship’ is not covered, while the concept of ‘národnost’ (national origin) is covered in several laws.

284 Ireland, Employment Equality Acts 1998-2015, Section 37.

285 In Cyprus, the prohibition of discrimination on the ground of nationality is imported into national law through the ratification of Protocol 12 to the European Convention on Human Rights.

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

	Law	Article	Equality body has explicit mandate to deal with nationality	If not, does so in practice
DENMARK	No	-	No	Yes <sup>65</sup>
ESTONIA	No	-	No	No
FINLAND	Non-Discrimination Act	S. 8	Yes	N/A
FRANCE	Law 2016-1547 on the modernisation of the justice system in the 21 <sup>st</sup> century <sup>66</sup>	-	Yes	N/A
FORMER YUGOSLAV REPUBLIC of MACEDONIA	Law on Prevention and Protection Against Discrimination <sup>67</sup>	Art. 3	Yes	N/A
GERMANY	No <sup>68</sup>	-	No	No
GREECE	No	-	No	No
HUNGARY	Act on Equal Treatment and the Promotion of Equal Opportunities <sup>69</sup>	Art. 8	No	Yes
ICELAND	No <sup>70</sup>	-	-	-
IRELAND	Employment Equality Acts 1998-2015	S. 6(2)(h)	Yes	N/A
	Equal Status Acts 2000-2015	S. 3(2)(h)	Yes	N/A
ITALY	No <sup>71</sup>	-	Yes	N/A
LATVIA	No	-	No	No
LIECHTENSTEIN	No <sup>72</sup>	-	Yes	N/A
LITHUANIA	No	-	No	Yes
LUXEMBOURG	No	-	No	No
MALTA	No	-	No	Yes
MONTENEGRO	No	-	No	No
NETHERLANDS	General Equal Treatment Act	Art. 1.b	Yes	N/A
NORWAY	No <sup>73</sup>	-	No	Yes
POLAND	Yes <sup>74</sup>	Art. 1.2	No	Yes

65 As possible indirect discrimination on the basis of race, ethnic or national origin. However, the Board of Equal Treatment has on several occasions rejected complaints where EU citizens were refused access to goods or services due to lack of Danish citizenship, without examining potential indirect discrimination on the ground of race, ethnic or national origin. See for instance Board of Equal Treatment, Decision No. 11202 of 23 September 2015.

66 This act has consolidated the list of protected grounds in all French anti-discrimination legislation, including the ground 'belonging to a nation,' which has been interpreted by courts to cover nationality (as in citizenship). See for instance Court of Cassation, Criminal Chamber, No. 01-85650, of 17 December 2002, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007070672&fastReqId=831302130&fastPos=6> (accessed 29 September 2017).

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

68 Nationality is a protected ground under the Works Constitution Act in its Section 75.1.

69 Nationality in the sense of belonging to a national minority is explicitly mentioned in the law, while nationality in the sense of citizenship is protected under the category of 'other characteristics'.

70 There is no general anti-discrimination legislation in Iceland, but the Act on Worker's Terms of Employment and Pension prohibits nationality discrimination.

71 Discrimination on the ground of nationality is not prohibited by the legislative decrees implementing the EU directives on discrimination but it is prohibited by Legislative Decree 286/1998 on immigration and the treatment of foreign citizens. According to Article 43, paragraphs 1 and 2, discrimination is prohibited on the ground of ancestry, religion, national or ethnic origin and religious beliefs and practices.

72 Nationality is mentioned in the Constitution.

73 Under the Anti-discrimination Act, national origin is a protected ground. The legal preparatory works clarify that national origin as a discrimination ground is closely associated with the term ethnicity, and consequently, nationality as a ground is protected under ethnicity.

74 Citizenship is covered only for workers exercising their freedom of movement under EU law, while 'nationality' (narodowość), understood as the fact of belonging to a nation is covered.

	Law	Article	Equality body has explicit mandate to deal with nationality	If not, does so in practice
PORTUGAL	Law 18/2004 transposing the Racial Equality Directive	Art. 3(2)	Yes	N/A
	Labour Code	Art. 4, 5(1), 24(1)(3) (a), 24(3) (a)	Yes	N/A
ROMANIA	Ordinance (GO) 137/2000 regarding the prevention and the punishment of all forms of discrimination	Art. 2	Yes	N/A
SERBIA	The Law on the Prohibition of Discrimination	Art.2, para. 1	Yes	N/A
SLOVAKIA	No <sup>75</sup>	-	No	No
SLOVENIA	No	-	No	Yes
SPAIN	Organic Law on the Rights and Freedoms of Foreigners in Spain and their Social Integration	Arts 2bis, 23, 54	No	No <sup>76</sup>
SWEDEN	No <sup>77</sup>	-	Yes	N/A
TURKEY	Law on the Human Rights and Equality Institution of Turkey (no. 6701)	Article 7(1)(g) <sup>78</sup>	No	No
UNITED KINGDOM	(GB) Equality Act	S. 9	Yes	N/A
	(NI) Race Relations Order	Art. 5	Yes	N/A

75 Nationality could be covered by 'other status' included in the non-exhaustive list of protected grounds in the Anti-discrimination Act.

76 Unless the case could be classified as racial or ethnic discrimination.

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

78 Provides protection on the ground of religion only.

### 3.4 Family benefits

Implementation of the directives has come at a time when an increasing number of states are allowing same-sex couples to marry or to register partnerships and to enjoy 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'.

In countries where same-sex couples can get married, i.e. **Belgium, Denmark, France, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden** and the **United Kingdom**,<sup>287</sup> limiting benefits to married couples does not result in discrimination on the grounds of sexual orientation. In other states, national legislation on the recognition of same-sex partnerships has had the impact of requiring marital benefits to be extended to registered partners. However, this is not an automatic consequence of same-sex partnership legislation. In 2006, the **German** Constitutional Court ruled that it was lawful to restrict supplementary payments to married civil servants and to exclude those in (same-sex) registered partnerships.<sup>288</sup> The compatibility of such practices with the directive was tested in a

287 The Marriage (Same-Sex Couples) Act 2013 makes it possible for same-sex couples to get married in England and Wales. In addition, the Marriage and Civil Partnership (Scotland) Act 2014 introduces the right of same-sex couples to get married and to enter into registered partnerships in Scotland. Marriage for same-sex couples is not permitted in Northern Ireland.

288 German Federal Constitutional Court, BVerwG, 2 C 43.04, 26 January 2006.

preliminary reference case judged on 1 April 2008 by the CJEU in *Maruko*.<sup>289</sup> Consequently, the **German** Constitutional Court has clarified that both same-sex couples living in a life partnership and married spouses have to be treated equally with regard to social benefits, thereby overruling the previous case law.<sup>290</sup>

There remain many states where restricting work-related benefits to married employees is likely to be regarded as lawful. These include **Austria**, where the point is made clear in the explanatory notes to the Equal Treatment Act, and some states where the issue has not been expressly addressed in national legislation, but it is the view of the national experts that courts would interpret the law as permitting benefits to be officially restricted to married employees (e.g. the **Former Yugoslav Republic of Macedonia, Greece, Lithuania, Montenegro** and **Poland**). In **Estonia**, it is unclear whether (all) employers' benefits are covered by the prohibition of discrimination as regards the establishment of working conditions and pay, and therefore whether restricting such benefits to married employees or to employees with opposite-sex partners would qualify as discrimination on the ground of sexual orientation.

### 3.5 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.'

Several states have adopted exceptions relying on Article 2(5), including **Cyprus, Estonia, Greece, Ireland, Italy, Malta, Poland** and **the United Kingdom**. The **Dutch** Age Discrimination Act and Disability Discrimination Act provide for exception for the protection of public security and health, but the legislation does not specify that these measures need to be based on a law. In **Croatia**, the Anti-discrimination Act contains an exception for conduct aimed at 'preserving health and preventing criminal acts and misdemeanours', stipulating that such conduct cannot lead to direct or indirect discrimination on the grounds of race or ethnic origin, skin colour, religion, gender, ethnic or social origin, sexual orientation or disability.<sup>291</sup> In **Portugal**, even though the laws implementing the directives do not include any specific exceptions concerning public security, these exceptions may be considered implicit. A similar situation exists in **Hungary**, where national law does not include an explicit exception, but these grounds could be referred to under the general exempting clause of the Equal Treatment Act.

### 3.6 Other exceptions

In some states, national legislation includes exceptions that 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 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'.

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

290 German Federal Constitutional Court, 1 BvR 1164/07, 7 July 2009.

291 Croatia, Anti-discrimination Act, Article 9(2)(1).



In the **Former Yugoslav Republic of Macedonia**, the Anti-discrimination Act provides 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. In **Austria**, in the context of discrimination-free advertising of housing, Section 36 of the Equal Treatment Act allows for a justification of differentiation based on ethnicity in cases where the provision of housing constitutes a particularly close or intimate relationship of the parties or their relatives. 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. In **Romania**, Article 2(8) of the Anti-discrimination Law states that its provisions cannot be interpreted as limiting freedom of expression and the right to access to information. However, there are no guidelines on balancing freedom of expression and the right not to be discriminated against, the case law of the equality body and of the courts is not coherent, and there are reported cases in which misinterpretation of this exception has led to harassment not being penalised.

### 3.7 Positive action

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

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

The scope for positive action is often a matter clarified through case law. In **Cyprus**, the Supreme Court has been called upon several times to determine the constitutionality of several sets of legal provisions granting priority in employment in the public sector to different categories of people, such as people with disabilities, veterans of war, etc. The Supreme Court has consequently developed a practice of declaring void and unconstitutional any law introducing positive action that is challenged.<sup>292</sup> In 2015 however, the Supreme Court reversed its practice by rejecting a claim that a law adopted in 2009 and imposing a quota of employees with disabilities in public employment was unconstitutional. The court thus clarified that the principle of equality provides protection against arbitrary differentiations but does not exclude reasonable ones, which are allowed as a result of the essential nature of the circumstances.<sup>293</sup> In **Croatia**, the Constitutional Act on the Rights of Ethnic Minorities provides for positive action for proportionate representation of members of ethnic minorities in the state administration, the judiciary and local authority bodies and administrations. In addition, the Judiciary Act<sup>294</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>295</sup> held that such advantages constitute special positive measures, which are intended 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 **Bulgaria**, the Constitutional Court held 25 years ago that preferential treatment on constitutionally protected grounds, including race/ethnicity and religion/belief was unconstitutional.<sup>296</sup> By contrast, preferential measures based on grounds that are excluded from the constitutional equality clause, such as disability or age, would be constitutional. It is unclear however whether the same position would be maintained if the court were to rule on another positive

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

293 Cyprus, Supreme Court, *Costas Tsikas et al v. Republic of Cyprus through the Committee of Educational Service*, Ref. Nos 1519/2010 και 1520/10, 3 September 2015, available at [http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros\\_4/2015/4-201509-1519-10etc.htm&qstring=%F7%E1%F1%F4%2A%20and%20%E8%E5%EC%E5%EB%E9%F9%E4%2A%20and%20%E4%E9%EA%E1%E9%F9%EC%E1%2A%20and%202015](http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2015/4-201509-1519-10etc.htm&qstring=%F7%E1%F1%F4%2A%20and%20%E8%E5%EC%E5%EB%E9%F9%E4%2A%20and%20%E4%E9%EA%E1%E9%F9%EC%E1%2A%20and%202015).

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

295 Croatian 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.

296 Bulgarian Constitutional Court ruling No 14 of 1992.

action measure today. In **Norway**, where the legislation refers to 'positive differential treatment',<sup>297</sup> the scope for positive action measures has been interpreted as very narrow, based on the CJEU's case law on gender. In **Turkey**, although the Constitution<sup>298</sup> and the Law on the Human Rights and Equality Institution of Turkey (no. 6701) contains the principle of positive action and other pieces of legislation provide for such measures in several areas, the issue is still new and under-developed.

### **Mandatory membership of a person with disability within Maltese public entities**

The Various Laws (Persons with Disability) (Membership in Various Entities) Act<sup>299</sup> intends to promote the integration of persons with disability into society through better representation in public decision-making entities in the Maltese legal and governmental system. It requires that at least one person with disability should be appointed to the boards of certain state entities.

The act affects the composition of the following entities, increasing their number by one:

- The Housing Authority,
- The National Commission for Further and Higher Education,
- The Employment and Training Corporation,
- The Broadcasting Authority,
- The Refugee Appeals Board,
- The Malta Statistics Authority,
- The National Commission for the Promotion of Equality for Men and Women,
- The Commission on Domestic Violence,
- The Council for the Voluntary Sector,
- The Authority for Transport in Malta.

Depending on the hierarchical structure, it is either the Prime Minister of Malta, or the relevant minister (whose ministry governs the specific entity) who is responsible for the implementation of these provisions. Should the entities fail to comply with the new provisions, they will not be considered as legally constituted in accordance with Maltese law.

Several states have introduced legal duties to promote equality. In some cases, there are broad obligations to advance equality in national constitutions (e.g. **Greece** (Article 116(2)) or **Spain** (Article 9.2)). The **Former Yugoslav Republic of Macedonia** has developed a set of positive action measures on the ground of racial or ethnic origin, as a result of the armed conflict in 2001 and the signing of the Ohrid Framework Agreement (OFA). One of the aims of signing the OFA was to enhance the situation of minority communities in the country, reflecting multi-ethnicity in the public sphere. These measures regulate, among other things, 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, public authorities and employer/employee organisations are under a legal obligation to make active, targeted and systematic efforts and to report annually on their efforts to promote equality and prevent discrimination on grounds of disability, ethnicity and sexual orientation.<sup>300</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, and a similar duty is imposed on employers with more than 50 employees. Other states have included more detailed obligations in national

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

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

299 Malta, Act No. VII of 2015 titled Various Laws (Persons with Disability) (Membership in Various Entities) Act, adopted on 10 March 2015.

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

legislation. In **Bulgaria**, the Protection against Discrimination Act places a duty on all authorities to take measures whenever necessary to equalise opportunities for disadvantaged groups and to guarantee participation by ethnic minorities in education to accomplish the objectives of the act.<sup>301</sup> The act requires authorities to prioritise such measures for the benefit of victims of multiple discrimination.<sup>302</sup> In practice however, no such measures are known. In **Finland**, the new Non-Discrimination Act obliges all public authorities as well as private organisations using public power or performing public administrative tasks, providers of education and those employers who employ more than 30 employees, to take steps to foster equality.<sup>303</sup> **Swedish** law was amended in 2016 to extend the existing positive duty to actively promote ethnic diversity in employment and higher education. The duty now requires employers as well as education providers to carry out continuous goal-oriented work with regards to all grounds protected by Swedish law.

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

Since April 2011, all public authorities in Britain have been under a positive obligation to have due regard to the need to:

‘eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the 2010 Equality Act, advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; [and] foster good relations between persons who share a relevant protected characteristic and persons who do not share it’.

The *Essential Guide to the Public Sector Equality Duty* gives a suggested approach to help public authorities to comply with the equality duty. Public authorities are required to:

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

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

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

Disability is the ground for which the most positive action measures are 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** (in the public sector), **Bulgaria, Croatia, Cyprus** (in the wider public sector), the **Czech Republic**,<sup>304</sup> **France, Germany, Greece, Hungary, Italy, Luxembourg, Malta,**

301 Bulgaria, Protection against Discrimination Act, Article 11(1).

302 Bulgaria, Protection against Discrimination Act, Article 11(2).

303 Finland, Non-Discrimination Act (1325/2014), Section 6.

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

**Poland, Portugal,**<sup>305</sup> **Romania, Serbia, Slovakia, Slovenia, Spain** and **Turkey**.<sup>306</sup> However, alternatives to employing disabled people, such as paying a fee or tax, are almost always offered. In **Italy**, there was until 2015 an exception from the obligation to respect the quota (applicable to employees with more than 15 employees) for political parties, trade unions and organisations for social development and support. This exception was lifted in 2015 through the adoption of a Legislative Decree on the Simplification of procedures and duties upon citizens and companies.<sup>307</sup> In **Ireland**, a policy objective of the Government is for 3 % of employees in the civil and public service to be people with disabilities, although no sanctions are in place if the target is not achieved. Nevertheless, the target was met in 2011 and has been slightly exceeded since then.<sup>308</sup> The Government has undertaken to progressively increase the statutory target towards 6 % by 2024.<sup>309</sup> In **Iceland**, there is no quota system, but the Act on the Affairs of Persons with Disabilities provides assistance when necessary to workers with disabilities, and priority should be given for positions in the public sector if their qualifications are equivalent to other applicants.

**Table 9: Main grounds and fields where positive action is used in practice (in the case of decentralised states according to federal law)**

<b>AUSTRIA</b>	Disability (employment).
<b>BELGIUM</b>	Disability (quotas for people with disabilities in the public administration); Roma (integration, education, housing).
<b>BULGARIA</b>	Roma (education, and housing), disability (employment, civil service), age (employment).
<b>CROATIA</b>	Ethnicity/race/national minorities (employment, education housing, social welfare), disability (employment).
<b>CYPRUS</b>	Disability (civic participation, employment, public services), race and ethnic origin (education).
<b>CZECH REPUBLIC</b>	Disability (employment), Roma (higher education).
<b>DENMARK</b>	Disability and age (employment)
<b>ESTONIA</b>	Disability (employment), ethnic origin (employment), age (employment).
<b>FINLAND</b>	All grounds (public administration, education, employment)
<b>FRANCE</b>	Disability (employment), age (employment), origin <sup>79</sup> (employment, education and integration).
<b>FORMER YUGOSLAV REPUBLIC of MACEDONIA</b>	Ethnicity including Roma and language (employment and education), age (recreation, transport and housing), disability (employment).
<b>GERMANY</b>	Disability (social inclusion/integration, employment), age (employment), race or ethnic origin (employment), ethnic origin (language, culture).
<b>GREECE</b>	Race and ethnic origin, disability (employment).
<b>HUNGARY</b>	Disability (employment, education), race (employment, education).
<b>ICELAND</b>	Disability (employment).
<b>IRELAND</b>	Race (supply of service), Disability (employment).
79 In France, positive action measures are only in place with regards to the ground of origin indirectly through the use of proxies such as social condition or integration of migrants.	

305 It is however not possible to determine whether the quota system in Portugal is being enforced or not, as no relevant data is available.

306 However, figures in 2016 show that while the total number of people with disabilities working in the public administration in Turkey should be 62 912, only 48 947 civil servants with disabilities are effectively employed.

307 Italy, Legislative Decree No. 151 of 14 September 2015, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2015-09-14;151!vig>.

308 Ireland, <http://nda.ie/Publications/Employment/Employment-of-people-with-disabilities-in-the-public-service/Reports-on-compliance-with-public-sector-jobs-target/2015-Report-on-Compliance-with-Part-5-on-the-Employment-of-People-with-Disabilities-in-the-Public-Sector.html>.

309 Government of Ireland (2015) *Comprehensive Employment Strategy for People with Disabilities 2015-2024*, <http://www.justice.ie/en/JELR/Comprehensive%20Employment%20Strategy%20for%20People%20with%20Disabilities%20-%20FINAL.pdf/Files/Comprehensive%20Employment%20Strategy%20for%20People%20with%20Disabilities%20-%20FINAL.pdf>.

<b>ITALY</b>	Disability (employment), linguistic minorities (employment, education, health care, access to public services, access to justice).
<b>LATVIA</b>	Disability, age. (employment).
<b>LIECHTENSTEIN</b>	Disability (education, employment, housing, integration).
<b>LITHUANIA</b>	Disability (education, employment), Ethnic origin (education), age (employment).
<b>LUXEMBOURG</b>	Disability (employment)
<b>MALTA</b>	Disability and age (employment).
<b>MONTENEGRO</b>	Minority rights, disability (health insurance, employment, education, social protection)
<b>NETHERLANDS</b>	Race, sex, disability (employment, access to goods and services)
<b>NORWAY</b>	Ethnicity, disability (employment).
<b>POLAND</b>	Ethnic origin, nationality (education, employment, healthcare, living conditions, security), age (employment), disability (employment).
<b>PORTUGAL</b>	Disability (education, employment, accessibility, health services, social security), Roma, ethnic origin (education, housing, employment, health).
<b>ROMANIA</b>	Roma (education), disability (housing, employment), youth (housing, employment).
<b>SERBIA</b>	Disability (employment), ethnicity (education, employment, housing)
<b>SLOVAKIA</b>	Disability (employment) ethnicity (education and health).
<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, employment).
<b>SPAIN</b>	Disability (employment), racial or ethnic origin (education).
<b>SWEDEN</b>	Disability (employment), ethnicity (employment, cultural rights, education)
<b>TURKEY</b>	Disability (employment), age (social services).
<b>UNITED KINGDOM</b>	GB: disability (education) NI: disability (education)

## 4 ACCESS TO JUSTICE AND EFFECTIVE ENFORCEMENT

Access to justice for victims of discrimination as well as the existence of effective, proportionate and dissuasive remedies are essential to ensure the effective enforcement of the non-discrimination obligations imposed on the EU Member States.

### 4.1 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, Italy, Portugal, Spain** and **Sweden**, or separately, as for example in **Croatia, Estonia, Finland**, the **Former Yugoslav Republic of Macedonia, Germany, Hungary, Malta, Montenegro, Poland, Serbia, Slovakia** and **Slovenia**. In **Sweden**, when a trade union is representing one of its members, negotiations must take place with the employer before a case is brought to the Labour Court, with a view to reaching a settlement agreement. Some national proceedings are exclusively for private or public-sector complaints, while others deal with both. In **Belgium**, mediation is available in cases involving an offence punishable by imprisonment of a maximum of two years.

#### 4.1.1 Available procedures

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 dispute resolution procedure, complementary to the normal courts. Among the general non-judicial procedures are inspectorates, ombudsmen and human rights institutions.

Labour inspectorates are charged with enforcing employment law, including equal treatment provisions, in the **Czech Republic, Finland**,<sup>310</sup> **Latvia, France, Poland, Portugal, Slovakia** and **Spain**.<sup>311</sup> In **Lithuania**, employment disputes commissions, regulated by the Employment Code, are the primary bodies mandated to resolve employment disputes. The responsibility for establishing an employment disputes 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 disputes commission can award compensation to an individual in cases of discrimination that have breached the Labour Code. Similarly, in **Estonia**, labour dispute committees have an important role in resolving labour disputes, including those involving discrimination. In **Slovakia** and **Spain**, victims can also submit complaints to education inspectorates, and in **Hungary** they can complain to the Hungarian Authority for Consumer Protection. In **Ireland**, the previous specialised equality tribunal was dismantled in 2015, when its functions were grouped together with those of all bodies involved with workplace relations into the new

310 In Finland, compliance by employers with anti-discrimination legislation is supervised by the Occupational Health and Safety Authority.

311 For a detailed analysis of the role and competences of labour inspectorates in discrimination cases in Europe, see Debrecéniová, J. (2013), 'Ex officio investigations into violations of the principle of equal treatment: the role of labour inspectorates and other bodies', in *European Anti-discrimination Law Review*, issue 17, November 2013, p. 23.

Workplace Relations Commission.<sup>312</sup> This new body, which specialises in workplace-related conflicts and issues, hears discrimination cases falling within the scope of the Equal Status Acts 2000-2015, in the fields of education and goods and services, including housing.

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

Some countries propose conciliation, such as **Austria** (mandatory for disability cases)<sup>313</sup> 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 **Malta**, depending on the nature of the complaint, victims can turn to several specialised bodies, including the Industrial Tribunal, the Commission for the Rights of Persons with Disability and the National Commission for the Promotion of Equality. Additionally, the Mediation Act encourages and facilitates the settlement of disputes through mediation by the Malta Mediation Centre. In **Finland**, the Non-Discrimination and Equality 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. Proceedings before the tribunal are free of charge and do not require the use of a legal counsel. The Non-Discrimination Ombudsman may issue statements on any discrimination case submitted to him/her, lead conciliation proceedings, where necessary forward the complaint to the pertinent authorities, if agreed to by the complainant, and provide legal assistance. In a few countries, the specialised equality bodies can impose sanctions, such as the **Bulgarian** Protection against Discrimination Commission or the **Portuguese** High Commissioner for Migrations, or can even award compensation to victims, such as the **Danish** Board of Equal Treatment.<sup>314</sup>

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 **Hungarian** Ombudsman (Commissioner for Fundamental Rights) can also investigate cases of discrimination by any public authority or public service provider, provided that all administrative remedies have been exhausted or none exist. The **Austrian** Equal Treatment Commission and the **Netherlands** Institute for Human Rights can both issue non-binding opinions. These do not preclude applicants from seeking binding court judgments on the same case, in which case the courts are obliged to take the opinion into consideration and give clear reasons for any dissenting decisions. In the **Former Yugoslav Republic of Macedonia**, the Anti-discrimination Act provides for an administrative procedure before the Commission for Protection against Discrimination, which can issue opinions and recommendations. If an opinion is not implemented, the commission can initiate a procedure before the competent authority.<sup>315</sup>

In **Romania**, a victim of discrimination or any interested NGO can file a complaint with the National Council on Combating Discrimination and/or file 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 remedies (the national equality body and civil courts) are not mutually exclusive, and the claimant can choose to use them

312 Ireland, Workplace Relations Act 2015, No. 16, of 20 May 2015, available at: <http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/pdf>.

313 Austria, Federal Disability Equality Act, Paras. 14-16.

314 Further information regarding sanctions can be found in section 4.4 below.

315 However, the act does not specify which authority.

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 can be submitted to the Non-Discrimination Ombudsman and/or the Non-Discrimination and Equality Tribunal.

There are special court procedures in a few countries. **Spain** has an emergency procedure in the social (labour) courts for actions for the defence of fundamental rights and civil liberties. In **Belgium**, claimants may request an injunction imposing immediate cessation of a discriminatory practice, although the national equality body UNIA has demonstrated that this measure does not in fact achieve its aim of accelerating the procedure.<sup>316</sup> In **Poland**, under the Labour Code,<sup>317</sup> a ‘compensation complaint’ procedure is available: victims of discrimination in employment are entitled to initiate judicial proceedings and seek compensation. The Labour Court determines the compensation to be awarded, taking into consideration the type and gravity of the discrimination. This specific remedy was intended to avoid the need to use more general legal remedies such as Article 415 of the Civil Code (general compensation clause), although the use of general remedies is not excluded. In addition, the 2010 Act on Equal Treatment introduced a compensation complaint available to any person (natural or legal) who claims an infringement to the principle of equal treatment, in any field of application of the act. The relevant general provisions of the Civil Code and the Civil Procedure Code apply.

#### 4.1.2 Specific procedures in the public sector

Complaints regarding the public sector are commonly dealt with separately from the private sector. For example, in **Italy**, cases concerning public sector employees are heard in the civil courts. In **Croatia**, civil procedures are the same for employment in the private and public sectors, with the exception of the obligation for a claimant wishing to file a claim against the state to send a request to the State Attorney’s office for amicable settlement. In **Lithuania**, complaints about administrative acts and acts or omissions by civil servants and municipal employees in the field of public administration, including social protection, social advantages, education, and access to and supply of goods and services which are available to the public, can be filed with the administrative disputes commissions or the administrative courts. Such complaints can also be filed with the Parliamentary Ombudsmen’s Office. Cases of alleged discrimination by public institutions in **Latvia** can be filed with the same public institution that has treated the person differently, with a higher institution, with an administrative court, or with the public prosecutor’s office. In **France**, the administrative courts hear complaints from civil servants and contractual employees in the public sector and from citizens bringing actions against the state. In the **Netherlands**, if the discrimination occurs in public sector employment, ordinary administrative law procedures apply. In **Liechtenstein** employment disputes in the private sector are referred to the ordinary courts, whereas discrimination complaints in the public sector are examined by an administrative court, with the Constitutional Court acting in last instance. In **Austria**, civil servants need to initiate administrative proceedings against their employer while contractual employees in the public sector need to bring their claims to the courts, as do private employees.

#### 4.1.3 Obstacles to effective access to justice

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

316 UNIA (2016), *Evaluation Report [of the Anti-discrimination Federal Acts]*, February 2016, pp. 10 and 53, available at: [http://unia.be/files/Documenten/Evaluation\\_2016.pdf](http://unia.be/files/Documenten/Evaluation_2016.pdf).

317 Poland, Labour Code, Article 18<sup>3d</sup>.



barrier to effective access to justice is the lack of effective remedies, including compensation, for victims of discrimination.<sup>318</sup>

A number of deterrents and potential barriers to litigation can still be identified. First, there are concerns that the complexity of discrimination law may be deterring victims of discrimination from bringing cases in, for instance, **Austria**, **Luxembourg** and the **United Kingdom**. Skilled, experienced assistance for victims can help counter this, but such aid remains limited in availability (in contrast to the professional advice and representation usually available to respondents).

The lack of sufficient financial means to pursue a case is another barrier cited in several countries and is closely related to the lack of adequate representation. In most countries, legal representation is either mandatory or – at least – necessary in practice, due to the complexity of procedures and of the legal framework. The availability of free legal aid constitutes a core requirement to ensure access to justice for victims of discrimination. In practice however, there are many countries where access to free legal aid is either very limited or dependent on complex procedures (e.g. the **Czech Republic**, **Lithuania**, **Slovakia**, and **Turkey**). An additional factor which may discourage victims from initiating legal actions is the level of court fees in some countries such as the **Czech Republic** and **Slovakia**. Similarly, the **Belgian** equality body UNIA highlighted in its 2015 anti-discrimination legislation evaluation report that it is very difficult for claimants who are not eligible for legal aid to bring a claim before the courts due to numerous obstacles, including very high costs and the risk of paying a procedural indemnity if the case is dismissed.<sup>319</sup> In **Bulgaria**, the Protection against Discrimination Act stipulates that procedures both before the general courts and before the quasi-judicial equality body are exempt from all costs, both state fees and expenses (Articles 53 and 75(2)). In practice, however this provision is not respected as the losing party is generally ordered to pay the winning party's fees and expenses.<sup>320</sup>

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 the **Netherlands**, an applicant who wishes to contest the lawfulness of the termination of an employment contract (discriminatory dismissal or victimisation dismissal) under civil law must do so within two months of the termination of the employment contract. Under **Germany's** General Equal Treatment Act there is a time limit of two months for claiming material or non-material damages in labour or civil law, beginning either with the receipt of the rejection of a job application by the applicant or with the knowledge of the disadvantageous behaviour. In **Ireland**, the Equal Status Acts 2000-2015 require 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 Workplace Relations Commission 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. The three-month time limit in **Greece** is very strict, regardless of the sector. The most commonly used procedure in **Lithuania** at the Equal Opportunities Ombudsperson has a time limit for filing complaints of three months after the commission of the acts in question. Complaints lodged after the expiry of this time limit are not investigated unless the Equal Opportunities Ombudsperson decides otherwise. In **Sweden**, the time limits for bringing a case in employment matters seem to be based on the assumption that the victim is represented by a trade union, and if that is not the case they constitute a serious barrier to access to justice. Indeed, if the claim aims to have a dismissal declared void, the time limit for filing is a matter of weeks from the act

318 For further information, please see section 4.5 below.

319 UNIA (2016), *Evaluation Report [of the Anti-discrimination Federal Acts]*, February 2016, pp. 10 and 53, available at: [http://unia.be/files/Documenten/Evaluation\\_2016.pdf](http://unia.be/files/Documenten/Evaluation_2016.pdf).

320 This practice is based on an interpretative ruling by the Supreme Administrative Court, which is not specific to cases under the Antidiscrimination law (No. 3 of 13.05.2010, rendered in commercial case No. 5 of 2009). The application of this ruling to anti-discrimination cases contradicts the Protection against Discrimination Act, Article 75 (2).

of dismissal or – in certain cases – one month after the termination of the employment.<sup>321</sup> Although the **Danish** Act on the Board of Equal Treatment does not contain any time limit for initiating proceedings, there is a general principle in Danish law which says that a person can lose his or her claim by acting passively. The board has applied this principle in specific cases, for instance in a case where the claimant had signed a resignation agreement in January 2012 and only introduced his claim before the board in December of the same year.<sup>322</sup> In addition, the Act on Limitations contains absolute periods of limitation (three years after the unlawful violation in general, five years in employment related cases), which the Board of Equal Treatment applies.<sup>323</sup> In **France**, the complexity of the different time limits (although they are not particularly short) applicable for different types of actions, in particular in the field of employment, create an additional barrier.

Furthermore, the length and the complexity of procedures may act as deterrents to those seeking redress, as is said to be the case in, for example, **Austria, Cyprus, Croatia, Malta, Portugal** and **Serbia**. However, on a positive note, **Serbia** has recently introduced the Law on the Protection of Trials within a Reasonable Timeframe,<sup>324</sup> which aims to tackle the issue of unreasonably lengthy trials. There are serious concerns in **Hungary** that some judicial proceedings take over three to four years to complete. In **Cyprus**, the equality body does not have the power to award compensation. In practice, it is often unable to provide any remedy in cases of discrimination when the delay in treating the case has caused either a third party to acquire rights which cannot be revoked, or the time limit to pass for the victim to apply to the court.<sup>325</sup> In the **Former Yugoslav Republic of Macedonia**, civil society organisations reported a substantial backlog in cases before the Commission for Protection against Discrimination,<sup>326</sup> despite its obligation to respond within 90 days.

Finally, the infrequency of litigation may itself be a deterrent to victims of discrimination as the prevailing impression may be 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 **Austria, Belgium** and **Italy** 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) courts that are competent to decide upon civil and criminal discrimination claims.

## 4.2 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].’

321 Sweden, Discrimination Act, Chapter 6, Sections 4 and 5.

322 Board of Equal Treatment, Decision No. 234/2013.

323 See, for instance, Board of Equal Treatment, Decision No. 29/2015 of 4 March 2015.

324 Serbia, Law on the Protection of Trials Within a Reasonable Timeframe (*Zakon o zastiti prava na sudjenje u razumnom roku*), *Official Gazette of the Republic of Serbia*, no. 40/2015, 19 April 2015.

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

326 See: <http://www.equalitylaw.eu/downloads/2864-fyr-macedonia-cso-network-annual-report-pdf-72-kb>.

Under the directives, EU Member States have some discretion as to how this clause is implemented in terms of the type of legal standing that associations can have, and therefore national legal orders present many different patterns that are difficult to compare. In some countries, the relevant anti-discrimination legislation provides associations and/or trade unions or other organisations with some legal standing specifically in cases of discrimination. These include **Belgium, Bulgaria, Cyprus, the Czech Republic, France, Germany, Greece,<sup>327</sup> Hungary, Ireland, Italy, Lithuania, Malta, Montenegro, Norway, Portugal, Romania, Slovakia, Slovenia, Spain, Serbia** and **Sweden**. In a number of countries however, no such specific provision is made for cases of discrimination, although general provisions of civil, administrative or labour law provide some standing to associations under certain conditions (e.g. **Denmark, Estonia, the Former Yugoslav Republic of Macedonia, Iceland, Latvia, Liechtenstein, the Netherlands, Poland** and **Turkey**).

#### 4.2.1 Entities which may engage in procedures

In many countries, legal standing – whether to engage on behalf or in support of victims – is limited to those associations or organisations that fulfil certain requirements, based on, for example, a certain number of years of existence and/or explicit mention of the fight against discrimination in their statutes. In **France**, for example, the Law of 16 November 2001 specifies the ability of all representative trade unions and NGOs that have been in existence for over five years to act either on behalf or in support of victims of discrimination, before any jurisdiction.<sup>328</sup> In addition, the equality body the Defender of Rights, can present observations in any case before any jurisdiction. Similarly, in **Belgium**, there are three categories of legal entities that may engage in proceedings on behalf or in support of a victim of discrimination: the equality body UNIA (previously the Inter-federal Centre for Equal Opportunities); officially recognised 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. 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 a landmark case decided in 2015, the Appeal Court of Brussels held that there is no territorial requirement as regards the location of the head office of associations bringing a claim before Belgian courts. Thus, the French NGO SOS Racisme had standing to bring a case against the Belgian employment agency Adecco for discriminatory practices.<sup>329</sup> 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 Anti-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 **Italy**, legal standing of associations active in the fight against discrimination varies depending on the legal basis for the action. As regards racial or ethnic origin, Legislative Decree 215/2003 authorises associations to engage in proceedings in support or on behalf of complainants only if they are included in a list approved by a joint decree of the Ministries of Labour and Social Policy and that of Equal Opportunities.<sup>330</sup> Such organisations are listed on the basis of criteria set out in the joint decree, which include having been established for at least one year and having promotion of equal treatment and combating discrimination as their only or primary aim. The list was updated in 2013 and contains more

327 In Greece, however, associations, organisations or trade unions acting on behalf of victims of discrimination must do so through an accredited lawyer, which is quite costly.

328 France, Article R779-9 of the Code of Administrative Justice; Article 3 the New Code of Civil Procedure; Article 2, Code of Penal Procedure; Articles L1134-2 and L1134-3 of the Labour Code; Article 8, paras 1 and 2, Law No 83-634 of 13 July 1983 in the public sector.

329 Appeal Court of Brussels, 10 February 2015.

330 Italy, Legislative Decree 215/2003, Article 5.

than 550 associations.<sup>331</sup> Regarding the grounds of discrimination covered by Directive 2000/78/EC, however, standing to litigate was previously limited to trade unions but is now accorded on an *ad hoc* basis to any organisation or association regarded as having a ‘legitimate interest’ in the enforcement of the relevant legislation.<sup>332</sup>

In some countries, legal standing of associations, organisations and/or trade unions is not dependant on specific criteria other than having a legitimate interest in the issue raised by the case. For instance, in the **Former Yugoslav Republic of Macedonia**, the Anti-discrimination Law grants the right to engage in judicial or other proceedings to associations with a legitimate interest as well as any other person working on the right to equal treatment. Under **Swedish** procedural law, trade unions always have legal standing where one of their members is involved. In the **United Kingdom**, there are no restrictions on the type of organisations which may be authorised by courts and tribunals to make a ‘third-party intervention’, whereby they may present legal arguments on a point of law that is at issue in the proceedings. Such interventions are often permitted in complex discrimination law cases. 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 either join proceedings brought by a victim in their support, or represent the complainants directly. Under **Slovakian** law, the equality body (the Slovak National Centre for Human Rights) or any NGO that seeks to protect the victims of discrimination can intervene as a third party in court proceedings. Since 1 July 2016, with the entry into force of the Slovak Civil Dispute Act, the provisions also enable trade unions to engage in court proceedings in support of victims of discrimination. In **Norway**, organisations must bear the ‘purpose, wholly or partly, to oppose discrimination according to the grounds as prohibited by law’.

In **Austria**, only one statutory organisation, the Litigation Association of NGOs against Discrimination, has been given third-party intervention rights in the courts in support of the complainant, with his or her consent (Section 62 of the Equal Treatment Act). All specialised NGOs can join this association, but non-members are not granted any special procedural rights—if they want to intervene they have to prove their legal interest in the case. An NGO, the **Austrian** National Council of Disabled Persons, has been given a similar right of intervention in disability cases, in addition to the Litigation Association’s own right to act. Similarly, the **Maltese** Equal Opportunities (Persons with Disability) Act empowers the Commission for the Rights of Persons with Disability to provide assistance to persons with disability in enforcing their rights under the same act. The Equal Treatment in Employment Regulations, the Equal Treatment of Persons Order and the Employment and Industrial Relations Act all allow associations, organisations and legal entities to engage on behalf of or in support of victims of discrimination, with the complainant’s approval. In **Lithuania**, the Equal Treatment Act stipulates that associations whose field of activity encompasses representation in the courts of victims of discrimination on a particular ground of discrimination have the right to engage on behalf or in support of complainants, with their approval, in judicial and administrative procedures. However, it is unclear how this provision will interact with more restrictive general provisions of the Code of Civil Procedure and the Law on the Proceedings of Administrative Cases.

#### 4.2.2 To engage ‘on behalf of’

A majority of the countries examined allow associations and/or trade unions to engage in proceedings ‘on behalf of’ victims of discrimination (i.e. representing them), including **Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, the Former Yugoslav Republic of Macedonia, France, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Malta, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Spain, Sweden** and **Turkey**. However, the conditions for associations to engage on behalf of victims

331 Italy, Decree of the Labour and Social Policy Office of 13 March 2013, available at: [http://www.asgi.it/public/parser\\_download/save/decreto\\_min\\_lavoro\\_13032013.pdf](http://www.asgi.it/public/parser_download/save/decreto_min_lavoro_13032013.pdf).

332 Italy, Legislative Decree 216/2003. Article 5.

of discrimination as well as the scope of such potential action vary among the countries. **Spanish** Act 62/2003 transposing the directives (Article 31) provides that in cases outside employment, 'legal entities legally authorised to defend legitimate collective rights and interests may engage on behalf of the complainant, with his or her approval, in any judicial procedure in order to make effective the principle of equal treatment based on racial or ethnic origin'. There is no corresponding provision for employment-related cases, in which only trade unions and employers' organisations can engage. With complainants' consent, trade unions can appear in court in the name and interest of their members.

In **Slovakia**, representation of victims by NGOs as well as the national equality body (the Slovak National Centre for Human Rights) is allowed before the ordinary courts. With the entry into force of the new Civil Dispute Act (as of 1 July 2016), representation by NGOs becomes possible before the Supreme Court as well, but Constitutional Court proceedings remain excluded.<sup>333</sup> In **Austria**, associations and other legal entities may act on behalf of victims of discrimination only in proceedings where representation by a barrister is not mandatory. Such proceedings are very rare, but include those before the Equal Treatment Commission. In **Latvia**, organisations and foundations whose aims are the protection of human rights and individual rights may represent victims of discrimination in court, but as of 4 January 2014 this option exists only before the lower instance courts.<sup>334</sup> Thus, an association having acted on behalf of a victim of discrimination before the first two instances may no longer appeal the decision of the Court of Appeal before the Court of Cassation, where a barrister needs to be present. Until the entry into force of this amendment, most cases of discrimination were brought before the civil courts by NGOs or legal practitioners other than barristers, which may indicate that the amended provisions could have a very negative impact on the (already low) number of court decisions in discrimination cases in Latvia. However, in 2003 the Constitutional Court found a similar provision to be in violation of the Constitution, and it was repealed.<sup>335</sup>

In **Lithuania**, the legal standing of associations to bring cases before the Equal Opportunities Ombudsperson on behalf of victims remains uncertain, in particular since 2013 when the Supreme Administrative Court held that associations can lodge a complaint with the Ombudsperson only when their own rights have been directly violated.<sup>336</sup> In **Finland**, the right to bring a case before the courts is reserved to the victim only. However, before the Non-Discrimination and Equality Tribunal either the Non-discrimination Ombudsman or an organisation with an interest in advancing equality may bring a case, as long as the victim gives his or her consent. The Government proposal clarifies that an organisation with an interest in advancing equality can be, for example, a human rights association or an association representing consumers or social partners.<sup>337</sup> Similarly, in **Ireland**, any individual or body may be authorised by an individual claimant to represent them before the Workplace Relations Commission, while only the Irish Human Rights and Equality Commission may represent victims before the civil courts.<sup>338</sup>

The **Hungarian** Equal Treatment Act provides that 'non-governmental and interest representation organisations' as well as the Equal Treatment Authority may act on behalf of the victim in proceedings launched due to the violation of the requirement of equal treatment.<sup>339</sup> The act further specifies that such organisations include: any social organisation formed under the Act on the Right to Assembly, Public Benefit Status and the Operation and Funding of Non-governmental Organisation, whose objectives, as set out in its articles of association or statutes, include the promotion of equal social opportunities or the catching up of disadvantaged groups defined by an exact enumeration of the concerned protected

333 Slovakia, Civil Dispute Act, 160/2015, Section 429(2)(c).

334 Amendments to the Civil Procedure Law, 19 December 2013, published in the Latvian Herald 2(5061), 3 January 2014, available in Latvian at: [www.vestnesis.lv/?menu=doc&id=263490](http://www.vestnesis.lv/?menu=doc&id=263490).

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

336 Supreme Administrative Court of Lithuania, Administrative case No A492-2078/2013, Decision of 7 November 2013.

337 Finland, *Government proposal on the Non-Discrimination Act 19/2014*, p. 87, available at: <http://www.finlex.fi/fi/esitykset/he/2014/20140019>.

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

339 Hungary, Equal Treatment Act, Article 18 (1).

ground(s) or the protection of human rights;<sup>340</sup> 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.<sup>341</sup> In **Sweden**, NGOs have the right to bring actions representing an individual person 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.

In **Slovenia**, the conditions for representation are stricter for judicial cases of discrimination dealt with by county courts, than for any other judicial case, which makes access to justice more difficult. According to the Civil Procedure Act, anyone with legal capacity may represent a party before the county courts, while according to the new Protection against Discrimination Act, the representative of the NGO must have passed the state legal exam (bar exam) to engage on behalf of a claimant. Similarly, **Greek** 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, although they must act through an authorised lawyer.

There are a few countries where legal standing to act on behalf of victims is limited to trade unions, such as in **Turkey**, where this right is limited to trade unions acting on behalf of their members in cases concerning employment and social security issues. Similarly, in **Croatia**, only trade unions can act on behalf of victims of discrimination in labour disputes. While trade unions in **Denmark** have legal standing to represent their members in cases concerning pay and employment conditions, there is no similar standing for NGOs. In **Iceland**, associations and trade unions can only act on behalf of their members, under certain conditions.

Table 10: Legal standing in court of organisations for discrimination cases

	Legal standing to act on behalf of victims	Legal standing to act in support of victims
<b>AUSTRIA</b>	Act Equal Treatment Commission and the National Equality Body, § 12/2 <sup>80</sup>	Equal Treatment Act (with limitations), § 62 <sup>81</sup>
	Federal Disability Equality Act, Art. 13 <sup>82</sup>	Federal Disability Equality Act, Art. 13 <sup>83</sup>
<b>BELGIUM</b>	Racial Equality Federal Act, Art. 32	Racial Equality Federal Act, Art. 32
	General Anti-discrimination Federal Act, Art. 30	General Anti-discrimination Federal Act, Art. 30
<b>BULGARIA</b>	Protection Against Discrimination Act, Art. 71(2) <sup>84</sup>	Protection Against Discrimination Act, Art. 71(2)
<b>CROATIA</b>	Civil Procedure Act, Art. 89.a and 434.a <sup>85</sup>	Anti-discrimination Act, Art. 21
<b>CYPRUS</b>	Law on Equal Treatment irrespective of Race or Ethnic origin N. 59(I)/2004, Art. 12	Law on Equal Treatment irrespective of Race or Ethnic origin N. 59(I)/2004, Art. 12
	Law on Equal Treatment in Employment and occupation 58(I)/2004, Art. 14	Law on Equal Treatment in Employment and occupation 58(I)/2004, Art. 14
	Law on the rights of persons with disability N. 127(I)/2000, Art. 9D	Law on the rights of persons with disability N. 127(I)/2000, Art. 9D
<b>CZECH REPUBLIC</b>	Anti-discrimination Law, Section 11	Anti-discrimination Law, Section 11
	Civil Procedure Code, Section 26(3)	
80 Representation before the Equal Treatment Commission. 81 Right to intervention in support of a victim for Litigation Association of NGOS Against Discrimination. 82 Limited group litigation for Austrian National Council of Disabled Persons. 83 Right to intervention in support of a victim for Austrian National Council of Disabled Persons. 84 Also Administrative Procedure Code, Art. 18(2). 85 Only trade unions have standing to act on behalf of victims of discrimination.		

340 As of 1 February 2012, the protected ground concerned by the legal action must be explicitly mentioned in the statutes of the organisation. Case law is still lacking but will be needed to determine whether a restrictive or flexible interpretation will be adopted of this new provision, in particular with regard to cases of intersectional discrimination.

341 Hungary, Equal Treatment Act, Article 3.

	Legal standing to act on behalf of victims	Legal standing to act in support of victims
<b>DENMARK</b>	Administration of Justice Act, S. 260 <sup>86</sup>	Administration of Justice Act, S. 252
<b>ESTONIA</b>	Individual Labour Dispute Resolution Act, Art. 14 (2 <sup>1</sup> ) <sup>87</sup>	No <sup>88</sup>
	Chancellor of Justice Act, Art. 23 (2) <sup>89</sup>	
<b>FINLAND</b>	No <sup>90</sup>	No <sup>91</sup>
<b>FRANCE</b>	Law no 2008-496 of 27 May 2008 relating to the adaptation of National Law to Community Law in matters of discrimination, Art. 6	Law no 2008-496 of 27 May 2008 relating to the adaptation of National Law to Community Law in matters of discrimination, Art. 6 <sup>92</sup>
	Law of 16 November 2001, Art 2	Law of 16 November 2001, Art 2
<b>FORMER YUGOSLAV REPUBLIC of MACEDONIA</b>	Law on Prevention and Protection Against Discrimination, Art. 39	Judicial interpretation required <sup>93</sup>
<b>GERMANY</b>	No.	General Equal Treatment Act, Sec. 23
<b>GREECE</b>	Equal Treatment Law 4443/2016, Art. 8(3) <sup>94</sup>	Equal Treatment Law 4443/2016, Art. 8(3) <sup>95</sup>
<b>HUNGARY</b>	Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, Art. 18 Paragraph (1)	Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, Art. 18 Paragraph (2)
	Act on Civil Procedure No. 91/1991, Arts 16(1) and 25(3) <sup>96</sup>	Interpretation required <sup>97</sup>
<b>ICELAND</b>	Act on Civil Procedure No. 91/1991, Arts 16(1) and 25(3)	Judicial interpretation required <sup>98</sup>
<b>IRELAND</b>	Irish Human Rights and Equality Commission Act 2014, Art. 40	Irish Human Rights and Equality Commission Act 2014, Art. 40
	Employment Equality Acts 1998-2015, S. 77(11)	Employment Equality Acts 1998-2015, S. 77(11)
<p>86 The legal standing of NGOs is more restricted than that of trade unions.</p> <p>87 Labour dispute resolution (ordinary employment).</p> <p>88 As regards civil procedures, judicial interpretation is however required of Articles 213 and 216 of the Code of Civil Procedure.</p> <p>89 Conciliation procedures (private sphere).</p> <p>90 Organisations can only act on behalf of victims in relation to the Non-Discrimination and Equality Tribunal and on issues outside employment.</p> <p>91 Organisations can only act in support of victims in relation to the Non-Discrimination and Equality Tribunal and on issues outside employment.</p> <p>92 Also Law of social modernisation no. 2002-73, Art. 24-1 as regards to housing; and Decree 75-1123 on the Code of Civil Procedure creating Article 31 of the Code of Civil Procedure, Art. 3 and Decree no 2008-799 on the Code of Administrative Justice Art. 2 relating to all fields.</p> <p>93 Law on Prevention and Protection Against Discrimination, Art. 39</p> <p>94 Organisations in Greece have legal standing subject to certain restrictions. They should have a legitimate interest in ensuring the application of the principle of equal treatment.</p> <p>95 Organisations in Greece have legal standing subject to certain restrictions. They should have a legitimate interest in ensuring the application of the principle of equal treatment.</p> <p>96 The Act on Civil Procedure No. 91/1991 provides for standing for associations to act on behalf of their members, under certain conditions.</p> <p>97 Of the Act on Civil Procedure No. 91/1991.</p> <p>98 Act on Civil Procedure No. 91/1991, Arts 16(1) and 25(3).</p>		

	Legal standing to act on behalf of victims	Legal standing to act in support of victims
<b>ITALY</b>	Legislative Decree No 215/2003 on the Implementation of Directive 2000/43/EC, Art. 5	Legislative Decree No 215/2003 on the Implementation of Directive 2000/43/EC, Art. 5
	Legislative Decree No 216/2003 on the Implementation of Directive 2000/78/EC, Art. 5	Legislative Decree No 216/2003 on the Implementation of Directive 2000/78/EC, Art. 5
	Act 67/2006 on Measures for the Judicial Protection of Persons with Disabilities who are Victims of Discrimination, Art. 4	Act 67/2006 on Measures for the Judicial Protection of Persons with Disabilities who are Victims of Discrimination, Art. 4
	Act 300/1970, Provisions on the protection of the freedom and dignity of workers, on freedom of trade unions and their activity in the workplace, and on employment, Art. 18	Act 300/1970, Provisions on the protection of the freedom and dignity of workers, on freedom of trade unions and their activity in the workplace, and on employment, Art. 18
<b>LATVIA</b>	Law on Organisations and Foundations, Art. 10(3)	Administrative Procedure Law, Art. 138
<b>LIECHTENSTEIN</b>	Act on Equality of People with Disabilities, Art. 31	Code of Civil Procedure Arts 11 and 17
<b>LITHUANIA</b>	Law on Equal Treatment, Art. 12(2)	Law on Equal Treatment, Art. 12(2)
<b>LUXEMBOURG</b>	No	Law of 28 November 2006 Arts 7 and 18
<b>MALTA</b>	Equal Treatment of Persons Order Art. 16	Equal Treatment of Persons Order Art. 16
	Equal Treatment in Employment Regulations, Art. 11	Equal Treatment in Employment Regulations, Art. 11
	Equal Opportunities (Persons with Disability) Act, Arts 22(k), 32(2) & (3), 33	Equal Opportunities (Persons with Disability) Act, Arts 22(k), 32(2) & (3), 33
<b>MONTENEGRO</b>	Law on the Prohibition of Discrimination, Arts 22 and 30	Law on Civil Procedure, Art. 205
<b>NETHERLANDS</b>	Civil Code, Art. 3:305a and Art. 3:305b	Civil Code, Art. 3:305a and Art. 3:305b
<b>NORWAY</b>	Dispute Act, S. 1-4(1)	Dispute Act, S. 15-7
	Anti-Discrimination Act on Prohibition of discrimination based on ethnicity, religion etc, S. 27	
	Working Environment Act, S. 13-10	
	Anti-Discrimination and Accessibility Act on Prohibition against Discrimination on the Basis of Disability, S. 32	
	Sexual Orientation Anti-Discrimination Act, S. 25	
<b>POLAND</b>	Act on Code of Civil Procedure, Art. 61	Act on Code of Civil Procedure, Art. 61
<b>PORTUGAL</b>	Law 18/2004 transposing the Racial Equality Directive, Art.5	Law 18/2004 transposing the Racial Equality Directive, Art.5
	Labour Code, Art. 443(1)(d) and 477 (d)	Labour Code, art. 443(1)(d) and 477 (d)
	Labour Procedure Code, Art.5	Labour Procedure Code, Art.5
	Law 46/2006 which prohibits and punishes discrimination based on disability and on a pre-existing risk to health, Art.15(1)	Law 46/2006 which prohibits and punishes discrimination based on disability and on a pre-existing risk to health, Art.15(1)
	Law 3/2011 on the non-discrimination principle in self-employment, Arts 5 and 8	
<b>ROMANIA</b>	Ordinance (GO) 137/2000 regarding the prevention and the punishment of all forms of discrimination, Art. 28	Ordinance (GO) 137/2000 regarding the prevention and the punishment of all forms of discrimination, Art. 28
<b>SERBIA</b>	The Law on the Prohibition of Discrimination, Art. 35, para. 3	The Law on the Prohibition of Discrimination, Art. 35, paras 3 and 4
	Civil Procedure Code, Art. 85, para. 3	Civil Procedure Code, Arts 215-217



	Legal standing to act on behalf of victims	Legal standing to act in support of victims
SLOVAKIA	Anti-discrimination Act, S. 10	Act No. 99/1963 Civil Procedure Act, S. 93(2)-(4)
		Act No. 160/2015 Civil Dispute Act, S. 95
SLOVENIA	Protection against Discrimination Act, Art. 41(1)-(3)	Protection against Discrimination Act, Art. 41(4)
SPAIN	Law on Fiscal, Administrative and Social Measures, Art. 31 <sup>99</sup>	No
	General Law on the Rights of Persons with Disabilities and their Social Inclusion, Art. 76	
SWEDEN	Discrimination Act <sup>100</sup> Ch. 6, S. 2	Code (1942:740) on Criminal and Civil Procedure, Ch. 12, S. 22
TURKEY	Law on Unions and Collective Agreements (no.6356), Art. 26(2) <sup>101</sup>	No <sup>102</sup>
UNITED KINGDOM	No	Yes <sup>103</sup>

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

100 Trade unions also have the right to represent their members in all disputes regarding employment (Labour Procedure Act, Ch. 4, S. 5).

101 Limited to trade unions and only on behalf of their members in cases concerning employment and social security issues.

102 The Law on Criminal Procedure (no. 5271), also provides some standing to organisations which can demonstrate that they have been 'harmed by the crime', although judicial interpretation is required regarding the extent to which this provision is applicable in cases of discrimination (Art. 237(1)).

103 Organisations may do that which they are not prohibited to do and no law prohibits the provision of support to litigants.

### 4.2.3 Collective redress

The European Commission has been assessing the need for a common EU approach to collective redress. In a working document published in 2011,<sup>342</sup> it recognised that collective redress is necessary where the same breach of rights provided under EU law affects a large number of persons, in particular when individual actions fail to reach effective redress, in terms of stopping unlawful conduct and securing adequate compensation. Following this public consultation, in 2013 the Commission issued a recommendation to the effect that all Member States should introduce collective redress mechanisms to facilitate the enforcement of the rights that all EU citizens have under EU law.<sup>343</sup> 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*.<sup>344</sup> 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, the 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. According to the Court of Justice, Member States are not precluded from

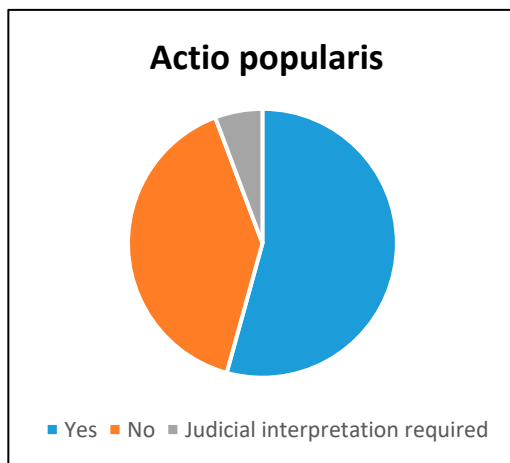
'laying down, in their national legislation, the right of associations with a legitimate interest in ensuring compliance with [the Racial Equality Directive], or for the body or bodies designated pursuant to Article 13 thereof, to bring legal or administrative proceedings to enforce the obligations

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

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

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

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>345</sup>



*Actio popularis* is permitted by national law for discrimination cases in 19 countries (**Austria, Bulgaria, Croatia, France, the Former Yugoslav Republic of Macedonia, Germany,**<sup>346</sup> **Hungary, Italy, Liechtenstein,**<sup>347</sup> **Luxembourg, Malta,**<sup>348</sup> **Montenegro,**<sup>349</sup> **the Netherlands, Norway, Portugal, Romania, Serbia, Slovakia, and Spain**).<sup>350</sup> For example, in **Hungary**, social and interest representation organisations, the Equal Treatment Authority and the Public Prosecutor can bring *actio popularis* claims, provided that the violation of the principle of equal treatment was based on a characteristic that is an essential feature of the individual, and that the violation affects a larger group of persons that cannot

be determined accurately. In other countries however, the possibilities for *actio popularis* are much more limited. In **Austria** for instance, the only possibility relies upon the Federal Disability Equality Act and lies with a limited number of organisations to act against insurance companies breaching the prohibition of discrimination on the ground of disability as set out in the Insurance Contracting Act.<sup>351</sup>

In three countries, judicial interpretation would be required. In the **United Kingdom**, the Senior Court Act 1981, applicable in England and Wales, needs interpretation, as any legal or natural person with 'sufficient interest' in a matter may bring a claim under administrative law against public authorities. In practice, trade unions, NGOs as well as the equality commissions have all brought important actions against public authorities through judicial review proceedings. A requirement for judicial interpretation also applies in Scotland (Section 27B of the Court of Session Act 1988) and Northern Ireland (Order 53(5) Rules of the Court of Judicature (Northern Ireland)). Finally, in **Lithuania**, both civil and administrative law provide that *actio popularis* is possible in cases 'as prescribed by law', but no such laws have been adopted. In addition, the Supreme Administrative Court has held that, as regards administrative law, only persons whose rights have been directly affected may file a complaint with the Ombudsperson.<sup>352</sup>

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*. Although associations cannot bring *actio popularis* claims in **Belgium** per se, the equality body UNIA as well as registered associations and representative workers' organisations can bring actions to defend their corporate purpose, on their own behalf. This possibility allowed the equality body to bring the action that gave rise to the CJEU's landmark *Feryn* case.<sup>353</sup> However, if there is an identifiable victim, such

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

346 This option exists only on the basis of disability law.

347 This option 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.

348 Only the National Commission for the Promotion of Equality may launch an *actio popularis*.

349 In Montenegro, anyone can initiate a procedure for the protection of public interest before the Constitutional Court (Article 150 of the Constitution).

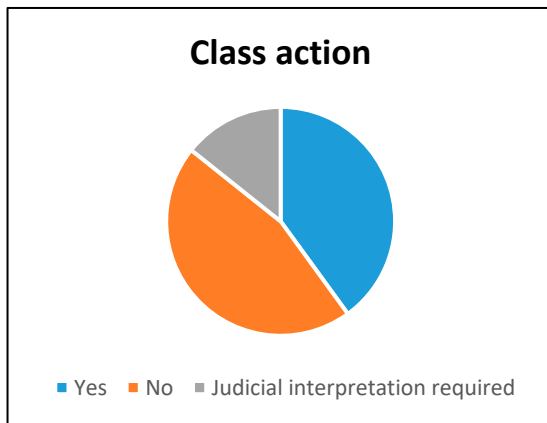
350 *Actio popularis* is possible in Spain only in criminal proceedings.

351 Austria, Federal Disability Equality Act, para 13/3.

352 Supreme Administrative Court of Lithuania, Administrative case No A492-2078/2013, Decision of 7 November 2013.

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

organisations can only act in support or on behalf of that victim. Although *actio popularis* is not allowed in **Ireland**, judicial interpretation of Section 42 of the Irish Human Rights and Equality Commission Act might empower the IHREC to bring an *actio popularis* before a court. Finally, since 2016 the **Danish** Institute for Human Rights has a competence to bring cases of principle before the Board of Equal Treatment, including cases of general public interest.<sup>354</sup>



Class actions (the ability for an 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 13 countries: **Bulgaria, Denmark, the Former Yugoslav Republic of Macedonia, France, Iceland,**<sup>355</sup> **Liechtenstein, Montenegro, the Netherlands, Norway, Portugal, Romania, Slovakia and Slovenia.** In **France**, class action was permitted only for housing cases until November 2016, when the Law on the modernisation of the justice system of the 21<sup>st</sup> century created a specific class action procedure

for discrimination cases, applicable in all fields covered by national anti-discrimination law. The action must be initiated by an NGO that has been in existence for at least five years except in the employment field, where the action must be initiated by a trade union.<sup>356</sup> In **Lithuania**, the law does not allow associations, organisations or trade unions to represent a class action, but it does allow for class action through representation by a lawyer.

Judicial interpretation is required in five countries. **Austrian** disability law provides for a type of action which does not clearly establish class action,<sup>357</sup> while judicial interpretation is also required of **Cypriot, Italian, Maltese and Polish** law.

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

Neither *actio popularis* nor class action is permitted in discrimination cases in the following countries: the **Czech Republic, Belgium, Estonia, Finland, Greece, Ireland, Latvia, Sweden and Turkey.**<sup>358</sup>

### 4.3 Burden of proof<sup>359</sup>

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

354 Denmark, Section 1(7) of Consolidated Act No. 1230 of 2 October 2016.

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

356 France, Law 2016-1547 on the modernisation of the justice system of the 21st century, Articles 62-88.

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

358 In Sweden, there is the possibility for 'group petitions' which can apply in some limited cases (Act on Group Petitions (2002:599)).

359 See also Farkas, L. and O'Farrell, O. (2015) *Reversing the burden of proof: Practical dilemmas at the European and national level*, European network of legal experts in the non-discrimination field, available at <http://www.equalitylaw.eu/downloads/1076-burden-of-proof-en>.

be presumed that there has been discrimination.<sup>360</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, although it is the responsibility of the petitioner in discrimination cases to submit the facts that could lead the judge 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.<sup>361</sup> **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. Similarly, in **Estonia**, the shift of the burden of proof does not apply in administrative court or criminal proceedings. In **Slovakia**, the Act on Labour Inspection does not contain any explicit and clear provisions on the burden of proof in relation to identifying breaches of the principle of equal treatment.<sup>362</sup> In **Bulgaria**, the shift of the burden of proof is applicable to both judicial proceedings and proceedings before the equality body.<sup>363</sup> Following the amendment of the Protection against Discrimination Act in 2015, the wording now clearly indicates that claimants have an alleviated onus of proof to establish the presumption of discrimination. Although the shift is uniformly applicable to all forms of discrimination, including harassment and victimisation, it is not always applied consistently in all cases and further training for judges and staff of the equality body would be advisable.

A minority of states appear to have failed to introduce burden of proof provisions in line with the directives. In **Latvia**, the shift of the burden of proof applies mainly to employment, but also to education and access to goods and services. The provision on the burden of proof in the **Austrian** federal-level Equal Treatment Act (applicable in the private sector) lowers the burden for the claimant but in a way that is not considered to comply satisfactorily with the directives. However, the Supreme Court has provided an interpretation in line with the directive by ruling that, 'If discriminatory infringements are successfully established, it is for the respondent to prove that he or she did not discriminate'. In 2013, the same provision contained in the Federal Equal Treatment Act (applicable in the federal public sector) was amended to comply with the directives.<sup>364</sup> In the **Former Yugoslav Republic of Macedonia**, the Anti-discrimination Act places the burden to a great extent on the complainant, as he or she must submit 'facts and proofs from which the act or action of discrimination can be established',<sup>365</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, but is not required for any of the five grounds listed under the directives. In **Liechtenstein**, the claimant must establish the discrimination claim as 'credible'.

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360 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).

361 *Conseil d'Etat*, No. 298348, 30 October 2009.

362 Slovakia, Act No 125/2006 on Labour Inspection and changing and supplementing Act No 82/2005 on Illegal Work and Illegal Employment and changing and supplementing certain laws, as amended (*zákon č. 125/2006 Z. z. o inšpekcii práce a o zmene a doplnení zákona č. 82/2005 Z. z. o nelegálnej práci a nelegálnom zamestnávaní a o zmene a doplnení niektorých zákonov v znení neskorších predpisov*).

363 After the cut-off date of this report, an amendment was adopted to modify the wording of the provision regulating the shift of the burden of proof, without however bringing it completely into line with the directives. See State Gazette issue No 26 of 7 April 2015.

364 Austria, BGBl. I No 81/2013 of 27 December 2013, amended §20a. Note that the Equal Treatment Act and the Federal Equal Treatment Act are two different acts.

365 Former Yugoslav Republic of Macedonia, Law on the Prevention of and Protection against Discrimination, Official Gazette of the Republic of Macedonia, No.50/10, 44/2014, 150/2015, Constitutional Court Decision: U.no.82/2010. Articles 25 (para.2), 38.

### Shift of the burden of proof in case of contradicting evidence of equal value

The claimant was a Muslim dental student who was required to work with bare underarms due to state regulations on hygiene issues. Due to her religious beliefs, she asked to wear disposable underarm protection instead of showing her bare arms to strangers. When this request was denied, the claimant brought her case to the Equality Ombudsman, which brought the case to court.

Before the court, the Swedish State defended the hygiene regulations by calling an expert witness who argued that the necessary hygiene standards could be compromised if the specific protection requested was used. The Equality Ombudsman however called a British expert who explained that the kind of underarm protection requested was used in the UK, arguing that nothing indicated that such protection would lead to increased risks of infection.

The court found both experts to be equally scientific and credible, stating that it was not possible for it (the court) to believe one expert more than the other. The court then noted that the education provider (as alleged discriminator) bears the burden of proof with regard to the justification of possible indirect discrimination. Under such circumstances, it was found that the education provider had failed to prove that there was no breach of the principle of equal treatment. The claimant was awarded SEK 5 000 (EUR 550) as compensation for indirect discrimination on the ground of religion.<sup>366</sup>

The meaning of this phrase, ‘facts from which it may be presumed that there has been direct or indirect discrimination’ was one of several questions on the burden of proof put before the Court of Justice of the European Union in the *Firma Feryn* case.<sup>367</sup> Further guidance was also provided by the Court on this issue in the *Asociația Accept* case, where it held that ‘a defendant employer cannot deny the existence of facts from which it may be inferred that it has a discriminatory recruitment policy merely by asserting that statements suggestive of the existence of a homophobic recruitment policy come from a person who, while claiming and appearing to play an important role in the management of that employer, is not legally capable of binding it in recruitment matters.’<sup>368</sup>

### Slovakian Constitutional Court provides guidance on the burden of proof in discrimination cases

In 2015, the Slovak Constitutional Court provided some clarifications related to the burden of proof in anti-discrimination proceedings.<sup>369</sup> The court emphasised the specificities of anti-discrimination proceedings, which are very demanding in terms of evidence assessment. It noted further that the claimant is required to communicate to the court facts which give rise to a reasonable assumption (i.e. not an unquestionable finding) that the principle of equal treatment has been breached. When such facts are communicated, the burden of proof is transferred to the defendant. The court noted that the shift of the burden of proof depends on the assessment of the available evidence by the deciding court, which has to thoroughly consider all facts that emerged in the proceedings.

The Constitutional Court further referred to case law of its Czech counterpart to hold that it would be impossible for the claimant to prove the discriminatory motivation (incentive) of the defendant. Therefore, claimants do not have any such obligation to establish the motive of the defendant.

366 Sweden, Stockholm Municipal Court, case T 3905-15, *Equality Ombudsman v the Swedish State through Karolinska Institutet*, judgment of 16 November 2016.

367 CJEU, Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v NV Firma Feryn*, judgment of 1 July 2008, ECLI:EU:C:2008:397.

368 CJEU, Case C-81/12, *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*, judgment of 25 April 2013, ECLI:EU:C:2013:275.

369 Constitutional Court of the Slovak Republic, No III. ÚS 90/2015-40, 1 December 2015.

## 4.4 Victimisation

Member States must ensure that individuals are protected from any adverse treatment or adverse consequences in reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment (Article 9, Racial Equality Directive; Article 11, Employment Equality Directive). There is still a major inconsistency with this principle in some states, where protection is restricted to the employment field and thereby fails to protect against victimisation in the areas outside employment protected by the Racial Equality Directive. This is the case in **Germany, Lithuania, Spain, and Turkey**, while in **Ireland** the prohibition of victimisation extends to employment and access to goods and services.

Although the directives do not limit the protection against victimisation to the actual claimants themselves but potentially extend it to anyone who could receive adverse treatment ‘as a reaction to a complaint or to proceedings’, the protection is more restricted in several countries. According to **Danish** law for instance, 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 **Belgium**, protection against victimisation is limited to victims filing a complaint of discrimination and any formal witness in the procedure. This limitation seems to mean that not ‘all persons’ involved are protected, for instance persons who provided assistance or support to the victim.

However, the scope of the protection is wider in most countries, such as in **Italy**, which includes protection for ‘any other person’ in addition to the claimant, or **Estonia** and **Poland**, where protection includes claimants as well as those who ‘support’ them. In **Romania**, protection against victimisation is not limited to the complainant but extends to witnesses, while the **Lithuanian** Equal Treatment Act repeats the wording of the Employment Equality Directive. In **Norway**, protection against victimisation is limited when the complainant acted with gross negligence, but apart from that, 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. The **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, extending protection to anyone ‘having testified in good faith’ about discriminatory behaviour or having reported it.

### UK courts deliver contrasting decisions on post-employment victimisation

In the spring of 2013, two Employment Appeal Tribunals (EATs) adopted contrasting decisions regarding the scope of the prohibition of victimisation contained in the Equality Act 2010. The Equality Act explicitly excludes victimisation from the provision that ensures protection against discrimination after the termination of the employment contract (Section 108(7)), which is why the EAT in the first case found that the act provides no remedy for post-employment victimisation, although it recognised that the gap in statutory protection was probably accidental.<sup>370</sup> The EAT did not accept that it had the power to fill the statutory gap itself, which would have required extensive re-writing of primary legislation.

However, the EAT in the second case came to the conclusion that the drafters of the Equality Act must have been familiar with the earlier case law which extended protection against discrimination after the termination of the employment contract, and that their failure to explicitly exclude such victimisation from the act must be interpreted to mean that it was implicitly included.<sup>371</sup> In addition, a construction compatible with EU law would have achieved the same result.

A few countries have gone further than the requirements of the directives. For example, in **Bulgaria**, protection is accorded for victimisation by presumption and by association as well. In the **United Kingdom**, it is not required that the perpetrator of the victimisation should have been involved in the initial

370 Employment Appeal Tribunal, *Rowstock Ltd & Anor v Jessemey*, 5 March 2013, Appeal No UKEAT/0112/12/DM.

371 Employment Appeal Tribunal, *Onu v Akwiwu & Anor*, 1 May 2013, Appeal No UKEAT/0283/12/RN & UKEAT/0022/12/RN.

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.

In **Slovenia**, the Advocate of the Principle of Equality may, upon finding discrimination in the original case, order the offender to apply appropriate measures to prevent victimisation. In the event that an alleged offender does not obey the Advocate's order, the Advocate may order the offender to eliminate the consequences of victimisation.

As regards non-EU Member States, **Turkish** labour law merely prohibits the dismissal of employees (and disciplinary measures of civil servants) who seek judicial redress, while **Icelandic** law only prohibits victimisation with regards to the ground of gender and there are no legal provisions in relation to other protected grounds. 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, exclusively on the ground of disability.

**Table 11: Prohibition of victimisation in national law (in the case of decentralised states only federal law is indicated)**

	Law	Articles	Protection extended outside employment
AUSTRIA	Equal Treatment Act	§§ 27, 39	Yes
	Federal Equal Treatment Act <sup>104</sup>	§ 20b	No
	Act on the Employment of People with Disabilities	§ 7i/2	No
	Federal Disability Equality Act <sup>105</sup>	§ 9/5	Yes
BELGIUM	Racial Equality Federal Act <sup>106</sup>	Arts 14 and 15	Yes
	General Anti-discrimination Federal Act	Arts 16 and 17	Yes
BULGARIA	Protection Against Discrimination Act	Art. 5.	Yes
CROATIA	Anti-discrimination Act	Art. 7	Yes
CYPRUS	Law on Equal Treatment in Employment and occupation 58(I)/2004	Art. 10	No
	Law on Equal Treatment irrespective of Race or Ethnic origin N. 59(I)2004	Art. 11	Yes
	Law on Persons with Disability N. 127(I)/2000	Art. 9E	Yes
CZECH REPUBLIC	Anti-discrimination Act	S. 4(3)	Yes
DENMARK	Act on Prohibition of Discrimination in the Labour Market etc.	S. 7(2)	No
	Ethnic Equal Treatment Act	S. 8	Yes
ESTONIA	Equal Treatment Act	Art. 3(6)	Yes
FINLAND	Non-Discrimination Act	S. 16	Yes
FRANCE	Law no 2008-496 of 27 May 2008 relating to the adaptation of National Law to Community Law in matters of discrimination	Arts 2 and 3	Yes
FORMER YUGOSLAV REPUBLIC of MACEDONIA	Law on Prevention and Protection Against Discrimination	Art. 10	Yes
<p>104 The Federal Equal Treatment Act and the Act on the Employment of People with Disabilities include protection against victimisation in employment discrimination cases only.</p> <p>105 The Federal Disability Equality Act includes protection against victimisation outside the employment field only.</p> <p>106 Belgian law only protects victims, their representatives and witnesses against victimisation while the EU directives cover 'all persons' involved.</p>			

	Law	Articles	Protection extended outside employment
GERMANY	General Act on Equal Treatment	Sec. 16	No
GREECE	Equal Treatment Law 4443/2016	Art. 10	Yes <sup>107</sup>
HUNGARY	Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities	Art. 10, Paragraph (3)	Yes
ICELAND	<sup>108</sup>	-	-
IRELAND	Employment Equality Acts 1998-2015	S. 14, 74(2)	No
	Equal Status Acts 2000-2015	S. 3(2)(j)	Yes
ITALY	Legislative Decree No 215/2003 on the Implementation of Directive 2000/43/EC	Art. 4bis	Yes
	Legislative Decree no. 216/2003 on the Implementation of Directive 2000/78/EC	Art. 4bis	No
LATVIA	Labour Law <sup>109</sup>	Art. 9	Yes
LIECHTENSTEIN	Act on Equality of People with Disabilities	Art. 23(4)	Yes
LITHUANIA	Law on Equal Treatment	Art. 7(8)	No
LUXEMBOURG	Law of 28 November 2006	Arts 4 and 18	Yes
MALTA	Employment and Industrial Relations Act	Art. 28	No
	Equal Treatment of Persons Order	Art. 7	Yes
	Equal Opportunities (Persons with Disability) Act	Art. 5(3)	Yes
	Equality for Men and Women Act	Art. 4	Yes
MONTENEGRO	Law on the Prohibition of Discrimination	Art.4.	No
NETHERLANDS	General Equal Treatment Act	Arts 8 and 8(a)	Yes
	Disability Discrimination Act	Arts 9 and 9(a)	Yes
	Age Discrimination Act	Arts 10 and 11	Yes
NORWAY	Anti-discrimination Act on Prohibition of Discrimination based on Ethnicity, Religion, etc.	S. 10	Yes
	Working Environment Act	S. 2-5	No
	Anti-discrimination and Accessibility Act on Prohibition of Discrimination on the Basis of Disability	S. 9	Yes
	Sexual Orientation Anti-Discrimination Act	S. 9	Yes
POLAND	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment	Art. 17	Yes
PORTUGAL	Labour Code	Art. 129(1), 331(1)(a)to(d), 351(1)(3), 381(b)	No
	Law 18/2004 transposing the Racial Equality Directive	Art. 7	Yes
ROMANIA	Ordinance (GO) 137/2000 regarding the prevention and the punishment of all forms of discrimination	Art. 2(7)	Yes
SERBIA	The Law on the Prohibition of Discrimination	Art.9	Yes
SLOVAKIA	Anti-discrimination Act	S. 2a(8) and (10)	Yes
	Labour Code	S.13(3)	Yes

107 Protection against victimisation covers the scope of the Racial Equality Directive for the grounds of racial or ethnic origin, but not for the other grounds.  
108 Victimisation is only defined and prohibited in gender equality law.  
109 Victimisation is also dealt with outside the employment field in the following laws: the 1995 Law on Social Security, Art. 34(2), the 1999 Law on Consumer Protection, Art. 3(1), and the 2012 Law on Prohibition of Discrimination against Natural Persons who are Economic Operators, Art. 6.



	Law	Articles	Protection extended outside employment
SLOVENIA	Protection against Discrimination Act	Art. 11	Yes
	Employment Relationship Act	Art. 6(8)	No
SPAIN	Law on Fiscal, Administrative and Social Measures	Art. 37	No
SWEDEN	Discrimination Act	Ch. 2, Ss. 18-19	Yes
TURKEY	Labour Law	Art. 18	No
UNITED KINGDOM	(GB) Equality Act	S. 27	Yes
	(NI) Race Relations Order (RRO)	Art. 4	Yes
	(NI) Fair Employment and Treatment Order	Art. 3(4)	Yes
	(NI) Employment Equality (Sexual Orientation) Regulations	Reg. 4	Yes
	(NI) Disability Discrimination Act	S. 55	Yes
	(NI) Employment Equality (Age) Regulations	Reg. 4	No

#### 4.5 Sanctions and remedies<sup>372</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 between the EU sex discrimination law and the Racial Equality Directive and Employment Equality Directive, this case law is of relevance to the latter directives. The meaning of the concept must be determined in each case in the light of individual circumstances.

##### CJEU ruling and its national follow-up: *Asociația ACCEPT*<sup>373</sup>

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

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

In its judgment of 25 April 2013, the Court observed that Directive 2000/78 applies to situations such as the present one, which involve statements concerning the conditions for access to employment, including recruitment conditions. The specificities of the recruitment of professional football players were found to be irrelevant in this regard, as was the fact that the statements were made by a person who was not legally capable of binding the employer in recruitment matters. Thus, statements made in relation to recruitment matters by a person who claims to play an important role in the management

372 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. Tobler, Christa (2005), *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*, Luxembourg. Some of the findings of this study are reproduced in this section.

373 CJEU, Case C-81/12, *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*, ECLI:EU:C:2013:275.

of an employer and who appears to do so, can constitute ‘facts from which it may be presumed that there has been discrimination’ in the sense of the directive.

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

However, the referring court and (on appeal) the High Court of Cassation and Justice did not follow the ruling of the CJEU. In its judgement, the High Court stated that ‘contrary to the statements of the complainant, warning (as sanction) is not incompatible with Art. 17 of Directive 2000/78/EC and cannot be considered *de plano* as a *purely symbolic* sanction. In applying this sanction the NCCD has a margin of appreciation under which it is assessing multiple elements, among which the context in which the deed was perpetrated, the effects or the outcome and the person of the perpetrator played an important role. Not lastly, the publicity generated by the decision to sanction the author of the deed of discrimination who excessively exercised his freedom of expression played a dissuasive part in the society.’<sup>374</sup>

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

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

In some Member States, the specialised body is empowered to issue sanctions in cases where they have found discrimination. The **Bulgarian** Protection against Discrimination Commission has powers to order preventative or remedial action and to impose financial sanctions between the equivalents of EUR 125

374 Romania, High Court of Cassation and Justice (*Inalta Curte de Casație și Justiție*), decision 224 in file 12562/2/2010, 29 May 2015. See 01-RO- ND-2016-ICCJ Becali, available at: <http://www.equalitylaw.eu/country/romania>.

and EUR 1 250, amounts that would be dissuasive to the majority.<sup>375</sup> These sanctions are administrative fines and are not awarded to the victim as compensation but go to the state budget. Similarly, the **Romanian** National Council on Combating Discrimination can issue administrative warnings and fines ranging from EUR 250 to 7 500 where the victim is an individual, and from EUR 500 to 25 000 where the victim is a group or a community. Until the CJEU adopted its ruling in the case of *Asociația ACCEPT*, the NCCD had developed the practice of issuing recommendations and administrative warnings in the large majority of cases where it found that discrimination had taken place, and only rarely issued fines. Following the CJEU decision, this practice was abandoned for a limited period of time,<sup>376</sup> and since then, the NCCD has increasingly issued fines as well as increasing their amount.<sup>377</sup> The **Cypriot** Commissioner for Administration ('Ombudsman') has the power to issue binding decisions and to impose small fines. It also has a duty to monitor the enforcement of its orders, and to impose fines for the failure to comply with its decisions. These fines are however so low that they can hardly be seen as a deterrent. 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 to comply with the order is exceeded. Except for this coercive power (which has been used only once in practice), the Equality Ombud and the Equality Tribunal cannot award compensation to victims. In contrast, the **Danish** Board of Equal Treatment issues binding decisions and can award compensation. Its decisions can be appealed before the civil courts.

In the **United Kingdom**, both the British Equality and Human Rights Commission and the Equality Commission for Northern Ireland are able to use their powers of formal investigation to investigate organisations they believe to be discriminating and, where they are satisfied that unlawful acts have been committed, they can serve a binding 'compliance notice' requiring the organisation to stop discriminating and to take action by specified dates to prevent discrimination from recurring. They also have the power to enter into (and to enforce via legal action if necessary) binding agreements with other bodies that undertake to avoid discriminatory acts and to seek an injunction to prevent someone committing an unlawful discriminatory act.

**The following administrative 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;
- compulsory closing of premises owned by the perpetrators;
- suspension of licences and other authorisations; and
- removal of the right to the benefits granted by public bodies or services.

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

There appear to be no limits either in relation to pecuniary or non-pecuniary damages in the national laws of **Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, the Former Yugoslav**

375 Bulgaria, Protection against Discrimination Act, Articles 78-80.

376 See, for example, National Council for Combating Discrimination (NCCD) (2013), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2013* (2013 Annual report of the NCCD).

377 See, for example, National Council for Combating Discrimination, Decision 357 of 11 May 2016.

**Republic of Macedonia, Finland, France, Germany,**<sup>378</sup> **Greece, Iceland, Italy, Liechtenstein,**<sup>379</sup> **Lithuania, Luxembourg, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Serbia, Slovakia,**<sup>380</sup> **Spain, Sweden** and the **United Kingdom**. In **Poland**, there is a *minimum* level of compensation, which is linked to the minimum wage. In **Malta** however, statutory upper limits on compensation for non-pecuniary damages apply for disability cases only (EUR 2 500).<sup>381</sup> Although there are no statutory limits on compensation for damages in **Croatia**, in 2002 the Supreme Court published guiding criteria for non-pecuniary damages, which the courts are using as guidelines to determine levels of compensation, without necessarily taking into account the effectiveness, proportionality and dissuasiveness of the sanction. In **Slovenia**, the new Protection against Discrimination Act introduced additional provisions on claiming compensation. Due to exposure to discrimination, the individual is entitled to compensation paid by the perpetrator of between EUR 500 and EUR 5 000. However, it is not yet clear how these provisions relate to the general rules of tort law, which contains no upper limit on the compensation.

#### Upper limit for unpaid salary damages under the Hungarian Labour Code

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

However, Article 83 of the Labour Code allows an unlawfully dismissed employee to request the courts to order his/her reinstatement. In this case the employment has to be regarded as continuous, which means that the employee receives his/her lost income as 'unpaid salary' and not as 'damages', and so the cap does not apply.

In **Latvia**, there is no maximum amount for damages under civil law, but the Reparation of Damages caused by State Administrative Institutions Act sets maximum amounts of damages for material harm at EUR 7 115, or EUR 9 960 in cases of grievous bodily harm, and EUR 28 457 if life has been endangered or grievous harm has been caused to health. The maximum amount of damages for non-pecuniary harm is set at EUR 4 269 or EUR 7 115 in cases of grave non-pecuniary harm and EUR 28 457 if life has been endangered or grievous harm has been caused to health. It is as yet unclear whether the courts would award damages for both material and non-pecuniary harm in cases of discrimination. The definitions of material and non-pecuniary harm permit cases of discrimination to be brought under both, and the law permits applications for several kinds of damages at the same time. **Austrian** law specifies an upper limit of EUR 500 for non-pecuniary damages in cases of non-recruitment or non-promotion if the employer proves that the victim would not have been recruited or promoted anyway. Of the countries where limits do exist, **Ireland** is particularly interesting because there are no comparable statutory limits on compensation for discrimination on grounds of sex. Articles 5 and 21 of the **Turkish** Labour Law provide

378 It is specified that the compensation for non-material damage in civil law and in labour law must also be appropriate. If the discrimination was not a causal factor in the decision not to recruit an individual, the compensation for non-material loss is limited to a maximum of three months' salary (General Equal Treatment Act (AGG), Section 15.2, sentence 2).

379 There is no upper limit for compensation for discrimination on the ground of disability under the Liechtenstein Act on Equality of People with Disabilities.

380 The Slovakian Labour Code provides however for an upper limitation to claims of salary compensation in cases of illegal dismissals (Section 79(2)), confirmed by the Supreme Court to be applicable also in anti-discrimination proceedings.

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

that an employee may ask compensation for the actual damage suffered, in addition to a compensation of up to eight months' wages.

The following examples illustrate sanctions in a number of Member States that can hardly be regarded as effective or dissuasive remedies. In **France**, judges are still generally reluctant to award substantial amounts when calculating pecuniary loss, and amounts awarded remain rather low. In **Sweden**, damages for violations of non-discrimination legislation generally range between EUR 1 700 and EUR 13 000, depending on the circumstances. However, in one specific case where a child was removed from its parents due to their disability, all three victims (the child and both parents) were awarded EUR 16 500 each.<sup>382</sup> **Dutch** courts are generally reluctant to grant damages for non-pecuniary loss, while the **Polish** Equal Treatment Act only refers to 'compensation' (which in Polish law implies that only material damage is covered). Finally, in **Greece**, there are no known cases on any ground where compensation has been awarded.

On initial examination, with the exception of the **United Kingdom** and **Ireland** for employment cases, the levels of compensation awarded in most countries seem relatively low. This, coupled with the length of time it can take to obtain a decision, throws doubt on the effectiveness of remedies and even whether they in actual fact make good the loss. Their dissuasiveness is also questionable, in particular with regard to the issue of whether such sums will deter larger employers. **Spanish** and **Portuguese** legislation provide criteria based on company turnover to determine the level of penalty in some cases. This approach presents an interesting option.

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382 Svea Court of Appeal, Case T 5096, *Equality Ombudsman v Sigtuna Municipality*, Judgment of 11 April 2014.

## 5 EQUALITY BODIES

### Article 13, Racial Equality Directive:

'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. Among the candidate countries, in **Turkey** there is no single specialised body that would be able to fulfil all three functions under Article 13(2) of the Racial Equality Directive. Although the Law on the Human Rights and Equality Institution of Turkey (no. 6701) was adopted in 2016, the new body is only expected to become operational in 2017. 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>383</sup> There is no specialised body in **Iceland**. The Ministry of Interior launched a public consultation on the establishment of the Icelandic National Human Rights Institute in July 2016, but the actual adoption of the bill has yet to be set out. **Liechtenstein** originally established the Office of Equal Opportunities to deal with gender equality, but it was subsequently 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>384</sup> **Germany**, **Greece**,<sup>385</sup> **Hungary**, **Italy**, **Romania**, **Slovenia**,<sup>386</sup> and **Spain**.<sup>387</sup> Bodies that already existed but which have been given the functions designated by Article 13 include the **Cypriot** Ombudsman,<sup>388</sup> the **Estonian** Chancellor of Justice and Commissioner for Gender Equality and Equal Treatment, the **Lithuanian** Equal Opportunities Ombudsperson, the **Maltese** National Commission for the Promotion of Equality, the **Slovak** National Centre for Human Rights and the **Croatian** Ombudsman. A new trend has arisen with the merging of existing institutions into one single body to exercise different responsibilities in a variety of areas. For instance, 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>389</sup> replacing the Equal Treatment Commission. Similarly, in 2014, the **Irish** Equality Authority and the Human Rights Commission were merged into the Irish Human Rights and Equality Commission.<sup>390</sup> The **Swedish** Equality Ombudsman was created in 2009 through the merger of four pre-existing ombudsmen institutions working with different grounds of discrimination: sex, ethnic origin and religion; disability and sexual orientation.<sup>391</sup> **Liechtenstein's** Office for Equal Opportunities was dissolved at the end of 2016 and, as of the beginning of 2017, its responsibilities were integrated into the new, more comprehensive Association for Human Rights,

383 Equality and Anti-discrimination Ombud. Decisions may be appealed before the Equality Tribunal.

384 The French Equal Opportunities and Anti-discrimination Commission (HALDE) was set up by law on 30 December 2004. The HALDE was incorporated into a new institution named the Defender of Rights, with effect from 1 May 2011 (Act No 2011-333 of 29 March 2011 creating the Defender of Rights).

385 The Equal Treatment Committee and Equal Treatment Service, which share the task of promoting the principle of equal treatment with the Ombudsman, the Work Inspectorate and the Economic and Social Committee. However, the National Commission of Human Rights recommends the merger of all existing equality bodies into the Ombudsman.

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

387 Since 2014, the Spanish equality body goes under the name Council for the Elimination of Racial or Ethnic Discrimination.

388 The Ombudsman was appointed as the national specialised body and is divided into two separate authorities: the Equality Authority that deals with employment issues and the Anti-discrimination Authority dealing with discrimination beyond employment.

389 Netherlands, Act of 24 November 2011 containing the establishment of the Netherlands Institute for Human Rights, (*Wet van 24 november 2011, houdende de oprichting van het College voor de rechten van de mens (Wet College voor e rechten van de mens)*), *Staatsblad* 2011, 573.

390 Ireland, Irish Human Rights and Equality Commission Act 2014, adopted on 27 July 2014, available at: <http://www.irishstatutebook.ie/pdf/2014/en.act.2014.0025.pdf>.

391 Sweden, Equality Ombudsman Act (2008:568).

covering the grounds of religion, belief, disability; race, origin, gender and sexual orientation.<sup>392</sup> One of the most important features of the new **Greek** Equal Treatment Law 4443/2016, was the unification of the separate jurisdictions for the private and public sector under one equality body.

## 5.1 Grounds covered

The minimum requirement on Member States is to have one or more bodies for the promotion of equality irrespective of racial or 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 are mandated to deal with, 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 undeniable advantages with instituting multiple-ground bodies, such as strategic litigation and cost-effectiveness, such 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. 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.

**Table 12: Relevant specialised bodies dealing with racial/ethnic origin and the grounds covered by their mandates**

Country	Relevant specialised body dealing with race/ethnic origin	Does this body cover other grounds than race or ethnic origin as specified by Article 13? If so, which ones?
AUSTRIA	<b>Equal Treatment Commission –ETC</b> <sup>110</sup> (Act on the Equal Treatment Commission and the Office for Equal Treatment, Art. §§ 1, 2, 11-14)	Gender, ethnic affiliation, religion, belief, age, sexual orientation.
	<b>National Equality Body –NEB</b> (Act on the Equal Treatment Commission and the office for Equal Treatment, §§ 3-5)	Gender, ethnic affiliation, religion, belief, age, sexual orientation.
BELGIUM	<b>Inter-federal Centre for Equal Opportunities and Opposition to Racism and Discrimination</b> (Cooperation Agreement between the Federal State, the Regions and the Communities creating the Inter-federal Centre for Equal Opportunities and Opposition to Racism and Discrimination, Art. 2)	Alleged race, colour, descent, national or ethnic origin, nationality, age, sexual orientation, civil status, birth, wealth/income ( <i>fortune</i> , in French), religious or philosophical belief, actual or future state of health, disability, physical characteristic, political opinion, trade union opinion ( <i>conviction syndicale</i> ), genetic characteristic and social origin (not gender and language).
BULGARIA	<b>Protection Against Discrimination Commission</b> , (Protection Against Discrimination Act, Art. 40)	Race, ethnicity, sex, national origin, human genome, nationality, origin, religion or faith, education, beliefs, political affiliation, personal or social status, disability, age, sexual orientation, family status, property status, or any other ground provided for by law or by international treaty Bulgaria is a party to.
110 This body exercises tribunal-like functions.		

392 Lichtenstein, Act on the Association for Human Rights 2016 (*Gesetz vom 4. November 2016 über den Verein für Menschenrechte in Liechtenstein*) (VMRG), LGBl. 2016, no 504; [https://www.gesetze.li/lilexprod/lgsystpage2.jsp?formname=showlaw&lgblid=2016504000&version=1&search\\_text=Menschenrechte&search\\_loc=text&sel\\_lawtype=conso&compl\\_list=1&rechts\\_gebiet=0&menu=0&tablesel=0&observe\\_date=26.01.2017](https://www.gesetze.li/lilexprod/lgsystpage2.jsp?formname=showlaw&lgblid=2016504000&version=1&search_text=Menschenrechte&search_loc=text&sel_lawtype=conso&compl_list=1&rechts_gebiet=0&menu=0&tablesel=0&observe_date=26.01.2017).

Country	Relevant specialised body dealing with race/ethnic origin	Does this body cover other grounds than race or ethnic origin as specified by Article 13? If so, which ones?
CROATIA	<b>Ombudsperson</b> <sup>111</sup> (Anti-discrimination Act, Art. 12)	Race or ethnic origin or colour, language, religion, political or other belief, national or social origin, property, trade union membership, education, social status, marital or family status, age, health condition, genetic heritage.
CYPRUS	<b>Equality Authority and Anti-discrimination Authority</b> (The Combating of Racial and other forms of Discrimination (Commissioner) Law N. 42(I)/2001), Arts 5 and 7)	Race/ethnic origin, religion or belief, age, sexual orientation, disability, colour, political or other beliefs, national origin, social descent, birth, wealth, social class, any ground whatsoever, all rights guaranteed in ECHR and all its protocols, in the International Convention for the Elimination of All forms of Discrimination, in the Convention against Torture and other Forms of Inhumane or Humiliating Treatment, in the International Covenant on Civil and Political Rights and in the Framework Convention on the Protection of National Minorities.
CZECH REPUBLIC	<b>Public Defender of Rights</b> (Law No. 349/1999 Coll., on the Public Defender of Rights, Art. 21(b))	Sex, race, ethnic origin, sexual orientation, age, disability, religion, belief or other conviction, 'nationality' (in Czech: <i>národnost</i> ).
DENMARK	<b>Institute for Human Rights – The National Human Rights Institute of Denmark</b> (Act No. 553 of 18 June 2012 with later amendments)	Race, ethnic origin, gender, disability.
	<b>Board of Equal Treatment</b> <sup>112</sup> (Act on the Board of Equal Treatment)	Protected grounds in employment: gender, race, skin colour, religion or belief, political opinion, sexual orientation, age, disability, national origin, social origin, ethnic origin. Protected grounds outside employment: gender, race and ethnic origin.
ESTONIA	<b>Commissioner for Gender Equality and Equal Treatment</b> (Equal Treatment Act, Arts 15-22)	Sex, ethnic origin, race, colour, religion or other beliefs, age, disability and sexual orientation.
	<b>Chancellor of Justice</b> (Chancellor of Justice Act, Art. 19-35 <sup>16</sup> )	Public sector: any ground 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.
FINLAND	<b>Non-Discrimination Ombudsman</b> (Non-Discrimination Act, Section 19)	Origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health or other personal characteristics.
	<b>National Non-Discrimination and Equality Tribunal</b> <sup>113</sup> (Act on National Non-Discrimination and Equality Tribunal, 1327/2014)	Origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health or other personal characteristics.
<p>111 The People's Ombudsman is competent for all the grounds covered by the Anti-discrimination Act except those grounds that are the responsibility of a special ombudsman. The ground of disability is covered by the Ombudsman for Persons with Disabilities and the grounds of gender, gender identity and expression and sexual orientation are covered by the Gender Equality Ombudsman. When the victim of discrimination is a child, it falls within the competence of the Ombudsperson for children.</p> <p>112 The Board of Equal Treatment adjudicates individual complaints of discrimination in the labour market regarding all the grounds mentioned above. For complaints outside the labour market, the Board of Equal Treatment only deals with the grounds of race, ethnic origin or gender. This body exercises tribunal-like functions.</p> <p>113 This body exercises tribunal-like functions.</p>		



Country	Relevant specialised body dealing with race/ethnic origin	Does this body cover other grounds than race or ethnic origin as specified by Article 13? If so, which ones?
FRANCE	<b>Defender of Rights</b> (Organic Law no 2011-333 of 29 March 2011 creating the Defender of Rights, Art. 4, para. 3)	Any ground protected by national <sup>114</sup> or European legislation and international conventions ratified by France.
FORMER YUGOSLAV REPUBLIC of MACEDONIA	<b>Commission for Protection against Discrimination</b> (Law on Prevention and Protection Against Discrimination, Arts 16-24 and 25-33) <sup>115</sup>	Sex, race, colour, gender, belonging to a marginalised group, ethnic affiliation, language, citizenship, social origin, religion or religious belief, other beliefs, education, political belonging, personal or social status, mental or physical impairment, age, family or marital status, property status, health condition, any other ground prescribed by law or ratified international treaty.
GERMANY	<b>Federal Anti-discrimination Agency</b> (General Act on Equal Treatment, Sec. 25)	Race or ethnic origin, sex, religion or belief <sup>116</sup> ( <i>Weltanschauung</i> ), disability, age, sexual identity.
GREECE	<b>Greek Ombudsman</b> (Law 2477/1997, Art. 1 and Equal Treatment Law 4443/2016)	Racial or ethnic origin, descent, colour, language, religious or other beliefs, disability, chronic illness, age, family or social status, sexual orientation, gender identity or characteristics.
HUNGARY	<b>Equal Treatment Authority</b> (Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities; Art. 14-17D)	Sex, racial affiliation, colour of skin, nationality, belonging to a national or ethnic minority, mother tongue, disability, health condition, religion or belief, political or other opinion, family status, maternity (pregnancy) or paternity, sexual orientation, sexual identity, age, social origin, financial status, part-time nature of employment legal relationship or other legal relationship connected with labour, or determined period thereof, belonging to an interest representation organisation, other situation, attribute or condition of a person or group.
ICELAND	No specific body <sup>117</sup>	-
IRELAND	<b>Irish Human Rights and Equality Commission</b> (Irish Human Rights and Equality Commission Act 2014, S. 9 and 44)	Gender, age, race, religion, family status, disability, civil status, sexual orientation, membership of the Traveller community, housing assistance.
ITALY	<b>National Office against Racial Discrimination</b> –UNAR (Legislative Decree No 215/2003 on the Implementation of Directive 2000/43/EC, Art. 7)	Race, ethnic origin, sex, religion or personal belief, disability, age and sexual orientation. <sup>118</sup>
LATVIA	<b>Ombudsman</b> , (Law on Ombudsman, Art. 11 (2))	Grounds not specified, hence any ground.

114 In French legislation, the protected grounds are: mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed, to an ethnic origin, a nation, a race or a determined religion, sex, disability, loss of autonomy, age, health, sexual orientation, opinions, physical appearance, last name, family situation, union activities, political opinions, age, health, disability, genetic characteristics, place of residence, capacity to express oneself in a language other than French, economic vulnerability, philosophical opinions. Grounds covered by national jurisprudence (such as condition of fortune, birth, property, language) are also included.

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

116 Not for Civil law.

117 The Parliamentary Ombudsman may deal with equality/discrimination in relation to administrative procedure.

118 In practice, the Italian body also deals with nationality.

Country	Relevant specialised body dealing with race/ethnic origin	Does this body cover other grounds than race or ethnic origin as specified by Article 13? If so, which ones?
LIECHTENSTEIN	<b>Office for Equal Opportunities</b> <sup>119</sup> (Act on Equality of People with Disabilities, Art.19 and 22)	Gender, migration and integration (including race and ethnicity), <sup>120</sup> sexual orientation, disability, social disadvantage.
LITHUANIA	<b>Equal Opportunities Ombudsperson</b> (Law on Equal Treatment, Arts 14-30)	Gender, race, nationality, origin, age, sexual orientation, disability, ethnic origin, language, social status, religion, belief, convictions, views.
LUXEMBOURG	<b>Centre for Equal Treatment</b> (Law of 28 November 2006, Art. 8)	Race, ethnic origin, religion or belief, disability, age, gender, sexual orientation.
MALTA	<b>National Commission for the Promotion of Equality for Men and Women</b> <sup>121</sup> (Equality for Men and Women Act, Art. 11)	Sex, family responsibilities, sexual orientation, age, religion or belief, racial and ethnic origin, gender identity, gender expression, sex characteristics, actual or potential pregnancy, childbirth.
MONTENEGRO	<b>Protector of Human Rights and Freedoms</b> (Law on the Protector of Human Rights and Freedoms, Art. 27, para. 1 and Law on the Prohibition of Discrimination, Art. 21.)	Race, skin colour, national affiliation, social or ethnic origin, affiliation to the minority nation or minority national community, language, religion or belief, political or other opinion, gender, gender identity, sexual orientation, health conditions, disability, age, material status, marital or family status, membership of a group or assumed membership of a group, political party or other organisation, other personal characteristics.
NETHERLANDS	<b>The Netherlands Institute for Human Rights</b> (Netherlands Institute for Human Rights Act, Arts 9-13)	Race, religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality, civil (or marital) status, disability, age, working time and type of labour contract.
	<b>The NGO 'Art. 1'</b> <sup>122</sup> (Law on Local Anti-discrimination Bureaux, Art. 2a)	Race, religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality, civil (or marital) status, disability, age.
NORWAY	<b>Equality and Anti-discrimination Ombud</b> <sup>123</sup> and <b>Equality and Anti-discrimination Tribunal</b> (Act on the Equality and Anti-discrimination Ombud and the Equality and Anti-discrimination Tribunal, S. 1)	Gender, ethnicity, religion and belief, disability, language, sexual orientation, age, political view. <sup>124</sup>
POLAND	<b>Commissioner for Civil Rights Protection</b> ('Ombudsman') (Act on the Commissioner for Civil Rights Protection, Art. 1)	Grounds not specified, hence any ground.
PORTUGAL	<b>High Commission for Migrations</b> (Decree-law 31/2014, Art. 1)	Racial and ethnic origin, nationality.

119 The Office will be dissolved and its responsibilities will be integrated into the new Association of Human Rights as of 1 January 2017.

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

121 In practice the Commission is generally referred to as the National Commission for the Promotion of Equality.

122 This organisation includes around 390 local anti-discrimination bureaux.

123 The Equality and Anti-discrimination Tribunal is the appeal instance of the Equality and Anti-discrimination Ombud, of which it is independent.

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

Country	Relevant specialised body dealing with race/ethnic origin	Does this body cover other grounds than race or ethnic origin as specified by Article 13? If so, which ones?
ROMANIA	<b>National Council for Combating Discrimination</b> (Ordinance (GO) 137/2000 regarding the prevention and the punishment of all forms of discrimination, Arts. 16-25, 29, 30)	Race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV positive status, belonging to a disadvantaged group, any other criterion.
SERBIA	<b>The Commissioner for the Protection of Equality</b> (The Law on Prohibition of Discrimination Art. 1, para. 2)	Race, skin colour, ancestry, citizenship, language, religious or political beliefs, gender, gender identity, sexual orientation, financial status, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership in political, trade union and other organisations.
SLOVAKIA	<b>Slovak National Centre for Human Rights</b> (Act No 308/1993 on Establishing of the Slovak National Centre for Human Rights, S. 1, paras 2a, e, f, g, h and S. 1 (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, unfavourable health condition, family duties, membership or involvement in a political party or a political movement, a trade union or another association, the reason of reporting criminality or other anti-social activity, or other status.
SLOVENIA	<b>Advocate of the Principle of Equality</b> (Protection against Discrimination Act, Arts 19-32)	Gender, language, ethnicity, race, ethnic origin, religion or belief, disability, age, sexual orientation, gender identity, gender expression, social standing, economic situation, education, any other personal characteristic.
SPAIN	<b>Council for the Elimination of Racial or Ethnic Discrimination</b> (Law 62/2003 on Fiscal, Administrative and Social Measures, Art. 33)	No
SWEDEN	<b>Equality Ombudsman</b> (Discrimination Act, Ch. 4, Ss 1-6, and the whole of the Equality Ombudsman Act)	Sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation, age.
TURKEY	No <sup>125</sup>	... <sup>126</sup>
UNITED KINGDOM	<b>Great Britain: Equality and Human Rights Commission</b> (Equality Act 2006, SS. 1-43)	Race, including colour, and nationality (including citizenship) ethnic or national origins sexual orientation, religion, belief, disability, age, sex (including gender reassignment, marriage/civil partnership status, pregnancy and maternity).
	<b>Northern Ireland: Equality Commission for Northern Ireland</b> , (Northern Ireland Act, SS. 73-74)	Race including ethnic origin, national origin, colour, nationality (including citizenship), sexual orientation, religion, belief, disability, age, sex (including gender reassignment, marriage/civil partnership status, pregnancy and maternity).
<p>125 Law on the Human Rights and Equality Institution of Turkey (no. 6701), adopted on 6 April 2016, provides for the establishment of the Human Rights and Equality Institution of Turkey, which will become operational in 2017. Pursuant to Articles 8-14 of Law no. 6701, the new body will have an explicit mandate to address ethnic and racial discrimination.</p> <p>126 Pursuant to Article 3(2) of Law no. 6701, the Human Rights and Equality Institution of Turkey will have a mandate to deal with discrimination on the following grounds in addition to race and ethnic origin: sex, colour, language, religion, belief, denomination, philosophical and political opinion, wealth, birth, marital status, health, disability and age.</p>		

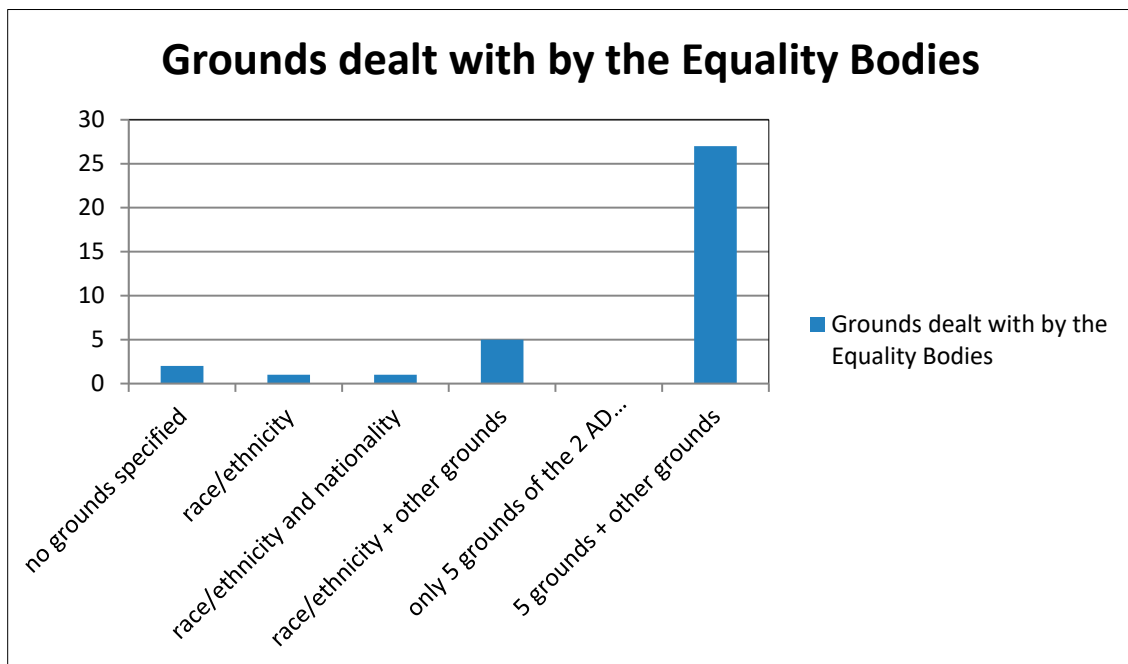
Out of the 35 countries included in this report, all but **Iceland** and **Turkey** have a specialised body which at least deals with race and ethnicity. Three countries (**Estonia**, the **Netherlands** and the **United Kingdom**)

have two specialised bodies. In **Cyprus**, there is only one specialised body divided into two departments with distinct duties: the Anti-Discrimination Authority which deals with fields beyond employment and the Equality Authority which deals only with employment issues. In **Norway**, there is only one specialised body, but it includes an independent appeal function—the Equality and Anti-Discrimination Tribunal. This makes a total of 36 bodies relevant for the purposes of examining the competencies according to Article 13 of the directive.

In **Austria, Denmark** and **Finland** there is another institution in addition to the equality body, exercising tribunal-like functions, namely the Equal Treatment Commission in **Austria**, the Board of Equal Treatment in **Denmark** and the National Non-Discrimination and Equality Tribunal in **Finland**. These institutions are included in the table above, but as their tasks do not fall within the competences of equality bodies as stipulated by the directive, they are not counted for the purposes of the analysis regarding the grounds covered and the competencies of the equality bodies.

Of the 36 relevant bodies, the **Spanish** specialised body is the only one dealing exclusively with race and ethnicity, while the **Portuguese** specialised body deals with race, ethnicity and nationality. In **Austria, Croatia, Denmark, Liechtenstein, and Malta** the grounds protected include race/ethnicity and one or more other grounds that are not necessarily identical to the other four protected by the Employment Equality Directive. In **Austria, Croatia** and **Malta** the ground of disability is covered by separate structures. In **Estonia**, in addition to the five grounds covered by the anti-discrimination directives, the Chancellor of Justice deals with ‘other grounds of discrimination provided for in the law’ in the private sector. It is interesting to note that some countries have chosen an open-ended list of grounds, for example **Finland, Montenegro, Romania** and **Slovenia**. The **Former Yugoslav Republic of Macedonia** has opted for a list of grounds that does not mention sexual orientation but does specify any other ground prescribed by law or ratified international treaty. Similar provisions, referring to any other ground as prescribed by law, apply in **Bulgaria** and in **France**.

In 24 countries, 27 bodies deal with the five grounds protected by the two anti-discrimination directives and other grounds. In **Latvia** and **Poland** no grounds are specified under the competencies of the body.



## 5.2 Competencies of equality bodies

Overall, the majority of countries comply with the requirements of the Racial Equality Directive and have provided the relevant equality bodies with a mandate to exercise all four competencies listed under Article 13. However, this does not mean that all of them exercise the full range of their competencies in practice. Priorities and focus points may change over time, but budget and staff concerns can also impact the effectiveness of equality bodies.

In terms of the specific powers of specialised bodies, it is notable that the relevant bodies support victims of discrimination in a variety of ways. Member States must 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 support in taking legal action – for example the **Belgian, Bulgarian, Finnish, Hungarian, Irish, Italian, Serbian, Swedish, British, Northern Irish, Norwegian** and **Croatian** bodies. Others give their – usually non-binding – opinion on complaints submitted to them, e.g. the **Austrian** Equal Treatment Commission and the **Netherlands** Institute for Human Rights, the **Danish** Board of Equal Treatment, the **Hungarian** Equal Treatment Authority, the **Latvian** Ombudsman’s Office, the **Greek** Ombudsman and the **Slovenian** Advocate of the Principle of Equality. Such proceedings do not preclude the victim from subsequently taking legal action before the courts with a view to obtaining a binding remedy.

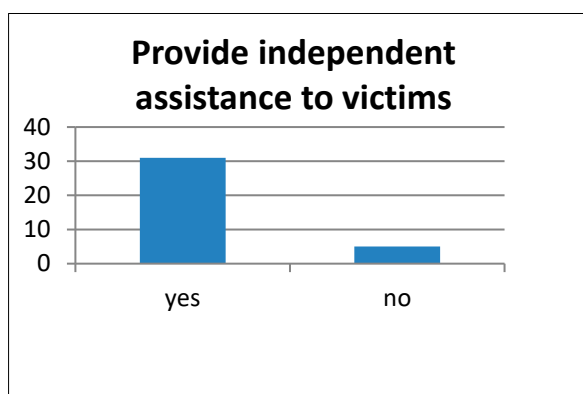
### Article 13, Racial Equality Directive:

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

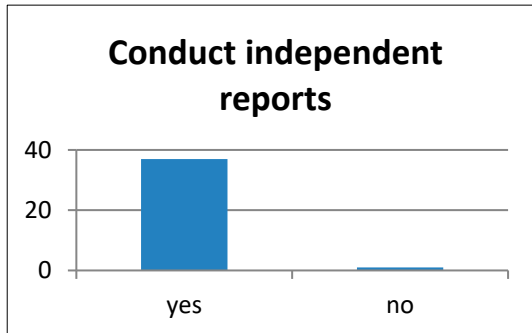
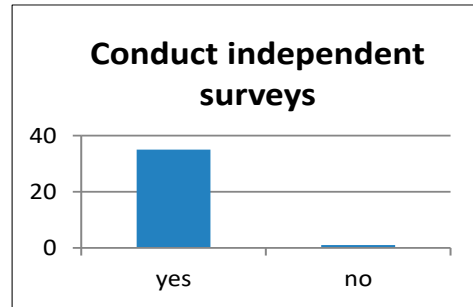
- without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
- conducting independent surveys concerning discrimination,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

Out of the 36 specialised bodies, 31 have a mandate to provide independent assistance to victims and five do not. The countries where the relevant bodies do not officially have a mandate to provide such assistance include: **Cyprus** (although in practice both the Equality Authority and the Anti-discrimination Authority advise victims informally of their rights), **Estonia** (the Chancellor of Justice, which nevertheless does so in practice), **Lithuania**, the **Netherlands** (the Netherlands Institute for Human Rights), and **Norway**. In **Poland**, the mandate of the Ombud is restricted with regards to providing

assistance to victims of discrimination when the alleged discriminator is another private party. In such cases, the Ombud can only provide information on the victim’s rights and possible means of action, without intervening in any way. The mandate of the **Lithuanian** Ombudsperson covers the provision of ‘independent consultations’, which could eventually be interpreted to include some form of independent assistance to victims. In practice, to some extent the Ombudsperson advises applicants on available judicial and administrative procedures to pursue justice.

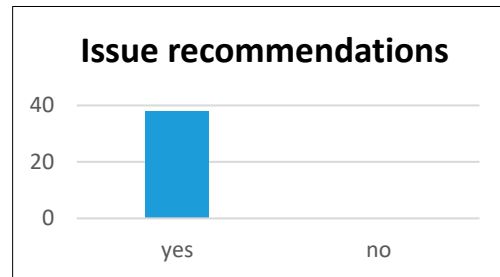


Of the 36 specialised bodies, 35 have a mandate to conduct independent surveys while only one, the **Estonian** Chancellor of Justice, does not. In contrast, the **Liechtenstein** equality body has a mandate to conduct independent surveys but does not do so in practice.



Almost all specialised bodies have a mandate to publish independent reports, with the exception of the **Estonian** Chancellor of Justice.<sup>393</sup> However, the independent nature of the surveys and reports published by the equality bodies is often questionable in practice (see below for more on the independence of equality bodies).

Specialised bodies should also have a mandate to issue recommendations on discrimination issues. This is the only one of the four duties set out by the directive for which all 36 specialised bodies have been mandated.



Although the directive does not require it, a number of specialised bodies (e.g. in **Austria, Bulgaria, Cyprus, France, Hungary, Ireland, Lithuania, Romania, Serbia, Slovenia** 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 that may propose recommendations, suggest mediation or decide to present observations to the courts. The Protection against Discrimination Commission in **Bulgaria** has the power to impose sanctions, including fines, and 'soft' penalties, such as public apology or publication of its decision. The **Hungarian** Equal Treatment Authority can apply sanctions on the basis of an investigation. In **Ireland**, the Human Rights and Equality Commission may serve a 'substantive notice' following an equality review or the preparation of an equality action plan. Where it appears to the commission that there is failure to comply with an equality action plan the substantive notice may outline steps that should be taken to implement the plan. Non-compliance with the notice may result in prosecution for a criminal offence.

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

393 Although the Chancellor of Justice does not have a mandate to publish independent reports, it does draft annual reports which may include information about complaints and related opinions on equality and discrimination-related issues.

Some 33 bodies in 31 countries officially keep a record of complaints/decisions. The details and the accuracy of the information provided by these 32 bodies regarding the number of complaints/decisions can differ. However, the data is usually broken down at least by grounds of discrimination and the information often also indicates the field of discrimination. However, in addition to **Iceland** and **Turkey**, where no specialised bodies exist, no such data are collected in **Spain** or in the **United Kingdom**, as neither of the UK equality bodies receives complaints as such.

All the 33 bodies that keep such records provide some kind of public information on complaints or decisions. In **Germany**, although the equality body keeps record of the complaints and decisions by ground, field and type of discrimination, these data are only partially and not systematically available to the public. In **Malta**, data are not published on a regular basis even though information on the complaints received each year and their division by ground is included in the equality body's annual report. The **Bulgarian** Protection against Discrimination Commission publishes its reports, including the data on the number of complaints and decisions, when the Parliament approves them. In recent years, there have been significant delays in this approval procedure and therefore in the publication of the available data. The sources of information can vary: usually they are available through the bodies' website and/or in its annual reports and also upon request by individuals.

### Enhancing the role of the Slovenian Advocate of the Principle of Equality

The new Slovenian Protection against Discrimination Act provides for the establishment of a new equality body by 24 November 2016. This will be the Advocate of the Principle of Equality, now organised as an independent state body.<sup>394</sup> Under the previous Act Implementing the Principle of Equal Treatment and in accordance with the Act Amending the Public Administration Act,<sup>395</sup> the Advocate of the Principle of Equality still functioned within the Ministry of Labour, Family, Social Affairs and Equal Opportunities, as a civil servant.

Several articles are dedicated to ensuring and enhancing the independence of the Advocate. A specific provision of the act is dedicated solely to the autonomous status of the Advocate, specifying that it may not be given binding guidelines related to the content of its work. The act explicitly states that the function of the Advocate is incompatible with other functions in state bodies, local community bodies, political parties and trade union bodies, or with other functions and activities that, by law, are not compatible with performing a public function.

The nomination procedure for the Advocate has also been redesigned. Following a public call for nominations for possible candidates published in the official gazette, the President of the Republic proposes a candidate to be appointed by the National Assembly, for a five-year term.

One of the most important new powers provided to the Advocate is the power to initiate a constitutional review of allegedly discriminatory legislation (Article 38 of the Protection against Discrimination Act). The Constitutional Court will be obliged to examine such requests for constitutional review on their merits.

To ensure that the Advocate will no longer function as a one-person body (as it has been since it was first established in 2005), Article 30 of the new act stipulates that the Advocate must have a professional service that will carry out professional, administrative or other tasks. The previous Advocate has recommended that, considering the workload, the new body should employ at least one director, four legal experts dealing with complaints, two experts for awareness-raising and monitoring and two administrative and technical support personnel.<sup>396</sup> It remains to be seen how many people will staff the new body.

*The new provisions are intended to enhance the capacity of the Advocate and its ability for independent, autonomous and effective work. However, the Advocate will still not have the power to impose sanctions.*

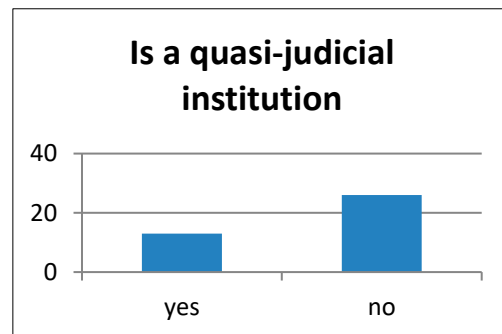
394 Slovenia, Protection against Discrimination Act of 21 April 2016, Articles 19-32.

395 Slovenia, Act Amending the Public Administration Act (*Zakon o spremembah in dopolnitvah Zakona o državni upravi*), adopted on 9 March 2012, available at: [www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO6328](http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO6328) (last accessed 26 May 2016).

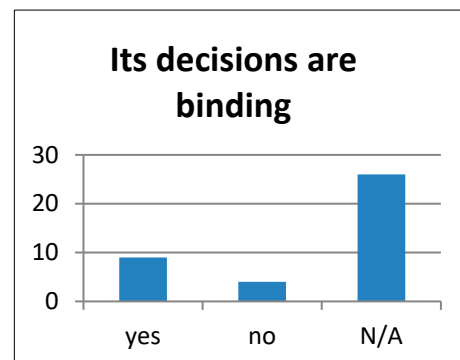
396 Advocate of the Principle of Equality (2012), *Letno poročilo zagovornika načela enakosti za leto 2011* (Annual report for 2011), available at: [www.mddsz.gov.si/si/delovna\\_podrocja/enake\\_moznosti/zagovornik/letna\\_porocila/](http://www.mddsz.gov.si/si/delovna_podrocja/enake_moznosti/zagovornik/letna_porocila/) (last accessed 11 August 2015).

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

Although this is not required by the Racial Equality Directive, some specialised bodies are also quasi-judicial institutions, the decisions of which are ultimately binding. Tribunal-like, quasi-judicial bodies exist parallel to the specialised bodies in **Austria, Denmark and Finland** and they are also included in the analysis of this section, making a total of 39 bodies. Only 13 of these 39 bodies are quasi-judicial institutions: in **Austria** (the Equal Treatment Commission), **Bulgaria** (the Protection against Discrimination Commission), **Cyprus** (the Equality Authority and Anti-Discrimination Authority), **Denmark** (the Board of Equal Treatment), **Estonia** (the Chancellor of Justice),<sup>397</sup> the **Former Yugoslav Republic of Macedonia** (the Commission for Protection against Discrimination), **Hungary** (the Equal Treatment Authority), **Lithuania** (the Equal Opportunities Ombudsperson), the **Netherlands** (the Netherlands Institute for Human Rights), **Norway** (the Equality and Anti-Discrimination Tribunal),<sup>398</sup> **Romania** (the National Council on Combating Discrimination) and **Serbia** (the Commissioner for the Protection of Equality). Some bodies, such as the **Macedonian** Commission for Protection against Discrimination, can issue opinions or recommendations regarding the complaints it receives. In **Finland**, the National Non-Discrimination and Equality Body is an independent and impartial judicial body whose decisions are binding and can be appealed against.



Among these 13 bodies, nine can issue binding decisions. This is the case for the **Bulgarian, Cypriot,**<sup>399</sup> **Danish,**<sup>400</sup> **Estonian,**<sup>401</sup> **Finnish, Hungarian, Lithuanian,**<sup>402</sup> **Romanian** and **Serbian** bodies. Nevertheless, in some countries, such as the **Netherlands**, due to the long experience, expertise and practice of the Netherlands Institute for Human Rights, its decisions are very much respected by both parties.<sup>403</sup> In **Norway**, the Equality and Anti-Discrimination Tribunal's decisions are binding only in relation to private parties, but not in relation to public entities.



Some specialised bodies have specific responsibilities or powers that are not necessarily listed in Article 13(2) of the Racial Equality Directive.

397 Only in conciliation procedures.

398 The Norwegian Equality and Anti-Discrimination Tribunal is the independent administrative complaints mechanism of the Ombud which rules on appeals against its decisions.

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

400 The Board of Equal Treatment.

401 The Chancellor of Justice only in conciliation procedures.

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

403 Further information regarding sanctions imposed by equality bodies can be found in Section 4.4 above.



**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 Defender of Rights 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.
- In **Slovakia**, if a breach of the principle of equal treatment could violate the rights or interests protected by law or freedoms of a higher or non-specified number of persons, or if the public interest could be otherwise seriously endangered by such a 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. They can also request that the court determines that the principle of equal treatment has been breached.
- In **Sweden**, when the Equality Ombudsman represents a claimant victim of discrimination in court, it may order the alleged discriminator to provide information, allow access to the workplace or enter into discussions with the Ombudsman, subject to a financial penalty.

Some concerns in relation to particular countries should be highlighted here. There is concern that some specialised bodies are too close to Government, thereby jeopardising the independence of their work. For instance, the independence of the **Portuguese** equality body is not stipulated in law, and it may be argued that it cannot exercise its competences independently due to its close links with the Prime Minister under whose authority its duties are carried out. Similarly, the **Italian** National Office against Racial Discrimination operates as a ministerial department. The **Spanish** Council for the Elimination of Racial or Ethnic Discrimination is attached to the Ministry of Health, Social Services and Equality although it is not part of the ministry’s hierarchal structure. However, representatives of all ministries with responsibilities in the areas referred to in Article 3(1) of the Racial Equality Directive have a seat on the council.<sup>404</sup> Since 2014, the act defining the functions of the council has stated that it must exercise its functions ‘with independence’, although it is difficult to assess this *de facto*, given the large number of Government representatives. In **Slovakia**, there have been concerns over the independence of the equality body and in November 2016, the Ministry of Justice announced its intention to amend the relevant act, so that the legal framework for the Slovak National Centre for Human Rights fully complies with the Paris principles. In **Lithuania**, the work and reputation of the Ombudsperson’s Office suffered during several years when Parliament was unable to appoint a new head of the Office. However, since the appointment in 2016 of the current Ombudsperson, the institution has taken important steps towards a strengthened position and further efficiency, including monitoring the implementation of its decisions and increasing its visibility. There has been an escalating concern from human rights activists and civil society representatives on the independence of the Commission for Protection against Discrimination (CPAD) in the **Former Yugoslav Republic of Macedonia**, following the appointment of new members to the Commission.<sup>405</sup> In **Poland**,

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

405 For more details, please consult the 2017 country report on the non-discrimination directives, Former Yugoslav Republic of Macedonia, Chapter 7.a.

the Ombud has been facing increasing challenges as some political parties as well as a prominent legal think tank have attacked the Ombud's activities in support of the LGBTI community.

Independence, but also effectiveness is greatly affected by the available budget for equality bodies. In the past, the budget cuts following the economic crisis have had an impact, for instance, in **Ireland, Hungary** and the **United Kingdom**. Financial cuts in previous years had already affected **Ireland, Latvia**, and the **UK**. In **Cyprus**, new problems have arisen due to the fact that the national equality body is severely under-equipped and understaffed. In **Romania**, although the budget of the equality body has been increasing, out of the 89 posts that were planned only 63 have actually been filled.<sup>406</sup> The **Serbian** Commissioner for the Protection of Equality started its activities in June 2011 in inadequate premises, which limited the capacities of the equality body. However, since October 2016 the Commissioner has been using new premises, allowing for the opening up of additional positions and increasing its efficiency.<sup>407</sup>

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406 Romania, National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) (2017), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2016* (2016 annual report), available in English at <http://cncd.org.ro/2017-04-20-raportul-de-activitate-al-cncd-anul-2016>.

407 Serbia, Commissioner for the Protection of Equality (2016), *Regular annual report of the Commissioner for the Protection of Equality for 2015*, Belgrade, p. 28, Commissioner for the Protection of Equality (2017), *Regular annual report of the Commissioner for the Protection of Equality for 2016*, Belgrade, p. 15.

## 6 IMPLEMENTATION AND COMPLIANCE

### 6.1 Dissemination of information and social and civil dialogue

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

'Dissemination of information

Member States shall take care that the provisions adopted pursuant to [these Directives], together with the relevant provisions already in force, are brought to the attention of the persons concerned by all appropriate means throughout their territory.'

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

'Social dialogue

1. Member States shall, in accordance with national traditions and practice, take adequate measures to promote the social dialogue between the two sides of industry with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.
2. Where consistent with national traditions and practice, Member States shall encourage the two sides of the industry without prejudice to their autonomy to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 3 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and the relevant national implementing measures.'

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

'Dialogue with non-governmental organisations

Member States shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of [racial and ethnic origin, religion or belief, disability, age or sexual orientation] with a view to promoting the principle of equal treatment.'

Of all 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 provisions seem to have been insufficiently implemented in at least **Bulgaria, Cyprus, the Czech Republic, the Former Yugoslav Republic of Macedonia, Slovenia, Spain and Turkey**, and, with particular regard to Directive 2000/78/EC, **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.

#### 6.1.1 Dissemination of information and awareness-raising

In general, activities organised by the Member States and candidate countries aimed at disseminating information about the anti-discrimination legal framework and available means of redress are very rare. In some countries, ministerial publications providing basic information on the principle of equal treatment are available or information campaigns through the media and the organisation of seminars take place, for instance in **Bulgaria, Germany, Malta and Sweden**. The **Czech** Ombudsman launched an awareness-raising and information campaign in 2014, which is still ongoing, focusing on its activities, including

protection against discrimination.<sup>408</sup> 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, medical doctors and healthcare workers. The **Lithuanian** Government approved the new edition of the Inter-institutional Action Plan for the Promotion of Non-discrimination for 2015-2020,<sup>409</sup> appointing the Ombudsperson as one of the main institutions responsible for its implementation. Despite significant efforts and a number of relevant initiatives in the past years, the most substantial measures that were planned for 2016 were not implemented due to bureaucratic failures or lack of financial resources. A new National Strategy on Equality and Non-discrimination (2016-2020) was adopted in the **Former Yugoslav Republic of Macedonia**, the aims of which include raising awareness about the functioning of the anti-discrimination legislation framework.<sup>410</sup> The **Serbian** Commissioner for Protection of Equality publishes brochures and handbooks for different professionals and the wider public to inform them about discrimination and to explain the available remedies if discrimination takes place. It actively works on the visibility of the institution, appears in the media and organises a moot court for law students.

The mandates of specialised bodies in most countries include awareness-raising activities, for instance in **Denmark, Estonia, France, Germany, Lithuania, Norway, Romania, Slovenia, Sweden** and the **United Kingdom**. Where the body only has powers relating to race and ethnic origin, 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. The Office has also gradually decreased its activities and no annual report on its actions has been published since 2014. In **Poland**, it is not the equality body but rather the separate Office of the Government Plenipotentiary for Equal Treatment that has a mandate to promote and disseminate issues of equal treatment. However, the activities of this Office have decreased in this regard since it was merged with the Office of the Plenipotentiary for Civil Society in 2016.<sup>411</sup>

A small number of Member States, including **Poland** and **Portugal**, have included in their legislation an obligation on employers to inform employees of discrimination laws. In **Poland**, the National Labour Inspectorate is responsible for monitoring the implementation of the obligation on employers. In **Greece**, the Ombudsman has a long-standing policy of cooperation with both the police training college and the National School of Public Administration, where it provides training on equal treatment and rights. Similarly, the **Swedish** Equality Ombudsman participates in the training programmes of the Prosecutor General and that of the National Courts Organisation, aiming to reach all prosecutors and judges.

However, in the vast majority of countries, serious concerns still persist around perception and awareness, as individuals are often not informed of their rights to protection against discrimination and of protection mechanisms.

### 6.1.2 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. For instance, in **Slovakia**, the Council of the Government of the Slovak Republic for Human Rights, National Minorities and Gender Equality was set up in 2010 as a permanent

408 Czech Republic, Public Defender of Rights (2014), *Summarising report on Ombudsman's activities in 2014*, p. 107, available at: [http://www.ochrance.cz/fileadmin/user\\_upload/zpravy\\_pro\\_poslaneckou\\_snmovnu/Reports/Annual\\_2014.pdf](http://www.ochrance.cz/fileadmin/user_upload/zpravy_pro_poslaneckou_snmovnu/Reports/Annual_2014.pdf).

409 Lithuania, Decision of the Government of the Republic of Lithuania, available in Lithuanian at [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=1006990&p\\_tr2=2](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=1006990&p_tr2=2).

410 Former Yugoslav Republic of Macedonia, Ministry of Labour and Social Policy (2016), *National Strategy on Equality and Non-discrimination (2016-2020)* (Национална стратегија за еднаквост и недискриминација 2016-2020), [http://www.mtsp.gov.mk/content/pdf/dokumenti/7.7\\_Strategija%20za%20ednakvost%20i%20nediskriminacija.pdf](http://www.mtsp.gov.mk/content/pdf/dokumenti/7.7_Strategija%20za%20ednakvost%20i%20nediskriminacija.pdf).

411 Poland, Regulation of 5 January 2016, announced on 7 January 2016.

expert, coordinating and consultative advisory body to the Government.<sup>412</sup> However, it can be argued that the Government does not take the recommendations of the council very seriously and that it often remains a forum for formal discussions only. Similarly, **Slovenian** law requires the Government and competent ministries to co-operate with NGOs that are active in the field of equal treatment and with the social partners.<sup>413</sup> In practice, however, this cooperation is sporadic and generally initiated by the NGOs. 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 equality body UNIA, in order to establish more systematic links with the social partners. In **France**, the National Consultative Commission on Human Rights (*Commission nationale consultative des droits de l'homme, CNCDH*), reports to the Prime Minister and is composed of representatives of all the major human rights and anti-racism NGOs, trade unions and branches of the public sector. It is consulted on all legislative reforms affecting human rights and provides advice and recommendations to the Government. In 2012, the **Croatian** Ombudsman's Office signed cooperation agreements with five independent NGOs, making them the contact points of the Ombudsman's Office at regional level. In **Finland**, following the reform of anti-discrimination legislation, an Advisory Board on Non-Discrimination was established<sup>414</sup> in January 2016 for a three-year period to facilitate communication and dialogue, including key ministries, social partners and NGOs representing all grounds of discrimination in the Ombudsman's sphere of activity.

#### Some countries consulted NGOs and social partners for support in the transposition of the directives:

- In **Slovakia**, cooperation between the Government and NGOs was shown in the process of amending the Anti-discrimination Act. An NGO representative was invited to become a member of the body commissioned to prepare the amendment 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 the 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 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**: a lack of public debate was attributable to the fact that the organisations that would normally generate public discussion were participants in the committees charged with considering the implementation of the directives and felt that they could not discuss the issues until that (lengthy) process was over.

412 Slovakia, Act on the Organisation of the Activities of the Government and on the Organisation of the Central State Administration, Section 2(3). The website of the Council of the Government: [www.radavladylp.gov.sk/](http://www.radavladylp.gov.sk/) (accessed 27 April 2015).

413 Slovenia, Protection against Discrimination Act, Article 15.

414 Finland, Government Decree on the Advisory Board on Non-Discrimination (*Valtionneuvoston asetus yhdenvertaisuusasiain neuvottelukunnasta*) (39/2016) <https://www.edilex.fi/saaduskokoelma/20160039.pdf>.

In **Romania**, the national equality body works closely with NGOs representing various vulnerable groups and consults with the main NGOs when developing its programmes in the relevant areas. There is, however, increasing criticism from NGOs regarding the difficulties in engaging in a dialogue on amending the Anti-discrimination Law or on the assessment of the equality body's national strategy. In **Greece**, the new anti-discrimination legislation set up the National Council against Racism and Intolerance, including NGOs, the Ombudsman and the National Human Rights Commission, to ensure better dialogue in the formulation of the national strategy to combat racism.<sup>415</sup>

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 National Disability Council, which represents disabled people's associations of various kinds. Its functions include issuing reports on draft regulations on equal opportunities, non-discrimination and universal accessibility. The **French** Disability Act of 2005 created *département*-level commissions for the rights and autonomy of the disabled, which are competent for all decisions relating to the support of disabled people. 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.

Generating dialogue with social partners and civil society is also often the role of the specialised equality bodies. This is the case for the **Greek** Ombudsman, the **Spanish** Council for the Elimination of Racial or Ethnic Discrimination and the **Belgian** UNIA. In 2016, UNIA launched an awareness-raising initiative, which offers free online training on anti-discrimination law, providing employers with practical situations and solutions to enhance diversity within workplaces.<sup>416</sup> In its last annual report published in 2016, UNIA stressed the success of this new tool with more than 3 000 registered users.<sup>417</sup>

General structures for social dialogue may be used for dialogue on equality issues in the **Czech Republic, Denmark, Latvia, Malta, Montenegro, Norway, Poland, Portugal, and Sweden**. 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 2013, the **French** Government gave a specific mandate to the Inter-ministerial Delegation on Emergency Accommodation and Access to Housing to establish the conditions for a programme on access to rights (including health, education, employment, accommodation and housing) and integration of foreign Roma and Travellers. It has published programmes, including good practices for local authorities and coordination of public policy, and has a further mandate to coordinate the implementation of integration policies targeting the Roma and initiating preparatory work to launch a review of the status of Travellers. In **Finland**, the Advisory Board on Romani Affairs was established in 1956, with the tasks of enhancing the equal participation of the Roma population in Finnish society, improving their living conditions and socio-economic status, and promoting their culture. **Spanish** Royal Decree 891/2005 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 and Equality, the Ministry of Education and Research and the Ministry of Labour and Social Affairs. In the context of the development of a National Strategy for Roma Integration, the **Austrian** Federal Chancellery set up a National Contact Point for Roma

415 Greece, Law 4356/2015 on civil partnership, exercise of rights, penal and other provisions, Article 15.

416 For more details on this initiative, see the UNIA website: [www.UNIA.be/en](http://www.UNIA.be/en).

417 UNIA (2016) *Annual Report 2015 (Discrimination – Diversity)*, p. 35, available at: [www.UNIA.be/en](http://www.UNIA.be/en).

Integration in 2012. This contact point mainly coordinates governmental activities regarding the Roma strategy and supports a corresponding ‘dialogue platform’, which also maintains contacts with NGOs. The **Swedish** Government has adopted a Roma strategy for inclusion in society 2012–2032, with the aim of eliminating the differences in living standards between the Roma minority and the majority with regard to housing, education, and employment etc., by the end of the 20-year period. One of the elements of this strategy was the adoption of a ‘white book’ (white paper) on Roma discrimination throughout the 20<sup>th</sup> century, which was published in March 2014. The aim is to correct the violations documented in the white paper where possible.<sup>418</sup> The **Hungarian** Government established a Consultation Council for Roma Affairs in 2013, chaired by the Prime Minister and co-chaired by the President of the National Roma Self-Government.<sup>419</sup> In contrast to this trend, in **Slovenia** the Government Office for Ethnic Minorities, which was the competent authority for Roma issues, was abolished in 2012.

## 6.2 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 that 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. In 2012, a new provision was introduced in the **Bulgarian** Protection against Discrimination Act, requiring all public authorities, including local government, to respect the aim of not allowing any direct or indirect discrimination when drafting legislation, as well as when applying it.<sup>420</sup> This general mainstreaming duty complements the original duty under the act for all public authorities to take all possible and necessary measures to achieve the aims of the act.<sup>421</sup> However, in practice the public authorities are not implementing these provisions.

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 that allow lower courts to declare void laws that are in breach of the principle of equal treatment. For example, in **France**, the Constitution, Civil Code and Labour Code all ensure that provisions and clauses that breach the principle of equality are void. 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

418 Sweden, Official Inquiry DS2014:8, presented on 25 March 2014.

419 Hungary, Resolution 1048/2013 of 12 February 2013.

420 Bulgaria, Protection against Discrimination Act, Article 6(2).

421 Bulgaria, Protection against Discrimination Act, Article 10.

Law as *lex specialis*. Following the decisions of the **Romanian** Constitutional Court, which limited both the mandate of the NCCD<sup>422</sup> and of the civil courts in relation to discrimination generated by legislative rules,<sup>423</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 23 of the **Greek** Equal Treatment Law 4443/2016 took over the relevant paragraph from the previous Anti-discrimination Act and 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 mechanism for annulling national legal provisions that are discriminatory is contained in the law setting out the mandate of the equality body.<sup>424</sup> This procedure requires the equality body to refer to the Attorney General all discriminatory laws, regulations and practices. The Attorney General is then obliged to advise the minister concerned and prepare the necessary amendment. In 2014, the Supreme Court established that the Attorney General is not at liberty not to pursue the recommendations of the equality body concerning a discriminatory law or practice.<sup>425</sup> However, this ruling has not changed the Attorney General's practice in this regard. In **Ireland**, there is concern that the Equal Status Acts 2000-2015 remain subordinate to other legislative enactments, because Section 14(a)(i) provides that nothing in the Equal Status Act will prohibit any action taken under any other enactment.

In some jurisdictions, an entire agreement is invalidated if it includes a discriminatory clause (e.g. **Germany**). However, legislation that can annul individual discriminatory rules in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations is more common among the Member States. This is the case in the **Netherlands** where the main equal treatment acts stipulate that 'agreements' that are in contravention of the equal treatment legislation are void. General labour law is relied on to this end in many countries, including **Hungary**,<sup>426</sup> where Article 27 of the Labour Code provides that an agreement (individual or collective) that violates labour law regulations is void. If annulled or successfully contested the agreement is invalid (Article 28) and, if invalidity results in loss, compensation must be paid (Article 30). Similar general labour law provisions are found in **Italy** (Article 15 of the Workers' Act), **Latvia** (Article 6 of the Labour Act), **Poland** (Article 18(2) of the Labour Code)<sup>427</sup> 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 that specifically render discriminatory provisions in contracts or collective agreements etc. void. For example, in **Luxembourg**, the Labour Code was amended by the Law of 28 November 2006 (anti-discrimination law) to include the same wording as that of Article 16(b)

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422 Constitutional Court of 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.

423 Constitutional Court of Romania (*Curtea Constituțională*) Decision 818, 3 July 2008, published in the Official Gazette 537 of 16 July 2008.

424 Cyprus, The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law No. 42(I)/ 2004, Article 39. Available at [www.cylaw.org/nomoi/enop/non-ind/2004\\_1\\_42/full.html](http://www.cylaw.org/nomoi/enop/non-ind/2004_1_42/full.html).

425 Cyprus Supreme Court, *Nicoletta Charalambidou v The Republic of Cyprus, the Finance Minister and the Attorney General*, No 1695/2009, 17 December 2014. Available at [http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros\\_4/2014/4-201412-1695-09.htm&qstring=%E4%E9%E1%EA%F1%E9%F3%20and%2058\(%E9\)#](http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2014/4-201412-1695-09.htm&qstring=%E4%E9%E1%EA%F1%E9%F3%20and%2058(%E9)#).

426 Articles 6:95 and 6:96 of the Hungarian Civil Code also contain similar provisions applicable outside of the employment field.

427 Similar provisions are applicable outside of the employment field (Poland, Civil Code, Articles 58.1 and 58.3).



of the Employment Equality Directive.<sup>428</sup> In **Spain**, Article 17(1) of the Workers' Statute declares void any discriminatory clauses in collective agreements, individual agreements and unilateral decisions of discriminatory employers. Section 25 of the **Finnish** Non-Discrimination Act provides that a court may, in a case before it, change or ignore contractual terms that are contrary to the prohibition of discrimination if it would be unreasonable to apply the contract otherwise unaffected.

Significantly, the **Irish** Employment Equality Acts 1998-2015 provide 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). Although 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 13 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 be considered void, on entry into force of the regulations. In the **United Kingdom**, Section 142 of the Equality Act provides that a contractual term is unenforceable insofar as it 'constitutes, promotes or provides for treatment of [a]... person that is of a description prohibited by this Act'. Collective agreements and rules of undertakings abide by the same principle in accordance with Section 145 of the act. Discrimination in the rules governing independent occupations, professions, workers' associations or employers' associations falls within the provisions of the same act, while similar provisions apply in Northern Ireland.<sup>429</sup> The **Belgian** Federal General Antidiscrimination Act, which was adopted in 2007 provided for the creation of an Expert Commission for the Assessment of the Anti-discrimination Legislation, which required the adoption of a decree establishing its composition. The decree was finally adopted on 18 November 2015<sup>430</sup> and the new Expert Commission was set up and started its work in 2016. It is composed of two representatives of the judiciary, two lawyers, four members proposed by the National Labour Council and four members proposed by the Ministry for Equal Opportunities. Its final report is expected to be submitted to the Federal Parliament in 2017.

428 Luxembourg, Labour Code, Article L. 253-3, as introduced by Article 18 of the Law of 28 November 2006.

429 In particular, Articles 68 and 68A of the Race Relations Order; Regulation 42 and Schedule 4 of the Employment Equality (Sexual Orientation) Regulations; Articles 99 and 100A of the Fair Employment and Treatment Order; Sections 16B and 16C of the Disability Discrimination Act; and Regulation 49 of the Employment Equality (Age) Regulations.

430 Decree of 18 November 2015 establishing the composition of the Expert Commission, the appointment of the experts as well as the form and the content of the report which has to be presented according to article 52, para. 3 of Federal Act of 10 May 2007 pertaining to fight certain forms of discrimination (*Arrêté royal du 18 novembre 2015 fixant la composition de la Commission d'experts, leur désignation, et la forme et le contenu concret du rapport qui doit être présenté en exécution de l'article 52, § 3, de la loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination*), M.B., 2 December 2015.

## 7 CONCLUSION

Seventeen years after the adoption of the Racial Equality and Employment Equality Directives it stands without question that their transposition has immensely enhanced legal protection against discrimination on the grounds of racial or ethnic origin, religion or belief, age, disability and sexual orientation across Europe. It is also encouraging to note that a majority of Member States provide further protection compared to the requirements of EU law and that the levelling up of protection across grounds continues in a number of countries. In the past few years, most of the remaining shortcomings and gaps in national transpositions have been remedied, sometimes following the initiation of infringement proceedings by the European Commission and sometimes due to pressure from other stakeholders, such as civil society organisations representing the groups most affected by discrimination. This comparative analysis of the specific transposition, implementation and enforcement on the national level shows however that some gaps still remain in many of the Member States and candidate countries.

There are a few Member States where some minor gaps can be found in the transposition of specific aspects of certain provisions. National law in some countries does not explicitly define different forms of discrimination as they are defined in the directives, leaving it up to the courts to interpret the law in accordance with the directives. One example of such differences between the wording of the directives and that of national law is the exclusion of one or two words in the definition of direct discrimination, apparently excluding hypothetical and/or past comparators. Another example is the definition of indirect discrimination only referring to apparently neutral 'provisions' but excluding 'criteria and practices'. Yet another is the definition of the duty to provide reasonable accommodation for persons with disabilities in employment, which sometimes excludes job seekers and only applies to existing employees, or vice versa. In addition, there are some countries where the limits of the material and/or personal scope of national anti-discrimination law remain unclear. For instance, the provisions defining the material scope can be complex or contained in several different laws, causing either overlap or gaps in the scope covered. Most often such gaps appear in the areas of social protection, social advantages or with regard to public employment or the self-employed. Gaps also appear in the material scope of the specific protection against victimisation and, in some countries, of the explicit provision of sanctions in case of violations. While these seemingly minor differences between the provisions of the directives and those of national law can be – and sometimes have been – interpreted in full accordance with the directives, there are countries where leading case law is missing to the detriment of legal certainty regarding these fundamental aspects of anti-discrimination law.

Some shortcomings also exist with regard to the effective implementation and application of anti-discrimination law. For instance, in many countries, the conditions required to have a right to reasonable accommodation in employment are particularly restrictive and definitions of disability that are being used in practice are often based on a medical rather than a social approach. One important issue of concern in several countries is the lack of specialised, relevant, publicly available case law interpreting the national anti-discrimination legal framework. On a positive note, the number of preliminary references lodged at the Court of Justice continues to rise, enriching and further developing EU anti-discrimination law through the interpretations of the Court. In many countries however it remains to be seen how national courts and equality bodies will apply this developing body of case law. Although case law is becoming more frequent in most countries, it does not always correctly apply the principles, concepts and definitions of the directives or those developed by the Court of Justice. Exceptions and exemptions are thus interpreted too extensively in some countries, for instance in relation to employers with an ethos based on religion or belief or age limits in employment.

As already expressed in previous editions of this publication, detailed and specialised legislation, and in particular, specific procedural rights as regards available remedies and enforcement provisions, could possibly fill these gaps. In relation to enforcement however, further issues of concern arise. These include the lack of (or too restrictive) legal standing of organisations and associations to engage in proceedings

on behalf or in support of victims of discrimination, restrictive application of the shift of the burden of proof as well as a number of barriers to effective access to justice. Although different means of collective redress, such as class action or *actio popularis*, could go a long way towards ensuring effective access to justice for victims of discrimination, procedural barriers in many countries hinder the full development of these potentially valuable tools. Most importantly it needs to be noted that the country reports on which this comparative analysis is based raise concern regarding the national specialised bodies being unable to effectively fulfil the role they are given by the Racial Equality Directive, whether it be due to insufficient resources, a restricted scope of activities or a lack of independence from Government and public authorities. The other main barrier to effective enforcement highlighted by the country reports is a lack of 'effective, dissuasive and proportionate' sanctions and remedies, in particular beyond the area of employment. In some countries sanctions are not provided in all areas or to all grounds while in others there are maximum limits (in the law or in practice) on compensation awarded to victims. Therefore, in some countries the impression remains of a theoretical legal framework that is in conformity with the directives but that does not work effectively in practice.

Polls throughout Europe regularly show an important discrepancy between the levels of discrimination experienced and discrimination that is being reported. Awareness of rights and of available mechanisms for claiming those rights is still generally quite low, and more needs to be done to break that pattern. A first step, which has been taken in a number of countries and is proving to be quite effective, is targeted training for judges and other legal professionals. Some countries have also made some progress regarding positive action measures and dissemination of information on anti-discrimination laws, but much more remains to be done to increase dialogue among government, 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 adequate resources.

Filling these remaining gaps in anti-discrimination law cannot merely be perceived as a technical issue. Seventeen years ago, the directives were drafted with the aim of contributing to the establishment of a more inclusive society, where everyone has equal rights and opportunities to achieve their potential. This objective continues to inspire and drive the ambitions of the European network of legal experts in gender equality and non-discrimination.



## Annexes

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 2016. 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>1</sup>

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1 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. Legislation which is specific for one single ground has been indicated in the tables where specific anti-discrimination law does not include these two grounds, and has been included in footnotes where anti-discrimination law also covered them.

**Annex 1. Main national specific anti-discrimination legislation**

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
AUSTRIA	Article 7 Federal Constitutional Act (B-VG), Article 2 Basic Law	Federal Equal Treatment Act of 23 June 2004, as last amended in 2015	Gender, ethnic affiliation, religion, belief, age, sexual orientation
		Equal Treatment Act of 23 June 2004, as last amended in 2015	Gender, ethnic affiliation, religion, belief, age, sexual orientation
		Act on the Equal Treatment Commission and the National Equality Body of 23 June 2004, as last amended in 2013	Gender, ethnic affiliation, religion, belief, age, sexual orientation
		Federal Disability Act of 10 August 2005, as last amended in 2014	Disability
		Act on the Employment of People with Disabilities of 10 August 2005, as last amended in 2016	Disability
		Styrian Equal Treatment Act of 28 October 2004, as last amended in 2014	Gender, race or ethnic origin, religion or belief, disability, disability of a relative, age, sexual orientation
		Viennese Service Order of 22 September 2006, as last amended in 2014	Race, ethnic origin, religion, belief, disability, age, sexual orientation, gender, pregnancy, maternity
		Viennese Anti-discrimination Act of 8 September 2004, as last amended in 2015	Race, ethnic origin, religion, belief, age, sexual orientation, sexual identity, gender, pregnancy, maternity
		Lower Austrian Anti-discrimination Act of 29 April 2005, as last amended in 2011	Gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
		Lower Austrian Equal Treatment Act of 11 July 1997, as last amended in 2011	Gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
		Carinthian Anti-discrimination Act of 28 December 2004, as last amended in 2013	Gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
		Vorarlberg Anti-discrimination Act of 19 May 2005, as last amended in 2014	Gender, ethnic affiliation, religion, belief, disability age, sexual orientation
		Upper Austrian Anti-discrimination Act of 6 May 2005, as last amended in 2013	Gender, ethnic affiliation, religion, belief, disability age, sexual orientation
		Burgenland Anti-discrimination Act of 5 October 2005, as last amended in 2013	Gender, ethnic affiliation, religion, belief, disability, age, sexual orientation
		Tyrolian Equal Treatment Act of 11 January 2005, as last amended in 2015	Gender, ethnic affiliation, religion, belief, disability, age, sexual orientation
		Tyrolian Anti-discrimination Act of 31 March 2005, as last amended in 2013	Gender, ethnic affiliation, religion, belief, disability, age, sexual orientation
Salzburg Equal Treatment Act of 31 March 2006, as last amended in 2015	Gender, racial or ethnic origin, religion, belief, disability, age, sexual orientation		

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
BELGIUM	Articles 10 and 11 of the Constitution	Racial Equality Federal Act, <sup>1</sup> as last amended in 2007	Alleged race, colour, origin, ethnic and national origin and nationality
		General Anti-discrimination Federal Act, <sup>2</sup> as last amended by the Act of 17 August 2013	Age, sexual orientation, civil status, birth, property, religious or philosophical belief, actual or future state of health, disability, physical characteristic, political opinion, trade union opinion ( <i>conviction syndicale</i> ) and language, genetic characteristic and social origin
		Flemish Region / Community: Decree establishing a Framework Decree for a Flemish Equal Opportunities and Equal Treatment Policy of 28 March 2014	All grounds of Article 19 TFEU plus colour, ancestry or national origin, civil status (married/non-married), birth, wealth/income, state of health, physical or genetic characteristics, political opinions, language, social position, nationality, trade union opinion ( <i>conviction syndicale</i> )
		Wallonia-Brussels Federation: Decree on the Fight Against Certain Forms of Discrimination of 12 December 2008	All grounds listed in Article 19 TFEU plus nationality, colour, ancestry and national or social origin, pregnancy, childbirth, maternity leave and transgender, civil status (married/non-married), birth, wealth/income, political opinion, language, present or future state of health, physical or genetic characteristics, trade union opinion ( <i>conviction syndicale</i> )
		Walloon Region: Decree on the Fight Against Certain Forms of Discrimination, including discrimination between Women and Men, in the fields of Economy, Employment and Vocational Training of 6 November 2008 as last amended in 2012	All grounds listed in Article 19 TFEU plus nationality, colour, ancestry and national or social origin, civil status (married/non married), birth, wealth/income, political opinion, trade union opinion ( <i>conviction syndicale</i> ), language, present or future state of health, physical or genetic characteristics, pregnancy, childbirth, maternity leave, gender reassignment and transgender
		German-speaking Community: Decree aimed at Fighting Certain Forms of Discrimination of 19 March 2012	Nationality, alleged race, skin colour, origin, national or ethnic origin, age, sexual orientation, religious or philosophical belief, disability, sex, pregnancy, motherhood, childbirth, gender reassignment, civil status, birth, property, political or trade union opinion ( <i>conviction syndicale</i> ), language, actual or future state of health, physical or genetic characteristic, social origin
<p>1 Initially Federal Act Criminalising Certain Acts inspired by Racism or Xenophobia of 30 July 1981.</p> <p>2 Initially the Act on the Fight against Certain Forms of Discrimination of 10 May 2007.</p>			

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
BELGIUM	Articles 10 and 11 of the Constitution	Region of Brussels-Capital: Ordinance related to the Fight Against Discrimination and Equal Treatment in the Employment field of 4 September 2008 as last amended in 2011	All grounds listed in Article 19 TFEU plus political opinion, civil status (married/non married), birth, wealth/ income, language, state of health, physical or genetic characteristics, pregnancy, childbirth, maternity leave, transgender, nationality, colour, ancestry, national or social origin, trade union opinion ( <i>conviction syndicale</i> )
		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 listed in Article 19 TFEU plus political opinion, civil status (married/non married), birth, wealth/ income, language, state of health, physical or genetic characteristics, pregnancy, childbirth, maternity leave, transgender, nationality, colour, ancestry, national or social origin.
		<i>Commission communautaire française</i> (COCOF): Decree on the Fight Against certain forms of discrimination and on the implementation of the principle of equal treatment of 9 July 2010	Age, sexual orientation, civil status, birth, property, religious or philosophical belief, political or trade union opinion ( <i>conviction syndicale</i> ), language, actual or future state of health, disability, physical or genetic characteristic, sex, pregnancy, motherhood, childbirth, gender reassignment, nationality, alleged race, skin colour, origin and national, ethnic or social origin
		<i>Commission communautaire française</i> (COCOF): Decree on Equal Treatment between Persons in Vocational Training of 22 March 2007, as last amended in 2012	All grounds in the two directives (open list of prohibited criteria)
BULGARIA	Article 6 of the Constitution	Protection against Discrimination Act of 16 September 2003, as last amended in 2016	Sex, race, national origin, ethnicity, human genome, nationality, origin, religion or faith, education, beliefs, political affiliation, personal or social status, disability, age, sexual orientation, family status, property status, or any other ground provided for by law or by international treaty Bulgaria is a party to.
		Integration of Persons with Disabilities Act of 2 September 2004, as last amended in 2015	Disability
CROATIA <sup>3</sup>	Article 14 of the Constitution	Anti-discrimination Act of 9 July 2008, as last amended in 2012	Race or ethnic origin 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.
<p><sup>3</sup> In addition, protection against discrimination on the ground of sexual orientation is provided by the Same-sex Life Partnership Act of 15 July 2014.</p>			



Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
CYPRUS	Article 28 of the Constitution	The Equal Treatment (Racial or Ethnic Origin) Law No. 59 (1)/2004, as amended by Law N. 147(I)/2006	Racial and ethnic origin
		The Equal Treatment in Employment and Occupation Law No. 58 (1)/2004, as amended by Laws N. 50(I)/2007 and 86(I)/2009	Racial and ethnic origin, religion or belief, age, sexual orientation
		Law on Persons with Disabilities N. 127(I)/2000 as amended by: Law N. 57(I)/2004; 72(I)/2007; 102(I)/2007; 63(I)/2014; 22(I)/2015	Disability
CZECH REPUBLIC	Article 3 of the Charter of Fundamental Rights and Freedoms (part of the Constitutional order)	Anti-discrimination Law 198/2009 of 23 April 2009, as last amended in 2014	Race, colour, ethnic origin, 'nationality' ( <i>národnost</i> ), sex, sexual orientation, age, disability, religion or belief.
DENMARK	None <sup>4</sup>	Act on Prohibition of Discrimination due to Race etc., Act 289 of 9 June 1971, as last amended in 2000	Race, skin colour, national or ethnic origin, belief, sexual orientation
		Act on Prohibition of Discrimination in the Labour Market etc., of 24 May 1996, as last amended in 2016	Race, skin colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin
		Act on Ethnic Equal Treatment of 28 May 2003, as last amended in 2013	Race and ethnic origin
ESTONIA	Article 12(1) of the Constitution	Chancellor of Justice Act of 25 February 1999, as last amended in 2015	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 in the law. <sup>5</sup>
		Equal Treatment Act of 11 December 2008, as last amended in 2014	Ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation
FINLAND	Art. 6 of the Constitution	Non-Discrimination Act adopted 30 December 2014	Origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health or other personal characteristics.
		Non-Discrimination Ombudsman Act adopted 30 December 2014	Origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health or other personal characteristics
<p><sup>4</sup> Articles 70 and 71 are both specific clauses respectively dealing with the right to civil and political rights, and deprivation of liberty on the basis of political or religious convictions and descent.</p> <p><sup>5</sup> These grounds are covered in the private sector for the conciliation procedure. For the public sector, the grounds are not specified.</p>			

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
<b>FINLAND</b>	Art. 6 of the Constitution	The Act on Non-Discrimination and Equality Tribunal adopted 30 December 2014	Gender, gender identity, origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health or other personal characteristics
<b>FRANCE</b>	Preamble to the Constitution, Article 1 of the Constitution	Law No.2001-1066 of 16 November 2001 relating to the fight against discriminations of 16 November 2001, as last amended in 2016	Mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed to an ethnic origin, a nation, a race or a determined religion, physical appearance, last name, family situation, philosophical convictions, union activities, political opinions, age, health, disability, genetic characteristics, place of residence, capacity to express oneself in another language than French, economic vulnerability, philosophical opinions
		Law no 2008-496 of 27 May 2008 relating to the adaptation of National Law to Community Law in matters of discrimination of 27 May 2012, as last amended in 2016	Mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed to an ethnic origin, a nation, a race or a determined religion, physical appearance, last name, family situation, union activities, political opinions, age, health, disability, genetic characteristics, place of residence, capacity to express oneself in another language than French, economic vulnerability
		Law no 2005-102 of February 11, 2005 for equal opportunities and integration of disabled persons of 11 February 2005, as last amended in 2014	Disability
<b>FORMER YUGOSLAV REPUBLIC of MACEDONIA</b>	Articles 9 and 54 of the Constitution	Law on Prevention and Protection against Discrimination of 8 April 2010, as last amended in 2016	Sex, race, colour of skin, gender, belonging to a marginalised group, ethnicity, language, citizenship, social origin, religion or religious belief, other sorts of belief, education, political affiliation, personal or social status, mental or physical disability, age, family or marital status, property, health condition, or any other ground stipulated by law or ratified national treaty.
<b>GERMANY</b>	Articles 3 and 33.3 of the, German Basic Law	General Act on Equal Treatment of 14 August 2006, as last amended in 2013	Race or ethnic origin, sex, religion or belief ( <i>Weltanschauung</i> ), disability, age, sexual identity; belief not in civil law
		Equal Opportunities for Disabled People Act of 27 April 2002, as last amended in 2016	Disability

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
GREECE	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 2014	Race or ethnic origin, religion
		Law 4443/2016 'On transposition of Directive 43/2000/EC on the application of the principle of equal treatment irrespective of racial and ethnic origin, and the transposition of Directive 78/2000/EC on the configuration of the general framework of equal treatment in employment and work' of 2 February 2016	Racial or ethnic origin, descent, colour, language, religious or other beliefs, disability or chronic illness, age, family or social status, sexual orientation, gender identity or gender characteristics
HUNGARY	Article XV of the Fundamental Law of Hungary	Act CXXV of 2003 on Equal Treatment and the Promotion of the Equality of Opportunities of 28 December 2003, as last amended in January 2016	Sex, racial affiliation, colour of skin, nationality, belonging to a national or ethnic minority, mother tongue, disability, health condition, religion or belief, political or other opinion, family status, maternity (pregnancy) or paternity, sexual orientation, sexual identity, age, social origin, financial status, part-time nature of employment, legal relationship or other legal relationship relating to employment or the fixed period thereof, belonging to an interest representation organisation, any other situation, attribute or condition of a person or group.
		Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities of 1 April 1998, as last amended in January 2016	Disability
ICELAND <sup>6</sup>	Article 65 of the Constitution	Act on the Affairs of Persons with Disabilities No 59/1992 of 2 June 1992 as last amended in 2016	Disability
IRELAND	Article 40.1 of the Constitution	Employment Equality Acts 1998-2015 of 18 June 1998, as last amended in 2015	Gender, age, race, religion, family status, disability, civil status, sexual orientation, membership of the Traveller community
		Equal Status Acts 2000-2015 of 26 April 2000, as last amended in 2015	Gender, age, race, religion, family status, disability, civil status, sexual orientation, membership of the Traveller community, housing assistance
ITALY	Article 3 of the Constitution	Legislative Decree No 215/2003 implementing Directive 2000/43/EC of 9 July 2003, as last amended in 2011	Race and ethnic origin
<p><sup>6</sup> There is no comprehensive anti-discrimination law in Iceland, protection may be granted through diverse pieces of specific legislation including: the Act on the Affairs of Persons with Disabilities No 59/1992 of 2 June 1992 as last amended in 2012, the Act on the Affairs of the Elderly No 125/1999 of 31 December 1999 as last amended in 2012, and the Act Amending Laws relating to the Legal Status of Homosexual Persons No 65/2006 of 14 June 2006. Most of the definitions or provisions are though included in the Act on Equal Status and Rights of Women and Men thus protecting the ground of gender.</p>			

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
ITALY	Article 3 of the Constitution	Legislative Decree No 216/2003 implementing Directive 2000/78/EC of 9 July 2003, as last amended in 2013	Religion or belief, age, disability and sexual orientation
		Act 67/2006, Provisions on the Judicial Protection of Persons with Disabilities who are Victims of Discrimination of 1 March 2006, as last amended in 2011	Disability
LATVIA	Article 91 of the Constitution	Labour Law of 20 June 2001, as last amended in 2016	Race, skin colour, age, disability, religious, political or other conviction, national or social origin, property or marital status, sexual orientation “or other circumstances”
		Law on Prohibition of Discrimination against Natural Persons – Economic Operators of 19 December 2012	Gender, age, religious, political or other conviction, sexual orientation, disability, race or ethnic origin
LIECHTENSTEIN	<sup>7</sup>	Act on Equality of People with Disabilities of 25 October 2006, as last amended in 2016 <sup>8</sup>	Disability
LITHUANIA	Article 29 of the Constitution	Law on Equal Treatment of 18 November 2003, as last amended in 2016	Gender, race, nationality, language, origin, social status, belief, convictions or views, age, sexual orientation, disability, ethnic origin or religion
		Law on Social Integration of People with Disabilities of 28 November 1991, as last amended in 2013	Disability
LUXEMBOURG	Article 10bis of the Constitution (for nationals only)	Law of 28 November 2006, as last amended in 2008	Religion or belief, disability, age, sexual orientation, race or ethnic origin
		Law of 12 September 2003 on disabled persons, as last amended in 2008	Disability
MALTA	Article 45 of the Constitution	Employment and Industrial Relations Act of 2 December 2002, as last amended in 2016	Marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership of a trade union or of an employers’ association
		Equal Treatment in Employment Regulations of 5 November 2004 (issued under the Employment and Industrial Relations Act), as last amended in 2014	Religion or religious belief, disability, age, sex, sexual orientation, and racial or ethnic origin, pregnancy or maternity leave, gender reassignment
		Equality for Men and Women Act of 9 December 2003, as last amended in 2015	Sex, family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, gender identity, gender expression, sex characteristics, actual or potential pregnancy or childbirth

<sup>7</sup> The only anti-discrimination clause that exists in the Constitution of Liechtenstein (Art. 31) regards women and men.

<sup>8</sup> Please note that the Penal Code also includes provisions regarding all the grounds in the two directives and additional grounds.

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
MALTA	Article 45 of the Constitution	Equal Opportunities (Persons with Disabilities) Act of 10 February 2000, as last amended in 2012	Disability
		Equal Treatment of Persons Order, Legal Notice 85 of 3 April 2007	Racial and ethnic origin
MONTENEGRO	Articles 7, 8 and 25 of the Constitution.	Law on the Prohibition of Discrimination, Official Gazette of Montenegro 46/10 and 18/14 as last amended in 2014	Race, skin colour, national affiliation, social or ethnic origin, affiliation to the minority nation or minority national community, language, religion or belief, political or other opinion, gender, gender identity, sexual orientation, health conditions, disability, age, material status, marital or family status, membership of a group or assumed membership of a group, political party or other organisation as well as other personal characteristics
		Law on Prohibition of Discrimination of Persons with Disabilities, Official Gazette of Montenegro 35/15 and 44/15, as last amended in 2015	Disability
NETHERLANDS	Article 1 of the Constitution	General Equal Treatment Act of 2 March 1994, as last amended in 2015	Race, religion and belief, political opinion, hetero or homosexual orientation, sex, nationality and civil (or marital) status
		Disability Discrimination Act of 3 April 2003, as last amended in 2016	Disability and Chronic disease.
		Age Discrimination Act of 17 December 2003, as last amended in 2014	Age
NORWAY	Section 98 of the Constitution.	Anti-discrimination Act on Prohibition of Discrimination based on Ethnicity, Religion, etc. of 21 June 2013, as last amended in 2015	Ethnicity, religion, belief <sup>9</sup>
		Working Environment Act of 12 June 2005, as last amended in 2014	Age, political affiliation, membership of a trade union, part-time/temporary work
		Anti-discrimination and Accessibility Act on Prohibition against Discrimination on the basis of Disability of 21 June 2013, as last amended in 2014	Disability
		Sexual Orientation Anti-Discrimination Act of 21 June 2013, as last amended in 2014	Sexual orientation, gender identity and gender expression
<p>9 Until 1 January 2014, national origin, descent, skin colour and language were explicitly covered in the legislation. The preparatory works to the new Anti-discrimination Act in force as of 1 January 2014 indicate that these grounds are still to be covered under the ADA.</p>			

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
<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, <sup>10</sup> as last amended in 2016	Gender, race, ethnic origin, nationality, citizenship, <sup>11</sup> religion, belief, political opinion, disability, age and sexual orientation
<b>PORTUGAL</b>	Article 13(2) of the Constitution	Law 18/2004 transposing the Council Directives 2000/43 of 29 June 2000 into Portuguese Law, and Establishing the Principle of Equality of Treatment between Persons Irrespective of Racial or Ethnic Origin, and a Legal Framework to Combat Discrimination on the Grounds of Racial or Ethnic origin of 11 May 2004, as last amended in 2005 <sup>12</sup>	Race, ethnic origin
		Law 7/2009 Labour Code, as last amended in 2016	Ancestry, age, gender, sexual orientation, gender identity, civil status, genetic heritage, work capacity, disability, chronic disease, nationality, ethnic origin, religion, political or ideological convictions or trade union affiliation
		Law 134/99 forbids discrimination in the exercise of rights based on race, colour, nationality or ethnic origin of 28 August 1999	Race, colour, nationality, ethnic origin
		Law 46/2006 which prohibits and punishes discrimination based on disability and on a pre-existing risk to health	Disability and pre-existing risk to health
<b>ROMANIA</b>	Articles 4 and 16 of the Constitution	Ordinance (GO) 137/2000 regarding the prevention and the punishment of all forms of discrimination of 31 August 2000, as last amended in 2013	Race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion.
		Law on the protection and promotion of the rights of persons with a handicap, law 448/2006 of 6 December 2006, as last amended in 2012	Disability
<b>SERBIA</b>	Article 21, para. 3 of the Constitution	Law on the Prohibition of Discrimination of 26 March 2009	Race, skin colour, ancestry, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial status, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership of political, trade union and other organisations, other real or presumed personal characteristic
<p>10 Referred to in this report as the 'Equal Treatment Act'.</p> <p>11 Citizenship is only protected for workers exercising their freedom of movement under EU law.</p> <p>12 Referred to in this report as the "Law transposing the Racial Equality Directive".</p>			

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
SERBIA	Article 21, para. 3 of the Constitution	Law on the Prevention of Discrimination against Persons with Disabilities of 17 April 2006, as last amended in 2016	Disability
SLOVAKIA	Article 12 of the Constitution	Act No. 365/2004 on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act) of 20 May 2004, as last amended in 2015	Sex, religion or belief, race, affiliation with a nationality ( <i>národnosť</i> ) 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, or the reason of reporting criminality or other anti-social activity, contained in Section 2(1) of the Anti-discrimination Act (as well as some other grounds contained in some other acts, mainly trade union involvement and unfavourable state of health, contained, for example, in the Labour Code)
SLOVENIA	Article 14 of the Constitution	Protection against Discrimination Act of 21 April 2016	Gender, ethnicity, race or ethnic origin, language, religion or belief, disability, age, sexual orientation, gender identity or gender expression, social standing, economic situation, education or any other personal characteristic
		Employment Relationship Act of 5 March 2013	Ethnicity, race or ethnic origin, national and social origin, gender, skin colour, health condition, disability, religion or belief, age, sexual orientation, family status, membership in a trade union, financial situation or other personal circumstance.
		Act on Equal Opportunities of People with Disabilities of 16 November 2010, as last amended in 2014	Disability
SPAIN <sup>13</sup>	Arts 14 and 16 of the Constitution	Law 62/2003, on Fiscal, Administrative and Social measures, of 30 December 2003, as last amended in 2014	Racial or ethnic origin, religion or beliefs, disability, age, sexual orientation
		RDL 1/2013, General Law on the Rights of Persons with Disabilities and their Social Inclusion of 29 November 2013	Disability
SWEDEN	Chapter 1, S. 2 and Chapter 2, S. 12 of the Instrument of Government <sup>14</sup>	Discrimination Act (2008:567) of 5 June 2008, as last amended in 2016	Sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation, age.
<p>13 Protection against discrimination on the ground of religion is also provided by the Organic Law 7/1980 on Religious Freedom of 5 July 1980.</p> <p>14 In Sweden, four separate Acts are considered to form the Constitution, including (of relevance as regards anti-discrimination provisions), the Instrument of Government.</p>			

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
TURKEY	Art. 10 of the Constitution	Law on the Human Rights and Equality Institution of Turkey (no. 6701) of 6 April 2016	Sex, race, colour, language, religion, belief, denomination, philosophical and political opinion, ethnic origin, wealth, birth, marital status, health, disability and age.
		Law on Persons with Disabilities No 5378 of 1 July 2005, as last amended in 2014	Disability
UNITED KINGDOM	No written constitution	UK: Equality Act of 16 February 2006, as last amended in 2010 <sup>15</sup>	Sex (incl. gender reassignment, married/ civilly partnered status, pregnancy), race, colour, nationality (including citizenship), ethnic origins, national origins, disability, sexual orientation, religion or belief, age
		UK: Equality Act of 8 April 2010, as last amended in 2016 <sup>16</sup>	Sex (incl. gender reassignment, married/ civilly partnered status, pregnancy), race, colour, nationality (including citizenship), ethnic origins, national origins, disability, sexual orientation, religion or belief, age
		Northern Ireland: Race Relations Order of 19 March 1997, as last amended in 2012	Racial grounds including race, ethnic origins, colour, nationality, national origins, belonging to the Irish Traveller Community
		Northern Ireland: Disability Discrimination Act of 8 November 1995, as last amended in 2011	Disability
		Northern Ireland: Employment Equality (Sexual Orientation) Regulations of 1 December 2003, as last amended in 2005	Sexual orientation
		Northern Ireland: Fair Employment and Treatment Order of 16 December 1998, as last amended in 2011	Religion, belief, political opinion
		Northern Ireland: Employment Equality (Age) Regulations of 1 October 2006, as last amended in 2011	Age
		<p>15 The 2006 Equality Act created the Equality and Human Rights Commission (EHRC) in Great Britain, and in the UK prohibited religious discrimination outside employment and created a basis for secondary legislation to do the same in relation to sexual orientation. Since the adoption of the Equality Act 2010, the previous act is mainly relevant as regards the provisions regulating the EHRC.</p> <p>16 The 2006 Equality Act created the Equality and Human Rights Commission in Great Britain, and in the UK prohibited religious discrimination outside employment and created a basis for secondary legislation to do the same in relation to sexual orientation. The 2010 Act for Great Britain consolidates all the grounds and amends the 2006 provisions in relation to sexual orientation, religion and belief beyond employment in Great Britain.</p>	



## Annex 2. Signature/ratification of international convention

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X:											
	European Convention on Human Rights	Protocol 12, ECHR	Revised European Social Charter	International Covenant on Civil and Political Rights	Framework Convention on the Protection of National Minorities	International Convention on Economic, Social and Cultural Rights	Convention on the Elimination of All Forms of Racial Discrimination	Convention on the Elimination of Discrimination against Women	ILO Convention No 111 on Discrimination	Convention on the Rights of the Child	Convention on the Rights of Persons with Disabilities
AUSTRIA	X	X	X	X	X	X	X	X	X	X	X
BELGIUM	X	/	X	X	/	X	X	X	X	X	X
BULGARIA	X	-	X	X	X	X	X	X	X	X	X
CROATIA	X	X	/	X	X	X	X	X	X	X	X
CYPRUS	X	X	X	X	X	X	X	X	X	X	X
CZECH REPUBLIC	X	/	/	X	X	X	X	X	X	X	X
DENMARK	X	-	/	X	X	X	X	X	X	X	X
ESTONIA	X	/	X	X	X	X	X	X	X	X	X
FINLAND	X	X	X	X	X	X	X	X	X	X	X
FRANCE	X	/	X	X	-	X	X	X	X	X	X
FORMER YUGOSLAV REPUBLIC of MACEDONIA	X	X	X	X	X	X	X	X	X	X	X
GERMANY	X	/	/	X	X	X	X	X	X	X	X
GREECE	X	/	X	X	/	X	X	X	X	X	X
HUNGARY	X	/	X	X	X	X	X	X	X	X	X
ICELAND	X	/	/	X	/	X	X	X	X	X	X
IRELAND	X	/	X	X	X	X	X	X	X	X	/
ITALY	X	/	X	X	X	X	X	X	X	X	X
LATVIA	X	/	X	X	X	X	X	X	X	X	X
LIECHTENSTEIN	X	/	-	X	X	X	X	X	<sup>-1</sup>	X	-
LITHUANIA	X	-	X	X	X	X	X	X	X	X	X
LUXEMBOURG	X	X	/	X	/	X	X	X	X	X	X
MALTA	X	-	X	X	X	X	X	X	X	X	X
MONTENEGRO	X	X	X	X	X	X	X	X	X	X	X
NETHERLANDS	X	X	X	X	X	X	X	X	X	X	X
NORWAY	X	-	X	X	X	X	X	X	X	X	X
POLAND	X	-	/	X	X	X	X	X	X	X	X
PORTUGAL	X	X	X	X	X	X	X	X	X	X	X
ROMANIA	X	X	X	X	X	X	X	X	X	X	X

<sup>1</sup> Liechtenstein is not an ILO member.

<b>SERBIA</b>	X	X	X	X	X	X	X	X	X	X	X
<b>SLOVAKIA</b>	X	/	X	X	X	X	X	X	X	X	X
<b>SLOVENIA</b>	X	X	X	X	X	X	X	X	X	X	X
<b>SPAIN</b>	X	X	/	X	X	X	X	X	X	X	X
<b>SWEDEN</b>	X	-	X	X	X	X	X	X	X	X	X
<b>TURKEY</b>	X	/	X	X	-	X	X	X	X	X	X
<b>UNITED KINGDOM</b>	X	-	/	X	X	X	X	X	X	X	X

### Annex 3. National specialised bodies

Country	Specialised body designated by law in compliance with Article 13	Grounds covered other than racial or ethnic origin	Provides independent assistance to victims	Conducts independent surveys	Publishes independent reports	Issues recommendations	Is a quasi-judicial body	Its decisions are binding
AUSTRIA	<b>Equal Treatment Commission –ETC</b> (Act on the Equal Treatment Commission and the Office for Equal Treatment, Art. §§ 1, 2, 11-14)	Gender, ethnic affiliation, religion, belief, age, sexual orientation	No	No	No <sup>1</sup>	Yes	Yes	No
	<b>National Equality Body – NEB</b> (Act on the Equal Treatment Commission and the office for Equal Treatment, §§ 3-5)	Gender, ethnic affiliation, religion, belief, age, sexual orientation	Yes	Yes	Yes	Yes	No	N/A
BELGIUM	<b>Inter-federal Centre for Equal Opportunities and Opposition to Racism and Discrimination (UNIA)</b> (Cooperation Agreement between the Federal State, the Regions and the Communities creating the Inter-federal Centre for Equal Opportunities and Opposition to Racism and Discrimination, Art. 2)	Alleged race, colour, descent, national origin, nationality, age, sexual orientation, civil status, birth, wealth/income ( <i>fortune</i> , in French), religious or philosophical belief, actual or future state of health, disability, physical characteristic, political opinion, trade union opinion ( <i>conviction syndicale</i> ), genetic characteristic and social origin (not sex and language).	Yes	Yes	Yes	Yes	No	N/A
BULGARIA	<b>Protection Against Discrimination Commission,</b> (Protection Against Discrimination Act, Art. 40)	Race, ethnicity, sex, national origin, human genome, nationality, origin, religion or faith, education, beliefs, political affiliation, personal or social status, disability, age, sexual orientation, family status, property status, or any other ground provided for by law or by international treaty Bulgaria is a party to.	Yes	Yes	Yes	Yes	Yes	Yes
<p>1 The Equal Treatment Commission(s) also publish reports about their work and summarize the general situation, but this is not part of their mandate by law.</p>								

Country	Specialised body designated by law in compliance with Article 13	Grounds covered other than racial or ethnic origin	Provides independent assistance to victims	Conducts independent surveys	Publishes independent reports	Issues recommendations	Is a quasi-judicial body	Its decisions are binding
CROATIA	<b>Ombudsperson<sup>2</sup></b> (Anti-discrimination Act, Art. 12)	Race or ethnic origin or colour, language, religion, political or other belief, national or social origin, property, trade union membership, education, social status, marital or family status, age, health condition, genetic heritage	Yes	Yes	Yes	Yes	No	N/A
CYPRUS	<b>Equality Authority and Anti-discrimination Authority</b> (The Combating of Racial and other forms of Discrimination (Commissioner) Law N. 42(I)/2001), Arts 5 and 7)	Race/ethnic origin, religion or belief, age, sexual orientation, disability, colour, political or other beliefs, national origin, social descent, birth, wealth, social class, any ground whatsoever, all rights guaranteed in ECHR and all its protocols, in the International Convention for the Elimination of All forms of Discrimination, in the Convention against Torture and other Forms of Inhumane or Humiliating Treatment, in the International Covenant on Civil and Political Rights and in the Framework Convention on the Protection of National Minorities.	No	Yes	Yes	Yes	Yes	Yes <sup>3</sup>
CZECH REPUBLIC	<b>Public Defender of Rights</b> (Law No. 349/1999 Coll., on the Public Defender of Rights, Art. 21(b))	Sex, race, ethnic origin, sexual orientation, age, disability, religion, belief or other conviction, 'nationality' (in Czech: <i>národnost</i> )	Yes	Yes	Yes	Yes	No	N/A
DENMARK	<b>Institute for Human Rights – The National Human Rights Institute of Denmark</b> (Act No. 553 of 18 June 2012 with later amendments)	Race, ethnic origin, gender, disability	Yes	Yes	Yes	Yes	No	N/A

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

3 Although the law entitles it to issue binding decisions, the sanctions foreseen are marginal and the equality body chooses to use its mediation function instead.

Country	Specialised body designated by law in compliance with Article 13	Grounds covered other than racial or ethnic origin	Provides independent assistance to victims	Conducts independent surveys	Publishes independent reports	Issues recommendations	Is a quasi-judicial body	Its decisions are binding
DENMARK	<b>Board of Equal Treatment</b> (Act on the Board of Equal Treatment)	Protected grounds in employment: gender, race, skin colour, religion or belief, political opinion, sexual orientation, age, disability, national origin, social origin, ethnic origin Protected grounds outside employment: gender, race and ethnic origin	No	No	No	No	Yes	Yes
ESTONIA	<b>Commissioner for Gender Equality and Equal Treatment</b> (Equal Treatment Act, Arts 15-22)	Sex, ethnic origin, race, colour, religion or other beliefs, age, disability and sexual orientation	Yes	Yes	Yes	Yes	No	N/A
	<b>Chancellor of Justice</b> (Chancellor of Justice Act, Art. 19-35 <sup>4</sup> )	Public sector: any ground. 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	No	No	Yes	Yes <sup>4</sup>	Yes <sup>5</sup>
FINLAND	<b>Non-Discrimination Ombudsman</b> (Non-Discrimination Act, Section 19)	Age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health or other personal characteristics.	Yes	Yes	Yes	Yes <sup>6</sup>	No	N/A
FRANCE	<b>Defender of Rights</b> (Organic Law no 2011-333 of 29 March 2011 creating the Defender of Rights, Art. 4, para. 3)	Any ground protected by national <sup>7</sup> or European legislation and international conventions	Yes	Yes	Yes	Yes	No	N/A
<p>4 In conciliation procedures. 5 In conciliation procedures. 6 Limited in employment. 7 In French legislation, the protected grounds are: mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed to an ethnic origin, a nation, a race or a determined religion, physical appearance, last name, family situation, philosophical convictions, union activities, political opinions, age, health, disability, genetic characteristics, place of residence, capacity to express oneself in another language than French, economic vulnerability, philosophical opinions. Grounds covered by national jurisprudence (such as condition of fortune, birth, property, language) are also included.</p>								

Country	Specialised body designated by law in compliance with Article 13	Grounds covered other than racial or ethnic origin	Provides independent assistance to victims	Conducts independent surveys	Publishes independent reports	Issues recommendations	Is a quasi-judicial body	Its decisions are binding
FORMER YUGOSLAV REPUBLIC of MACEDONIA	<b>Commission for Protection against Discrimination</b> (Law on Prevention and Protection Against Discrimination, Arts 16-24 and 25-33) <sup>8</sup>	Sex, race, colour, gender, belonging to a marginalised group, ethnic affiliation, language, citizenship, social origin, religion or religious belief, other beliefs, education, political belonging, personal or social status, mental or physical impairment, age, family or marital status, property status, health condition, any other ground prescribed by law or ratified international treaty.	Yes	Yes	Yes	Yes	Yes	No
GERMANY	<b>Federal Anti-discrimination Agency</b> (General Act on Equal Treatment, Art. 25)	Race or ethnic origin, sex, religion or belief <sup>9</sup> ( <i>Weltanschauung</i> ), disability, age, sexual identity	Yes	Yes	Yes	Yes	No	N/A
GREECE	<b>Greek Ombudsman</b> (Law 2477/1997, Art. 1 and Equal Treatment Law 4443/2016)	Racial or ethnic origin, descent, colour, language, religious or other beliefs, disability or chronic illness, age, family or social status, sexual orientation, gender identity or characteristics	Yes	Yes	Yes	Yes	No	N/A
HUNGARY	<b>Equal Treatment Authority</b> (Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities; Art. 14-17D)	Sex, racial affiliation, colour of skin, nationality, belonging to a national or ethnic minority, mother tongue, disability, health condition, religion or belief, political or other opinion, family status, maternity (pregnancy) or paternity, sexual orientation, sexual identity, age, social origin, financial status, part-time nature of employment legal relationship or other legal relationship connected with labour, or determined period thereof, belonging to an interest representation organisation, other situation, attribute or condition of a person or group	Yes <sup>10</sup>	Yes	Yes	Yes	Yes	Yes

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

9 Not for civil law.

10 However, the Equal Treatment Authority focuses on its quasi-judicial function.

Country	Specialised body designated by law in compliance with Article 13	Grounds covered other than racial or ethnic origin	Provides independent assistance to victims	Conducts independent surveys	Publishes independent reports	Issues recommendations	Is a quasi-judicial body	Its decisions are binding
ICELAND	No specific body <sup>11</sup>	-	-	-	-	-	-	-
IRELAND	<b>Irish Human Rights and Equality Commission</b> (Irish Human Rights and Equality Commission Act 2014, S. 9 and 44)	Gender, age, race, religion, family status, disability, civil status, sexual orientation, membership of the Traveller Community, housing assistance	Yes	Yes	Yes	Yes	No	N/A
ITALY	<b>National Office against Racial Discrimination</b> – UNAR (Legislative Decree No 215/2003 on the Implementation of Directive 2000/43/EC, Art. 7)	Race, nationality, ethnic origin, sex, religion or personal belief, disability, age and sexual orientation	Yes <sup>12</sup>	Yes	Yes	Yes	No	N/A
LATVIA	<b>Ombudsman</b> , (Law on Ombudsman, Art. 11(2))	Grounds not specified, hence any ground	Yes	Yes	Yes	Yes	No	N/A
LIECHTENSTEIN	<b>Office for Equal Opportunities</b> <sup>13</sup> (Act on Equality of People with Disabilities, Art.19 and 22)	Gender, migration and integration (including race and ethnicity), <sup>14</sup> sexual orientation, disability, social disadvantage	Yes	Yes <sup>15</sup>	Yes	Yes	No	N/A
LITHUANIA	<b>Equal Opportunities Ombudsperson</b> (Law on Equal Treatment, Arts 14 and 15, Law on Equal Opportunities for Women and Men, Art. 24)	Gender, race, nationality, origin, age, sexual orientation, disability, ethnic origin, language, social status, religion, belief, convictions, views	No <sup>16</sup>	Yes	Yes	Yes	Yes	Yes <sup>17</sup>
LUXEMBOURG	<b>Centre for Equal Treatment</b> (Law of 28 November 2006, Art. 8)	Race, ethnic origin, religion or belief, disability, age, gender, sexual orientation	Yes	Yes	Yes	Yes	No	N/A

11 The Parliamentary Ombudsman may deal with equality/discrimination in relation to administrative procedure.

12 There have been serious concerns in 2015 regarding the interference of the state in UNAR's activities and therefore its independence in dealing with its tasks (such as providing independent assistance to victims, surveys and reports and issuing recommendations).

13 The Office for Equal Opportunities is replaced by the Association of Human Rights with the same competencies as of 2017.

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

15 Although the body has the mandate to do so, no independent surveys have been conducted during the last years.

16 In practice, the Ombudsperson is doing consultancy work, and, possibly advising the applicants with regard to which procedural ways to pursue justice.

17 The Ombudsperson's administrative sanctions are binding but not her/his recommendations.

Country	Specialised body designated by law in compliance with Article 13	Grounds covered other than racial or ethnic origin	Provides independent assistance to victims	Conducts independent surveys	Publishes independent reports	Issues recommendations	Is a quasi-judicial body	Its decisions are binding
MALTA	<b>National Commission for the Promotion of Equality for Men and Women</b> <sup>18</sup> (Equality for Men and Women Act, Art. 11)	Sex, family responsibilities, sexual orientation, age, religion or belief, racial and ethnic origin, gender identity, gender expression, sex characteristics, actual or potential pregnancy, childbirth	Yes	Yes	Yes	Yes	No	N/A
MONTENEGRO	<b>Protector of Human Rights and Freedoms</b> (Law on the Protector of Human Rights and Freedoms, Art. 27, para. 1 and Law on the Prohibition of Discrimination, Art.21.)	Race, skin colour, national affiliation, social or ethnic origin, affiliation to the minority nation or minority national community, language, religion or belief, political or other opinion, gender, gender identity, sexual orientation, health conditions, disability, age, material status, marital or family status, membership of a group or assumed membership of a group, political party or other organisation as well as other personal characteristics	Yes	Yes	Yes	Yes	No	N/A
NETHERLANDS	<b>The Netherlands Institute for Human Rights</b> (Netherlands Institute for Human Rights Act, Arts 9-13)	Race, religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality, civil (or marital) status, disability, age, working time and type of labour contract	No	Yes	Yes	Yes	Yes	No
	<b>The NGO 'Art. 1'</b> <sup>19</sup> (Law on Local Anti-discrimination Bureaus, Art. 2a)	Race, religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality, civil (or marital) status, disability, age	Yes	Yes	Yes	Yes	No	N/A
<p>18 In practice the Commission is generally referred to as the National Commission for the Promotion of Equality.                      19 This organisation includes around 430 local anti-discrimination bureaus.</p>								



Country	Specialised body designated by law in compliance with Article 13	Grounds covered other than racial or ethnic origin	Provides independent assistance to victims	Conducts independent surveys	Publishes independent reports	Issues recommendations	Is a quasi-judicial body	Its decisions are binding
NORWAY	<b>Equality and Anti-discrimination Ombud<sup>20</sup> and Anti-discrimination Tribunal</b> (Act on the Equality and Anti-discrimination Ombud and the Equality and Anti-discrimination Tribunal, Art. 1)	Gender, ethnicity, religion and belief disability, language, sexual orientation, age, political view <sup>21</sup>	No <sup>22</sup>	Yes	Yes	Yes	Yes	No <sup>23</sup>
POLAND	<b>Commissioner for Civil Rights Protection</b> (‘Ombudsman’) (Act on the Commissioner for Civil Rights Protection, Art. 1)	The Act on the Commissioner for Civil Rights Protection does not specify any protected grounds	Yes <sup>24</sup>	Yes	Yes	Yes	No	N/A
PORTUGAL	<b>High Commission for Migrations</b> (Decree-law 31/2014, Art. 1)	Racial and ethnic origin, nationality	Yes <sup>25</sup>	Yes	Yes	Yes	No	N/A <sup>26</sup>
ROMANIA	<b>National Council for Combating Discrimination</b> (Ordinance (GO) 137/2000 regarding the prevention and the punishment of all forms of discrimination, Arts. 16-25, 29, 30)	Race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion	Yes	Yes	Yes	Yes <sup>27</sup>	Yes	Yes

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

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

22 The Ombud’s role is to provide guidance to victims of discrimination on the content of the law and not to give assistance in the form of legal counselling or legal aid.

23 Only partially: The Ombud issues only statements, not decisions, but these should be followed by virtue of established practice for public entities. The decisions of the Tribunal are binding only in relation to private parties, not in relation to public entities.

24 Judicial interpretation is required as under the Polish Constitution and the law, the competences of the Ombudsman are limited regarding conflicts between private parties.

25 As the independence of the equality body is not stipulated in law, due to the potential political influence, it cannot be affirmed that the body can exercise its competencies independently.

26 Even though the equality body is not considered to be a quasi-judicial institution, its decisions are binding and it can also impose sanctions.

27 Issuing recommendations is not specifically provided for in the law, but it is set out in secondary legislation: Governmental Decision 1194/2001 for the organising and functioning of the National Council for Combating Discrimination, of 12 December 2001 as modified by Governmental Decision 1514 of 18 December 2002 and Governmental Decision 1279 of 4 November 2003.

Country	Specialised body designated by law in compliance with Article 13	Grounds covered other than racial or ethnic origin	Provides independent assistance to victims	Conducts independent surveys	Publishes independent reports	Issues recommendations	Is a quasi-judicial body	Its decisions are binding
SERBIA	<b>The Commissioner for the Protection of Equality</b> (The Law on Prohibition of Discrimination Art. 1, para. 2)	Race, skin colour, ancestry, citizenship, language, religious or political beliefs, gender, gender identity, sexual orientation, financial status, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership of political, trade union and other organisations, and other real or presumed personal characteristics.	Yes	Yes	Yes	Yes	Yes	Yes
SLOVAKIA	<b>Slovak National Centre for Human Rights</b> (Act No 308/1993 on Establishing the Slovak National Centre for Human Rights, S. 1, paras 2a, e, f, g, h and S. 1(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, unfavourable health condition, family duties, membership or involvement in a political party or a political movement, a trade union or another association, the reason of reporting criminality or other anti-social activity, or other status.	Yes	Yes	Yes	Yes	No	N/A
SLOVENIA	<b>Advocate of the Principle of Equality</b> (Protection against Discrimination Act, Arts 19-32)	Gender, language, ethnicity, race or ethnic origin, religion or belief, disability, age, sexual orientation, gender identity, gender expression, social standing, economic situation, education, any other personal characteristic	Yes	Yes	Yes	Yes	No	N/A
SPAIN	<b>Council for the Elimination of Racial or Ethnic Discrimination</b> (Law 62/2003, of 30 December on Fiscal, Administrative and Social Measures, Art. 33)	No	Yes <sup>28</sup>	Yes	Yes	Yes	No	N/A
<p><sup>28</sup> The Spanish body has the competence to provide assistance to victims, conduct surveys and reports and issue recommendations but the independence of these functions is not certain due to the status of the body.</p>								

Country	Specialised body designated by law in compliance with Article 13	Grounds covered other than racial or ethnic origin	Provides independent assistance to victims	Conducts independent surveys	Publishes independent reports	Issues recommendations	Is a quasi-judicial body	Its decisions are binding
SWEDEN	<b>Equality Ombudsman</b> (Discrimination Act, Ch. 4, Ss 1-6, and the whole of the Equality Ombudsman Act)	Sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation, age	Yes	Yes	Yes	Yes	No	N/A
TURKEY	No <sup>29</sup>	... <sup>30</sup>	... <sup>31</sup>	... <sup>32</sup>	... <sup>33</sup>	... <sup>34</sup>	... <sup>35</sup>	... <sup>36</sup>
UNITED KINGDOM	<b>Great Britain: Equality and Human Rights Commission</b> (UK Equality Act 2006, SS. 1-43)	Ethnic origin, national origin, colour, nationality (including citizenship), sexual orientation, religion, belief, disability, age, sex (including gender reassignment, marriage/civil partnership status, pregnancy)	Yes	Yes	Yes	Yes	No	N/A
	<b>Northern Ireland: Equality Commission for Northern Ireland</b> , (Northern Ireland Act, SS. 73-74)	Ethnic origin, national origin, colour, nationality (including citizenship), sexual orientation, religion, belief, disability, age, sex (including gender reassignment, marriage/civil partnership status, pregnancy)	Yes	Yes	Yes	Yes	No	N/A

29 Law on the Human Rights and Equality Institution of Turkey (no. 6701), adopted on 6 April 2016, provides for the establishment of the Human Rights and Equality Institution of Turkey, which will become operational in 2017. Pursuant to Articles 8-14 of Law no. 6701, the new body will have an explicit mandate to address ethnic and racial discrimination.

30 Pursuant to Article 3(2) of Law no. 6701, the Human Rights and Equality Institution of Turkey will have a mandate to deal with discrimination on the following grounds in addition to race and ethnic origin: sex, colour, language, religion, belief, denomination, philosophical and political opinion, wealth, birth, marital status, health, disability and age.

31 Pursuant to Article 9(1)(ğ) of Law no. 6701, the Human Rights and Equality Institution of Turkey will have a mandate to provide independent assistance to victims.

32 Law no.6701 does not give an explicit competence to the competence to the Human Rights and Equality Institution to conduct independent surveys.

33 Pursuant to Article 9(1)(k)(l) of Law no. 6701, the Human Rights and Equality Institution of Turkey will have a mandate to publish independent reports.

34 Pursuant to Article 9(1)(a)(b)(e)(k)(l) of Law no. 6701, the Human Rights and Equality Institution of Turkey will have the power to issue recommendations.

35 Pursuant to Articles 11 and 25 of Law no. 6701, the Human Rights and Equality Institution of Turkey will be a quasi-judicial body.

36 Pursuant to Article 25 of Law no. 6701, the decisions of the Human Rights and Equality Institution of Turkey will be binding.



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