



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

A comparative analysis of non-discrimination law in Europe

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A comparative analysis of non-discrimination law in Europe 2022

The 27 EU Member States, Albania, Iceland, Liechtenstein, Montenegro, North Macedonia, Norway, Serbia, Türkiye and the United Kingdom compared

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

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Introduction

More than 20 years ago, a major and unprecedented development occurred in the European Union with the adoption in 2000 of two pieces of EU legislation in the field of anti-discrimination: the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC). The transposition and implementation of these legal provisions into the national legal systems of the 27 Member States is described in a series of annually updated country reports produced by the European network of legal experts in gender equality and non-discrimination. In addition, the network also includes candidate countries (Albania, Montenegro, North Macedonia, Serbia and Türkiye) and the EEA countries (Iceland, Liechtenstein and Norway), as well as the United Kingdom, which exited the EU on 31 January 2020.

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). The current 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 36 reports cover national law, the establishment of enforcement mechanisms, case law and the adoption of other measures. They contain information current as of 1 January 2022.¹ 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.

This comparative analysis, drafted by Isabelle Chopin and Catharina Germaine (Migration Policy Group), compares and analyses the information set out in the country reports relating to 2021 in a format mirroring that of the country reports themselves and draws some conclusions from the information contained in them. The report further 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. By contrast, the United Kingdom formally left the EU on 31 January 2020, and the non-discrimination directives consequently stopped applying directly in the UK as of 31 December 2020. The current candidate countries have entered the transposition process and 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. National provisions on anti-discrimination exist, but the level of protection offered in practice does not always meet EU standards. It goes beyond the scope of this report to assess the extent to which Member States have fully complied

¹ Where major changes in legislation have been adopted at national level after the cut-off date of 1 January 2022, they have been included and this has been indicated accordingly.

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. During the transposition process, it became apparent that judicial interpretation might be necessary to provide further clarity of some key concepts and provisions. Twenty-two years after the adoption of the directives, both national courts and the Court of Justice of the EU have provided some interpretation to this effect, as will be further developed below.

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 a 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.

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. In 2021 there were four ongoing infringement proceedings; against **Czechia, Hungary and Slovakia** concerning discrimination against Roma children in education,² and, also against **Hungary**, for breaches of the Racial Equality and Employment Equality Directives due to newly adopted legislation on sanctions for discrimination in education and vocational training.³

2 See European Commission, Infringement Nos (2014)2174 (Czechia), (2015)2025 (Slovakia) and (2015)2206 (Hungary).

3 See European Commission, Infringement No. (2021)2073. For further details regarding the national legislation at hand, see below pp. 103-104.

In March 2021, the European Commission published its third report on the state of implementation of both the Racial Equality Directive and the Employment Equality Directive in the EU Member States.⁴ The report focused on a series of challenges, whether specific to one of the Directives or common to both, linking them in particular to the severe under-reporting of discrimination. In this regard, the report listed several possible follow-up means of action, highlighting notably the overall important role of equality bodies.⁵

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 and healthcare, social advantages, education, and supply of and/or access to goods and services available to the public, including housing. In addition, the Employment Equality Directive requires the prohibition of discrimination to be extended in the field of employment and occupation to the grounds of religion or belief, disability, age and sexual orientation. While neither directive contains definitions of any of the grounds, the Court of Justice of the EU has provided guidance regarding some of them. 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, **Albania, Belgium, Croatia, France, Hungary, Italy, Latvia, Lithuania, Luxembourg, North Macedonia, Poland, Portugal, Romania, Serbia, Slovakia** 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, Czechia, Denmark, Estonia, Finland, Germany, Greece, Iceland, 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, including in **Austria, Cyprus, Denmark, France, Germany, Ireland, Italy, the Netherlands** and the **United Kingdom**.

All countries have included the general principle of equal treatment or specific grounds of discrimination in their constitution (except the **United Kingdom**, 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 **Albania, Bulgaria, Cyprus, Estonia, Finland, Greece, Iceland, Liechtenstein, Luxembourg, Montenegro, the Netherlands, Norway, Portugal, Serbia, Slovenia, Spain** and **Türkiye**. Horizontal direct effect remains theoretical or largely debatable in a minority of countries (for instance, **Belgium, Hungary, Italy, and North Macedonia**). In **France**, constitutional provisions can be invoked in judicial proceedings against private parties to challenge legislation 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.

4 European Commission (2021), *Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive')*, Brussels, 19.03.2021, COM(2021) 139 final, available at: https://ec.europa.eu/info/sites/default/files/report_on_the_application_of_the_racial_equality_directive_and_the_employment_equality_directive_en.pdf.

5 For further information, notably regarding the Staff Working Document attached to the implementation report, see below section 5.

Most countries have transposed the directives through civil or labour law, with a minority having also maintained, introduced or amended criminal law provisions (e.g. **Belgium, Denmark, Estonia, France** and **Luxembourg**). Although anti-discrimination provisions still exist in various pieces of legislation in some countries (e.g. **Latvia**), this method has largely been replaced by more general anti-discrimination provisions and legislation. Similarly, there has been a discernible move towards multiple-ground equality bodies.

Some countries, such as **Finland, Sweden** and the **United Kingdom**, having previously 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.

Several countries have also put in place processes for evaluating and/or reviewing the national non-discrimination frameworks. Such processes can be statutory, as in **Belgium**, where a detailed evaluation by national experts in the field is foreseen by the non-discrimination legislation adopted in 2007 and has taken the form of two analytical reports. More recently, in 2021, **Ireland** initiated the first comprehensive review of the national non-discrimination framework, based notably on public consultations. In the context of a vivid public debate on issues related to discrimination and intolerance in the **Netherlands**, a similar review process was also initiated in 2021 through the creation of a Parliamentary Investigation Committee with the aim of exploring available legislative means of combating discrimination.

In all 28 Member States, national anti-discrimination law includes other prohibited grounds in addition to those required by the directives. In **France**, for instance, several new protected grounds have been added in the past few years, including ‘loss of autonomy’, ‘expressing oneself in a language other than French’, ‘economic vulnerability’, ‘gender identity’ and ‘banking residence’. In contrast, however, in **Türkiye**, although some additional grounds not provided for in the directives are covered, sexual orientation is not.

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 general anti-discrimination legislation.

Table 1. Grounds protected in national general anti-discrimination legislation⁶ (at federal level)

Country	Grounds of discrimination protected in general anti-discrimination legislation
ALBANIA (Law on Protection from Discrimination)	Gender, race, colour, ethnicity, language, citizenship, political, religious or philosophical beliefs, economic condition, education or social situation, gender identity, sexual orientation, characteristics of sex, life with HIV/AIDS, pregnancy, parentage, parental responsibility, age, family or marital condition, civil status, residence, health status, genetic predispositions, appearance, disability, affiliation with a particular group or any other grounds.
AUSTRIA (Equal Treatment Act; Federal Equal Treatment Act)	Gender, ethnic affiliation, religion, belief, age, sexual orientation. ⁷
BELGIUM (Racial Equality Federal Act; General Anti-Discrimination Federal Act)	Alleged race, colour, descent, ethnic or national origin, nationality, age, sexual orientation, civil status, birth, property (<i>fortune</i>), religious or philosophical belief, actual or future state of health, disability, physical or genetic features, political opinion, language, social origin, trade union opinion (<i>conviction syndicale</i>).
BULGARIA (Protection Against Discrimination Act)	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 Bulgaria is a party.

⁶ When one of the grounds covered by the directives is not covered by the general anti-discrimination legislation but by some other national legislation, this is indicated specifically.

⁷ In addition, disability is covered by the Act on the Employment of Persons with Disabilities and the Federal Disability Equality Act.

Country	Grounds of discrimination protected in general anti-discrimination legislation
CROATIA (Anti-discrimination Act)	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, ⁸ disability, genetic heritage, gender identity and expression, ⁹ sexual orientation.
CYPRUS (Equal Treatment in Employment and Occupation Law; Equal Treatment (Racial or Ethnic Origin) Law)	Racial and ethnic origin religion or belief, age, sexual orientation. ¹⁰
CZECHIA (Anti-Discrimination Act)	Race, colour, ethnic origin, nationality (<i>národnost</i>), sex, sexual orientation, age, disability, religion or belief. ¹¹
DENMARK (Act on the Prohibition of Discrimination in the Labour Market etc.; Act on Ethnic Equal Treatment)	Race, age, disability, skin colour, religion, belief, sexual orientation, political opinion, national, social or ethnic origin, gender identity, gender expression or gender characteristics.
ESTONIA (Equal Treatment Act)	Ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation. ¹²
FINLAND (Non-Discrimination Act)	Origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health or other personal characteristics.
FRANCE (Law relating to the adaptation of National Law to Community Law in matters of discrimination ¹³)	Mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed, to an ethnic origin, a nation, a race or a specific religion, physical appearance, place of residence or banking residence, last name, family situation, trade union activities, political opinions, age, health, disability, loss of autonomy, genetic characteristics, capacity to express oneself in a language other than French, apparent economic vulnerability, loss of autonomy.
GERMANY (General Act on Equal Treatment)	Sex, race or ethnic origin, religion or belief, ¹⁴ disability, age, sexual identity. ¹⁵
GREECE (Equal Treatment Law)	Racial or ethnic origin, descent, colour, religious or other beliefs, disability or chronic illness, age, family or social status, sexual orientation, gender identity or characteristics.

8 The aim of the separate ground 'health condition' is to protect persons with certain health conditions that do not constitute disability (e.g. persons infected with HIV).

9 It is noted that, given the specific wording of the Anti-discrimination Act, which refers to 'gender identity, expression or sexual orientation', there is common confusion as to whether gender identity and expression constitute separate discrimination grounds or not. The Ombudsperson interprets it as one discrimination ground.

10 In addition, disability is covered by the Law on Persons with Disabilities.

11 In addition, as of 1 January 2018, the Anti-discrimination Act stipulates that, in situations relating to free movement of workers where EU Regulation 492/2011 applies, EU citizenship will also be deemed a discrimination ground.

12 In addition, Art. 2(3) of the Equal Treatment Act stipulates that any ground not listed here, in particular the grounds of family-related duties, social status, representation of the interests of employees or membership of an organisation of employees, level of language proficiency or duty to serve in defence forces, may be the subject of 'requirements of equal treatment' in labour relations only.

13 Law No. 2008-496 of 27 May 2008.

14 In Germany, 'belief' is not an explicitly protected ground in civil law.

15 The term 'sexual identity' is considered to have the same meaning as 'sexual orientation'.

Country	Grounds of discrimination protected in general anti-discrimination legislation
HUNGARY (Equal Treatment Act)	Sex, racial affiliation, colour of skin, nationality (not in the sense of citizenship), belonging to a national minority, mother tongue, disability, health condition, religion or belief, political or other opinion, family status, maternity (pregnancy) or paternity, sexual orientation, gender identity, age, social origin, financial status, part-time nature of employment legal relationship or other legal relationship relating to employment or fixed period thereof, belonging to an interest representation organisation, other situation, attribution or condition of a person or group.
ICELAND (Racial Equality Act; ¹⁶ Labour Equality Act ¹⁷)	Race or ethnic origin, religion or belief, disability, reduced capacity to work, age, sexual orientation, gender identity, gender expression, sex characteristics.
IRELAND (Employment Equality Acts ¹⁸ ; Equal Status Acts) ¹⁹	Gender, age, race, ²⁰ religion, civil status, family status, disability, sexual orientation, membership of the Traveller community, housing assistance.
ITALY (Legislative Decree on equality of treatment between persons irrespective of racial or ethnic origin; ²¹ Legislative Decree Implementing Directive 2000/78/EC for equal treatment in employment and occupation ²²)	Race and ethnic origin, religion or belief, disability, age, sexual orientation.
LATVIA	– ²³
LIECHTENSTEIN	– ²⁴
LITHUANIA (Equal Treatment Act)	gender, race, nationality, ²⁵ citizenship, ²⁶ language, origin, social status, belief, convictions or views, age, sexual orientation, disability, ethnic origin or religion.
LUXEMBOURG (General Anti-Discrimination Law; ²⁷ Public Sector Law ²⁸)	Race or ethnic origin, religion or belief, age, disability, sexual orientation, nationality.

16 Act on Equal Treatment Irrespective of Racial and Ethnic Origin No. 85/2018.

17 Act on Equal Treatment in the Labour Market No. 86/2018.

18 Employment Equality Acts 1998-2021 of 18-06-1998.

19 Equal Status Acts 2000-2018 of 26-04-2000.

20 Section 6(2)(h) of the Employment Equality Act and Section 3(2)(h) of the Equal Status Act stipulate that the ground of race includes 'nationality' and ethnic or national origin.

21 Legislative Decree No. 215/2003 of 09.07.2003.

22 Legislative Decree No. 216/2003 of 09.07.2003.

23 There is no general anti-discrimination legislation in Latvia. The grounds covered by the directives are however covered notably by the Labour Law of 20.06.2001, the Law on Prohibition of Discrimination of Natural Persons-Parties to Legal Transactions of 19.12.2012, the Law on Social Security of 07.09.1995, the Education Law of 29.10.1998 and the Consumer Rights Protection Law of 18.03.1999.

24 There is no general anti-discrimination legislation in Liechtenstein. Disability is covered by the Act on Equality of Persons with Disabilities.

25 The term used in the Equal Treatment Act is '*tautybė*', which refers to belonging to a national minority and is not used in the meaning of 'citizenship'.

26 Citizenship is a protected ground only for citizens of EU Member States and of EEA countries, as well as their family members.

27 Law of 28 November 2006.

28 Law of 29 November 2006.

Country	Grounds of discrimination protected in general anti-discrimination legislation
MALTA (Equal Treatment in Employment Regulations; Equal Treatment of Persons Order)	Racial or ethnic origin disability sex, sexual orientation, pregnancy or maternity leave, gender reassignment, age, religion or religious belief.
MONTENEGRO (Law on the Prohibition of Discrimination)	Race, skin colour, national affiliation, social or ethnic origin, affiliation to a minority nation or minority national community, language, religion or belief, political or other opinion, sex, sex change, gender identity, sexual orientation and/or intersex characteristics, 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.
NETHERLANDS (General Equal Treatment Act)	Sex, race, religion, belief, political opinion, nationality, heterosexual or homosexual orientation, civil (or marital) status. ²⁹
NORTH MACEDONIA (Law on Prevention and Protection Against Discrimination)	Race, skin colour, origin nationality or ethnicity, sex, gender, sexual orientation, gender identity, belonging to a marginalised group, language, citizenship, social origin, education, religion or religious belief, political conviction, other convictions, disability, age, family or marital status, property status, health condition, personal capacity and social status or upon any other ground.
NORWAY (General Equality and Anti-Discrimination Act)	Gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, ³⁰ religion, belief, disability, sexual orientation, gender identity, gender expression, age ³¹ or combinations of these factors.
POLAND (Equal Treatment Act)	Gender, race, ethnic origin, nationality, citizenship, ³² religion, belief, political opinion, disability, age, sexual orientation.
PORTUGAL (Law establishing the legal regime for the prevention, prohibition and combating of discrimination on the grounds of racial and ethnic origin, nationality, ancestry and territory of origin ³³)	Racial and ethnic origin, colour, nationality, ancestry, territory of origin. ³⁴
ROMANIA (Ordinance regarding the prevention and punishment of all forms of discrimination ³⁵)	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.

29 In addition, disability is covered by the Disability Discrimination Act, while age is covered by the Age Discrimination Act.

30 Ethnicity includes national origin, descent, skin colour and language.

31 Age in employment is protected through the Working Environment Act (WEA) Chapter 13, while age outside employment is protected through the GEADA. Other grounds protected through the WEA are political views and membership of a trade union.

32 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.

33 Law No. 93/2017 of 23.08.2017.

34 In addition, religion or belief, age, disability and sexual orientation are covered by the Labour Code of 12.02.2009.

35 The 'Anti-discrimination Law', i.e., Government Ordinance 137/2000 of 31.08.2000.

Country	Grounds of discrimination protected in general anti-discrimination legislation
SERBIA (Law on the Prohibition of Discrimination)	Race, skin colour, ancestry, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, sex, gender, gender identity, sexual orientation, sex characteristics, level of income, financial position, 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.
SLOVAKIA (Anti-discrimination Act)	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, the reason of reporting criminality or other anti-social activity.
SLOVENIA (Protection Against Discrimination Act)	Gender, ethnicity, race or ethnic origin, language, religion or belief, disability, age, sexual orientation, gender identity or gender expression, social standing, economic situation, education, any other personal characteristic.
SPAIN (Law on Fiscal, Administrative and Social Measures)	Race or ethnic origin, religion or belief, age, disability, sexual orientation.
SWEDEN (Discrimination Act)	Sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation, age.
TÜRKIYE	– ³⁶
UNITED KINGDOM (GB: Equality Act)	Great Britain (England, Wales and Scotland): sex (including gender reassignment, married/civilly partnered status, pregnancy), colour, nationality (including citizenship), ethnic origins, national origins, disability, sexual orientation, religion or belief, age. Northern Ireland: – ³⁷

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’.³⁸ 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.’

36 There is no general anti-discrimination legislation in Türkiye. Disability is covered notably by the Law on Persons with Disabilities of 01.07.2005, while the grounds of race and ethnic origin, religion or belief, age and disability are covered by Law No. 6701 on the Human Rights and Equality Institution of Türkiye of 06.04.2016. Sexual orientation is not a protected ground in Türkiye.

37 There is no general anti-discrimination legislation in Northern Ireland. The grounds covered by the directives are covered by the following acts: the Disability Discrimination Act of 08.11.1995, the Race Relations Order of 19.03.1997, the Fair Employment and Treatment Order of 16.12.1998 (covering religion and belief), the Employment Equality (Sexual Orientation) Regulations of 01.12.2003, and the Employment Equality (Age) Regulations of 14.06.2006, respectively.

38 See the table in the previous section, immediately above.

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 in transposing legislation. For example, the **Swedish** Discrimination Act defines ‘ethnicity’ (Chapter 1, Section 5(3)), as ‘national or ethnic origin, skin colour or similar circumstance’. In **Finland**, the Non-Discrimination Act refers to ‘origin’, which is defined in the Government proposal as including ethnic origin, national origin, societal origin, race and colour of skin.³⁹ **German** anti-discrimination legislation includes the term ‘race’ but its inclusion generated heated criticism and opposition. In 2020, the Federal Government announced a series of measures to combat right wing extremism and racism, including the reformulation of the Constitution to remove the word ‘race’.⁴⁰ However, such an amendment has not yet been adopted. In **Iceland**, the explanatory notes to the new Racial Equality Act set out that ‘race’ refers to historically important divisions of people into races, based on physical appearance such as skin colour and/or other aspects often considered characteristic for a particular race, although explicit reference is also made to Recital 6 of the Directive. **Belgian** law refers to ‘alleged race’, while in **France**, various legal provisions refer to ‘real or assumed’ (*vraie ou supposée*) race or ethnic origin, in an attempt to underline the non-acceptance of the concept of ‘race’.⁴¹ In **Norway**, the Equality and Anti-Discrimination Act of 2017 lists ‘national origin, descent, skin colour and language’ as part of ‘ethnicity’. These examples are binding for the interpretation of the concept of ethnicity, but not exhaustive examples.

One of the areas in the Racial Equality Directive where judicial interpretation was needed was 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**, **Poland** and **Slovenia**. In **Ireland**, the race ground under the Employment Equality Acts and the Equal Status Acts covers individuals who are of ‘different race, colour, nationality or ethnic or national origins’. According to case law, ‘national origin’ is ‘acquired by a person at the time of birth and connects that person with one or more groups of people who can be described as a “nation”’. Moreover, since 2017, Travellers have been formally recognised as an ethnic group,⁴² meaning that they are covered by the race ground as well as by the separate ground of being a member of the ‘Traveller community’.⁴³

Some guidance in this regard has been provided by the Court of Justice in the past few years, notably in the *CHEZ* judgment of 2015 where the Court stated that ‘the concept of ethnicity (...) has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds’.⁴⁴ The Court thus followed closely the guidance already provided by the European Court of Human Rights.⁴⁵

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

40 The detailed list of measures was published on 25 November 2020, and is available at: <https://www.bundesregierung.de/resource/blob/974430/1819984/4f1f9683cf3faddf90e27f09c692abed/2020-11-25-massnahmen-rechtsextremi-data.pdf?download=1>.

41 See the discussion of amendment No. 15 to Article L122-45 of the Labour Code (now re-codified as Article L1132-1 of the Labour Code), during the adoption of Law No. 2001-1066 of 16.11.2001, available at: <http://www.senat.fr/seances/s200101/s20010109/sc20010109007.html>.

42 Ireland (2017), 941(1) *Dáil Éireann Debates* 461-463 (Traveller Ethnicity: Statements), Wednesday, 1 March 2017. Available at: <https://data.oireachtas.ie/ie/oireachtas/debateRecord/dail/2017-03-01/debate/mul@/main.pdf>.

43 See for instance Ireland, Workplace Relations Commission, *O'Donoghue v The Minister for Social Protection*, DEC-S2018-014, of 5 June 2018, available at: <https://www.workplacerelations.ie/en/Cases/2018/June/DEC-S2018-014.html>.

44 CJEU, Case C-83/14, judgment of 16.07.2015, ECLI:EU:C:2015:480, para 46.

45 European Court of Human Rights (ECtHR), *Timishev v Russia*, Nos. 55762/00 and 55974/00 of 13 December 2005, paragraph 55. Available at: <http://hudoc.echr.coe.int/eng?i=001-71627>.

This guidance highlights how closely linked the concepts of ethnic origin and religion can be. Within the directives, it is evident that the distinction between these two grounds is crucial because the material scope of the Racial Equality Directive is much more extensive than that of the Employment Equality Directive covering religion.

The following examples show how some Member States are dealing with this close interconnection between race and religion. In the **United Kingdom**, discrimination against Sikhs⁴⁶ or Jews⁴⁷ or on the basis of caste⁴⁸ has been accepted as possibly falling within discrimination on racial grounds (specifically, ethnic origin). Due to the historical background of Nazi ideology in **Germany**, antisemitism is regarded as discrimination on the grounds of race and not of religion. In **Sweden**, national courts are not required to 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. This was further underlined by the Government Bill for the Discrimination Act, which stated that together, these two grounds ‘cover a broad area and it can be assumed that in practice it is of subordinate importance which of the discrimination grounds is referred to in e.g. a negotiation or before a court.’⁴⁹

Jyske Finans: ethnic origin cannot be determined on the basis of a single criterion⁵⁰

The case concerned the practice of a Danish credit institution that imposed additional identification requirements on customers whose driving licence mentioned a country of birth that is not an EU or EFTA Member State.

The Danish Board of Equal Treatment considered that this practice amounted to indirect discrimination on the basis of ethnic origin. The Danish court upheld this decision, finding however that the practice amounted to direct rather than indirect discrimination. The decision was appealed against. The Court of Appeal requested a preliminary ruling from the CJEU on the interpretation of the Racial Equality Directive.

The CJEU, in a decision of April 2017, stated that ‘the concept of “ethnicity” has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds. Ethnic origin cannot be determined on the basis of a single criterion but, on the contrary, is based on a whole number of factors, some objective and others subjective. As a consequence, a person’s country of birth cannot, in itself, justify a general presumption that that person is a member of a given ethnic group such as to establish the existence of a direct or inextricable link between those two concepts.’ The Court added that ‘it cannot be presumed that each sovereign State has one, and only one, ethnic origin.’

In the present case, the country of birth was the only criterion that led the Board of Equal Treatment and then the national court to find that the practice in question constituted discrimination on the basis of ethnic origin. However, the CJEU noted that the use of this criterion amounted to neither direct nor indirect discrimination on this ground and was thus not precluded by the Racial Equality Directive.⁵¹ Following the CJEU preliminary ruling, the Danish Board of Equal Treatment reopened the case in 2018, repealing its previous decision and concluding that the applicant had experienced neither direct nor indirect discrimination.⁵²

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

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

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

49 Sweden, Government Bill No. 2007/08:95, *A stronger protection against discrimination*, p. 122, available at: <https://www.regeringen.se/49bafd/contentassets/9992e1e8bedd4019aaa6a9e8565f778b/ett-starkare-skydd-mot-diskriminering-prop.-20070895>.

50 CJEU, Judgment of 6 April 2017, *Jyske Finans A/s v Ligebehandlingsnævnet*, C-668/15, ECLI:EU:C:2017:278. Available at: <http://curia.europa.eu/juris/>.

51 Also see: Farkas, L. (2018), ‘Throwing the babies out with the bathwater: the CJEU, xenophobia and equality bodies after *Jyske Finans*’ in *European Equality Law Review* 2018/1. Available at: <https://www.equalitylaw.eu/downloads/4639-european-equality-law-review-1-2018-pdf-1-086-kb>.

52 Denmark, Board of Equal Treatment, Decision No. 9559 of 21 June 2018.

In 2021, the Court of Justice confirmed further that a difference in treatment between third-country nationals who are long-term residents, on the one hand, and Austrian nationals, on the other, does not cause a disadvantage to third-country nationals of a particular ethnic origin. The Racial Equality Directive is therefore not applicable to a case involving such a difference in treatment.⁵³

In the **Netherlands**, the equality body NIHR (Netherlands Institute for Human Rights) has explicitly stated that its interpretation of the ground ‘race’ protected by Dutch law is broader than the definition of ‘racial or ethnic origin’ provided by the CJEU in the *Jyske Finans* case. Applying the CJEU interpretation would, in the view of the equality body, imply a significant lowering of the level of protection provided by Dutch law.⁵⁴ Furthermore, in criminal law cases, the ground of ‘race’ is interpreted to cover references to nationality and immigration status, which was confirmed in 2020 in the case of a well-known politician who was convicted for having incited discrimination against ‘Moroccans’ at a political meeting.⁵⁵

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 2017 however, the Court of Justice of the EU provided some guidance in its seminal *Achbita* ruling, confirming that the concept of religion ‘should be interpreted as covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public.’⁵⁶

In the second implementation report on the Racial Equality Directive and the Employment Equality Directive adopted on 17 January 2014,⁵⁷ 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.⁵⁸

Some countries (for example, **Czechia** 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**, **Denmark**, **Estonia**, **France**, **Ireland**, the **Netherlands**,⁵⁹ and the **United Kingdom**. In **Germany**, the Constitutional Court has developed extensive case law in this regard. In **Great Britain**, according to the Explanatory Notes to the UK Equality Act 2010,⁶⁰ ‘the religion must have a clear structure and belief system’. It adds that ‘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 with human dignity and not conflict with the fundamental rights of others. So, for example,

53 CJEU, Judgment of 10 June 2021, *Land Oberösterreich v KV*, C-94/20, ECLI:EU:C:2021:477.

54 Netherlands Institute for Human Rights, Opinion No. 2017-67 of 6 June 2017, available at: www.mensenrechten.nl.

55 Netherlands, Court of Appeal of The Hague, 4 September 2020, ECLI:NL:GHDHA:2020:1606.

56 CJEU, Judgment of 14 March 2017, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, C-157/15, ECLI:EU:C:2017:203, para 28. See text box below, p. 21.

57 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/>.

58 It should be noted that Ireland has failed to transpose the directive with regards to non-religious beliefs.

59 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 *godsdiens* (religion).

60 Please note that the UK Equality Act 2010 is only partially applicable in Northern Ireland. Where this report refers to the law in Great Britain, a different legal framework applies in Northern Ireland.

any cult involved in illegal activities would not satisfy these criteria...'.⁶¹ Furthermore, an Employment Appeal Tribunal held in 2019 that the Equality Act does not prohibit discrimination on the basis of the discriminator's religion or belief. In this case, the Tribunal rejected the argument that the employee had been dismissed due to a *lack of belief* in a religious rule forbidding cohabitation before marriage, concluding that the concern of the employer was rather with the risk of harm to its reputation.⁶² In **Cyprus**, case law from 2019 confirmed that the concept of belief covers both the existence (or not) of beliefs as well as their public manifestation. The court further held in the case that an individual's statement as to his beliefs is sufficient to prove them, without any further elements of proof being required.⁶³ In addition, the Equality Body found in 2021 that the decision not to get vaccinated against COVID-19 amounted to a protected 'belief', and that the exclusion of unvaccinated university students from classrooms amounted to unlawful discrimination.⁶⁴ By contrast, the **Slovenian** equality body held in 2021 that a COVID-pass requirement to access goods and services did not amount to discrimination on the ground of religion or belief.⁶⁵ Similarly, the **Austrian** Supreme Court has found that not believing in the danger of COVID-19 and refusing to wear a protective mask at the workplace by no means constitutes a protected 'belief'.⁶⁶ In **Italy**, the Supreme Court confirmed in 2020 that the definition of religion encompasses both atheist and agnostic beliefs.⁶⁷ It also confirmed its long-standing interpretation that 'belief' as a protected ground covers trade union affiliation.⁶⁸ In the **UK**, on the other hand, recent case law has confirmed that 'gender-critical' beliefs such as that trans women are not women, may be protected under non-discrimination law, depending on the circumstances of the case.⁶⁹

Cresco: direct discrimination through legislation on the ground of religion⁷⁰

The case concerned a provision of Austrian law that stipulated that Good Friday was a (paid) public holiday for members of four specific churches, and that only the members of those churches were entitled to double pay if they carried out work on that day. The claimant did not belong to one of those four churches and sued his employer when he did not receive double pay for working on Good Friday in 2015.

The CJEU noted first that the provision at hand amounted to a difference in treatment based directly on religion that affected categories of employees who were in comparable situations. In this regard, the Court noted that the granting of the public holiday only depended on formal church membership, regardless of the employee's actual duty or need to celebrate Good Friday. Having determined that the provision amounted to direct discrimination, the Court then examined whether it could be justified on the basis of either Article 2(5) or Article 7(1) of Directive 2000/78. The Court emphasised that employees belonging to other religions can be absent from work and celebrate religious festivals only if they are expressly authorised by their employer, who are under a specific duty of care in this regard. As such an arrangement was considered sufficient for members of other religious groups, the legal provision at hand could not fulfil the requirement of necessity and was therefore not proportionate to the aim of protecting rights and freedoms of others as set out by Article 2(5). Similarly, and for the same reason, it was not proportionate to the aim of ensuring full equality in practice, which is inherent to positive action measures under Article 7(1). The direct discrimination caused by the national provision at hand could therefore not be justified under EU law.

61 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.

62 United Kingdom, Employment Appeal Tribunal, *Gan Menachem Hendon Ltd v Ms Zelda De Groen*, decision of 12.02.2019.

63 Cyprus, District Court of Larnaca, *Voroklini Community Council v XXXX Zarifis et al*, No. 1243/2018, 25 January 2019.

64 Cyprus, Commissioner for Administration and human rights acting as Equality and Non-discrimination Body (2021), 'Report regarding the protocol of the Cyprus University of Technology on the manner of conducting lessons during the autumn semester of 2021', No. A/P 183/21 et al, 16 December 2021.

65 Slovenia, Advocate of the Principle of Equality, assessment of discrimination No. 050-27/2021/6, 18 August 2021, available at: <https://www.zagovornik.si/wp-content/uploads/2021/08/OCENA-DISKRIMINATORNOSTI-Odloka-in-Uredbe.pdf>.

66 Austria, Supreme Court, Dec. No. 9ObA130/21i, 25 November 2021.

67 Italy, Supreme Court, Judgment of 17 April 2020, *UAAR (Unione degli atei e degli agnostici razionalisti) v Comune di Verona*, No. 7893, available at: <https://www.questionegiustizia.it/data/doc/2558/7893-2020.pdf>.

68 Italy, Supreme Court, Judgment of 2 January 2020, *S.L.A.I. COBAS v F.C.A. Italy S.P.A.*, No. 1, available at: http://www.bollettinoadapt.it/wp-content/uploads/2020/01/20200102_snciv@sL0@a2020@n00001@tS.clean_.pdf.

69 United Kingdom, Employment Appeal Tribunal, 10 June 2021, *Maya Forstater v CGD Europe and Others*, UKEAT/0105/20/JOJ.

70 CJEU, Case C 193/17, *Cresco Investigation GmbH v Markus Achatzi*, Grand Chamber judgment of 22.01.2019, ECLI:EU:C:2019:43.

With regard to the practical consequences of the finding of non-compliance with EU law and the issue of the levelling-up or levelling-down of rights, the Court concluded that the national court must set aside any discriminatory provision of national law contrary to EU law and that employers should – until the national legislature had amended the relevant legislation – have the obligation to grant a paid public holiday to all employees who seek prior permission to be absent from work on Good Friday.⁷¹

On 21 March 2019, Austria amended its Law on Rest Periods and Public Holidays, removing the public holiday on Good Friday for the relevant church members.⁷² Thus, the Austrian legislature opted to ‘level down’ the rights of the previously advantaged group rather than ‘levelling up’ the rights of all other employees.

One of the key issues in the practical implementation of the directives with regard to religion or belief has been the manifestation of religious belief through dress or symbols. The group most affected by far by any limitations to such manifestations is Muslim women wearing Islamic headscarves (hijabs).

When such limitations arise in the public sphere such as public employment or education, issues related to such limitations are very closely linked to the principles of secularity and neutrality of the state. For this reason, states greatly vary in their approach to this topic. In **Germany**, the Federal German Constitutional Court has ruled on a number of such cases, attempting to balance the interests of religious freedom on the one hand and public interests such as integration and neutrality of the state on the other.⁷³ In **Austria**, the School Education Act was amended in 2019 to prohibit children below the age of 10 from wearing ‘clothing that is influenced by belief or religion and which encompasses a covering of the head’. The amendment contained an exemption for the Jewish kippah and the Sikh turban, making it particularly clear that the provision specifically targeted Muslim girls. In 2020, the Constitutional Court declared the 2019 provision null and void for being clearly discriminatory.⁷⁴ Similarly, in 2019, the **Czech** Supreme Court ruled that schools may not prohibit Muslim students from wearing hijabs on the basis of a general prohibition of head coverings in the school, as it would amount to a violation of the freedom of religious expression.⁷⁵ In **Belgium**, it was ruled in 2021 that higher education establishments cannot simply prohibit all religious symbols by their internal regulations but that such provisions must be established through a decree.⁷⁶

In the private sphere, many employers impose dress codes, which sometimes refer to religious neutrality, thereby prohibiting employees from wearing religious symbols or dress. Since 2017, the CJEU has dealt with several cases that involved employees having been dismissed due to their refusals to comply with such dress codes.⁷⁷

71 In this regard the Court did not agree with Advocate General Bobek, who had found that the burden to ‘compensate’ disadvantaged employees should not fall on the employers but rather on the state. See AG Opinion delivered on 25 July 2018, ECLI:EU:C:2018:614.

72 Austria, Section 7a of the Law on Rest Periods and Public Holidays, BGBl I 22/2019 of 21 March 2019.

73 See for instance German Federal Constitutional Court, Judgment No. 1 BvR 471/10 of 27 January 2015 and Judgment No. 1 BvR 354/11 of 18 October 2016.

74 Austria, Constitutional Court, Decision No. G4/2020-27 of 11 December 2020.

75 Czechia, Supreme Court, Decision No. 25 Cdo 348/2019 of 27 November 2019.

76 Belgium, Brussels Court of First Instance, decision of 24 November 2021.

77 CJEU, Judgment of 14 March 2017, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, C-157/15, ECLI:EU:C:2017:203; Judgment of 14 March 2017, *Asma Bougnaoui and Association de défense des droits de l’homme (ADDH) v Micropole SA*, C188/15, ECLI:EU:C:2017:204; and Judgment of 15 July 2021, joined cases *IX v WABE eV*, C-804/18 and *MH Müller Handels GmbH v MJ*, C-341/19, ECLI:EU:C:2021:594.

Secularity and neutrality of private employers – the headscarf cases

The 2017 cases *Achbita*⁷⁸ and *Bougnaoui*⁷⁹ as well as the 2021 cases *Wabe and Müller* all concerned the ability of private employers to prohibit employees from wearing conspicuous religious dress or symbols.

In *Achbita*, the Court found that an internal company rule of religious neutrality does not constitute direct discrimination based on religion or belief. It may however constitute indirect discrimination if it puts persons adhering to a particular religion or belief at a particular disadvantage, unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. In this case, the Ghent Labour Appeal Court finally ruled that the neutrality policy did not amount to indirect discrimination as it did not disadvantage Muslim women more than others.⁸⁰

In *Bougnaoui*, the CJEU concluded that ‘the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement’. In this case, the Court of Cassation also followed the reasoning of the CJEU and stated that the decision to dismiss the claimant, because of her refusal to remove her veil when demanded by clients, constituted direct discrimination. The court concluded that there was no neutrality rule justifying disciplinary action, but an ad hoc rule targeting a specific religious sign.⁸¹

In the *Wabe* case, in the context of determining whether an employer’s neutrality policy amounts to indirect discrimination, the Court found that it must be determined whether the policy pursues a legitimate aim. In this regard, the employer must demonstrate that the policy at hand meets a ‘genuine need’ and is pursued in a consistent and systematic manner.

Finally, in the *Müller* case, the Court first noted that a prohibition imposed by an employer on its workers wearing conspicuous, large-sized signs of political, philosophical or religious beliefs may amount to direct, rather than indirect, discrimination on the grounds of religion or belief, where the criterion of wearing such signs is inextricably linked to one or more specific religions or beliefs.

In recent years, there has been an interesting increase in cases where religion has been invoked to justify exemptions from the prohibition of discrimination outside employment, notably on the ground of sexual orientation. Such cases have become widely debated in for instance the **United Kingdom** and **Poland** and often concern access to goods and services.⁸²

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. 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 persons with disabilities.⁸³

78 Judgment of 14 March 2017, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, C-157/15, ECLI:EU:C:2017:203. See also the Opinion of Advocate General Kokott delivered on 31 May 2016.

79 Judgment of 14 March 2017, *Asma Bougnaoui and Association de défense des droits de l’homme (ADDH) v Micropole SA*, C-188/15, ECLI:EU:C:2017:204. See also the Opinion of Advocate General Sharpston delivered on 13 July 2016.

80 Belgium, Labour Court of Appeal (*Arbeidshof*) of Ghent, Judgment No. 2019/AG/55 of 12 October 2020, available at: https://www.unia.be/files/Documenten/Rechtspraak/2020_10_12_Arbh_Gent.pdf.

81 France, Court of Cassation, Social Chamber, *Asma Bougnaoui, ADDH v Micropole SA*, No. 13-19855 of 22 November 2017, available at: https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/2484_22_38073.html.

82 See also lordache, R. (2019), ‘Matters of individual conscience or non-discriminatory access to public services and goods?’ in *European Equality Law Review*, Issue 2019/1, pp. 30-43.

83 All countries covered by this report, except Liechtenstein, have ratified the UN Convention on the Rights of Persons 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.⁸⁴ 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.⁸⁵ 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.⁸⁶ In recent years, the CJEU has refined its interpretation of the concept of disability through several rulings related notably to specific provisions of **Spanish** labour law.⁸⁷

In many countries covered by this report, national legislation contains several examples of definitions of disability (e.g. **Albania, Austria, Belgium, Bulgaria, Croatia, Cyprus, Estonia, France, Germany, Greece, Hungary, Lithuania, Montenegro, Portugal, Serbia, Slovakia, Slovenia, Spain** and **Türkiye**) but these often stem from the context of social security legislation rather than anti-discrimination law.

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. In contrast, the definitions of disability in a number of countries fail to refer to the interaction with various barriers and only focus 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, Cyprus, Czechia, Estonia, Ireland, Latvia, Liechtenstein, Poland, Romania, Sweden**⁸⁸ and the **United Kingdom**). In **Denmark**, although the anti-discrimination legislation does not define disability, the case law of the Board of Equal Treatment and of the Supreme Court provides abundant guidance on the concept, relying heavily on the burden of the claimant to demonstrate the existence of a medical impairment.⁸⁹ A landmark decision was delivered by the Supreme Court in 2017, confirming that the claimant’s condition does not necessarily need to be caused by a medically diagnosed illness, but must be evaluated based on all the circumstances of the case, including information from doctors and other health professionals describing the impairment.⁹⁰ 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.⁹¹ In **Germany**, it still remains to be seen how the case law of the Federal Labour Court

84 CJEU, Judgment of 11 July 2006, *Chacón Navas v Eurest Colectividades SA*, C-13/05, ECLI:EU:C:2006:456, Paras. 43-45. See commentary by Lisa Waddington (2007), *Common Market Law Review* 44 (2), p. 487.

85 CJEU, Judgment of 11 April 2013, *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*, Joined Cases C-335/11 and C-337/11, ECLI:EU:C:2013:222. Commentary by Lisa Waddington (2013) in *European Anti-discrimination Law Review*, Issue 17, p. 11.

86 CJEU, Judgment of 11 April 2013, *HK Danmark*, Joined Cases C-335/11 and C-337/11, ECLI:EU:C:2013:222, Paras. 39-42.

87 See for instance CJEU, Judgment of 18 January 2018, *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA and Ministerio Fiscal*, C-270/16, ECLI:EU:C:2018:17; and Judgment of 11 September 2019, *D.W. v Nobel Plastiques Ibérica SA*, C-397/18, ECLI:EU:C:2019:703.

88 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 person who was allegedly discriminated against did or did not have a disability, rather than examining whether the elements of the definition are fulfilled or not.

89 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.

90 Denmark, Supreme Court Decision No. 305/2016, delivered on 22 November 2017 and printed in U2018.853H.

91 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.

will be adapted to the definition of disability that has applied since 30 December 2016,⁹² even though it seeks to ensure compliance with the case law of the CJEU and Article 1 of the UN CRPD. In **Bulgaria**, the People with Disabilities Act which entered into force on 1 January 2019, defines key concepts, such as ‘persons with disabilities’, who are defined as ‘persons with a physical, mental, intellectual or sensory insufficiency, which in interaction with the environment may hinder their full and effective participation in the life of society’. The definition aims to abandon the medical approach to disability taken in the previous Integration of People with Disabilities Act. In practice, however, courts generally require claimants to produce medical certificates to establish their disability.⁹³ Furthermore, the new law also defines ‘persons with long-term disabilities’, by referring to a medically certified disability of at least 50 %.⁹⁴

Some countries, including **Albania, Estonia, Hungary, Lithuania, Malta, Montenegro, Serbia** and the **United Kingdom** go beyond the employment field by defining disability in a way that refers to everyday activities or all aspects of social life. In **Malta**, the 2021 UN Convention on the Rights of Persons with Disabilities Act stipulates that “disability” shall be construed within the meaning of Article 1 of the Convention’, which provides that persons with disabilities include those who have ‘a long-term physical, intellectual, sensory or mental impairment which, in interaction with various barriers, may hinder one’s full and effective participation in society on an equal basis with others’.⁹⁵ Likewise, **Bulgaria, Iceland, Sweden** and **Türkiye** do not restrict the scope of relevant impairment to professional activities only.

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**⁹⁶ and **Germany**,⁹⁷ impairments must be likely to last for more than six months in order to amount to disabilities, while in **Great Britain**⁹⁸ 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**⁹⁹ and **Sweden**¹⁰⁰). In **Denmark**, the legislation does not specify the minimum duration of an impairment for it to be considered to be ‘long term’. However, the Supreme Court has held that whatever constitutes ‘long term’ needs to be based on a specific assessment of the individual case.¹⁰¹

Irish Labour Court refers to CJEU requirement of ‘long-term’ impairment, despite long-standing national jurisprudence¹⁰²

The claimant was employed by the respondent and had applied for a promotion when he contracted pleurisy. He submitted a series of illness certificates over a three-month period. Having accommodated the claimant by postponing the promotion interviews twice, the respondent finally held the interview with the other candidates while the claimant was on sick leave. At first instance, the Workplace Relations Commission found that the respondent had thus failed to make reasonable accommodation.¹⁰³

On appeal, the Labour Court determined that the claimant failed to establish that he was covered by the definition of disability under the Employment Equality Act. The court stated that it was ‘bound by

92 Germany, Act on Strengthening the Participation and Self-Determination of Persons with Disabilities (‘Federal Participation Act’), 23 December 2016.

93 See, for instance, Bulgaria, Supreme Administrative Court, Decision No. 414 of 13 January 2021 in case No. 9907/20, and Decision No. 1632 of 31 January 2020 in case No. 10422/2018.

94 Bulgaria, People with Disabilities Act, Paras 1.1 and 1.2, Additional Provisions.

95 Malta, United Nations Convention on the Rights of Persons with Disabilities Act, Cap 627, Article 2(1).

96 Austria, Act on the Employment of Persons with Disabilities, BGBl 22/1970, Para. 3, among others.

97 Germany, Social Code IX, 2016, Section 2.1 and Federal Disability Equality Act, 2002, Section 3.

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

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

100 Sweden, Discrimination Act, 2008:567, Chapter 1, Section 5(4). The Swedish term ‘*varaktig*’ has been translated in the Government’s unofficial translation as ‘permanent’. The term permanent should here be read as meaning long term or durable; in other words, it is probable that the impairment *will last*.

101 Denmark, Supreme Court, judgment of 23 June 2015, case No. 25/2014. Printed in U2015.3301H.

102 Ireland, Labour Court, judgment of 11 June 2019, *Houses of the Oireachtas v Hickey*, No. EDA1918.

103 Ireland, Workplace Relations Commission, *A Deputy Head Services Officer v A Government Department*, DEC-E2018-023, 13 November 2018, <https://www.workplacelrelations.ie/en/cases/2019/november/dec-e2018-023.html>.

the judgment of the Court of Justice’ in *HK Danmark (Ring and Skouboe Werge)*¹⁰⁴ in this regard. It therefore found that ‘a relatively short illness’, such as that experienced by the claimant, could not amount to a disability within the meaning of the CJEU case law. The court did not consider the ‘non-regression’¹⁰⁵ or minimum requirements¹⁰⁶ provisions of the Employment Equality Directive. The court’s decision is at odds with previous case law, which emphasised that the definition of disability under national law is more extensive than that provided for under EU law¹⁰⁷ and found that persons on sick leave for relatively short periods of time were recognised as having a disability.¹⁰⁸

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 have a disability or likely to have a future disability. These scenarios are anticipated in some national legislation. For instance, **Irish** legislation covers discrimination on the basis of an existing disability, one which previously existed or may exist in the future, or is imputed to a person.¹⁰⁹ 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’.¹¹⁰ **UK** law also protects individuals with respect to past and future disabilities, as well as the perception of a future disability.¹¹¹ **Swedish** law does not consider the claimant’s specific 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.¹¹²

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’.¹¹³ 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 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’.¹¹⁴ Reasonable accommodation may therefore include both material and organisational measures such as adapted working hours.

104 CJEU, Judgment of 11 April 2013, *HK Danmark (Ring and Skouboe Werge)*, Joined Cases C-335/11 and C-33711, ECLI:EU:C:2013:222.

105 Article 8(2) of the Employment Equality Directive stipulates that its implementation must not constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States.

106 Recital 28 stipulates that the Directive ‘lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions’.

107 See for instance Ireland, Labour Court, *Cregg Labour Solutions v Cahill*, EDA1634, 1 December 2016, <http://www.workplacerelations.ie/en/Cases/2016/December/EDA1634.html>.

108 See for instance Ireland, Labour Court, *Customer Perception Limited v Leydon*, EED0317, 12 December 2003, <https://www.workplacerelations.ie/en/cases/2003/december/eed0317.html> (a temporary injury arising from a car accident constitutes a disability).

109 Ireland, Employment Equality Acts 1998-2021, Section 2(1).

110 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).

111 UK Employment Appeal Tribunal, *Chief Constable of Norfolk v Coffey*, Decision No. UKEAT/0260/16 of 19 December 2017, available at: http://www.bailii.org/uk/cases/UKEAT/2017/0260_16_1912.html.

112 See, for example, Swedish Labour Court, *Sveriges Civilingenjörersförbund and MK v T&N Management AB*, Judgment No. 32, of 30 March 2005.

113 Directive 2000/78/EC, Article 5.

114 CJEU, Judgment of 11 April 2013, *HK Danmark (Ring and Skouboe Werge)*, Joined Cases C-335/11 and C33711, ECLI:EU:C:2013:222, Para 54.

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: **Albania, Austria, Belgium, Bulgaria, Croatia,**¹¹⁵ **Cyprus, Czechia, Denmark, Estonia, Finland, France, Greece, Hungary, Iceland, Ireland, Italy,**¹¹⁶ **Latvia, Lithuania, Luxembourg, Malta, Montenegro,**¹¹⁷ the **Netherlands, North Macedonia, Norway, Poland, Portugal, Slovakia, Spain, Türkiye** and the **United Kingdom**. These vary considerably, from states that provide a basic duty with little elaboration on how this should be implemented or how a disproportionate burden must be assessed (e.g. **Croatia** and **North Macedonia**) to states with more extensive guidance on the practical application of the reasonable accommodation duty (e.g. the **United Kingdom**). In the **Netherlands**, the Netherlands Institute for Human Rights (NIHR) demands a high level of accommodation that is closely linked with the specific wishes of the individuals. The NIHR emphasises that the purpose of the obligation to provide reasonable accommodation is to realise the autonomy of persons with disabilities to the greatest extent possible. Moreover, the duty to provide reasonable accommodation applies in the fields of education and goods and services,¹¹⁸ in addition to the field of employment and vocational training. 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. Furthermore, the People with Disabilities Act establishes several forms of support for children and students with disabilities in the area of education, which could be considered as reasonable accommodation duties.¹¹⁹ 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 **Cyprus**, the duty to provide 'reasonable measures' is not restricted to the workplace but also covers a wide range of areas, as long as the burden is not disproportionate or unjustified.¹²⁰ In **Sweden**, the Discrimination Act prohibits 'inadequate accessibility' as a separate form of discrimination. This 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'.¹²¹ In **Slovenia**, the legal framework is particularly fragmented and unclear with regard to the duty to provide reasonable accommodation, making further judicial interpretation necessary to determine its scope and limitations.

There are concerns regarding the extent of the duty to provide reasonable accommodation in several countries. In **France**,¹²² 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. In **Hungary**, the duty to provide 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 does not seem to prescribe that reasonable effort should be made to adapt the workplace to special needs with a view to enabling a job applicant with a disability to do the work. Furthermore, the duty is *stricto sensu* limited to physical adaptations of the workplace and judicial interpretation is thus required to determine whether alternative accommodation

115 The law does not elaborate on whether a formal proof of disability is necessary to trigger the duty of reasonable accommodation. In practice, the existence of the claimant's disability is, in most cases, not disputed by the respondent but, when it is disputed, a formal proof of disability can be requested, such as a certificate issued by the Institute for Expertise, Professional Rehabilitation and Employment of Persons with Disabilities.

116 The Italian legislation states that public employers 'shall apply this provision without any additional burden and with human, financial and instrumental resources already available'.

117 In Montenegro, the duty only applies to persons with disabilities employed 'under special conditions', i.e., with a formal disability assessment and official recognition as someone needing accommodation.

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

119 Bulgaria, People with Disabilities Act, notably Articles 31(2), 32(1) and 33.

120 Cyprus, Law amending the Law on Persons with Disabilities N. 63(I)/2014, 23 May 2014. Available at: http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=100626.

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

122 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.

such as a reallocation of tasks or reassignment to another post would be excluded.¹²³ 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.¹²⁴ 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. In **Romania**, Law 448/2006 on the protection and promotion of the rights of ‘persons with a handicap’ 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 **Lithuania**, the wording of the relevant provision lacks precision and only refers to a duty on employers to ‘take appropriate measures to provide conditions for disabled people to obtain work, to work, to pursue a career or to study, including adapting premises’. In 2019, however, the Vilnius Regional Administrative Court confirmed that the concept of ‘adapting premises’ also covers the accommodation of working conditions.¹²⁵ This broad interpretation was further confirmed by the Supreme Administrative Court in 2020, in a judgment referring to the UN CRPD and the Employment Equality Directive as well as the national Equal Treatment Act.¹²⁶ In **Italy**, the relevant provision does not *define* reasonable accommodation or offer employers any sort of guidance, but states 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’.¹²⁷ In **Bulgaria**, the reasonable accommodation duty established by the Protection Against Discrimination Act applies to employees and successful job applicants, while the duties established by the People with Disabilities Act appear to apply to successful job applicants only. Therefore, unsuccessful job applicants appear not to be covered. In **Serbia**, both the Law on the Professional Rehabilitation and Employment of Persons with Disabilities and, since 2021, the Law on the Prohibition of Discrimination, establish a duty on employers to provide some form of reasonable accommodation. It is not clear however whether either of these duties fully complies with the directive. Finally, the duty to provide reasonable accommodation has not been included fully in national legislation in **Liechtenstein**, although it does stipulate that indirect discrimination occurs if no attempts have been made to accommodate the situation of the person concerned.¹²⁸

Czechia: The employee’s duty to inform the employer of their disability and need for reasonable accommodation

In 2020, the Supreme Court of Czechia issued a landmark ruling specifying the criteria for determining whether the duty to provide reasonable accommodation has indeed been breached in a specific case.

The case at hand concerned more specifically the question of whether the employer had been (or must have been) aware of the employee’s disability and of the fact that it had (or may have had) an impact on the employee’s working activity, which represented (or may have represented) a barrier in their full engagement in working life on an equal basis with other employees. The Supreme Court found that this question must be examined with regard to all circumstances of each case, and that a failure to provide accommodation only amounts to (indirect) discrimination where the employer was indeed aware of the disability and its impact. Furthermore, the court specified that the claimant bears the burden of proof to demonstrate that they have made the employer aware of their disability status. In the case at hand, the Supreme Court found that the claimant had not proved that they had made the employer aware of their status and the employer could thus not have been reasonably expected to provide any accommodation measures.¹²⁹

123 Hungary, Act XXCI of 1998 on the rights of persons with disabilities and the guaranteeing of their equal opportunities, Article 15(2).

124 Germany, Civil Code, Section 241.2.

125 Lithuania, Vilnius Regional Administrative Court decision of 03.07.2019 in case No. el-2472-244/2019.

126 Lithuania, Supreme Administrative Court, decision of 25 March 2020 in case No. A-162-602/2020, available at: <https://eteismai.lt/byla/187295332148781/A-162-602/2020?word=tomas%20ryzgelis>.

127 Italy, 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 young people, the promotion of social cohesion, and other urgent financial measures.

128 Liechtenstein, Article 7(3) of the Act on Equality of Persons with Disabilities.

129 Supreme Court (Nejvyšší soud), No. 21 Cdo 1844/2020, 12 August 2020.

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 **Albania, Austria, Belgium, Croatia, Cyprus, Czechia, Denmark, Estonia, France, Germany, Greece, Iceland, Ireland, Italy** (public employers), **Latvia, Lithuania, Luxembourg, Malta**, the **Netherlands, North Macedonia, Norway**,¹³⁰ **Poland, Portugal, Serbia, Slovakia, Slovenia, Spain** and **Türkiye**). In **Bulgaria**, the Protection Against Discrimination Act limits the duty to provide reasonable accommodation when ‘costs are unfoundedly large and would seriously hinder’ the employer (Article 16). In addition, however, the People with Disabilities Act establishes entitlements for persons with disabilities to ‘reasonable facilitations’ in employment. These entitlements are absolute, i.e. there is no ‘unreasonable’ or ‘disproportionate’ burden limit. In **France**, the Labour Code refers to ‘disproportionate costs’ rather than a ‘disproportionate burden’, and employers are required to establish that they had applied for funding to implement the reasonable accommodation needed, before being able to argue that the costs would indeed have been disproportionate.¹³¹ In **Malta**, a specific board is set up for the purpose of determining the reasonableness of any action undertaken to fulfil the provisions of the Equal Opportunities (Persons with Disability) Act 2000 or of the UN Convention on the Rights of Persons with Disabilities Act 2021, including on reasonable accommodation. The board will have regard to whether such actions, notably reasonable accommodation measures, could be undertaken ‘without unjustifiable hardship’.

The preamble of the Employment Equality Directive provides an indication of the criteria to be taken into account in determining the reasonableness of a particular accommodation, in countries where such limits do exist. Recital 21 identifies three issues to consider in particular, and these are often included in national legislation or case law:

- the financial and other costs entailed: **Bulgaria, Czechia, Estonia, Finland, France, Germany, Ireland, Liechtenstein**,¹³² **Malta, Norway, Slovenia, Spain, Sweden, Türkiye** and the **United Kingdom**;
- the scale and financial resources of the organisation or undertaking: **Austria, Belgium, Denmark, Estonia, Finland, Ireland, Liechtenstein, Malta, Norway, Slovakia, Slovenia, Spain, Sweden** and the **United Kingdom**; and
- the possibility of obtaining public funding or any other assistance: **Albania, Austria, Belgium, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Liechtenstein, Malta**, the **Netherlands, Norway, Poland, Portugal, Serbia, Slovakia, Spain, Sweden** and the **United Kingdom**.

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,¹³³ that it is only if the employer knows or ought to know about the employee’s disability that the duty can apply,¹³⁴ and that the size of the employer’s business is relevant for assessing the reasonableness of accommodations.¹³⁵ Furthermore, the employee needs to be competent, suitable and available to perform the job, which is not the case for instance when a medical secretary loses the ability to hear, thereby losing the capacity to perform the most important functions of the job.¹³⁶ Similarly, in the **Netherlands**, the aim of providing reasonable accommodation is to enable persons with

130 In Norway, the definition of ‘individual accommodation’ does not use the term ‘reasonable’, but if it is determined that the measures taken were suitable/adequate, the general proportionality test is applied.

131 See for instance France, Administrative Court of Caen, Decision No. 0802480 of 1 October 2009.

132 Although Liechtenstein lacks a duty for employers to provide reasonable accommodation, Article 7(2) of the Act on Equality of Persons 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.

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

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

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

136 Denmark, Eastern High Court, Decision of 28 February 2020 in case No. BS-14028/2018-OLR.

a disability to fulfil the tasks pertaining to their job, but does not require employers to change the content or nature of those tasks.¹³⁷

One specific issue that has been discussed and decided by different courts in several EU Member States is that of determining whether the duty to provide reasonable accommodation includes a duty to reassign an employee to another position. The findings have differed, with courts, notably in **Czechia**,¹³⁸ **Ireland**¹³⁹ and **Italy**,¹⁴⁰ finding that employers do not have a duty to reassign employees with disabilities to another position for which they would be capable. By contrast, the Court of Cassation in **France** held in 2020 that an employer's refusal to reassign an employee with a disability to another, vacant position when they had been declared incapable of exercising the functions of their original position, amounted to a discriminatory failure to meet the duty to provide reasonable accommodation.¹⁴¹ However, the same duty would not apply if the employer had to create a new position to accommodate the employee.¹⁴² Further guidance is expected from the Court of Justice on this issue.¹⁴³

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, Slovenia**). 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 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 other forms of discrimination.¹⁴⁴ In **Greece**¹⁴⁵ and **Malta**,¹⁴⁶ failure to meet the duty to provide reasonable accommodation amounts to direct discrimination. In **Lithuania**, some guidance was provided in 2014 when the Vilnius Regional Court found that the failure of an employer to evaluate the realistic possibilities of an employee with a disability continuing to work or to consider adjusting his working conditions constituted direct discrimination on the ground of disability.¹⁴⁷ However, it is worth noting that the amendments to the Labour Code of 2017 do not specify that failure to adopt reasonable accommodation constitutes direct discrimination.¹⁴⁸ In **Croatia, France, Poland and Portugal**,¹⁴⁹ a failure to meet the duty constitutes unlawful discrimination, but it is not specified whether this is classified as direct or indirect discrimination. In contrast, failure to provide reasonable accommodation constitutes indirect discrimination in **Austria, Czechia, Denmark and Spain**. 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). In specific situations however, the actions or omissions of an employer can 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

137 See, notably, Netherlands Institute for Human Rights, Opinion No. 2020-109, of 8 December 2020, available at: www.mensenrechten.nl.

138 Czechia, Municipal Court of Prague, *Anonymous v The Prison Service of the Czech Republic*, decision of 20 October 2021 in case No. 62 Co 282/2021.

139 Ireland, Supreme Court, *Nano Nagle School v Daly*, Decision No. [2019] IESC 63 of 31 July 2019, available at: https://www.courts.ie/acc/alfresco/77ed9bc6-3c69-482e-9390-a73c341a3192/2019_IESC_63_1.pdf/pdf#view=fitH.

140 Italy, Supreme Court, *decision of 9 March 2021 in case No. 6497*.

141 France, Court of Cassation, Social chamber, Decision No. 18-21993 of 3 June 2020, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000041995790>.

142 France, Court of Appeal of Versailles, decision of 30 January 2020 in case No. 18/01698.

143 Such guidance was provided by the CJEU after the cut-off date for this publication, in its decision of 10 February 2022, *XXXX v HR Rail SA*, C-485/20, ECLI:EU:C:2022:85.

144 Cyprus, Code of conduct issued by the equality body in order to clarify Article 5(1) of the Law on Persons with Disabilities No 127(I)2000, as amended by Law No 72(I) of 2007.

145 Greece, Explanatory Report to Law 4488/2017, p. 25-26, available in Greek at: <http://www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/s-syndas-eis-%CE%BF%CE%BB%CE%BF.pdf>.

146 Malta, Paragraph 1(2)(d) of Part B of the Fourth Schedule to the United Nations Convention on the Rights of Persons with Disabilities Act 2021.

147 Lithuania, Vilnius Regional Court, decision No 2A-557-640/2014 of 27 February 2014.

148 Lithuania, Labour Code, 2016, No. XII-2603. Available in Lithuanian at: <https://www.e-tar.lt/portal/lt/legalAct/f6d686707e7011e6b969d7ae07280e89>.

149 In Portugal, this is not explicitly stipulated but rather suggested by the wording of Law 46/2006.

harassment.¹⁵⁰ In **Sweden**, failure to provide reasonable accommodation in an individual case amounts to ‘inadequate accessibility,’ which constitutes a separate form of discrimination. Similarly, in **Belgium, Finland, Ireland**¹⁵¹ 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,¹⁵² although it is not specified whether this would be direct discrimination, indirect discrimination or a third form of prohibited distinction. In several countries, including **Bulgaria** and **Latvia**, failure to provide reasonable accommodation does not amount to discrimination in any form.

Finally, there are concerns in some countries with regard to the practical implementation of the provisions establishing the duty to provide reasonable accommodation. For instance, in **Croatia**, the Disability Ombudsperson stated in a report published in 2020 that persons with disabilities are often exposed to harassment and misunderstanding by their superiors and colleagues when claiming reasonable accommodation rights. Furthermore, the large number of complaints regarding the denial of reasonable accommodation in the workplace indicates a negative attitude towards this particular right of persons with disabilities. The Ombudsperson noted that meeting the reasonable accommodation duties is often considered to be ‘good will’ on the part of the employer and not as a fundamental right of persons with disabilities. The report further concluded that failure to provide reasonable accommodation is the most common form of discrimination faced by persons with disabilities.¹⁵³

Table 2: Reasonable accommodation is provided for persons with disabilities in national law (at the federal level)

Country	Legislation	Failure to provide RA counts as discrimination
ALBANIA	Law on Protection from Discrimination, Art. 3(9)	Yes
	Labour Code, Arts. 9(1) and 9(8)	Yes
	Law on the Inclusion and Accessibility of Persons with Disabilities, Art. 3(6)	Yes
AUSTRIA	Act on the Employment of Persons with Disabilities, Sections 6, 7c/4-7	Yes
BELGIUM	General Anti-discrimination Federal Act, Arts. 4(12) and 14	Yes
BULGARIA ¹⁵⁴	Protection Against Discrimination Act, Art. 16	No ¹⁵⁵
	People with Disabilities Act, Arts. 5(2.4), 29(6.5), 29(9.6)	No
CROATIA	Anti-discrimination Act, Art. 4(2)	Yes
	Act on professional rehabilitation and employment of persons with disability, Art. 7(2)	No ¹⁵⁶

150 See for instance Slovakia, Supreme Court, Decision No. 7Sžo/83/2014, 24 September 2015.

151 Through judicial interpretation since the decision of the Equality Tribunal in *O’Sullivan v Siemens Business Services Ltd*, DEC-E2006-058, of 22 November 2006, available at: <https://www.workplacereactions.ie/en/cases/2006/november/dec-e2006-058-full-case-report.html>.

152 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.’

153 Croatia, Disability Ombudsperson (2021), *Report for 2020*, available at: <https://posi.hr/wp-content/uploads/2021/04/lzvjesce-o-radu-Pravobranitelja-za-osobe-s-invaliditetom-za-2020.-godinu.pdf>.

154 Protection can also be found in the Labour Code, Article 314; Civil Servant Act, Article 30; and the Healthy and Safe Working Conditions Act, Article 16(1.4).

155 Although case law in 2018 did so (SAC, Decision No. 5302 of 24 April 2018 in Case No. 11143/2016).

156 Although failure to meet the duty of reasonable accommodation for persons with disabilities is not included in the law, it can be noted that the Ombudsperson for Persons with Disabilities in annual reports continuously points out that the failure to meet the duty of reasonable accommodation counts as discrimination.

Country	Legislation	Failure to provide RA counts as discrimination
CYPRUS	Law on Persons with Disabilities, Art. 5(1A)	No ¹⁵⁷
CZECHIA	Anti-Discrimination Act, Sec. 3(2)	Yes
DENMARK	Act on Prohibition of Discrimination in the Labour Market etc., Sec. 2(a)	Yes
ESTONIA	Equal Treatment Act, Art. 11	No ¹⁵⁸
FINLAND	Non-Discrimination Act, Sec. 15	Yes
FRANCE ¹⁵⁹	Labour Code, Art. L5213-6	Yes
	Law relating to the adaptation of National Law to Community Law in matters of discrimination, Art. 2 para 5	Yes
GERMANY	Social Code IX, Sec. 164	Yes
GREECE	Equal Treatment Law, Art. 5	Yes
HUNGARY	Act on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities, Art. 15 ¹⁶⁰	Yes
	Act on the Labour Code, Art. 51	
ICELAND	Labour Equality Act, Art. 10	No
IRELAND	Employment Equality Acts 1998-2021, Secs. 16(3)(a), 16(3)(b) and 16(4)	Yes ¹⁶¹
ITALY	Legislative Decree 216/2003 Implementing Directive 2000/78/EC, Art. 3(3-bis)	Yes
LATVIA	Labour Law, Art. 7(3)	No
LIECHTENSTEIN	– ¹⁶²	No ¹⁶³
LITHUANIA	Law on Equal Treatment, Art. 7(9)	No ¹⁶⁴
	Labour Code, Art. 26(2)	
LUXEMBOURG	General Anti-Discrimination Law, Art. 20	No
	Law on persons with disabilities, Art. 8	No

- 157 Although the law does not expressly provide that failure to meet the duty of reasonable accommodation amounts to discrimination, this may be inferred from the wording of the law, which stipulates that, in order to comply with the principle of equal treatment, reasonable accommodation is anticipated and for this purpose the employer must take all necessary measures so as the person with disability may have access to a job position, may exercise his profession or may attend training, provided the burden is not unreasonable. Article 5(1A) of the Law on Persons with Disabilities.
- 158 Judicial interpretation is required, but national legislation does not stipulate that a failure to provide reasonable accommodation would amount to discrimination.
- 159 Non-registered persons with disabilities, non-salaried workers with disabilities and persons with disabilities who are members of liberal 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. 8416 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 persons with disabilities, of 11 February 2005).
- 160 The disability law clearly imposes a duty to provide reasonable accommodation regarding the physical conditions of the recruitment process; regarding all other aspects of employment and access to employment, judicial interpretation is still required.
- 161 Although Irish legislation does not define denial of reasonable accommodation as discrimination, case law has established that it is a free-standing form of discrimination. This interpretive approach has been adopted in a line of cases dating to 2006 and is aimed at securing compliance with Directive 2000/78/EC.
- 162 Judicial interpretation is required of Article 7(3) of the Act on Equality of Persons with Disabilities, which stipulates that indirect discrimination has occurred if no attempts have been made to accommodate the situation of the person concerned.
- 163 Judicial interpretation is required of Article 7(3) of the Act on Equality of Persons with Disabilities.
- 164 Although legislation does not stipulate explicitly that failure to meet the duty to provide reasonable accommodation amounts to discrimination, case law allows the conclusion that it does. See Vilnius Regional Court decision of 27.02.2014 in case No. 2A-557-640/2014, available in Lithuanian at: <https://eteismai.lt/byla/276850064617444/2A-557-640/2014>. The Equal Opportunities Ombudsperson considers however that such a failure does amount to discrimination; see Equal Opportunities Ombudsperson (2019), *Annual Report for 2018*, available in Lithuanian at: <https://lygybe.lt/data/public/uploads/2019/04/lgk-2018-m.-veiklos-ataskaita-.pdf>.

Country	Legislation	Failure to provide RA counts as discrimination
MALTA	United Nations Convention on the Rights of Persons with Disabilities Act 2021, Part B of Fourth Schedule, Art. 7	Yes
	Equal Treatment in Employment Regulations, Art. 4A	Yes
MONTENEGRO	Law on Professional Rehabilitation and Employment of Persons with Disabilities, Art. 15.3 ¹⁶⁵	Yes ¹⁶⁶
NETHERLANDS	Disability Discrimination Act, Art. 2	Yes
NORTH MACEDONIA	Law on Prevention and Protection Against Discrimination, Art. 4(1)(4)	Yes
NORWAY ¹⁶⁷	Equality and Anti-Discrimination Act, Sec. 22	Yes
POLAND	Act on Vocational and Social Rehabilitation and Employment of Persons with Disabilities, Art. 23a (1-3)	Yes
PORTUGAL	Labour Code, Arts. 85 - 88	Yes ¹⁶⁸
	Law prohibiting and punishing discrimination based on disability and on a pre-existing risk to health, Art. 5(4)	Yes ¹⁶⁹
ROMANIA	Law on the protection and promotion of the rights of persons with a handicap, Art. 5(4)	No ¹⁷⁰
SERBIA ¹⁷¹	Law on the Prevention of Discrimination against Persons with Disabilities, Art. 22(4) ¹⁷²	No
	Law on the Prohibition of Discrimination, Art. 14(3)	No
SLOVAKIA	Anti-discrimination Act, Sec. 7	Yes
SLOVENIA	Act on Equal Opportunities of Persons with Disabilities, Art. 3(3) ¹⁷³	No ¹⁷⁴
SPAIN	General Law on the Rights of Persons with Disabilities and their Social Inclusion, Art. 2(m)	No ¹⁷⁵
SWEDEN	Discrimination Act, Ch. 1 Sec. 4 p. 3, in conjunction with Ch. 2 Sec. 1	Yes ¹⁷⁶
TÜRKIYE	Law on the Human Rights and Equality Institution of Türkiye, Art. 5(2)	Yes
	Law on Persons with Disabilities, Arts. 4/A and 14(4)	No

165 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, but only for the employment of persons with disabilities under special conditions who have a formal disability assessment and are officially recognised as needing an accommodation.

166 Only for persons who have been assessed as needing to work under 'special conditions': (Article 5 of the Law on Professional Rehabilitation and Employment of Persons with Disabilities and Article 21(4) of the Law on the Prohibition of Discrimination of Persons with Disabilities).

167 It should also be noted that Section 4-6 of the Working Environment Act contains provisions on individual accommodation for workers who due to 'accident, sickness, fatigue or the like' need this. This section lays out procedural rules for the dialogue between employer and employee, including for mapping opportunities for reasonable accommodation.

168 Failure to meet the duty to provide reasonable accommodation in employment for persons with disabilities is not explicitly recognised by law as a form of discrimination, but it is implied.

169 Failure to meet the duty to provide reasonable accommodation in employment for persons with disabilities is not explicitly recognised by law as a form of discrimination, but it is implied.

170 While failure to meet the duty to provide reasonable accommodation is not explicitly stipulated as amounting to discrimination, it is considered as such in practice by the national equality body and by the courts. See notably: National Council for Combating Discrimination, Decision *M.E.R. v Dr PG and Mayoralty of V.*, 17.10.2007.

171 In addition, Article 11(4) of the Law on the Professional Rehabilitation and Employment of Persons with Disabilities provides technical, professional and financial support for the adaptation of work tasks and/or the workplace. This provision does not however create an individual right to claim reasonable accommodation.

172 The duty only encompasses technical adaptations.

173 The material scope of the provision is restricted and refers mainly to areas outside employment. Judicial interpretation is therefore required.

174 Judicial interpretation is required.

175 A failure to provide reasonable accommodation does not explicitly amount to discrimination per se, but to a violation of the right to equal opportunities.

176 In Sweden, failure to provide reasonable accommodation amounts to a specific form of discrimination, i.e. inadequate accessibility.

Country	Legislation	Failure to provide RA counts as discrimination
UNITED KINGDOM	(GB) Equality Act, Sec. 20	Yes
	(NI) Disability Discrimination Act 1995, Sec. 4A	Yes

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 persons with disabilities. Some national legislatures have interpreted this provision as permitting health and safety exceptions to non-discrimination on the ground of disability, e.g. **Cyprus, Greece, Ireland, Luxembourg, the Netherlands, Slovakia and Spain.**

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 person with a disability if the work will pose a risk to that person's health and safety. However, a person with a disability 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.¹⁷⁷ Furthermore, in view of the specific dangers for employees with a reduced work capability¹⁷⁸ 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 4¹ 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', (Section 1.10 Additional Provisions). A similar approach is adopted in **Finland, 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'.¹⁷⁹ Similarly, in **Austria** 'sexual orientation' is generally considered to cover heterosexuality, homosexuality and bisexuality. In the **Netherlands**, non-discrimination legislation refers to 'hetero- or homosexual orientation', which is considered also to include bisexuality.¹⁸⁰ Although **Belgian** anti-discrimination legislation does not contain a definition of sexual orientation, it is worth mentioning that the 2013 Inter-federal plan to fight homophobic and transphobic violence, defined sexual orientation as 'heterosexuality, homosexuality and bisexuality'. It further specified that '[s]exual orientation is not a choice. Sexual orientation is defined on the basis of the

177 Bulgaria, Healthy and Safe Working Conditions Act, Article 16 (1.2a).

178 Bulgaria, Healthy and Safe Working Conditions Act, Article 16 (1.3).

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

180 Netherlands, Tweede Kamer 1991-1992, 22 014, No. 10, p. 12. There are plans to replace this terminology with 'sexual orientation'. For further information, see <https://www.internetconsultatie.nl/awgbseksuelegerichtheid>.

gender of individuals for whom an individual has both physical and emotional attraction and affection'.¹⁸¹ In **Denmark**, as of 1 January 2022, sexual orientation is defined as including 'a person's persistent sexual attraction pattern based on which gender one falls in love with and is sexually attracted to'.¹⁸² 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.¹⁸³

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 **Türkiye** do not explicitly mention sexual orientation as a protected ground, while anti-discrimination laws in **Albania, Montenegro, North Macedonia** and **Serbia** do. In **Türkiye**, in 2021, the Council of State ruled that a dismissal due to the homosexual relations of the employee was illegal, in breach of the Constitution and of the ECHR (Article 8).¹⁸⁴ 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 'lesbian, gay, bisexual and heterosexual orientation'. In **Iceland**, sexual orientation is defined simply as 'the ability of an individual to be attracted to or fall in love with another person'.¹⁸⁵

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 Section 3.2 below). 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 LGBTIQ persons.¹⁸⁶

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. **Hungary, Lithuania**,¹⁸⁷ **North Macedonia** and **Poland**¹⁸⁸).

181 Belgium (2013), *Inter-federal plan to fight homophobic and transphobic violence*, 31 January 2013, available at: http://igvm-iefh.belgium.be/sites/default/files/advisories/plan_daction_interfederal_violences_homophobes_transphobes_fr.pdf.

182 Denmark, Preparatory works to Bill No. 18 (2021/1), available at <https://www.retsinformation.dk/eli/ft/202112L00018>, adopted as Amendment Act No. 2591 of 28 December 2021, entry into force 1 January 2022.

183 See German Federal Constitutional Court of 6 December 2005; 1 BvL 3/03, paragraph 48 *et seq.*

184 Türkiye, Council of State, Decision No. E. 2018/10177, K. 2021/988 of 25 February 2021, available at: <https://karararama.danistay.gov.tr/getDokuman?id=673845700&arananKelime=10177>.

185 Iceland, Act No. 86/2018 on Equal Treatment in the Labour Market, of 11 June 2018, Article 3.11.

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

187 Despite a generally hostile political climate, the Lithuanian Constitutional Court declared in 2019 that the Constitution must be interpreted to prohibit discrimination on the grounds of gender identity and sexual orientation. See judgment of 11 January 2019, case No. KT3-N1/2019.

188 In 2019 and 2020, the hostility of the political climate in Poland was reinforced and expressed through the adoption by municipalities throughout the country of resolutions declaring them to be 'zones free from LGBT ideology'. Following complaints submitted by the national equality body against nine such resolutions, the Supreme Administrative Court found five complaints to be admissible in 2021, referring them back for a ruling on the merits. See for instance Supreme Administrative Court Resolutions of 2 July 2021, No. III OSK 3682/21, available at: <https://orzeczenia.nsa.gov.pl/doc/3075FAA1BA>; and No. III OSK 3353/21, available at: <https://orzeczenia.nsa.gov.pl/doc/9B8C4416C2>. Furthermore, the European Commission initiated infringement proceedings against Poland, due to a failure to provide necessary information regarding the resolutions. See INFR(2021)2115, 15 July 2021.

Hungary: Restrictions on LGBTIQ-related content in media and education

In June 2021, the Hungarian Parliament adopted legislation introducing severe restrictions on the display of LGBTIQ-themed media content and the provision of information on LGBTIQ-related topics in educational institutions.¹⁸⁹

Act LXXIX of 2021 amended several different laws, and banned any advertisement or media content that ‘promotes or portrays deviation from [gender] identity aligning with birth at sex, gender reassignment, or homosexuality’ from being made available to persons under the age of 18. The Act also amended the National Public Education Act of 2011 to prescribe that sessions delivered in educational institutions on sexual culture, sexual life, sexual orientation or sexual development must not be aimed at promoting deviation from the child’s gender identity aligning with sex at birth, gender reassignment or homosexuality. Furthermore, only persons or organisations registered by a designated state body are allowed to hold a session on, among other subjects, sexual culture, sexual life, sexual orientation or sexual development. The law’s explanatory memorandum makes it clear that this provision is aimed at preventing LGBTIQ NGOs and other persons who may wish to sensitise students in relation to the issue of non-discrimination based on sexual orientation from having access to educational institutions.¹⁹⁰

On 15 July 2021, the European Commission launched infringement proceedings against Hungary on the basis that the new legislation violates, among many other provisions and principles of EU primary and secondary law, the right to non-discrimination as enshrined in the EU Charter of Fundamental Rights as well as the values laid down in Article 2 TEU.¹⁹¹

1.2.5 Age¹⁹²

Age is generally assumed to be an objective characteristic with a natural meaning and hence it is rarely 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 protected. Likewise, most states have not restricted the scope of the legislation, but the **Irish** Employment Equality Acts 1998-2021 limit their application to ‘persons above the maximum age at which a person is statutorily obliged to attend school’,¹⁹³ while the protection in the field of access to goods and services only applies to those aged above 18.¹⁹⁴ Similarly, 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.¹⁹⁵ Moreover, the prohibition against differential treatment due to age does not apply with regard to the employment and conditions of pay and dismissal of young people under the age of 15, since their employment is not regulated by a collective agreement. In **Cyprus**, courts have ruled that retirement ages fall outside the scope of the directive and are thus exempt from judicial scrutiny.¹⁹⁶

189 Hungary, Act LXXIX of 2021 on harsher action against paedophile criminal perpetrators and the amendment of certain laws with a view to protecting children, adopted 15 June 2021, available at: https://net.jogtar.hu/jogszabaly?docid=A2100079_TV×hift=20220201&txtreferer=00000003.txt.

190 Hungary, Act LXXIX of 2021, explanatory memorandum: ‘The proposal envisages the introduction of rules for school sessions/activities – including sex education sessions – held by organisations [...] whose objective in many cases is to represent specific sexual orientations. Representatives of certain organisations in these sessions seek to influence the sexual development of children through activities called sensitising programmes provided in the framework of anti-discrimination awareness-raising activities, which can cause serious damage to children’s physical, intellectual and moral development.’ (Translations by the non-discrimination expert for Hungary, András Kádár).

191 European Commission (2021), ‘EU founding values: Commission starts legal action against Hungary and Poland for violations of fundamental rights of LGBTIQ people’, press release, 15 July 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668. A reasoned opinion was issued on 2 December 2021, see European Commission (2021), ‘December infringements package: key decisions’, 2 December 2021, https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201.

192 For a detailed analysis of the justifications for age discrimination, see Section 3.3 below.

193 Ireland, Employment Equality Acts 1998-2021, Section 6(3)(a).

194 Ireland, Equal Status Acts 2000-2018, Section 3(3)(a).

195 Denmark, Act on the Prohibition of Discrimination in the Labour Market etc., Section 5(a)(4).

196 Cyprus, Supreme Court, Appeal Jurisdiction, *Michael Raftopoulos v Republic of Cyprus*, Appeal No. 3/2017, 10 October 2017, available at: http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_3/2017/3-201710-3-123.htm&qstring=%EC%E9%F7%E1%EB%E1%EA%2A%20and%20%F1%E1%F6%F4%EF%F0%EF%F5%EB%EF%2A.

Discrimination on the ground of age is widespread across Europe, notably in access to employment where job advertisements discriminating against or discouraging persons of certain age groups from applying for a position are particularly common. Two such cases were decided by the **Danish** Board of Equal Treatment in 2021, where both cases concerned job advertisements on social media platforms that used the platform settings to target specific age groups (i.e., persons aged below 43 and 50, respectively).¹⁹⁷ Based on different circumstances of fact, the Board found that discrimination had occurred in one of the cases, but not the other where, notably, a person aged above the specific age-limit had been offered the position in the end.

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,**¹⁹⁸ **Italy, Latvia, Liechtenstein, Lithuania, Poland, Romania** and the **UK.**¹⁹⁹ In **Poland**, discrimination by association has been found in two cases, both relating to employees who were dismissed due to their association with the LGBT community.²⁰⁰ 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.²⁰¹ 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, while discrimination by assumption is only implicitly prohibited. 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,²⁰² 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.²⁰³ A landmark Supreme Court ruling from November 2017 seems to recognise the unlawfulness of discrimination based on perceived disability.²⁰⁴ In the case, the Supreme Court explicitly clarified that to have a disability covered by anti-discrimination law, it is not a requirement that the condition in question is caused by a medically diagnosed illness. Instead, the impairment must be evaluated according to all the circumstances of the case. By doing so, the court leaves substantial room for the coverage of discrimination by assumption under anti-discrimination law. At the same time however, a series of decisions by the Board of Equal Treatment and by the courts have assessed disability from a purely medical approach, failing to examine whether the employer assumed or perceived the claimant to have a disability. Further guidance is therefore necessary in this regard in Denmark. In **France**, national law is interpreted as prohibiting discrimination by association²⁰⁵ and explicitly prohibits discrimination based on ‘real or assumed’ belonging or not belonging to an ethnic origin, nation, race or specific religion.

197 Denmark, Board of Equal Treatment, Decision No. 9134 and Decision No. 9135, both of 25 February 2021.

198 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.

199 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.

200 See notably: 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.

201 However, it is interesting to note that, so far, there has never been any case examined by the Cypriot Courts or by the equality body where the primary carer of a person with disability was not a close relative.

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

203 Danish Supreme Court, judgment of 8 October 2014, printed in U2015.16H.

204 Danish Supreme Court, Case 305/2016, judgment delivered on 22 November 2017.

205 France, Caen Appeal Court, *Enault v SAS ED*, No. 08/04500, 17 September 2010.

Anti-discrimination legislation in **Bulgaria, Croatia, Finland, Greece, Ireland, North Macedonia, Norway, Portugal, Serbia** and **Slovenia** explicitly prohibits both discrimination on perceived or assumed grounds and discrimination by association. Similarly, **Austrian** law prohibits discrimination by association as well as discrimination by assumption, as confirmed by the Supreme Court in 2013.²⁰⁶ In **Sweden**, and **Great Britain**, both discrimination by association and by assumption are considered to be prohibited due to the wording of the anti-discrimination legislation: the Swedish Discrimination Act prohibits discrimination that ‘is associated with’ the protected grounds and the UK Equality Act prohibits discrimination ‘because of’ a protected characteristic. Indeed, in 2019, a court of appeal confirmed that direct discrimination includes discrimination on the basis of the employer’s perception about a risk of future disability.²⁰⁷ In **Czechia, Luxembourg**,²⁰⁸ **Malta**²⁰⁹ and **Türkiye**, discrimination on the ground of assumed characteristics – but not on the basis of association – is forbidden. In **Slovakia**, discrimination by association is prohibited only with regard to the grounds of racial or ethnic origin and religion or belief, while discrimination by assumption is prohibited for all grounds. In **Albania**, discrimination by association is explicitly prohibited, as is discrimination ‘because of a supposition of such an association’, i.e. an assumption of association. However, discrimination by assumption is not prohibited. In **Bulgaria**, while the Protection Against Discrimination Act explicitly prohibits discrimination by assumption, courts often require that a protected ground be actual, thereby excluding assumed ones.²¹⁰

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’²¹¹ 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 a disability that existed in the past or which may exist in the future (e.g. **Ireland**). In **Belgium**, the Flemish Framework Equal Treatment Decree stipulates that the definition of direct discrimination is applicable in cases of discrimination by both association and assumption. The Walloon Equal Treatment Decree on the other hand stipulates that both direct and indirect discrimination are applicable in cases of discrimination by association. On the federal level, the preparatory works of the Racial Equality Federal Act and the General Anti-discrimination Federal Act indicate that these acts apply to discrimination by assumption and by association.

1.4 Multiple and intersectional discrimination

The EU has recognised the significance of multiple discrimination, although the Employment Equality and Racial Equality Directives only address the issue briefly in the preambles.²¹² Explicit provisions are provided in only a few countries. This is the case for instance in **Albania, Greece, Iceland, Norway**, and **Portugal** – where multiple discrimination is understood as ‘a combination of two or more discrimination factors’, covering the grounds of racial or ethnic origin, nationality, ancestry and territory of origin,²¹³ – as well as in **Türkiye**. In **Malta**, the Equal Opportunities (Persons with Disability) Act and the UN Convention on the Rights of Persons with Disabilities Act both refer to multiple discrimination without providing a definition. The Protection Against Discrimination Act in **Bulgaria** defines multiple discrimination as ‘discrimination based on more than one [protected] ground’.²¹⁴ It places a statutory duty on public authorities to give

206 Austrian Supreme Court decision No 9ObA40/13t of 24 July 2013. Some inconsistencies remain however on the provincial level.

207 United Kingdom, Court of Appeal of England and Wales, *Chief Constable of Norfolk v Coffey*, decision of 26.06.2019.

208 In Luxembourg, discrimination by assumption is only prohibited on the ground of ethnic origin or belonging to a nationality, race or specific religion.

209 In Malta, discrimination by assumption is only prohibited on the ground of disability, while discrimination by association on the ground of disability could be interpreted as being prohibited.

210 See notably Bulgaria, Supreme Administrative Court, Decision No. 6151 of 11 May 2018 in case No. 7203/2016.

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

212 Recital 3 of the Employment Equality Directive and recital 14 of the Racial Equality Directive.

213 Portugal, Law 93/2017 establishing the legal regime of prevention, prohibition and combating of discrimination on the ground of racial and ethnic origin, nationality, ancestry and territory of origin.

214 Bulgaria, Protection Against Discrimination Act, Additional Provisions, Article 1.11.

priority to positive action measures to the benefit of victims of multiple discrimination.²¹⁵ 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.²¹⁶ Although none of the rulings by either the equality body or the courts have so far discussed any of the conceptual or evidentiary implications of a plurality of grounds, one court did award compensation in a case of multiple discrimination higher than the amount that would have been awarded if only one ground had been at hand.²¹⁷ 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.²¹⁸ 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.²¹⁹ 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,²²⁰ while multiple discrimination must be considered when assessing the amount of immaterial damages in **Austria** and **Liechtenstein**. In **Austria**, the explanatory notes further clarify that cases of discrimination based on multiple grounds need to be assessed taking an overall view and that the claims cannot be separated or cumulated by grounds. In **Croatia, Serbia** and **Slovenia**, multiple discrimination is a ‘severe’ form of discrimination, which needs to be considered when the amount of compensation or severity of other sanctions is evaluated. Similarly, the Anti-Discrimination Law in **North Macedonia** explicitly prohibits both multiple and intersectional discrimination, qualifying them as grave forms of discrimination.

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.²²¹ A **Belgian** Labour Court came to a similar conclusion in a case where the refusal to employ a Muslim woman wearing a headscarf had been found to constitute both direct discrimination on the ground of religion and indirect discrimination on the ground of gender. Going against previous case law on this issue, the court found that the lump-sum compensation provided for by national law for each of the violations was due only once.²²²

215 Bulgaria, Protection Against Discrimination Act, Article 11(2). Under Article 11(1) authorities are placed under a general statutory duty to take positive action whenever necessary to achieve the legislation’s goals.

216 Bulgaria, Protection Against Discrimination Act, Article 48(3).

217 Bulgaria, Sofia City Court, Decision No. 828 of 30 January 2020 in case No. 751/ 2019.

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

219 Netherlands, Tweede Kamer, 2011-2012, 28 481, No. 16, p. 4.

220 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’.

221 Sweden, Labour Court, *The Equality Ombudsman v State Employment Board*, Judgment No. 91/2010, of 15.12.2010.

222 Belgium, Brussels Labour Court, decision of 3 May 2021.

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 the countries examined have adopted legislation that closely reflects the definition of direct discrimination found in the directives in relation to the relevant grounds, except for **Liechtenstein**, where direct discrimination is prohibited only on the ground of disability. In **Türkiye**, direct discrimination is not prohibited on the ground of sexual orientation.

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, Cyprus, Czechia, Denmark, Estonia, Germany, Greece, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Montenegro, the Netherlands, North Macedonia, 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, Sweden** and the **United Kingdom**. In **Albania** and **Spain**, the law does not determine whether past and hypothetical comparators are covered, while the **French** and **Turkish** definitions do not cover hypothetical comparisons.²²³ Even when the definition of direct discrimination complies with the directives, it does not necessarily apply to the full material scope required by the directives and may coexist with other legislation containing different definitions of direct discrimination. 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 directives since it provides a detailed definition, attempting to cover the whole range of actions and omissions leading to discrimination.

223 French courts do however use hypothetical comparisons, see for example in a case relating to discrimination on the ground of origin, Court of Cassation, Social Chamber, 3 November 2011, No. 10-20765, Dos Santos.

Irish Workplace Relations Commission finds direct discrimination using a hypothetical comparator

The complainant is a Brazilian national who was employed as a receptionist in a hostel. She argued before the Workplace Relations Commission (WRC) that the employer was treating her and her colleagues, who were all of Brazilian origin, less favourably than he would have treated an Irish person in a comparable situation. The behaviour complained of included constant video surveillance, duties beyond their roles and a failure to address alleged racial slurs uttered by a third person who carried out a management role without being employed.

The WRC considered that the respondent paid ‘little or no regard’ to the rights of the complainant, noting that it had ‘no policies or other measures in place to safeguard the dignity of employees or to enable employees to raise concerns regarding disrespectful and undermining behaviour’. Noting that there were no actual comparators, the WRC found that the respondent would not have treated an Irish person in the same manner as the complainant was treated. She was awarded EUR 15 000 in compensation.²²⁴

It is worrying that in a few countries, direct discrimination may be generally justified under certain circumstances, 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 notably when the act or activity is ‘found by objective consideration to have a reasonable ground directly related to the relevant legal relationship’ (if the act concerns no fundamental right other than the right to non-discrimination). However, it is unclear whether this exemption applies in the field of employment.²²⁵ In **Finland**, differential treatment on the ground of ethnic origin is allowed in fields such as education and ‘when using public power or performing public administrative tasks’, when the treatment is based on legislation, has an acceptable aim and the means used are in due proportion for achieving that aim.²²⁶ In **Cyprus**, a series of Supreme Court decisions introduced a theory of ‘reasonable discrimination,’ which amounts to considering that discrimination that is ‘reasonable’ is lawful.²²⁷ More recently, however, the Supreme Court has recalled both that exceptions to the principle of equality and non-discrimination must be interpreted narrowly,²²⁸ and that discrimination is permitted only where the individuals concerned are in dissimilar and non-comparable situations.²²⁹ Similarly, in **Bulgaria**, several court decisions in recent years have made rulings that could arguably be considered as contrary to the definition of direct discrimination contained in the directives. Such rulings include a requirement that the differential treatment be intentional²³⁰ or a refusal to accept a hypothetical comparator.²³¹ 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.

224 Ireland, Workplace Relations Commission, *A Receptionist v A Hostel*, ADJ-00023445, 7 October 2020, available at: <https://www.workplacelrelations.ie/en/cases/2020/october/adj-00023445.html>.

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

226 Finland, Non-Discrimination Act, Section 11(1).

227 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://cyllaw.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’.

228 See Cyprus, Supreme Court, Review Jurisdiction, *Petros Michaelides v The Republic of Cyprus through the Minister of Labour and Social Insurance*, case No. 2005/2012, 27 January 2016, available at: http://cyllaw.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.

229 Cyprus, Supreme Court, Appeal Jurisdiction, *Michael Raftopoulos v Republic of Cyprus*, Appeal No. 3/2012, 10 October 2017, available at: http://cyllaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_3/2017/3-201710-3-123.htm&qstring=%EC%E9%F7%E1%EB%E1%EA%2A%20and%20%F1%E1%F6%F4%EF%F0%EF%F5%EB%EF%2A.

230 See for instance, Bulgaria, Supreme Court of Cassation, Ruling No. 245 of 29 March 2021 in case No. 336/2021.

231 See for instance, Bulgaria, Supreme Administrative Court, Decision No. 2922 of 27 February 2019 in case No. 10318/ 2016.

Table 3: Prohibition of direct discrimination in national law (for decentralised states, only federal law is indicated)

Country	Legislation	Defined	Definition equivalent to the directives
ALBANIA	Law on Protection from Discrimination, Art. 3(2)	Yes	Yes
AUSTRIA	Federal Equal Treatment Act, Sec. 13	Yes	Yes
	Equal Treatment Act, Sections 17/1, 18, 31/1	Yes	Yes
	Act on the Employment of Persons with Disabilities, Sec. 7b/1	Yes	Yes
	Federal Disability Equality Act, Sec. 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
CROATIA ²³²	Anti-discrimination Act, Art. 2(1)	Yes	Yes
CYPRUS	Equal Treatment in Employment and Occupation Law, Art. 6(1)(a)	Yes	Yes
	Equal Treatment (Racial or Ethnic origin) Law, Art. 5(1)	Yes	Yes
	Law on Persons with Disabilities, Art. 3(1)	Yes	Yes
CZECHIA	Anti-Discrimination Act, Sec. 2(3)	Yes	Yes
DENMARK	Act on Prohibition of Discrimination in the Labour Market etc., Sec. 1(2)	Yes	Yes
	Act on Ethnic Equal Treatment, Sec. 3(2)	Yes	Yes
	Act on the Prohibition of Discrimination due to Disability, Sec. 5(2)	Yes	Yes
ESTONIA	Equal Treatment Act, Art. 3(2)	Yes	Yes
FINLAND	Non-Discrimination Act, Sec. 8	Yes	Yes
FRANCE	Law relating to the adaptation of National Law to Community Law in matters of discrimination, Art. 1	Yes	No
GERMANY	General Act on Equal Treatment, Sec. 3.1	Yes	Yes
GREECE	Equal Treatment Law, Art. 2(2)(a)	Yes	Yes
HUNGARY	Equal Treatment Act, Art. 8	Yes	Yes
ICELAND	Racial Equality Act, 3(2)	Yes	Yes
	Labour Equality Act, 3(2)	Yes	Yes
IRELAND	Employment Equality Acts 1998-2021, Sec. 6(1)	Yes	Yes
	Equal Status Acts 2000-2018, Sec. 3(1)	Yes	Yes
ITALY	Legislative Decree No 215/2003 Implementing Directive 2000/43/EC, Art. 2(1)(a)	Yes	Yes
	Legislative Decree No 216/2003 Implementing Directive 2000/78/EC, Art. 2(1)(a)	Yes	Yes
	Law on Measures for the Judicial Protection of Persons with Disabilities Victims of Discrimination, Art. 2	Yes	Yes
LATVIA	Labour Law, Art. 29(1) and (5)	Yes	Yes
	Law on Prohibition of Discrimination against Natural Persons – Parties to Legal Transactions, Arts. 2(1) and 4(2)	Yes	Yes
	Consumer Rights Protection Law, Art. 3. ¹ (1, 6)	Yes	Yes
	Law on Social Security, Art. 2. ¹ (1, 3)	Yes	Yes
LIECHTENSTEIN	Act on Equality of Persons with Disabilities, Art. 6(1)	Yes	Yes
LITHUANIA	Law on Equal Treatment, Art. 2(9)	Yes	Yes

232 The Labour Code and the Same-sex Life Partnership Act also prohibit direct discrimination, with limited scopes of application.

Country	Legislation	Defined	Definition equivalent to the directives
LUXEMBOURG	General Anti-Discrimination Law, ²³³ 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
	United Nations Convention on the Rights of Persons with Disabilities Act, Part A of Fourth Schedule	No	No
MONTENEGRO ²³⁴	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
NORTH MACEDONIA ²³⁵	Law on Prevention and Protection Against Discrimination, Art. 8(1)	Yes	Yes
NORWAY ²³⁶	Equality and Anti-Discrimination Act, Sec. 7	Yes	Yes
POLAND ²³⁷	Equal Treatment Act, Arts. 3(1) and 6	Yes	Yes
PORTUGAL	Law establishing the legal regime for the prevention, prohibition and combating of discrimination on the ground of racial or ethnic origin, nationality, ancestry and territory of origin, Art. 3(1)(b)	Yes	Yes
	Law 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 on the non-discrimination principle in self-employment, Art. 5(2)(a)	Yes	Yes
ROMANIA	Ordinance (GO) 137/2000 regarding the prevention and the punishment of all forms of discrimination, Art. 2(1)	Yes	Yes
SERBIA	Law on the Prohibition of Discrimination, ²³⁸ Art. 2(1)	Yes	Yes
SLOVAKIA	Anti-discrimination Act, Secs. 2a(2)	Yes	Yes
SLOVENIA	Protection Against Discrimination Act, Arts. 6(1) and 4(2)	Yes	Yes
	Employment Relationship Act, Art. 6(3)	Yes	Yes
	Act on Equal Opportunities of Persons with Disabilities, Art. 3	Yes	Yes
SPAIN	Law on Fiscal, Administrative and Social Measures, Art. 28.1.b	Yes	No ²³⁹
	General Law on the Rights of Persons with Disabilities and their Social Inclusion, Art. 2.c	Yes	No ²⁴⁰
SWEDEN	Discrimination Act, Ch. 1 Sec. 4(1)	Yes	Yes
TÜRKIYE	Law on the Human Rights and Equality Institution of Türkiye, Art. 4(1)(ç) ²⁴¹	Yes	No
	Law on Persons with Disabilities, Art. 4/A	Yes	No

233 In addition, the Public Sector Law of 29 November 2006 prohibits direct discrimination in the public sector.

234 The Labour Law also prohibits direct discrimination, but only in the field of employment.

235 The Labour Law (Article 7(2)) and the Law on Child Protection (Article 14(1)) also prohibit direct discrimination.

236 The Working Environment Act (Sec. 13-1) also prohibits direct discrimination, adding part-time/temporary work as well as political views and trade union membership to the list of grounds protected by the Equality and Anti-Discrimination Act.

237 The Labour Code also prohibits direct discrimination, but only in the field of employment.

238 In addition, the Law on the Prevention of Discrimination against Persons with Disabilities also prohibits direct discrimination (Article 6(2)).

239 Although the definition is not equivalent to that of the directives, it is interpreted as such by the jurisprudence.

240 Although the definition is not equivalent to that of the directives, it is interpreted as such by the jurisprudence.

241 Sexual orientation is not listed as a protected ground.

Country	Legislation	Defined	Definition equivalent to the directives
UNITED KINGDOM	(GB) Equality Act, Sec. 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, Sec. 3A	Yes	Yes
	(NI) Employment Equality (Age) Regulations, Reg. 3	Yes	Yes
	(NI) Employment Equality (Sexual Orientation) Regulations, Reg. 3	Yes	Yes

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.²⁴² This includes **Albania, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Montenegro**, the **Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden** and the **United Kingdom**. In **Liechtenstein** indirect discrimination is explicitly only prohibited on the ground of disability. In **Türkiye**, indirect discrimination is not prohibited on the ground of sexual orientation.

The directives envisage a comparison between the effect of a measure on persons with a particular characteristic 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.²⁴³ In 2017, the Supreme Court confirmed that it is not necessary to establish the reason for the particular disadvantage caused to the claimant, but rather that it is sufficient to show that a provision, criterion or practice is the main cause of the disadvantage suffered by the group and the individual claimant.²⁴⁴ Furthermore, indirect discrimination is not explicitly prohibited on the ground of disability in **Northern Ireland**. 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.²⁴⁵

The concept of indirect discrimination is not necessarily well understood in all countries, and courts do not always apply the law in full compliance with the directives. For instance, in **Belgium**, there is confusion in some court decisions between disguised direct discrimination and indirect discrimination, leading to incorrect conclusions regarding intent.²⁴⁶ This can be illustrated notably by some aspects of the national court decision that followed the CJEU ruling in *Achbita*.²⁴⁷ The case law on indirect discrimination is also contradictory in **Bulgaria**, where the courts sometimes hold that indirect discrimination is defined by a covert discriminatory aim.²⁴⁸

242 For an in-depth analysis of the definitions and prohibitions of indirect discrimination across the 27 EU Member States, see Tobler, C. (2022), *Indirect discrimination under Directives 2000/43 and 2000/78*, European network of legal experts in gender equality and non-discrimination.

243 Great Britain, Equality Act 2010, Section 19.

244 UK Supreme Court, *Essop and others v Home Office (UK Border Agency)* [2017] UKSC 27 5 April 2017 <http://www.bailii.org/uk/cases/UKSC/2017/27.html>.

245 Slovenia, Protection Against Discrimination Act, Article 6(2).

246 See notably Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, para. 66, available at: www.unia.be/en. A new version of this report was published on 17 June 2022, after the cut-off date for this report.

247 Belgium, Ghent Labour Court of Appeal, Judgment No. 2019/AG/55 of 12 October 2020, available at: https://www.unia.be/files/Documenten/Rechtspraak/2020_10_12_Arbh_Gent.pdf. See also Van Drooghenbroeck, S. (2022), *Country report Non-discrimination Belgium*, European network of legal experts in gender equality and non-discrimination, p. 74.

248 See, for instance, Bulgaria, Supreme Court of Cassation, Ruling No. 60827 of 25 November 2021 in case No. 2146/2021.

Danish Board of Equal Treatment finds indirect discrimination on the ground of disability²⁴⁹

The claimant was a junior doctor with paralysis and significant shortening of one leg because of polio. She argued that she had experienced indirect discrimination due to the failure of the employer to exempt her from the two-site requirement during the training to become a specialist doctor. The requirement caused a significant worsening of her health as a result of increased transportation time.

The Board of Equal Treatment considered that the two-site requirement, albeit appearing neutral, put the claimant in a worse situation than others because of her disability. The two-site requirement was justified by the legitimate purpose of ensuring the quality of the education to become a specialist doctor. However, although it was, generally, an appropriate means to fulfil that purpose, the Board found that it was not sufficiently established that the requirement was necessary in the situation in question. It was not specifically justified why the claimant could not achieve the same educational quality as other doctors within that specialty if she was exempted from the two-site requirement. The Board also found that there were no specific agreements on reasonable accommodation that could compensate the claimant for the health disadvantages that she experienced. The claimant was awarded compensation of EUR 6 690 (DKK 50 000).

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

Country	Legislation	Defined	Definition equivalent to the directives
ALBANIA	Law on Protection from Discrimination, Art. 3(7)	Yes	Yes
AUSTRIA	Federal Equal Treatment Act, Sec. 13	Yes	Yes
	Equal Treatment Act, Sections 17/1, 18, 31/1	Yes	Yes
	Act on the Employment of Persons with Disabilities, Sec. 7b/1	Yes	Yes
	Federal Disability Equality Act, Sec. 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
CROATIA ²⁵⁰	Anti-discrimination Act, Arts. 2(2)	Yes	Yes
CYPRUS	Equal Treatment in Employment and Occupation Law, Art. 6(1)(b)	Yes	Yes
	Equal Treatment (Racial or Ethnic origin) Law, Art. 5	Yes	Yes
	Law on Persons with Disabilities, Art. 3(1)	Yes	Yes
CZECHIA	Anti-Discrimination Act, Secs. 1(3) and 2(2)	Yes	Yes
DENMARK	Act on Prohibition of Discrimination in the Labour Market etc., Sec. 1(3)	Yes	Yes
	Act on Ethnic Equal Treatment, Sec. 3(3)	Yes	Yes
	Act on the Prohibition of Discrimination due to Disability, Sec. 5(3)	Yes	Yes
ESTONIA	Equal Treatment Act, Art. 3(4)	Yes	Yes
FINLAND	Non-Discrimination Act, Sec. 8	Yes	Yes
FRANCE	Law relating to the adaptation of National Law to Community Law in matters of discrimination, Art. 1	Yes	Yes
GERMANY	General Act on Equal Treatment, Sec. 3.2	Yes	Yes
GREECE	Equal Treatment Law, Art. 2(2)(b)	Yes	Yes
HUNGARY	Equal Treatment Act, Art. 9	Yes	No ²⁵¹

249 Denmark, Board of Equal Treatment, Decision No. 9466 of 9 March 2019.

250 The Labour Code and the Same-sex Life Partnership Act also prohibit indirect discrimination, with limited scopes of application.

251 Not fully, due to an exemption clause.

Country	Legislation	Defined	Definition equivalent to the directives
ICELAND	Racial Equality Act, Art. 3(3)	Yes	Yes
	Labour Equality Act, Art. 3(3)	Yes	Yes
IRELAND	Employment Equality Acts 1998-2021, Sec. 22 and 31	Yes	Yes
	Equal Status Acts 2000-2018, Sec. 3(1)(c)	Yes	Yes
ITALY	Legislative Decree No 215/2003 Implementing Directive 2000/43/EC, Art. 2(1)(b)	Yes	Yes
	Legislative Decree No 216/2003 Implementing Directive 2000/78/EC, Art. 2(1)(b)	Yes	Yes
	Law on Measures for the Judicial Protection of Persons with Disabilities Victims of Discriminations, Art. 2	Yes	Yes
LATVIA	Labour Law, Art. 29(1) and (6)	Yes	Yes
	Law on Prohibition of Discrimination against Natural Persons – Parties to Legal Transactions, Art. 2(1) and 4(2)	Yes	Yes
	Consumer Rights Protection Law, Art. 3. ¹ (1) and (6)	Yes	Yes
	Law on Social Security, Art. 2. ¹ (1) and (4)	Yes	Yes
LIECHTENSTEIN	Act on Equality of Persons with Disabilities, Art. 6(2)	Yes	Yes
LITHUANIA	Law on Equal Treatment, Art. 2(5)	Yes	Yes
LUXEMBOURG	General Anti-Discrimination Law, ²⁵² 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
	United Nations Convention on the Rights of Persons with Disabilities Act, Part A of Fourth Schedule	No	No
MONTENEGRO ²⁵³	Law on the Prohibition of Discrimination, Art. 2(1)	Yes	Yes
	Law on the Prohibition of Discrimination of Persons with Disabilities, Art. 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
NORTH MACEDONIA ²⁵⁴	Law on Prevention and Protection Against Discrimination, Art. 8(2)	Yes	Yes
NORWAY ²⁵⁵	Equality and Anti-Discrimination Act, Sec. 8	Yes	Yes
POLAND ²⁵⁶	Equal Treatment Act, Arts. 3(2) and 6	Yes	Yes
PORTUGAL	Law establishing the legal regime for the prevention, prohibition and combating of discrimination on the grounds of racial and ethnic origin, nationality, ancestry and territory of origin, Art. 3(1)(c)	Yes	Yes
	Law 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 on non-discrimination principle in self-employment, Art. 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

252 The Public Sector Law of 29 November 2006 also prohibits indirect discrimination, in the public sector.

253 The Labour Code also prohibits indirect discrimination, but only in the field of employment.

254 The Labour Law (Article 7(3)) and the Law on Child Protection (Article 14(2)) also prohibit indirect discrimination.

255 The Working Environment Act (Section 13-1(1), and the Preparatory works Ot. Prp. Nr. 49 (2004-2005) chapter 25) also prohibits indirect discrimination, adding part-time/temporary work, political views and trade union membership to the list of grounds protected by the Equality and Anti-Discrimination Act.

256 The Labour Code also prohibits indirect discrimination, but only in the field of employment.

Country	Legislation	Defined	Definition equivalent to the directives
SERBIA	Law on the Prohibition of Discrimination, Art. 7	Yes	Yes
SLOVAKIA	Anti-discrimination Act, Secs. 2a(3)	Yes	Yes
SLOVENIA	Protection Against Discrimination Act, Arts. 6(2) and 4(2)	Yes	Yes
	Employment Relationship Act, Art. 6(3)	Yes	No ²⁵⁷
	Act on Equal Opportunities of Persons with Disabilities, Art. 3	Yes	No ²⁵⁸
SPAIN	Law on Fiscal, Administrative and Social Measures, Art. 28.1.c	Yes	No ²⁵⁹
	General Law on the Rights of Persons with Disabilities and their Social Inclusion, Art. 2.d	Yes	No ²⁶⁰
SWEDEN	Discrimination Act, Ch. 1 S. 4 pt. 2	Yes	Yes
TÜRKIYE	Law on the Human Rights and Equality Institution of Türkiye, Art. 4(1)(d) ²⁶¹	Yes	No
	Law on Persons with Disabilities, Art. 4/A	Yes	Yes
UNITED KINGDOM	(GB) Equality Act, Sec. 19	Yes	Yes
	(NI) Race Relations Order, Art. 3	Yes	Yes
	(NI) Fair Employment and Treatment Order, Art. 3	Yes	Yes
	(NI) Employment Equality (Age) Regulations, Reg. 3	Yes	Yes
	(NI) Employment Equality (Sexual Orientation) Regulations, Reg. 3	Yes	Yes

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.²⁶² 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, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Montenegro, the Netherlands, North Macedonia, Norway, Poland, Portugal, Serbia, Slovakia, Slovenia, Sweden, Türkiye**²⁶³ 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, Sweden** and **Türkiye**. In **Albania**, although the definition corresponds to that prescribed by the directives, the term used in national law is ‘annoyance’ rather than ‘harassment’. In **Austria**, the definition refers to conduct that is ‘unacceptable, undesirable and offensive (indecent)’.

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 **Romania**, the definition of harassment does not cover conduct with the purpose of violating a person’s dignity but without the effect of doing so. Similarly, 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. During the preparation of the Swedish Discrimination Act,

257 Judicial interpretation is required.

258 Judicial interpretation is required.

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

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

261 Sexual orientation is not listed as a protected ground.

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

263 In Türkiye, harassment related to sexual orientation is not prohibited.

this specific point raised some discussion although it was finally concluded by the Government that the effects – rather than the intention – of the conduct are decisive.²⁶⁴ By contrast, it appears that the **Belgian** Constitutional Court requires an intention to harass on behalf of the respondent,²⁶⁵ which could raise an issue of compliance with EU law. In addition, the definition of harassment under the Belgian Act on the welfare of workers requires ‘several acts’ (i.e. a pattern of repetitive behaviour), whereas the EU equality and anti-discrimination directives do not demand such a condition to apply the definition of harassment. In **Liechtenstein**, harassment as defined under the non-discrimination directives is prohibited only on the ground of disability.

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, 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, emails or presenting inappropriate material can all count as harassment.²⁶⁶ In **Ireland**, various forms of communication have been the subject of successful harassment complaints, including ‘spoken words’, text messages and graffiti. Moreover, case law shows that a complainant does not need to demonstrate that they fall under one of the discriminatory grounds since it is sufficient that the impugned conduct is ‘related to’ a ground.

Swedish Appeal Court finds no harassment as alleged harasser was unaware of the consequences of their conduct²⁶⁷

The claimant (SES) had received half-time sickness benefits from the Social Insurance Agency. When the benefits were not renewed, a meeting was set up between the claimant, a representative of the Social Insurance Agency, a trade union representative and a representative of the National Employment Authority. During the meeting, the claimant underlined his dissatisfaction with the Agency’s decision not to renew his benefits since the Agency had overridden the opinion of various experts, including doctors. The claimant (who came to Sweden from Kosovo in the 1990s) stated that he did not understand how this could happen in Sweden. The Agency representative responded that he followed the rules that apply in Sweden and that if the claimant did not like the Agency’s decision, he was free to leave the country. There was a moment of silence, but no one commented on the Agency representative’s remark. The claimant was upset however, and contacted his trade union, which agreed to represent the claimant in a civil case against the Agency. They argued that the claimant had been subjected to discrimination in the form of harassment by the Agency’s representative.

The Stockholm District Court heard the evidence from the different parties about what had been said during the meeting. The Agency representative pointed out that no response had been made following the ‘leave the country’ comment and claimed that he had not understood that the claimant had experienced the comment as derogatory. While pointing out that there are good reasons for placing high demands on public employee’s treating private individuals in a correct manner, the court nonetheless concluded that harassment has to reach a particular level. Concerning isolated incidents that may not in themselves constitute harassment, if the harasser is made aware of their harassing nature, a repetition can constitute harassment. In this case, the Agency representative did not realise the harassing nature of his comments, so they did not qualify as harassment under the Discrimination Act. The claimant was ordered to pay the Agency’s trial costs. Upon appeal by the claimant, the Appeal Court confirmed the decision of the trial court.

264 Sweden, Government proposal (*Regeringens proposition*) No. 2007/08:95, p. 106.

265 Belgium, Constitutional Court, Decision of 12 February 2009, No. 17/2009, para. B.53.4, among others.

266 Finland, Government Proposal on the Non-Discrimination Act 19/2014, p. 78.

267 Sweden, Svea Appeal Court, judgment of 29 November 2019, *SES v Swedish Social Insurance Agency*, case No. T12009-18.

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.²⁶⁸ In **Ireland**, employers and service providers are liable for harassment by employees and third parties such as tenants, clients and customers,²⁶⁹ unless they can show that they took reasonably practicable steps to prevent harassment.²⁷⁰ In this regard, the adjudicator examines closely the specific steps taken by the employer or service provider, as was demonstrated for instance in a case decided by the Workplace Relations Commission (WRC) in 2020 and then on appeal by the Labour Court in 2021. The WRC found that the steps taken by the employer, such as encouraging the complainant, its employee, to proceed with a formal complaint against the alleged harasser, investigating the complaint, apologising to the complainant, eliciting an apology from the perpetrator, and informing the complainant that the perpetrator was issued with a final written warning and obliged to undertake training, were sufficient.²⁷¹ The Labour Court concluded however that the respondent's harassment policy and its application in practice were flawed, notably due to the lack of a written report, the failure to take adequate steps to reverse the effects of the harassment such as providing counselling to the victim, as well as the failure to involve the complainant in the investigation. Consequently, the employer was liable for the harassment and was directed to pay the complainant EUR 30 000 in compensation.²⁷² In **Austria**, the individual harasser can always be held liable, while the employer can also be held liable in a situation where a superior harasses a subordinate. In this regard, the Supreme Court confirmed in 2020 that the formal employment position of the harasser is of no consequence for the liability of the employer, as long as the harasser fulfils certain functions for the employer and has their mandate and consent to do so.²⁷³ In contrast, harassment by colleagues or third parties in **Sweden** 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. 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, (although the employer is liable under the Act for taking no action against reported harassment). In the **United Kingdom**, liability for harassment by third parties is only imposed on employers if their actions or omissions in not addressing the third-party harassment were themselves motivated by the protected ground.²⁷⁴

Bulgaria: No liability of employer for harassment by one employee against another outside the workplace

The initial facts of the case concerned a claimant who was employed by the Bulgarian Bobsleigh Federation. He claimed, initially before the national equality body, the Protection Against Discrimination Commission (PADC), that homophobic and racist remarks made against him by an official at the Federation amounted to discrimination. The remarks had been made partly on television and partly in writing during the proceedings before the PADC.

The PADC found discrimination, and the claimant then brought a compensation claim before the civil courts. The Sofia District Court found that the official was liable for direct multiple discrimination in the form of harassment on grounds of Roma ethnicity and sexual orientation, and awarded damages to

268 Germany, General Equal Treatment Act, Section 12.4.

269 Ireland, Employment Equality Acts 1998-2021, Section 14A; Equal Status Acts 2000-2018, Section 11.

270 Irish Labour Court, *Dublin Bus v McCamley*, EDA 164, 18.02.2016; *A Store v A Worker*, EDA 163, 28.01.2016.

271 Ireland, Workplace Relations Commission, *Kings Oluebube v CPL Solutions Ltd T/A Flexsource Recruitment*, ADJ-00024254, 30 June 2020, <https://www.workplacerelements.ie/en/cases/2020/june/adj-00024254.html>.

272 Ireland, Labour Court, *CPL Solutions Limited T/A Flexsource v Kings Oluebube*, EDA2134, 4 October 2021, <https://www.workplacerelements.ie/en/cases/2021/october/eda2134.html>.

273 Austria, Supreme Court, Decision No. 9ObA66/20a of 29 September 2020.

274 See, for instance, England and Wales Court of Appeal, *Unite the Union v Nailard*, decision of 24.05.2018, EWCA Civ. 1203.

the claimant. The court held that the impugned conduct was such that it was to be presumed that it had caused harm. On appeal, the Sofia City Court confirmed the decision but reduced the compensation amount. The court concluded that the individual Federation official was solely liable for the violation, and not the Federation itself. Neither the failure to distance itself from the remarks, nor the fact that both the claimant and the official had been employed by the Federation at the time, mattered with regard to the issue of liability as the official had not made the remarks in his capacity as a Federation employee, but rather in his individual personal capacity.²⁷⁵

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

Country	Legislation	Defined	Definition equivalent to the directives
ALBANIA	Law on Protection from Discrimination, Art. 3(13)	Yes	Yes
AUSTRIA	Federal Equal Treatment Act, Sec. 13	Yes	Yes
	Equal Treatment Act, Sections 17/1, 18, 31/1	Yes	Yes
	Act on the Employment of Persons with Disabilities, Sec. 7b/1	Yes	Yes
	Federal Disability Equality Act, Sec. 4/1	Yes	Yes
BELGIUM	Racial Equality Federal Act, Art. 12	Yes	Yes
	General Anti-Discrimination Federal Act, Art. 14	Yes	Yes
	Federal Act on the welfare of workers while carrying out their work, Art. 32 <i>ter</i> 2°	Yes	No
BULGARIA	Protection Against Discrimination Act, Art. 5	Yes	Yes
CROATIA ²⁷⁶	Anti-discrimination Act, Art. 3(1)	Yes	Yes
CYPRUS	Equal Treatment in Employment and Occupation Law, Art. 6(1)(c)	Yes	Yes
	Equal Treatment (Racial or Ethnic origin) Law, Art. 5(2)(c)	Yes	Yes
	Law on Persons with Disabilities, Art. 3(2)(e)	Yes	Yes
CZECHIA	Anti-Discrimination Act, Secs. 1(3) and 2(2)	Yes	Yes
DENMARK	Act on Prohibition of Discrimination in the Labour Market etc., Sec. 1(4)	Yes	Yes
	Act on Ethnic Equal Treatment, Sec. 3(4)	Yes	Yes
	Act on the Prohibition of Discrimination due to Disability, Sec 5(4)	Yes	Yes
ESTONIA	Equal Treatment Act, Art. 3(3)	Yes	Yes
FINLAND	Non-Discrimination Act, Sec. 8	Yes	Yes
FRANCE	Law relating to the adaptation of National Law to Community Law in matters of discrimination, Art. 1(1))	Yes	Yes
GERMANY	General Act on Equal Treatment, Sec. 3.3	Yes	Yes
GREECE	Equal Treatment Law, Art. 2(2)(c)	Yes	Yes ²⁷⁷
HUNGARY	Equal Treatment Act, Art. 10(1)	Yes	Yes
ICELAND	Racial Equality Act, Art. 7(1)	Yes	Yes
	Labour Equality Act, Art. 7(1)	Yes	Yes
IRELAND	Employment Equality Act 1998-2021, Sec. 14A	Yes	Yes
	Equal Status Act 2000-2018, Sec. 11	Yes	Yes

275 Bulgaria, Sofia City Court, Decision No. 828 of 30 January 2020 in case No. 751/2019, available at: <https://sgs.justice.bg/bg/12543?from=30.01.2020&to=30.01.2020&actkindcode=5001&casenumber=751&caseyear=2019&casetype=%D0%93%D1%80%D0%B0%D0%B6%D0%B4%D0%B0%D0%BD%D1%81%D0%BA%D0%BE>.

276 The Labour Act also prohibits harassment, without defining it, but applies only in the field of employment.

277 Judicial interpretation is required in relation to the term 'unacceptable behaviour'.

Country	Legislation	Defined	Definition equivalent to the directives
ITALY	Legislative Decree No 215/2003 Implementing Directive 2000/43/EC, Art. 2(3)	Yes	Yes
	Legislative Decree No 216/2003 Implementing Directive 2000/78/EC, Art. 2(3)	Yes	Yes
LATVIA	Labour Law, Art. 29(1) and (4)	Yes	Yes
	Law on Prohibition of Discrimination of Natural Persons – Parties to Legal Transactions, Arts. 2(1) and 4(3)	Yes	Yes
	Consumer Rights Protection Law, Art. 3. ¹ (7, 8)	Yes	Yes
	Law on Social Security, Art. 2. ¹ (1) and (5)	Yes	Yes
LIECHTENSTEIN	Act on Equality of Persons with Disabilities, Art. 8	Yes	Yes
LITHUANIA	Law on Equal Treatment, Art 2(1) and (7)	Yes	Yes
LUXEMBOURG	General Anti-Discrimination Law, ²⁷⁸ Arts. 1(3) and 18	Yes	Yes
MALTA	Equal Treatment in Employment Regulations, Art. 3(3)	Yes	Yes
	Equal Treatment of Persons Order, Arts. 2(2)(c) and 4	Yes	Yes
	United Nations Convention on the Rights of Persons with Disabilities Act	No	No
MONTENEGRO ²⁷⁹	Law on the Prohibition of Discrimination, Art. 7	Yes	Yes
	Law on Prohibition of Harassment at Work, Art. 4	Yes	No ²⁸⁰
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
NORTH MACEDONIA ²⁸¹	Law on Prevention and Protection Against Discrimination, Art. 10(1)	Yes	Yes
NORWAY ²⁸²	Equality and Anti-Discrimination Act, Sec. 13	Yes	Yes
POLAND ²⁸³	Equal Treatment Act, Arts. 3(3) and 6	Yes	Yes
PORTUGAL	Labour Code, Art. 29(1)	Yes	Yes
	Law establishing the legal regime for the prevention, prohibition and combating of discrimination on the grounds of racial and ethnic origin, nationality, ancestry and territory of origin, Art. 3(1)(f)	Yes	Yes
	Law on the non-discrimination principle in self-employment, Art. 5(5)-(6)	Yes	Yes
ROMANIA	Ordinance (GO) regarding the prevention and the punishment of all forms of discrimination, Art. 2(5)	Yes	No
SERBIA	Labour Law, Art. 21(2)	Yes	Yes
	Law on the Prohibition of Discrimination, Art. 12	No	N/A
SLOVAKIA	Anti-discrimination Act, Secs. 2a(4)	Yes	No ²⁸⁴
SLOVENIA	Protection Against Discrimination Act, Arts. 8(1), 7, and 4(2)	Yes	Yes
	Employment Relationship Act, Art. 7	Yes	Yes

278 The Public Sector Law of 29 November 2006 also prohibits harassment, in the public sector.

279 The Law on the Prohibition of Discrimination of Persons with Disabilities and the Labour Code also prohibit harassment.

280 Judicial interpretation is required due to the differences in wording between national law and the directives.

281 The Labour Law (Article 9(3)) and the Law on Protection against Harassment in the Workplace (Article 5) (definition not equivalent to that of the directives) also prohibit harassment in employment.

282 The Working Environment Act (Article 13-1(2)) also prohibits harassment, adding part-time/temporary work, political views and trade union membership to the list of grounds protected by the Equality and Anti-Discrimination Act.

283 The Labour Code also prohibits harassment, but only in the field of employment.

284 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.

Country	Legislation	Defined	Definition equivalent to the directives
SPAIN	Law on Fiscal, Administrative and Social Measures, Art. 28(1)(d)	Yes	Yes ²⁸⁵
	General Law on the Rights of Persons with Disabilities and their Social Inclusion, Art. 2(f)	Yes	Yes
	Workers' Statute, Art. 4(2)(e)	Yes	Yes ²⁸⁶
SWEDEN	Discrimination Act, Ch. 1 Sec. 4 pt 4	Yes	Yes ²⁸⁷
TÜRKIYE	Law on the Human Rights and Equality Institution of Türkiye, Art. 4(1)(g) ²⁸⁸	Yes	Yes
UNITED KINGDOM	(GB) Equality Act, Sec. 26	Yes	Yes
	(NI) Race Relations Order, Art. 4A	Yes	Yes
	(NI) Fair Employment and Treatment Order, Art. 3A	Yes	Yes
	(NI) Employment Equality (Sexual Orientation) Regulations 2006, Reg. 5 (2003) and Reg. 3 (2006)	Yes	Yes
	(NI) Disability Discrimination Act, Sec. 3B	Yes	Yes
	(NI) Employment Equality (Age) Regulations, Reg. 6	Yes	Yes

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'.²⁸⁹ A similar provision has been included in the national legislation of all the countries covered, although some differences are evident, notably with regards to the scope of the prohibition. In **Liechtenstein**, only instructions to discriminate on the ground of disability are prohibited under anti-discrimination law.²⁹⁰

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.²⁹¹

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 **Greece**, the **Netherlands** and **Poland**. However, in a large majority of the countries, both the instructor and the discriminator can be held liable, including **Albania, Austria, Belgium, Bulgaria, Croatia, Czechia, Finland, France, Germany, Hungary, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Montenegro, North Macedonia, Norway, Portugal, Romania, Slovakia, Slovenia, Spain, Türkiye** and the **United Kingdom**. In **Denmark**, either

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

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

287 Some judicial interpretation is required regarding conduct with the purpose but without the effect of violating the victim's dignity, and regarding the requirement that the harasser be aware that their conduct is offensive.

288 Sexual orientation is not listed as a protected ground.

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

290 In addition, public incitement to hatred or discrimination on other grounds is prohibited by the Criminal Code.

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

the instructor or the discriminator can be held liable, but not both. In **Sweden**, there are situations in the employment field where no one can be held liable due to the requirement of disadvantageous effect of the instruction towards one or more persons. In **Ireland**, employers and service providers (e.g. landlords, schools, hospitals) are legally liable for discrimination, including by instruction, carried out by their employees. The legislation specifies that anything done by a person during his or her employment shall be treated as done also by that person's employer, regardless of the employer's knowledge or approval. An employer can evade liability by proving that it took such steps as were reasonably practicable to prevent the employee (a) from doing that act, or (b) from doing in the course of his or her employment acts of that description.

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

Country	Legislation	Defined
ALBANIA	Law on Protection from Discrimination, Art. 3(10)	Yes
AUSTRIA	Federal Equal Treatment Act, Sec. 13	Yes
	Equal Treatment Act, Sections 17/1, 18, 31/1	Yes
	Act on the Employment of Persons with Disabilities, Sec. 7b/1	Yes
	Federal Disability Equality Act, Sec. 4/1	Yes
BELGIUM	Racial Equality Federal Act, Art. 12	Yes
	General Anti-Discrimination Federal Act, Art. 14	Yes
BULGARIA	Protection Against Discrimination Act, Art. 5	No
CROATIA	Anti-discrimination Act, ²⁹² Art. 4(1)	No
CYPRUS	Equal Treatment in Employment and Occupation Law, Art. 6(1)(d)	No
	Equal Treatment (Racial or Ethnic origin) Law, Art. 5(2)(d)	No
	Law on Persons with Disabilities, Art. 2	No
CZECHIA	Anti-Discrimination Act, Sec. 2(2)	Yes
DENMARK	Act on Prohibition of Discrimination in the Labour Market etc., Sec. 1(5)	No
	Act on Ethnic Equal Treatment, Sec. 3(5)	No
	Act on the Prohibition of Discrimination due to Disability, Sec. 5(5)	No
ESTONIA	Equal Treatment Act, Art. 3(5)	No
FINLAND	Non-Discrimination Act, Sec. 8	No ²⁹³
FRANCE	Law relating to the adaptation of National Law to Community Law in matters of discrimination, Art. 1(5)	Yes
GERMANY	General Act on Equal Treatment, Sec. 3.5	Yes
GREECE	Equal Treatment Law, Art. 2(2)(d)	Yes
HUNGARY	Equal Treatment Act, Art. 7(1)	No
ICELAND	Racial Equality Act, Art. 7(1)	No
	Labour Equality Act, Art. 7(1)	No
IRELAND ²⁹⁴	Employment Equality Acts 1998-2021, Secs. 2(1), 14	No
	Equal Status Acts 2000-2018, Sec. 13	No

292 The law prohibits 'encouragement' to discriminate, which should cover both instructions and incitement, but case law confirming this is still lacking.

293 According to the travaux préparatoires instructions, guidelines or orders that relate to or create discrimination are discrimination if those giving instructions, guidelines or orders have a power to impose these obligations. Finland, Government proposal on the Non-Discrimination Act, p. 69.

294 In addition, although the Equal Status Acts 2000-2018 do not prohibit instructions to discriminate explicitly, it can be argued that the prohibition on procurement or attempted procurement of 'prohibited conduct' under Section 13 includes the issuing of instructions.

Country	Legislation	Defined
ITALY	Legislative Decree No. 215/2003 Implementing Directive 2000/43/EC, Art. 2(4)	No
	Legislative Decree No. 216/2003 Implementing Directive 2000/78/EC, Art. 2(4)	No
LATVIA	Labour Law, Art. 29(1) and (4)	No
	Law on Prohibition of Discrimination against Natural Persons – Parties to Legal Transactions, Arts. 2(1) and 4(3)	No
	Consumer Rights Protection Law, Art. 3. ¹ (1) and (7)	No
	Law on Social Security, Art. 2. ¹ (1) and (2)	No
LIECHTENSTEIN	Act on Equality of Persons with Disabilities, Art. 9	Yes
LITHUANIA	Law on Equal Treatment, Arts. 2(1) and 2(9)(10)	No
LUXEMBOURG	General Anti-Discrimination Law, ²⁹⁵ Arts. 1(4) and 18	Yes
MALTA ²⁹⁶	Equal Treatment in Employment Regulations, Art. 3(4)	Yes
	Equal Treatment of Persons Order, Arts. 2(2)(c) and (d)	No
MONTENEGRO ²⁹⁷	Law on the Prohibition of Discrimination, Art. 2(5)	Yes
NETHERLANDS	General Equal Treatment Act, Art. 1.a	No
	Disability Discrimination Act, Art. 1.a	No
	Age Discrimination Act, Art. 1.a	No
NORTH MACEDONIA	Law on Prevention and Protection Against Discrimination, Art. 9	No
NORWAY ²⁹⁸	Equality and Anti-Discrimination Act, Sec. 15	Yes
POLAND ²⁹⁹	Equal Treatment Act, Art. 9	Yes
PORTUGAL	Law establishing the legal regime for the prevention, prohibition and combating of discrimination on the grounds of racial and ethnic origin, nationality, ancestry and territory of origin, Art. 3(3)	No
	Law which prohibits and punishes discrimination based on disability and on a pre-existing risk to health, Art. 5(1)	No
	Labour Code, Art. 23(2)	Yes
	Law on the non-discrimination principle in self-employment, Art. 5(3)	No
ROMANIA	... ³⁰⁰	No
SERBIA	Law on the Prohibition of Discrimination Art. 5(3)	Yes
SLOVAKIA	Anti-discrimination Act, Secs. 2a(6)	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
	General Law on the Rights of Persons with Disabilities and their Social Inclusion, Art. 35(7)	No
SWEDEN	Discrimination Act, Ch. 1 Sec. 4 pt 6	Yes
TÜRKIYE	Law on the Human Rights and Equality Institution of Türkiye, Art. 4(1)(b) ³⁰¹	Yes ³⁰²

295 The Public Sector Law of 29 November 2006 also prohibits instructions to discriminate, in the public sector.

296 Instructions to discriminate are also prohibited in the Constitution of Malta (Article 45), Civil Code (Article 1044) and Criminal Code (Article 42).

297 The Criminal Code (Article 370(1)) also prohibits instructions to discriminate but does not provide a definition, the Law on Prohibition of Discrimination against Persons with Disabilities also provides for the prohibition of instructions to discriminate and for a definition.

298 The Working Environment Act (Sec. 13-1(2)) also prohibits instructions to discriminate, adding part-time/temporary work, political views and trade union membership to the list of grounds protected by the Equality and Anti-Discrimination Act.

299 The Labour Code also prohibits instructions to discriminate, but only in the field of employment.

300 The NCCD interprets the prohibition of 'orders to discriminate' of Article 2(2) of GO 137/2000 as a prohibition of instructions to discriminate.

301 Sexual orientation is not listed as a protected ground.

302 While the wording of the definition seems to be in line with the directives, sexual orientation is not listed as a protected ground.

Country	Legislation	Defined
UNITED KINGDOM	(GB) Equality Act, Sec. 111	No
	(NI) Race Relations Order, Art. 30	No
	(NI) Fair Employment and Treatment Order, Art. 35	No
	(NI) Disability Discrimination Act, Sec. 16C	No
	(NI) Employment Equality (Sexual Orientation) Regulations, Reg. 21	No
	(NI) Employment Equality (Age) Regulations, Reg. 5	No

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.³⁰³ 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 could not be understood under the term 'persons' in this directive as well. In many countries both natural and legal persons are protected against discrimination, including **Belgium, Bulgaria, Croatia, Greece, Hungary, Iceland, Italy, Lithuania, Luxembourg, Malta,**³⁰⁴ **Montenegro, North Macedonia, Portugal, Romania, Slovakia, Slovenia, Spain** and **Türkiye**. In some countries however, legal persons remain categorically unprotected, such as in **Czechia, Denmark, Norway** and **Sweden**,³⁰⁵ while 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 **Ireland**, the legal acts are also silent on the issue, but national case law has established that only natural persons are protected.³⁰⁶ 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 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.³⁰⁷ In **Poland**, protection against discrimination for legal persons extends only to the grounds of race, ethnic origin and nationality of their members. In the **United Kingdom**, legal persons have traditionally not been protected against discrimination, but in 2015, an Employment Appeal Tribunal confirmed that the word 'person' in the Equality Act (applicable in Great Britain) should be interpreted to include legal persons.³⁰⁸ In Northern Ireland, judicial interpretation

303 In France, for example, the principle of equality is applicable to non-nationals unless the legislature 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.

304 In Malta, legal persons are not afforded protection against discrimination on the ground of disability.

305 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.

306 Ireland, Equality Tribunal, *Gloria (Ireland's Lesbian & Gay Choir) v Cork International Choral Festival Ltd.*, DEC-S2008-078, 28.10.2008, available at: <https://www.workplacerelations.ie/en/Cases/2008/October/DEC-S2008-078-Full-Case-Report.html>.

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

308 UK, 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.

is still required. With regard to the ground of disability however, only natural persons are protected in both jurisdictions as the laws refer to ‘a disabled person’. In **Latvia**, legal persons are in principle protected against discrimination by the Constitution, but it is not directly applicable against private parties. In addition, the anti-discrimination provisions of some laws (including the Labour Law, the Law on Education and the Consumer Rights Protection Law), only protect natural persons.

Neither directive indicates whether it should be understood as making both natural and legal persons liable for discriminatory acts. Nor do they state exactly who 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**,³⁰⁹ the **Netherlands**³¹⁰ and **Sweden**, anti-discrimination legislation is directed at employers, and the person who actually discriminated can therefore not always be held personally liable. 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.

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.³¹¹ 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.³¹² 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.³¹³ 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 **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.

309 Ireland, Employment Equality Acts 1998-2021. 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.

310 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.

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

312 Netherlands, Explanatory Memorandum to the Act on Equal Treatment on the Ground of Age in Employment, Tweede Kamer, 2001-2002, 28 170, No. 3, p.19.

313 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 **Albania, Austria, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Türkiye**³¹⁴ and the **United Kingdom**.

The material scope is not fully covered in **Liechtenstein** and **Serbia**. 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 and with regards to self-employment and occupation. 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.³¹⁵ In **Spain**, beyond the field of employment, the anti-discrimination legislation is not 'real and effective' as no sanctions are provided in the event of a violation.³¹⁶ In **Iceland**, the legislation adopted in 2018 does not explicitly prohibit discrimination in the area of social advantages, which might be an oversight as the explanatory notes to the bill provides an explanation of 'social advantages' and what they are. In **Montenegro**, there is no protection against discrimination in access to self-employment and occupation.

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 not listing the fields falling under its scope, but instead listing 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-government and public authorities (Article 4 of the Equal Treatment Act). Four groups of

314 There are some exceptions in Türkiye, notably in the area of public employment.

315 For instance, discrepancies still persist in certain regions/communities as regards social advantages, access to (public) employment or membership of/involvement in workers' or employers' organisations.

316 Criminal sanctions may apply, depending on judicial interpretation.

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).

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, as well as vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience. A number of countries fall short of this protection, for instance by failing to cover fully self-employment and/or occupation, as is the case in **Montenegro, Slovakia**³¹⁷ and the **United Kingdom**.³¹⁸ With regard to the specific area of (access to) self-employment, it is noteworthy that countries such as **Latvia, Malta** and **Portugal** have adopted specific legislation on the prohibition of discrimination in this area. In other countries, such as **Austria, Bulgaria, Ireland** and **Norway**, the scope of the protection is specified in anti-discrimination and/or labour law and is sometimes limited to certain aspects, such as protection against discrimination in relation to the establishment, equipment or extension of an activity or profession. Finally, in countries such as **Greece** and **Lithuania**, there is neither specific legislative provisions nor any case law clarifying whether or to what extent self-employed persons are protected against discrimination at all. 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 Netherlands Institute for Human Rights (previously the Equal Treatment Commission), in order to guarantee that not only are doctors, architects etc. covered, but also freelancers and entrepreneurs working in any field.

In **Germany**, the General Act on Equal Treatment covers employment and working conditions, including pay and dismissals.³¹⁹ 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,³²⁰ 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.³²¹ In addition, in **Belgium**, some regional or community-level legislation fails to provide complete protection against discrimination in access to employment, for example, in the public administration.

Lithuanian Supreme Administrative Court interprets the limits of ‘employment’ for the purpose of protection against discrimination³²²

The claimant’s initial complaint concerned alleged discrimination on the ground of political views in relation to the claimant’s candidacy to be appointed as a member of the Lithuanian Culture Council. The Lithuanian equality body, the Equal Opportunities Ombudsperson, had rejected the complaint, finding that it fell outside the material scope of the Law on Equal Treatment and that the competent authorities appointing the members of the Culture Council could not be considered to be their employers, for the purpose of the act. These authorities, the Minister of Culture and the Lithuanian

317 In Slovakia, contract work that falls beyond the scope of the Labour Code would probably not be covered by anti-discrimination law.

318 See however: United Kingdom, Supreme Court judgment of 13.06.2018, *Pimlico Plumbers Ltd and another v Smith* UKSC 29, available at: <https://www.bailii.org/uk/cases/UKSC/2018/29.html>.

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

320 Germany, Law on Protection against Dismissal of 25 August 1969 (BGBl. I, 1317). Last amended on 14.06.2021 (BGBl. I, 1762).

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

322 Lithuania, Supreme Administrative Court, *T.B. v Office of the Equal Opportunities Ombudsperson*, administrative case No. eA-949-415/2019, decision of 5 November 2019, available at: <http://liteko.teismai.lt/viesasprendimupaiseska/tekstas.aspx?id=796b8e5b-3ca2-4452-9a86-901fdcd804b2>.

Culture and Art Council, had considered the claimant's candidacy but declared that his membership of a political party prevented him from being appointed. The claimant considered that this amounted to discrimination.

The case was brought before the Supreme Administrative Court, which interpreted the scope of application of the Employment Equality Directive and of the Law on Equal Treatment and concluded that 'it must be assessed in every individual situation, based on the essence of the legal relationship, whether the legal relationship falls within the scope of employment (employment or occupation) regardless of whether the relationship is being formed based on an employment contract or another legal basis, but in essence corresponding to the characteristics of the employment relationship.' The decision of the Ombudsperson was thus repealed, and the initial complaint will be reconsidered.

Military service is not included in the scope of legislation transposing the directives in **Latvia**, while in **Czechia**, the Act on service by members of the security forces and the Act 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. In **Ireland**, the High Court has held that unpaid volunteers are not covered by the Employment Equality Acts.³²³ A similar position was held by the **Danish** Board of Equal Treatment in 2015 with regard to an unpaid volunteer worker whose tasks could not be considered as paid employment.³²⁴ In 2018 however, the Board changed its position when deciding a case involving the age discrimination claim of a voluntary lieutenant in the Danish Home Guard. The Board concluded that although the claimant was not paid, he was obliged to perform a certain number of duties and had contributed to the Home Guard with 800 hours of his time per year. The claim was therefore encompassed by the Act on the Prohibition of Discrimination in the Labour Market etc.³²⁵

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, to the extent that the aspects relating to social protection fall within the competence of the region or community. 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 municipal institutions and agencies must, within their competence, ensure that equal rights and opportunities are enshrined in all legal acts irrespective of gender, race, nationality, citizenship,³²⁶ language, origin, social status, belief, convictions or views, age, sexual orientation, disability, ethnic origin or religion'. This could be interpreted to encompass social security and healthcare as well, as these fields are not explicitly excluded. The practice of the Ombudsman indicates that the equality body considers the wording of the Equal Treatment Act regarding goods and services to be broad enough to include healthcare services, while the interpretation regarding other aspects of social protection remains unclear.³²⁷ In **Ireland**, the Equal Status Acts 2000-2018 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'.³²⁸ However, the Equality Tribunal (now the Workplace Relations Commission) has interpreted

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

324 Danish Board of Equal Treatment, Decision No. 111/2015.

325 Denmark, Board of Equal Treatment, Decision No. 9254 of 7 March 2018.

326 This ground only applies to citizens of the EU and EEA countries and their family members (partners, however, are not explicitly included).

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

328 Ireland, Equal Status Acts 2000-2018, Section 2(1).

the definition of ‘service’ to include social protection from the outset.³²⁹ There are no specific provisions referring to social protection on the protected grounds of the directives in **Liechtenstein**.³³⁰

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.³³¹

2.2.2.3 Social advantages

Protection against discrimination in social advantages is not explicitly provided in **Hungary**,³³² **Iceland**,³³³ **Ireland**,³³⁴ **Liechtenstein**, **Lithuania**³³⁵ and **Serbia**. 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 to regional legislation, to the extent that the aspects relating to social advantages fall within the competence of the region or community.³³⁶ In **Austria**, the province of Upper Austria limits access to certain social advantages on the basis of residency status and German language skills. One such limitation was challenged before the national courts, which led to the CJEU decision C-94/20 of 10 June 2021.³³⁷ The Court ruled that indirect discrimination requires ‘that it is particularly persons of a given ethnic origin who are at a disadvantage because of the measure at issue,’ (paragraph 55) limiting the protection by the Racial Equality Directive against indirect discrimination when the different treatment applies to all non-(EU)citizens.

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 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

329 Ireland, Equality Tribunal, *Donovan v Donnellan* DEC-S2001-011, 17.10.2001, available at: https://www.workplacerelations.ie/en/equality_tribunal_import/database-of-decisions/2001/equal-status-decisions/dec-s2001-011.pdf; Applied in e.g. *McQuaid v Department of Social Protection*, DEC-S2014-015, 02.10.2014, available at: <https://www.workplacerelations.ie/en/cases/2014/october/dec-s2014-015.html>.

330 However, the Act on Equality of Persons with Disabilities (Article 10) prohibits disability discrimination in the granting of voluntary social benefits in connection with an employment relationship.

331 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.

332 Although providers of social advantages would generally fall under the personal scope of the Equal Treatment Act (Article 4), and their discriminatory acts would thereby be covered by the Act on the basis of Article 8, irrespective of the area in which they take place.

333 In Iceland, social advantages may have been excluded from the Racial Equality Act by mistake, as the explanatory notes to the bill explicitly refer to social advantages.

334 While the Irish Equality Tribunal upheld some discrimination complaints in this area, a circuit court judgment has cast doubt on the applicability of anti-discrimination law to social advantages provided by the public sector: Circuit Court, *Pobal v Hoey*, unreported judgment, 14 April 2011.

335 The practice of the Lithuanian Ombudsman seems to indicate however that the equality body does accept complaints in the area of social advantages.

336 In the Brussels Capital Region, some aspects of ‘social advantages’ could fall within the jurisdiction of the Commission Communautaire commune (the Joint Community Commission), which has not yet transposed Directive 2000/43/EC in these matters.

337 CJEU, Judgment of 10 June 2021, *Land Oberösterreich v KV*, C-94/20, ECLI:EU:C:2021:477, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=242564&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13526953>.

prices for the cinema and theatre.³³⁸ With regard to **Slovakia**, it seems that the provision that stipulates that the rates of payment of child benefit, parental care allowance and childbirth allowance are dependent on compliance with preventive measures, is discriminatory.³³⁹

2.2.2.4 Education

Among the analysed countries it is only in **Liechtenstein** that national legislation does not explicitly prohibit discrimination in the field of education on the grounds of racial or ethnic origin, as formulated in the Racial Equality Directive. Rather, many countries go beyond the requirements of the Directive in this area 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 grounds covered by the Employment Equality Directive. Similar legal frameworks exist in **Czechia, Finland, Slovakia** and **Slovenia**, for example.

Nevertheless, some limitations to the specific scope of protection in this field can occur. For instance, in **Poland**, the Supreme Administrative Court found in 2018 that university bodies' administrative decisions regarding postgraduate studies are not subject to judicial-administrative control. Therefore, the Court did not examine the substance of the discrimination claim concerning the refusal by a private vocational college to admit the claimant to a postgraduate course in environmental protection due to his failure to include the opinion of a priest among his application documents.³⁴⁰ Subsequently, however, the same case has been examined by the civil courts, which found that the requirement to produce the parish priest's opinion amounted to indirect discrimination on the ground of religion.³⁴¹ Furthermore, 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.

In many countries, these two groups were also the most severely impacted by the COVID-19 pandemic in 2020, and by the public measures implemented in the area of education to limit the spread of the virus. This was the case for instance in countries such as **Croatia, Cyprus, Czechia, Hungary, Ireland, Lithuania, Poland, Romania, Slovenia, Slovakia** and the **United Kingdom**. By far, the measure which affected the largest number of pupils and students overall, was the closure of schools and the online/distance learning models that were implemented instead. While reliable data for most countries is lacking, it is evident that a large number of pupils and students with disabilities were particularly affected by the distance learning models that were, for the most part, implemented in a rush with insufficient regard for their specific needs. This was the case in particular for pupils and students with sensory impairments and those who need special learning tools and/or individual assistance. Similarly, many pupils and students from disadvantaged Roma communities were severely impacted by the online learning models due to the lack of the electronic devices required and/or a sufficient internet connection. The **Slovenian** equality body found in 2021 that the prolonged closure of schools amounted to discrimination against vulnerable groups of children, such as children from national or ethnic minorities, including Roma, as well as children with disabilities.³⁴² Some good practices emerged during this period however, such as the distribution of equipment required for online learning to pupils and students in Roma communities, for example in **Croatia** and **Lithuania**.

338 See for example CJEU, Judgment of 12 July 1984, *Castelli*, C-261/83, ECLI:EU:C:1984:280 and Judgment of 27 March 1985, *Hoeckx*, C-249/83 ECLI:EU:C:1985:139, 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.

339 UNCRD (2016), *Concluding observations on the combined third to fifth periodic reports of Slovakia*, CRC/C/SVK/CO/3-5, 20 July 2016. Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/SVK/CO/3-5&Lang=En.

340 Poland, Supreme Administrative Court, *M.J. v CSMC*, case No. II SA/Bd 732/17, dated 17.04.2018.

341 Poland, District Court of Toruń, Judgment of 06 August 2019, No. I C 469/18; Regional Court of Toruń, Judgment of 21 August 2020, No. VIII Ca 1058/19.

342 Slovenia, Advocate of the Principle of Equality, Decision No. 050-15/2021/56 of 19 October 2021, <http://www.zagovornik.si/wp-content/uploads/2021/10/Ocena-diskriminarnosti-solanje-na-daljavo.pdf>.

In **Czechia**, in November 2020, the Government adopted a new *Strategy on Education 2030+* to modernise the Czech educational system, preparing it for new challenges in particular those exacerbated by the COVID-19 pandemic, and focusing on persisting problems.³⁴³ One of the two objectives of the strategy is to reduce inequalities in access to education and develop the potential of all children, in particular Roma pupils, children with disabilities and pupils from a disadvantaged background. While there is still no data on the implementation of this strategy, several reports were published in 2021 on the effects of the pandemic on vulnerable groups and its role in exacerbating existing inequalities in the Czech education system.³⁴⁴ Similarly, the **Slovak** Ministry of Education established an inclusive education department and adopted a specific action plan in 2020,³⁴⁵ while the Schools Act was amended in 2021 to include and define the principle of ‘inclusive education’.³⁴⁶

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 placing a child in a special school for persons with disabilities against the will of the parents constituted a breach of the Basic Law, if it was possible for the child to attend a mainstream 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.³⁴⁷ As a rule, although many countries declare that SEN should be included in mainstream education, implementation of this requirement is often lacking in practice, for instance in **Bulgaria, Hungary** and **Italy**, for instance, where approximately one in three schools is accessible for students with mobility disabilities.³⁴⁸ This is also the case in **Croatia**, although it remains to be seen how the National plan for the equalisation of opportunities for persons with disabilities for 2021 to 2027 (adopted in December 2021) will be implemented in practice.³⁴⁹ It is concerning that a national court found in 2021 that the failure of a school for children with SEN to ensure accessibility for children with mobility disabilities did not amount to discrimination as it is ‘common knowledge’ in Croatia that no schools, whether mainstream or not, comply with the relevant accessibility standards.³⁵⁰ In **Lithuania**, legislation adopted in 2020, which will enter into force in 2024, imposes an obligation upon all schools to accept children and pupils with disabilities,³⁵¹ thus putting an end to the practice of segregation in special schools. In **Czechia**, a series of amendments was adopted between 2015 and 2017 to reform the Schools Act with the aim of ensuring inclusive education for children with special needs. While it appears that these reforms led to an increase in the number of children with special needs attending mainstream education, there are also some signs that the change in the law was not always followed by a change in practice. Furthermore, new amendments were introduced in 2019, 2020 and 2021 with the aim of ensuring the cost-effectiveness of the system. These latest amendments however appear to have the potential consequence of lowering rather than

343 Czechia, Ministry of Education, Youth, and Sports (2020), *Strategy on Education 2030+*, strategy document, available at: https://www.msmt.cz/file/54104_1_1/.

344 See, for instance, People in Need (2021), *More than one quarter of children do not understand the matter taught during classes. Research showed the long-distance education of socially-disadvantaged pupils – research summary*, available at: <https://www.clovekvtisni.cz/jak-se-uci-na-dalku-socialne-znevychodnene-deti-7374gp>.

345 Slovakia, Ministry of Education (2020), ‘Inclusive education as “way of the possible”’, press release of 16 December 2020, available at: <https://www.minedu.sk/inkluzivne-vzdelavanie-ako-cesta-mozneho/>. The ‘Zero action plan for the Strategy for inclusive approaches to education for 2021’ is available at: <https://www.minedu.sk/data/att/17994.pdf>.

346 Slovakia, Act No. 415/2021 amending Act No. 245/2008 on Education (‘Schools Act’), Section 2 (ai).

347 See Federal Constitutional Court, BVerfG 96, 288.

348 Istat (2021), ‘School inclusion for pupils with disabilities’, 12 January 2021, available at: <https://www.istat.it/it/files/2022/01/REPORT-ALUNNI-CON-DISABILITA.pdf>.

349 Decision of the Government of the Republic of Croatia, Official Gazette 143/2021, available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2021_12_143_2440.html.

350 Croatia, Dubrovnik County Court, Decision No. U-III/A-1038/2020Gž-845/21 of 24 February 2021, available at: <https://sudskapraksa.csp.vsrh.hr/decisionText?id=090216ba80b5ee85&q=>.

351 Lithuania, Law on the Amendment of Articles 5, 14, 21, 29, 30, 34 and 36 of the Law on Education and Supplementing it with Article 45-1, No. XIII-3268, 30 September 2020, available at: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/a396c630c07711eaae0db016672cba9c?jfwid=8oekcj9c3>.

raising the overall standard of inclusive education.³⁵² In **Poland**, controversial changes with regard to pupils with disabilities were adopted in 2017, requiring that individual teaching based on special needs is to be organised at home, rather than in school.³⁵³ The implementation of these changes in regulation is being monitored by the national equality body and by the Children's Rights Ombud.

In **Latvia**, special education institutions must implement special education programmes for pupils with 'mental development disorders' or with sight or hearing impairments, while pupils with mobility impairments, speech disorders and learning difficulties are integrated in mainstream education. In **Cyprus**, a draft law on the system of education for children and pupils with disabilities was drafted in 2019 and submitted for public consultation in 2021. It was criticised, however, as it allegedly changes terminology instead of significantly reforming the system, which is still based on segregation.³⁵⁴ In **Belgium**, the duty to provide reasonable accommodation for persons with disabilities also applies in the field of education. In practice, however, many education providers fail to meet this duty and national courts are regularly called upon to enforce the law in this area.³⁵⁵ Similarly, in **Sweden**, education providers have a duty to provide 'adequate accessibility' by accommodating the needs of pupils and students with special educational needs. A series of court rulings from 2021 demonstrated the limits of this duty however, as pupils with dyslexia were refused the use of their ordinary assistance devices during the national exams. The cases were lost, as the schools based their refusal on the National Education Authority's guidelines, which were found to be proportionate.³⁵⁶

Children and pupils of Roma origin

Issues also arise in relation to discrimination against 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.³⁵⁷ 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.³⁵⁸ There are Roma in all the countries covered with the apparent exception of **Iceland, Liechtenstein and Malta**.³⁵⁹

Discrimination of Roma in education, including segregation, can take different forms. Among these, the following three categories will be studied here: 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 discrimination can be found in many European countries, including for example **Bulgaria, Croatia, Cyprus, Czechia, Greece, Hungary, North Macedonia, Romania, Serbia, Slovakia** and **Türkiye**.

352 Czechia, Decree No. 248/2019 amending Decree No. 27/2016 on the education of pupils with special educational needs and gifted pupils, as amended, and Decree No. 72/2005 on the provision of guidance services in schools and school guidance facilities, as amended. Available at: <https://www.psp.cz/sqw/sbirka.sqw?cz=248&r=2019>. See also Draft amendment to the Decree No. 27/2016, on the education of children with special educational needs, available at: <https://apps.odok.cz/veklep-detail?pid=ALBSBT2J3U3L>.

353 Poland, Ordinance of the Minister of National Education of 28 August 2017 amending the ordinance on the individual obligatory annual pre-school preparation of children and individual teaching of children and youth; Dz.U.2017.1656.

354 See notably KYSOA (Confederation of Disability Organisations) (2019), 'Statement from KYSOA and the Pancyprian Alliance on Disability: The position of the disability movement on the bill entitled Law on special education (Support structures) of 2019'.

355 See Belgium, Antwerp Court of First Instance, Judgment of 7 November 2018, available at: www.unia.be/files/Documenten/Rechtspraak/Rechtbank_Eerste_aanleg_Antwerpen_7_november_2018.pdf.

356 See, notably, Sweden, Solna District Court, *LK v Sweden through the Chancellor of Justice*, decision of 22 December 2021 in case No. FT 10318-20. For further information, see textbox below pp. 90-91.

357 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 of this issue. <https://www.equalitylaw.eu/publications/thematic-reports>.

358 Proceedings have been brought against Czechia (2014), Slovakia (2015) and Hungary (2016).

359 For further information regarding the Roma population in Europe, see references in European Commission (2020), *A Union of Equality: EU Roma strategic framework for equality, inclusion and participation*, COM(2020) 620 final, Brussels, 7 October 2020, p. 1.

First, a disproportionate number of Roma children attend remedial ‘special’ schools for children with intellectual disabilities and are thereby separated from the mainstream school system and receive an inferior level of education, which affects their life chances, in **Bulgaria, Czechia, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia** and **Türkiye**. Following a finding of discrimination by the ECtHR in 2013 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’,³⁶⁰ as well as national court rulings in the same vein,³⁶¹ the European Commission initiated an infringement procedure against **Hungary** in 2016 with regard to the segregation of Roma children in education and the placement of a disproportionate number of Roma children in ‘special’ schools for children with intellectual disabilities.³⁶² The Commission urged Hungary to align its national law with the Racial Equality Directive and, as a result, amendments to national legislation were introduced. Furthermore, Hungarian courts continue to find violations of national law in misdiagnosis cases concerning Roma pupils.³⁶³ On the other hand, research seems to suggest that segregation in mainstream education (i.e. not in special schools) has been on the rise.³⁶⁴ In **Czechia**, 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. Furthermore, the action plan for inclusive education 2019-2020 prioritised the desegregation of Roma pupils as well as ensuring data collection in order to discover the causes and consequences of segregation.³⁶⁵ Despite these measures, segregation of Roma pupils remains an issue of serious concern in Czechia. In **Slovakia**, where segregation of Roma children in special schools has been a well-documented issue of concern for many years, the Research Institute for Child Psychology and Psychopathology published a report in 2020 commissioned by the Ministry of Education and proposing a range of general measures for state authorities to reform the current system of diagnostics.³⁶⁶ The aim of the reformed diagnostics would be not to select children for different types of education but rather to define the strengths and weaknesses of each child to evaluate their needs. In practice, some courts have recently found that segregation of Roma children in ‘special’ schools has amounted to discrimination, although without finding that the state was partly responsible for such discrimination.³⁶⁷

Secondly, Roma segregation also occurs in some mainstream schools through the existence of segregated classes. This is the case in **Croatia, Czechia, Greece, Hungary, Romania, Slovakia** and **Türkiye**. In **Croatia**, about 20 % of Roma children study in fully ethnically segregated classes. Most of those classes are located in the same county, which is where the largest Roma population lives.³⁶⁸ In **Slovakia**, a significant proportion of Roma children and pupils from ‘socially disadvantaged environments’ are being segregated in separate schools or classes,³⁶⁹ despite amendments to the Schools Act in 2015³⁷⁰ and 2019³⁷¹ that attempted to address this issue. Further measures were announced in the Government strategy for equality, inclusion and participation of Roma adopted in April 2021.³⁷² In **Czechia**, the School

360 ECtHR, *Horváth and Kiss v Hungary*, No 11146/11, Judgment of 29 January 2013.

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

362 European Commission, Infringement No. (2015)2206. Press release available at: http://europa.eu/rapid/press-release-MEMO-16-1823_en.htm.

363 Hungary, Debrecen Appeals Court, decision of 24 September 2020 in case No. 2.Pf.1.20.214/2020/10.

364 Hajdu, T., Hermann, Z., Horn, D. and Varga, J. (2019), *A közoktatás indikátorrendszere 2019* (The indicator system of public education 2019), https://www.mtaki.hu/wp-content/uploads/2020/01/A_kozoktatasi_indikatorrendszere_2019.pdf, p. 181.

365 Czechia, Action Plan for Inclusive Education 2019-2020, available at: http://www.msmt.cz/file/49950_1_1/.

366 Slovakia, Research Institute for Child Psychology and Psychopathology (2020), *Creation of model of the process of diagnostics and rediagnostics of the children and pupils from socially disadvantaged environment: Final report on the task*. Available at: <https://vudpap.sk/wp-content/uploads/2020/02/Zaverecna-sprava-KK.pdf>.

367 See, for a recent (rare) example: Slovakia, Prešov District Court, Decision No. 15C/14/2016-557 of 24 November 2021.

368 Croatia, People's Ombudsperson (2022), *Report for 2021*.

369 Slovakia, Ministry of Finance (2019), *Revision of expenses for groups threatened by poverty and social exclusion: Interim report (Revízia výdavkov na skupiny ohrozené chudobou a sociálnym vylúčením: Priebežná správa)*, January 2019, pp. 42-48, available at: <https://www.minedu.sk/data/att/14208.pdf>.

370 Slovakia, 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.

371 Slovakia, Act No. 209/2019 amending the Act No. 245/2008 on Education (Schools Act). The amendment entered into force on 1 January 2021.

372 Government of the Slovak Republic (2021), *Stratégia rovnosti inklúzie a participácie Rómov do roku 2030* (Strategy for equality, inclusion and participation of Roma to 2030), 7 April 2021, available at: <https://rokovania.gov.sk/RVL/Material/25860/1>.

Inspectorate concluded in its annual report for 2019-2020 that internal segregation (Roma classes separated from other classes in mainstream schools) remains an issue of concern.³⁷³ It could be argued that schools implement such a system to avoid becoming entirely segregated on school level due to 'white flight'.

There are only a few instances where segregated Roma classes have been challenged under national legal systems, for instance in **Bulgaria, Croatia, Greece, Hungary, Romania** and **Slovakia**. However, complaints of allegedly segregated classes are often dismissed, for instance in **Slovakia** where *actio popularis* complaints have been submitted against the practices of schools and local or state authorities. One such case was decided in 2019 by the Prešov District Court, which found that the claimant organisation had not established that the state authorities had violated the principle of equal treatment by failing to set the school catchment areas in such a way that the relevant school was able to desegregate and remove all Roma-only classes.³⁷⁴ This decision was upheld by the Regional Court on appeal in August 2020,³⁷⁵ and is currently pending before the Supreme Court. In **Hungary**, the case of Gyöngyöspata has received particular attention in recent years. The case was initially brought as an *actio popularis* claim by the Chance for Children Foundation and concerned a primary school where each grade was composed of one class for Roma pupils and one class for non-Roma pupils. After several years of judicial proceedings before different instances, the Supreme Court (Curia) delivered the final ruling in May 2020, concluding that unlawful segregation had taken place and awarding compensation for non-pecuniary damage to the 60 claimants.³⁷⁶ The case is further discussed below in section 4.5 on sanctions.³⁷⁷

Thirdly, in a large number of countries (e.g. **Bulgaria, Cyprus, Hungary, Serbia** and **Slovakia**), residence patterns also lead to a high concentration of Roma children in certain schools, resulting in 'ghetto schools'. In **Slovakia**, several *actio popularis* claims invoking such segregation have been heard in recent years by national courts. For instance, in two separate cases decided in 2020,³⁷⁸ the courts found that the respective situations of segregation of Roma pupils stemmed from demographic development and the free choice of the Roma parents who had registered their children in the segregated schools. The courts further held that the respondent authorities had not had any intention of actively separating Roma children from the majority children. There was thus no violation in either case of the relevant legislation prohibiting segregation. These schools follow the same curriculum but the quality of education and the physical condition of the buildings are often inferior.

Hungarian court finds Education Ministry liable for segregation of Roma pupils

In 2009, the Chance for Children Foundation initiated an *actio popularis* lawsuit against the failure of the then Ministry of Education and Culture to take effective action – directly and/or through the administrative bodies responsible for the operation of schools – against the segregation of Roma children in education. The Foundation claimed that the ministry had failed to fulfil its obligations stemming from the Equal Treatment Act and from the National Public Education Act, thus violating the segregated Roma pupils' right to equal treatment. The ministry did not question the fact that Roma pupils were highly overrepresented in the schools referred to by the complaint. However, it denied responsibility for this situation on the basis that (i) it exercised its rights and performed its duties regarding educational institutions through lower-level administrative bodies and that (ii) data protection regulations prevented the collection of data on the pupils' ethnic origin, thereby preventing action against ethnically based segregation.

373 Czechia, School Inspectorate (2021), Quality and effectiveness of education and the educational system: Annual report 2019/2020 (*Kvalita a efektivita vzdělávání a vzdělávací soustavy: Výroční zpráva 2019/2020*), p. 419.

374 Slovakia, Prešov District Court, Decision of 27 February 2019, *Poradňa pre občianske a ľudské práva (Centre for Civil and Human Rights) v Ministry of Education, Science, Research and Sport of the Slovak Republic and the District Office in Prešov*, case No. 29C/14/2016.

375 Slovakia, Regional Court in Prešov, decision of 20 August 2020 in case No. 16 Co/21/2019 – 483.

376 Hungary, Supreme Court (Curia), Judgment No. Pfv.IV.21.556/2019/22 of 12 May 2020.

377 See below, pp. 103-104.

378 See Slovakia Regional Court of Bratislava, decision of 29 April 2020 in case No. 4Co/260/2017; and District Court of Bratislava III, decision of 6 February 2020 in case No. 21 C 698/2015.

In 2018, the Metropolitan Court concluded first that the ministry must have been sufficiently aware of the situation and of the fact that it was not improving. If not, it would mean that its monitoring mechanisms/guidelines were deficient, for which it would also be liable. As the entity ultimately responsible for the lawful operation of the Hungarian education system, the ministry was therefore liable for failure to meet the statutory requirement of non-segregation. Secondly, the court noted that in this case, the right not to be segregated prevailed over the protection of sensitive personal data.³⁷⁹

Regarding sanctions, the court imposed a very detailed list of obligations upon the ministry, including the obligation to ban the admission of new first-graders to the schools where segregation was still in place; to instruct the entities operating the schools concerned to prepare desegregation plans; to publish these desegregation plans on its website and continuously monitor their implementation; to amend its inspection guidelines to enable the estimation of the proportion of pupils perceived to be of Roma ethnicity and to instruct the competent Government offices to carry out inspections on the basis of these new guidelines. Finally, the ministry was ordered to pay a public interest fine of approximately EUR 156 250 (HUF 50 million) to be spent on the civil monitoring of desegregation programmes within the next five years. The court argued that these sanctions were justified due to the lack of improvements in the 10 years preceding the judgment.

In February 2019, the Metropolitan Appeals Court confirmed the assessment of the first instance court regarding the liability of the respondent but modified the judgment significantly regarding the sanctions imposed.³⁸⁰ The only sanction maintained by the appeals court was the payment of the public interest fine, which will, however, go to the general state budget instead of being used for targeted desegregation monitoring.

In addition, in many states, including **Belgium, Croatia, Cyprus, Finland, France, Italy, Lithuania, Montenegro, North Macedonia, Poland, Slovenia, Türkiye** and the **United Kingdom** school absenteeism and disproportionately high drop-out rates are serious issues among the Roma, Sinti and Traveller communities.

There have been several attempts by governments to address the segregation of Roma pupils. In **Bulgaria**, the Pre-School and School Education Act bans the segregation of children of ‘a different’ ethnicity in separate groups or classes, but it does not prevent segregation in different kindergartens and schools.³⁸¹ Furthermore, the legal definition of segregation requires the state of separation to be forced, thus implying that children may waive their right not to be segregated (or that their parents may waive it for them). In **Norway**, a white paper to the Parliament published in 2021 describes efforts to improve the access to education for Roma and Traveller pupils, including the financing of Roma coordinators in Oslo municipality where most Roma live, as well as future efforts to improve access to education for adult Roma.³⁸² In **Portugal**, several measures have been adopted in recent years to ensure effective access for Roma people to education, including the creation of several different scholarships and the publication in 2019 of a guide for schools.³⁸³ In December 2020, the **Cypriot** Ombudsman’s office published a report noting that measures that have been in place for many years to encourage school attendance by Roma pupils and students have still not yielded results as school enrolment remains low and drop-out rates remain high.³⁸⁴

379 Hungary, Metropolitan Court, Decision No. 40.P.23.675/2015/84, 18.04.2018, available at: http://cfcf.hu/sites/default/files/23675-2015-84-1%20%C3%ADt%C3%A9let%20Es%C3%A9lyt%20a%20H%C3%A1tr%C3%A1nyos%20-%20Nemzeti%20Er%C5%91forr%C3%A1s%20_.pdf.

380 Hungary, Metropolitan Appeals Court, Judgment No. 2.Pf.21.145/2018/6/I, 14.02.2019. *Chance for Children Foundation (CFCF) v the Ministry of Education and Culture (successor: Ministry of Human Capacities)*.

381 Bulgaria, Pre-School and School Education Act, adopted 13 October 2015, entered into force 1 August 2016, Article 62(4) and Article 99(4) and (6).

382 Norwegian Government (2020), *National minorities in Norway – a comprehensive policy* (Nasjonale minoriteter i Norge — En helhetlig politikk), Meld. St. 12 (2020–2021) Chapter 4.3.1.3, available at: [Meld. St. 12 \(2020–2021\) - regjeringen.no](https://www.regjeringen.no).

383 Portugal, Directorate-General for Education (2019), *Promoting the Inclusion and Educational Success of Roma Communities – Guide for Schools (Promover a inclusão e o sucesso educativo das comunidades ciganas – Guia para as Escolas)*, available at: https://www.dge.mec.pt/sites/default/files/ECidadania/Educacao_Intercultural/documentos/guiao_comunidades_ciganas.pdf.

384 Cyprus, Ombudsman’s Office, acting as National Human Rights Institution (2020), *Position of the Commissioner of Administration and Human Rights as National Independent Human Rights Authority (NHRI) regarding the living conditions of the Roma community in Cyprus*, Ref. AYT 3/2020, 22 December 2020.

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 more than half of the countries examined do not restrict protection to publicly available goods and services (**Albania, Bulgaria, Croatia, Finland, France, Iceland, Ireland, Italy, Latvia, Lithuania,**³⁸⁵ **Luxembourg, Montenegro, North Macedonia, Romania, Spain and Türkiye**).

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**). 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. By contrast, 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. A 2019 legal opinion on anti-discrimination law in the area of housing commissioned by the German equality body, the Federal Anti-Discrimination Agency, recommended that this exception should be modified.³⁸⁶ 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’.³⁸⁷ In **Latvia**, the personal scope of non-discrimination law was extended in 2021 to cover physical persons purchasing or selling goods and services, to ensure full compliance with EU law.³⁸⁸

Controversy surrounding Polish LGBT discrimination case leads to Constitutional Tribunal ruling on unconstitutionality

Until June 2019, Article 138 of the Polish Code of Petty Crimes established misdemeanour liability for professional service providers who demanded or collected payment higher than that in force, or deliberately refused to provide the service without just cause. Since 2016, this provision was the focus of some controversy due to a case in which the owner of a printing company who had refused to print a banner for an LGBT initiative was found to be liable under this provision.³⁸⁹ Following the final confirmation of the conviction by the Supreme Court, the Prosecutor General/Minister of Justice challenged Article 138 before the Constitutional Tribunal, arguing that the provision was contrary to the principle of a democratic state of law as expressed in the Constitution (Article 2: ‘The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice’).

In June 2019, the Constitutional Tribunal held (by three to two) that Article 138 of the Code of Petty Crimes was unconstitutional.³⁹⁰ The Tribunal stated that the legislature’s decision to penalise a refusal to provide services by professional service providers was inadequate to meet the legislative objective under Article 138, and thereby violated Article 2 of the Constitution. In particular, the Tribunal raised

385 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.

386 Thüsing, G. and Vianden (2019), *Rechtsfreie Räume? Die Umsetzung der EU-Antirassismusrichtlinie im Wohnungsbereich: Zum verbleibenden Umsetzungsbedarf der Richtlinie 2000/43/EG im Allgemeinen Gleichbehandlungsgesetz* (A legal vacuum? The transposition of the EU Anti-Racism Directive in the area of housing), *Anti-Diskriminierungsstelle des Bundes* (Federal Anti-Discrimination Agency), Berlin, p. 39, available at: https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Rechtsgutachten/rechtsgutachten_rechtsfreie_raeume_umsetzg_eu_rl_im_wohnungsbereich.html?nn=6580778.

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

388 Latvia, Amendments to the Law on the Prohibition of Discrimination of Natural Persons-Economic Operators, 23 September 2021, available at: <https://www.vestnesis.lv/op/2021/187A.2>. The aim of the amendment was to ensure compliance with EU gender equality law, following infringement proceedings initiated in 2020. See European Commission Infringement No. (2014)2241.

389 See notably Poland, Supreme Court, judgment of 14 June 2018, No. II KK 333/17.

390 In the absence of a public hearing or of a published decision, the only available information is that which is presented on the website of the Constitutional Tribunal, see: <http://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/10679-odmowa-swadczenia-uslugi-ze-wzgledu-na-wolnosc-sumienia-i-religii-uslugodawcy/>.

doubts regarding the notions of ‘being obliged to provide a service’ or ‘unjustified refusal to provide a service’. The imprecise nature of these concepts may – at the application stage – lead to broad interpretations that would not be justified by constitutional principles and values. Doubts about these concepts could not be removed by way of interpretation in accordance with the Constitution.

As with education, access to housing is another area where Roma face serious barriers and difficulties in many states. For instance, in **Croatia**, only 25 % of Roma households are integrated with the majority population, while some 46 % live in segregated settlements with very poor living conditions.³⁹¹

In recent years, there have been many reports of forced expulsions and segregation (e.g. in **Belgium, Bulgaria, Greece, Italy, Romania** and **Türkiye**) or issues in relation to campsites and stopping places for Roma and Travellers (e.g. in **Belgium, France** and the **UK**). Although these issues do not necessarily fall within the scope of the Directive, they do cause serious concern for the Roma and Traveller populations on the national level across Europe. In **France** for instance, the Government has been systematically evicting Travellers and Roma from illegally occupied land since 2012. Despite a Ministerial Instruction in January 2018 to revise this eviction policy,³⁹² a total of 1 330 such evictions took place between November 2020 and October 2021. Some 91 % of the evicted persons did not receive any alternative housing solution.³⁹³ In 2019, the two highest courts of the French legal order delivered contradictory rulings in similar cases challenging such evictions. While the Council of State held that, in the absence of imminent necessity, evacuation cannot be ordered without securing the rights of the (illegal) Roma occupants,³⁹⁴ the Court of Cassation held that the right of the landowners to their property prevails over the various rights of the illegal occupants.³⁹⁵ In 2021, a **Romanian** Court of Appeal confirmed the illegal conditions of the eviction of approximately 200 Roma, due to the failure of the authorities to take into account the specific, vulnerable situation of the Roma by adopting positive measures preceding the eviction.³⁹⁶ In **Lithuania**, with the specific aim of avoiding such forced evictions, the Vilnius City Municipality adopted an integration to society programme³⁹⁷ for the Roma community living in the Kirtimai settlement on the outskirts of the city. In 2020, the programme achieved its aim of emptying the settlement and relocating the residents. Similar initiatives have been put in place in several **Italian** municipalities, leading to an overall improvement in the housing situation of many Roma.³⁹⁸

Some countries have chosen to go beyond the scope of the directives in the area of services available to the public. For example, in the **Netherlands**, national anti-discrimination law is used to prevent Roma and Travellers from ending up with a shortage of stopping sites, which would be considered to constitute discrimination under national law. In this regard, the Minister of the Interior and Kingdom Relations issued a policy framework in 2018 with the aim of ensuring Roma cultural rights and legal security in the area

391 Croatia, People’s Ombudsperson (2022), *Report for 2021*.

392 France, Instruction of Government supporting a renewed policy for the suppression of slums and illegal camps, No. NOR: TERL1736127, 25 January 2018, available at: http://circulaires.legifrance.gouv.fr/pdf/2018/01/cir_42949.pdf.

393 CNDH Romeurope (2021), *Observatoire des expulsions de lieux de vie informels: Rapport annuel* (Observatory of evictions from informal housing, annual report), 21 November 2021, available at: https://www.observatoiredesexpulsions.org/storage/wsm_publication/acAqJQl52Htcl7FvZEKeLigyadOfIb7dOKP1QcDJ.pdf; and *Observatoire des expulsions de lieux de vie informels: Note d’analyse détaillée* (Detailed analysis), available at: https://www.romeurope.org/wp-content/uploads/2020/11/OBSERVATOIRE_NOTE_20192020.pdf.

394 France, Council of State, decision of 13 February 2019, No. 427423, available at: https://www.legifrance.gouv.fr/affichJuriAdmin.do?jsessionid=4B8116330BCFF04DC838B446306461F0.tplgfr25s_1?oldAction=rechExpJuriAdmin&idTexte=CETATEXT000038135472&fastReqId=614933702&fastPos=264.

395 France, Court of Cassation, Third Civil Chamber, decision of 4 July 2019, No. 18-17119, available at: https://www.courdecassation.fr/jurisprudence_2/troisieme_chambre_civile_572/619_4_43088.html; and decision of 28 November 2019, No. 17-22810, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000039465719&fastReqId=246564261&fastPos=1>.

396 Romania, Bucharest Court of Appeal Civil Decision No. 1293 of 25 November 2020, in case No. 4/57/2019 ECLI:RO:CAB:2020:177.001.001293, *Consiliul local al Municipiului Alba Iulia, UAT Municipiul Alba Iulia v CNCD si Asociatia Partida Romilor Pro Europa*.

397 Lithuania (2016), *Vilnius Kirtimai Roma Community Integration to Society Programme 2016–2019*, available in Lithuanian at: <http://www.romuplatforma.lt/wp-content/uploads/2017/02/2016%E2%80%932019-METU-PROGRAMA.pdf>.

398 Istat-UNAR (2021), ‘Survey on housing transitions for Roma, Sinti and Caminanti’, available at: <https://www.unar.it/portale/documents/20125/63457/Abitare-in-transizione-F.pdf/d56d6218-d102-5067-03a8-2a0019056385?t=1620642520315>.

of housing.³⁹⁹ This policy followed the publication by the Ombudsman of a report in 2017 concluding that several municipal authorities' housing policies were in violation of national law, therefore discriminating against Roma individuals by not making available sufficient caravan or trailer sites.⁴⁰⁰ Similarly, in the **United Kingdom**, the Equality Act 2010 was invoked by a court of appeal when declaring that a blanket injunction prohibiting encampments throughout the London Borough of Bromley was unlawful.⁴⁰¹

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 all provincial legislations it is levelled up.
- 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, 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 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. Furthermore, discrimination on the ground of disability is prohibited in all areas covered by the Racial Equality Directive.
- 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 a long list of grounds including all grounds covered by EU law.⁴⁰²
- **Hungarian** law has practically unlimited material scope, treating all grounds of discrimination equally.
- **Italian** anti-discrimination law offers protection against discrimination based on race and ethnic origin, religion or belief, age, disability, sexual orientation and nationality in the areas of employment, social advantages and housing.
- 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.

399 Netherlands Ministry of the Interior and Kingdom Relations (2018), 'Policy framework on municipal trailer and camping sites', available at: https://vng.nl/sites/default/files/publicaties/2018/beleidskader_gemeentelijk_woonwagena-standplaatsenbeleid_002.pdf.

400 Ombudsman (2017), *Trailer resident seeks trailer site. An investigation into the reliability of the public authorities for trailer inhabitants*, available at: www.nationaleombudsman.nl/system/files/bijlage/DEF%20Rapport%202017060%20Woonwagena-bewoner%20zoekt%20standplaats.pdf.

401 United Kingdom, Court of Appeal of England and Wales, *The Mayor and Burgesses of the London Borough of Bromley v Persons Unknown*, decision of 21 January 2020, in case No. [2020] EWCA Civ. 12.

402 It should however be noted that French law only covers 'belonging or not belonging, real or assumed, to a specific religion' as opposed to 'religion or belief' as covered by the Employment Equality Directive.

- In **Malta**, the UN Convention on the Rights of Persons with Disabilities Act provides protection against discrimination on the grounds of disability in the fields of social protection, 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.
- **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 **Slovakian** law, the right to healthcare is guaranteed equally to every person irrespective of a large number of personal characteristics, and discrimination in housing is prohibited 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 on the grounds of sex, transgender identity or expression, ethnic origin, religion or other belief, disability, age and sexual orientation in essentially all areas of society, ranging from working life, education and social security and healthcare, including social services, state grants for education, social insurance and related benefit systems, to the provision of goods, services and housing.
- 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.

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. **Albania, Finland, Latvia**,⁴⁰³ and **Slovenia** with regard to the ground of race and ethnicity).

Justification of direct discrimination in Slovenia

The 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). States are not required to include any or all of the possible exceptions.

The directives also allow 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 that are necessary to ensure 'full equality in practice'. States are not required to adopt positive action measures, although they cannot prohibit the adoption of such measures on the national level.

3.1 Genuine and determining occupational requirements

Article 4 of the Racial Equality Directive and Article 4(1) of 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.'⁴⁰⁴

All countries surveyed have chosen to include an exception for genuine and determining occupational requirements within their national legislation. The **Netherlands** takes an interesting approach by specifying that only *external racial appearances* may constitute a genuine occupational requirement.⁴⁰⁵ 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

403 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 2¹(1) of the Law on Social Security.

404 The Court of Justice has interpreted this provision in several rulings, recalling notably that it must be interpreted strictly as it provides an exception to the prohibition of discrimination. See, among other decisions, CJEU, Case C-447/09, *Reinhard Prigge and Others v Deutsche Lufthansa AG*, Judgment of 13 September 2011, ECLI:EU:C:2011:573; and CJEU Case C-824/19, *TC and UB v Komisija za zashtita od diskriminatsia and VA*, Judgment of 21 October 2021, ECLI:EU:C:2021:862.

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

differences. There is no exception relying specifically 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 **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. In **Hungary**, the provision on genuine and determining occupational requirements could be interpreted in such a way as to raise doubts concerning its compliance with the directives. While the wording of the exception is more restricted than that of the directives (applying only to recruitment but not to other aspects of employment), there is a risk that this exception is interpreted as *lex specialis* while the general exempting clause is considered as *lex generalis*, applying therefore in all areas of employment except recruitment. As the general exempting clause provides a simple reasonability test, such an interpretation of the amended provision would lead to a wider margin for exception than set out by the directives.

Non-EU Member States have also chosen to include the genuine and determining occupational requirements exception in their equality and anti-discrimination legislation, for instance **Iceland, Montenegro, Norway** and **Serbia**. In **Türkiye**, Article 7(1)(a) of the Law on the Human Rights and Equality Institution of Türkiye states that ‘differential treatments’ shall not be considered as discriminatory when they are appropriate and proportional to the aim pursued and where inherent professional requirements exist with respect to employment and self-employment. In a 2017 ruling, the Constitutional Court clarified that it is not possible to specifically identify the inherent requirements for each professional activity and that such requirements will need to be assessed on an individual basis in the implementation of the law.⁴⁰⁶ 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.

CJEU ruling in *Tartu Vangla*: Genuine and determining occupational requirements related to disability in physically demanding positions⁴⁰⁷

The case concerned a prison officer who had been dismissed due to his failure to meet a hearing requirement imposed by the relevant national regulation, due to the prohibition of prison officers using hearing aids.

The Court of Justice ruled on the compliance of such a regulation with Article 4(1) of the Employment Equality Directive, which provides an exception to the prohibition of discrimination and must therefore be interpreted strictly. The Court first found that ensuring the operational capacity and proper functioning of the prison services constitutes a legitimate aim. Further, it found that the nature of a prison officer’s duties and the context in which they are carried out justify a national regulation setting a certain level of auditory acuity as a genuine and determining occupational requirement.

The Court further held that the national regulation at hand may only be considered appropriate if it genuinely reflects a concern to attain the objective pursued, in a consistent and systematic manner. In this regard, the Court noted that the same national regulation allowed prison officers to use corrective devices such as contact lenses or spectacles when their compliance with the visual acuity standards laid down in the same regulation was assessed.

The Court finally noted that non-compliance with the requirement constituted an absolute impediment to the exercise of the duties of any prison officer, to which no derogations existed and for which no

⁴⁰⁶ Turkish Constitutional Court, Judgment, E. 2016/132, K. 2017/154, 15 November 2017, at para. 15. More generally, the Constitutional Court considered ‘special skills, physical qualities, graduation from certain schools, acquisition of certain documents and information’ as examples of inherent professional requirements that would justify differential treatment.

⁴⁰⁷ CJEU, Judgment of 15 July 2021, *XX v Tartu Vangla*, C-795/19, ECLI:EU:C:2021:606.

individual assessment was performed. Noting that the absolute nature of the national regulation at hand prevented the employer from meeting the duty to provide reasonable accommodation measures, where needed in a particular case, to enable a person with a disability to have access to, participate in or advance in employment, the Court concluded that the regulation appeared to have imposed a requirement that goes beyond what is necessary to attain the objectives pursued.

3.2 Employers with an ethos based on religion or belief

Article 4(2) Employment Equality Directive:

'Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.'

The Employment Equality Directive only allows for differential treatment on the grounds of religion or belief under the provision in Article 4(2), and it cannot be used to justify discrimination on another ground, for example sexual orientation. In 2018, the Court of Justice of the EU was finally provided with the opportunity to silence some of the controversy surrounding this exception, through the long-awaited Grand Chamber rulings in the cases of *Egenberger*⁴⁰⁸ and *I.R. v. J.Q.*⁴⁰⁹

***Egenberger*: CJEU landmark ruling on exception for employers with a religious ethos**

The claimant applied for a post advertised by a body associated with a German Protestant church. While the main task was to produce a parallel report on the UN Convention on the Elimination of All Forms of Racial Discrimination, the work also consisted of representing the diaconate of Germany and coordinating the opinion-forming process internally. The claimant had the relevant experience and knowledge for the post, but she was not of a religious faith, which was explicitly required in the advertisement for the post. She was therefore not invited for an interview. She took the case to the German courts alleging discrimination on the ground of religion or belief.

The referring court observed that the well-established case law of the German Federal Constitutional Court on churches' privilege of self-determination shows that the judicial review should be limited to a review of plausibility on the basis of the church's self-perception. The referring court therefore asked the CJEU whether that limited judicial review was compatible with the Directive. In that regard, the CJEU found that the right of autonomy of churches must be balanced with the right of workers not to be discriminated against on the ground of religion or belief. Accordingly, in the event of a dispute, that balancing exercise should be the subject of an effective judicial review by an independent authority, and ultimately by a national court.

408 CJEU, Grand Chamber judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257. See also *European Equality Law Review*, Issue 2018/2, pp. 98-99.

409 CJEU, Grand Chamber judgment of 11 September 2018, *IR v JQ*, C-68/17, ECLI:EU:C:2018:696. See also *European Equality Law Review*, Issue 2019/1, pp. 66-67. On 20 February 2019, the German Federal Labour Court delivered the final ruling in the case, in alignment with the findings of the CJEU. See ruling No. 2 AZR 746/14.

Secondly, the referring court asked the CJEU for clarifications on the interpretation of the three criteria of 'genuine, legitimate and justified occupational requirement' with regard to employers with a religious ethos, in the meaning of Article 4(2) of the Directive. The Court concluded that, in principle, it is not for the national courts to rule on the ethos as such on which the purported occupational requirement is based, but they must nevertheless decide on a case-by-case basis whether the three criteria are fulfilled from the point of view of that ethos. In doing so, national courts must ascertain whether the requirement put forward is necessary and objectively dictated – having regard to the ethos of the church (or organisation) concerned – by the nature of the occupational activity in question or the circumstances in which it is carried out. In addition, the requirement must comply with the principle of proportionality.

Finally, the Court recalled that it is for the national courts to interpret the national law transposing the Directive, as far as possible, in line with the Directive. Where such an interpretation is not possible however, national courts must disapply any contrary provision of national law. Since the Charter of Fundamental Rights of the EU is applicable, the national court must ensure the judicial protection deriving for individuals from the prohibition of all discrimination on the ground of religion or belief (Article 21 of the Charter) and the right to effective judicial protection (Article 47 of the Charter). Following the CJEU decision, the Federal Labour Court in Germany ruled in the case, finding that unequal treatment on the ground of religion is only permissible if, based on the nature of the professional activity or the circumstances of its exercise, religion constitutes an objective, legitimate and justified professional requirement in light of the employer's religious ethos.⁴¹⁰

Not all countries chose to explicitly include the Article 4(2) exception: this is the case in **Albania, Finland, France, Iceland, Liechtenstein, North Macedonia, 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 on genuine and determining occupational requirements and Articles 23-26 of 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. A similar situation exists in **Portugal**. 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.' In contrast, the following states have adopted provisions in national law which seek to rely on Article 4(2): **Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands**,⁴¹¹ **Poland, Slovakia, Slovenia, Spain, Türkiye** and the **United Kingdom**. In **Norway**, the exception is explicitly specified only in relation to the recruitment process but follows from the legal preparatory works in relation to all other aspects of employment. It concerns organisations or enterprises with an aim to promote particular life stances or religious views, regarding the applicant's religion, life stance or marital/cohabitation status.

Some states have provided exceptions that appear to go beyond the strict terms of the Employment Equality Directive (e.g. **Hungary**), appear to be too wide (e.g. **Italy**), or remain ambiguous (e.g. the **United Kingdom**). In **Northern Ireland**, specific provisions allow explicitly organised religions to 'apply a requirement related to sexual orientation' in employment, under certain conditions. In **Greece**, the relevant provision transposing Article 4(2) stipulates that the law does not affect the right of public or private organisations with an ethos based on religious or other beliefs to demand that their employees act in compliance with that ethos. In practice, for example, the Orthodox Church, invokes ethos requirements

410 Germany, Federal Labour Court, 8 AZR 501/14, 25 October 2018. At the time of writing, a constitutional complaint is pending before the Federal Constitutional Court against this decision of the Federal Labour Court, arguing that the CJEU acted *ultra vires* when handing down the *Egenberger* decision, which should therefore not be applied.

411 The Dutch legislature did not formally aim to transpose Article 4(2) when adopting the relevant provision, Article 5(2) of the General Equal Treatment Act, but rather attempted to reconcile the constitutional right to equality with other constitutional rights, notably the freedom of religion and the freedom of education.

in order to discriminate against individuals who are homosexual or in a same-sex civil partnership agreement, without linking it to specific occupational requirements but by claiming that their way of life in general is not ‘compatible’ with the teachings of the Church.⁴¹²

3.3 Justification of differences of treatment on grounds of 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) Employment Equality Directive:

‘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*,⁴¹³ 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.⁴¹⁴

Several Member States have simply inserted the text of Article 6 of the Employment Equality Directive into national law, including **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.

France: Discrimination on the ground of age in access to the National Magistrates’ School

In France, judicial judges are recruited through various selective processes that give them access to a two-year training programme at the National Magistrates’ School or to directly enter a probationary period of two years. The relevant legislation provides for two different processes to access the school’s training programme, depending on the candidate’s age.

Candidates *under* 31 years of age are selected to attend the programme through a series of competitive and particularly challenging examinations.⁴¹⁵ Persons aged *above* 31 years of age with eight years of various professional experience or with a legal education and four years of experience of legal work are exempted from the examinations and can instead be selected through a facilitated procedure based on their education and experience.

Exceptionally, the Employment Equality Directive has not been transposed in the national legislation applicable to the status of the French judiciary.⁴¹⁶

The claimant met the requirements to submit a candidacy based on her education and experience, but she was too young (under 31) to access the training programme on the basis of the alternative,

412 Vevi, E., Samouri, Z. (2018), *The modern view on homosexuality and the civil partnership in Greece*, School of Health and Welfare Professions – Department of Social Work of the Technological Educational Institute of Western Greece.

413 CJEU, Judgment of 22 November 2005, *Mangold v Helm*, C-144/04, ECLI:EU:C:2005:709. *Mangold*, and in particular the CJEU’s exercise of powers in that case, was (unsuccessfully) challenged before the Federal Constitutional Court in Germany. See the German Federal Constitutional Court, Decision 2 BvR 2661/06 of 6 July 2010.

414 CJEU, Judgment of 19 January 2010, *Seda Küçükdeveci v Swedex GmbH & Co*, C-555/07, ECLI:EU:C:2010:21.

415 This procedure is also available to civil servants under 40 years of age with four years of experience in the civil service.

416 France, Executive Order No. 58-1270 of 22 December 1958.

facilitated procedure. Before the Supreme Administrative Court (Council of State), she challenged the legality and conformity of the relevant regulation with the Constitution and the Employment Equality Directive, alleging that it was discriminatory on the ground of age.

Although the Constitutional Council had already concluded that the regulation was in conformity with the Constitution in 1992, the Council of State concluded in September 2021 that it was not in compliance with the directive. In this regard, the Council of State noted that students can access the Magistrates' School before 31 years of age under certain circumstances, while the state did not present evidence that age constituted a genuine and determining occupational requirement for this specific selection process. The state alleged the necessity to limit access to the school for candidates under 31 to entry examinations, but it did not present justifications that such a requirement for this age group was appropriate or necessary.⁴¹⁷

Implementing the decision of the Council of State, the French legislature repealed the relevant regulation in December 2021.⁴¹⁸

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 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.⁴¹⁹

The approach in national law to retirement age can be loosely grouped into three categories. First, there are countries 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**,⁴²⁰ the **Netherlands**,⁴²¹ **Poland**,⁴²² **Slovakia**,⁴²³ **Slovenia**⁴²⁴ and the **United Kingdom**.⁴²⁵ 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.⁴²⁶ As of that date, no contracts or collective agreements containing a retirement age can be entered into.⁴²⁷ 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).

417 France, Supreme Administrative Court (Council of State), decision of 8 September 2021 in case No. 453471, available at: <http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-09-08/453471>.

418 France, Decree No. 2021-1686 of 16 December 2021.

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

420 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.

421 In the Netherlands, there are exceptions for some categories, notably judges.

422 In Poland, there are exceptions for judges, public prosecutors, court enforcement officers and notaries public.

423 In Slovakia, there are some de facto exceptions for certain professions in the public sector.

424 In December 2020, legislation was adopted in Slovenia to allow employers to unilaterally terminate the employment of a person who meets the conditions for the retirement pension. On 18 November 2021, the Constitutional Court ruled that this legislation was unconstitutional, without ruling specifically on its allegedly discriminatory nature. See Decision No. U-I16/21, U-I-27/21, available at: <http://www.us-rs.si/documents/3f/3c/u-i-16-21-u-i-27-21-decision-en6.pdf>.

425 In the United Kingdom, exceptions apply to some categories of civil servants, the police and the judiciary.

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

427 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).

In a second group of states, retirement ages are specified for public sector employees only. The precise age varies: **Albania** (65),⁴²⁸ **Belgium** (65), **Czechia** (70), **Greece** (67), **Iceland** (70), **Ireland** (70),⁴²⁹ **Latvia** (65 – being phased in), **Lithuania** (65 – being phased in),⁴³⁰ **Luxembourg** (65),⁴³¹ **Portugal** (70),⁴³² and **Türkiye** (65).⁴³³ In **Ireland**, in the private sector, retirement ages are generally provided for in employment contracts, although any mandatory retirement age must be capable of objective justification both by the existence of a legitimate aim and evidence that the means of achieving that aim is appropriate and necessary.⁴³⁴ In **Cyprus**, different retirement ages apply to different public-sector employees, depending on the profession, the rank and the year of joining the service.⁴³⁵ In **Austria**, public sector employees retire automatically when they reach the age of 65 years. However, if there is ‘an important operational reason’ related to the service, the employment contract can be extended for one year, renewable up to a maximum of five years. In **Hungary**, public sector employees retire at the age of 65, although civil service can be prolonged under certain circumstances until the age of 70.⁴³⁶

Workplace Relations Commission (Ireland) disapplies statutory mandatory retirement age⁴³⁷

The case concerned a public servant who wished to work beyond the imposed statutory retirement age of 65. Although the retirement age had been raised to 70, the claimant had reached the age of 65 before the entry into force of that amendment. Following a CJEU ruling confirming that a quasi-judicial body such as the Workplace Relations Commission (WRC) was indeed empowered to disapply national legislation in contravention with EU law,⁴³⁸ the WRC ruled on the case. It found that the respondent had failed to reach the high standard of proof needed to objectively justify the difference in treatment. While the aims advanced by the respondent such as maintaining intergenerational fairness, manpower planning and allowing for promotion of younger staff, were legitimate, the measure of refusing to allow the claimant to maintain her position was not proportionate, due to the circumstances of the case. The complainant was awarded compensation of EUR 82 000 (the maximum award possible of 104 weeks’ remuneration).

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: **Bulgaria**, **Croatia** (65),⁴³⁹ **Finland** (68-70), **France** (67/70),⁴⁴⁰ **Italy** (70), **Liechtenstein** (65), **Malta** (65 – being phased in), **Montenegro** (67), **North Macedonia** (64), **Norway** (70),⁴⁴¹ **Romania** (63/65),⁴⁴² **Serbia** (65),

428 In Albania, the public sector retirement age is the same as the general pensionable age: 65 for men and 61 years and 4 months for women. Furthermore, there are some exceptions, notably for academics.

429 In Ireland, the statutory retirement age is dependent on the date of recruitment. For people who joined the public service before 1 April 2004 or since 1 January 2013, the statutory retirement age is generally 70. Public servants recruited between April 2004 and December 2012 have no compulsory retirement age. Distinct compulsory retirement ages are set for members of An Garda Síochána (police), the Defence Force, firefighters and prison officers.

430 In Lithuania, retirement can be postponed on a case-by-case basis for a maximum of two years.

431 In Luxembourg, in exceptional circumstances, a civil servant can remain in office until the age of 68 on request. The employer has to give their consent and has no obligation to maintain the civil servant in office.

432 In Portugal, retirement can be postponed on a case-by-case basis, at the request of the employee, if there is a public interest. In this case, a fixed-term contract is concluded for a maximum overall period of five years.

433 Other retirement ages apply to certain categories of public sector employees in Türkiye (Retirement Fund Law No. 5434, Article 40).

434 Ireland, S.I. No. 600/2017 – Industrial Relations Act 1990 (Code of Practice on Longer Working) (Declaration) Order 2017, 20.12.2017, <http://www.irishstatutebook.ie/eli/2017/si/600/made/en/print>.

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

436 Hungary, Act CXIX of 2011 on Civil Servants, adopted on 30 December 2011, Article 60(1)(j).

437 Ireland, Workplace Relations Commission, *Geraghty v The Office of the Revenue Commissioners*, decision of 4 November 2021 in case No. ADJ-00000031, available at: <https://www.workplacelrelations.ie/en/cases/2021/november/adj-00000031.html>.

438 CJEU, Judgment of 4 December 2018, *Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission*, C-378/17, ECLI:EU:C:2018:979.

439 All employment contracts covered by the Labour Act. Different retirement ages apply in the public sector.

440 In France, retirement is imposed in the public sector when the employee reaches the age of 67. It can only be extended (for a maximum of three years) if the employee has the care of children still living at home or pursuing their education. In the private sector, employers can impose retirement as of the age of 70.

441 Employers in the private sector may impose retirement when the employee turns 70 (WEA Section 1315a(3)), while in the public sector 70 years is the state-imposed mandatory retirement age.

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

Spain (68/70)⁴⁴³ and **Sweden** (68). In **Bulgaria**, although there is no generally applicable compulsory retirement age (other than in certain sectors of civil service), employers may, at their discretion, dismiss their employees who have acquired the right to an old-age pension.⁴⁴⁴

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 pension age in the case of *Prigge and Others v Deutsche Lufthansa*.⁴⁴⁵ 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.

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.⁴⁴⁶ 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.

3.4 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**,⁴⁴⁷ **France, Greece, Ireland, Italy, Lithuania, Malta, Slovakia** and the **United Kingdom**. In **Germany**, the Soldiers General Act on Equal Treatment covers all grounds except for age

443 In Spain, retirement can be imposed at the age of 70 in the public sector. In the private sector, collective agreements can stipulate imposed retirement ages of 68 or above, since 2021, if certain criteria are met. See Law No. 21/2021 of 28 December on guaranteeing the purchasing power of pensions and other measures to reinforce the financial and social sustainability of the public pension system.

444 The ages for acquiring an old-age pension vary depending notably on the number of years of service.

445 CJEU, Judgment of 13 September 2011, *Prigge and Others v Deutsche Lufthansa AG*, C-447/09, ECLI:EU:C:2011:573.

446 Danish Supreme Court, Case 185/2010, decision of 14 November 2013.

447 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).

and disability. Similarly, the specific anti-discrimination provisions contained in legislation regulating the security and armed forces in **Czechia** do not cover age and disability as protected grounds. In **Norway**, the Armed Forces Act states that military personnel are exempt from the prohibition on age discrimination of the Working Environment Act. It was however clarified in 2020 that this exemption only applies to the armed forces, and excludes non-combat personnel such as doctors.⁴⁴⁸ There is no specific disability-related exception in the legislation, but general health requirements apply. In **Ireland**, the Workplace Relations Commission ruled in 2021 that Section 37(5) of the Employment Equality Act (transposing Article 3(4) of the Directive) afforded the respondent, the Irish Naval Service, a ‘complete exemption’ from the prohibition of age discrimination.⁴⁴⁹

Other countries 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. **Albania, Estonia, Hungary, Latvia, Montenegro, Poland, Portugal, Romania** and **Spain**. Military service requires candidates not to be older than a certain fixed age in, for instance, **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). For example, **Irish**⁴⁵⁰ law provides exemptions on the basis of age in respect of the police, the prison service or any emergency service.

3.5 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, Finland, Italy, Luxembourg, Lithuania**,⁴⁵¹ the **Netherlands, Portugal, Romania, Serbia** and the **United Kingdom**.⁴⁵² 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), although the definitions are not similar to those used in the directives. 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 essentially includes citizenship. Finally, in **France**, case law has confirmed that the explicitly protected ground of ‘belonging to a nation’ must be interpreted to cover citizenship.⁴⁵³ In addition, there are several countries where the lists of protected grounds include the term ‘nationality’ but where this term is not considered to mean ‘citizenship’ but rather ‘national affiliation’ or similar concepts. This is the case for instance in **Czechia, Poland** and **Slovakia**.

448 Norway, Borgarting Court of Appeal, *A v Ministry of Defence and Norwegian Medical Association*, decision of 3 November 2020 in case No. LB-2019-190061.

449 Ireland, Workplace Relations Commission, *Irwin v Irish Defence Forces Naval Service*, ADJ-00031786, 17 August 2021, <https://www.workplacerelements.ie/en/cases/2021/august/adj-00031786.html>.

450 Ireland, Employment Equality Acts 1998-2021, Section 37(4).

451 In Lithuania, ‘citizenship’ is a protected ground only for citizens of the EU and EEA countries and their family members.

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

453 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>.

Nationality discrimination of 848 Moroccan employees by the French public railway company, SNCF⁴⁵⁴

In the 1970s, SNCF (the French public railway service) hired 2 000 Moroccan employees to fill lower skilled jobs. However, French citizenship was required for employment under ‘permanent employee status’, and they were therefore hired as contractual agents under a specific status (known as PS25) that was used for temporary employees and for persons holding a list of jobs that were not covered by the statutory regime. The Moroccan employees spent their entire careers at SNCF, with less favourable employment and retirement conditions than those applicable to French permanent employees. While half of them became French citizens, only 113 of the 2 000 Moroccan employees obtained permanent employee status. After retiring, the claimants brought a case to court, claiming damages for their career and retirement conditions.

In January 2018, the Court of Appeal of Paris confirmed the decision of the Employment Tribunal from 2015 and concluded that there had been discrimination in the career and retirement rights of the Moroccan employees. Considering the mass of evidence, the court held that the shift in the burden of proof imposed on the employer the obligation to establish that the difference of treatment was justified by objective elements unrelated to discrimination based on nationality.

The employer argued that the regulation reserving permanent employee status to French nationals was justified because at the time the railroad was considered to be part of the public service. The court dismissed this argument, as the SNCF’s representative had argued many times that the reason for not modifying the regulation was the financial burden that would result from integrating foreign workers into the status of French workers.

The court concluded that the condition of nationality contravened the bilateral conventions between France (and the EU) and Morocco and amounted to a violation of Article 14 ECHR and Protocol No. 1 to the ECHR. Each of the 848 claimants was awarded compensation amounting to more than EUR 240 000 for the loss of career, pension benefits and training as well as non-pecuniary damage. The overall liability of the SNCF is estimated at EUR 180 million.

A number of Member States have specific exclusions from the scope of their implementing legislation which apply to discrimination based on nationality: **Cyprus, Greece, Italy, Luxembourg and Malta**. In **Cyprus**, the law regulating the grant of nationalities includes a provision according to which no automatic citizenship is recognised to an applicant whose parent entered or resides in Cyprus unlawfully; in such a case the grant of citizenship is left at the discretion of the Council of Ministers. Although the provision appears neutral, it may exclude from citizenship those persons born to a parent from Türkiye who migrated to and settled in Cyprus in the post-war era.

3.6 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, Iceland, Ireland, Italy, Lithuania, Malta, Montenegro, 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

454 France, Court of Appeal of Paris, Decision No. 15/11389 of 31.01.2018, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=24074.

social origin, sexual orientation or disability.⁴⁵⁵ 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. In **Greece**, the exception also covers the ground of racial or ethnic origin, indicating a potential breach of the Racial Equality Directive which does not contain a provision similar to Article 2(5) of the Employment Equality Directive.

3.7 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. In **Albania**, the Law on Protection from Discrimination stipulates that ‘Distinctions in compensation and benefits, established based on grounds mentioned in Article 1 of this law, do not constitute discrimination when the distinctions are reasonable and in proportion to a risk that is assessed on the basis of current and statistical data that can be verified and are closely linked to the risk.’⁴⁵⁶ In **Luxembourg**, insurance contracts are excluded from the material scope of the prohibition of discrimination.

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 **Hungarian** Equal Treatment Act and the **Irish** Equal Status Act (ESA) also contain a number of exceptions and exemptions to the non-discrimination rule that could be problematic with regard to the directives. With regards to the latter, any action required by or taken under ‘any enactment or order of a court’ is exempted from the prohibition of discrimination under the ESA. The word ‘enactment’ is not defined however, and while earlier case law had indicated that Government department circulars and other administrative rules were not ‘enactments’ and could therefore be challenged under the ESA,⁴⁵⁷ a 2021 judgment of the High Court held that the exemption encompasses guidance notes devised by a public body to process applications for driving licences.⁴⁵⁸ The guidance notes are referred to, but do not form part of the applicable statutory instrument. The judgment suggests that policy or guidance adopted by a public body that is expressly derived from legislation may be covered by the exemption.

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.

3.8 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.’

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

456 Albania, Law on Protection from Discrimination, Article 20(5).

457 See, for example, Circuit Court Dublin, *Health Service Executive v Quigley*, unreported, 26 April 2010.

458 Ireland, High Court, *A.B. v Road Safety Authority*, [2021] IEHC 217, 25 March 2021, https://www.courts.ie/view/judgments/a6f51761-a591-46b8-8d2c-299e8fb6f7df/d56b90ba-36a4-4962-b964-8370efca557a/2021_IEHC_217.pdf/pdf.

In most countries, anti-discrimination legislation stipulates explicitly that positive action measures are permitted in relation to some or all grounds, although the specific scope and requirements vary. In **Denmark** for instance, individual employers cannot adopt positive action measures in the labour market as this possibility is reserved to the legislature and Government ministers through public projects.⁴⁵⁹ **Spanish** non-discrimination law contains similar provisions, although it also provides that collective agreements may include measures to ‘encourage equality of opportunity’. In **Estonia**, the law indicates that the Equal Treatment Act ‘does not prejudice the maintaining or adoption’ of positive action measures, without specifying who could adopt such measures and under what circumstances. In 2019, the **Belgian** Government adopted a Royal Decree setting the conditions for employers who wish to put in place positive action measures for the benefit of underrepresented groups.⁴⁶⁰ As of July 2021, five such positive action measures have been put in place at federal level, targeting women, persons of certain ethnic origins or refugees. In the **Netherlands**, positive action schemes including narrowly tailored preferential treatment are only possible with respect to the grounds of sex, race and disability, as these are considered to be the only grounds that are causing ‘structural disadvantages’⁴⁶¹ in society. Similarly, **Slovakian** law explicitly permits positive action, under the term ‘temporary equalising measures’, only for the grounds of racial or ethnic origin, age and disability. Entities that adopt such measures are required to monitor and evaluate them continuously and to provide regular information to the national equality body. By contrast, in **Great Britain**, the Equality Act allows for the adoption of proportionate positive action measures for all grounds of discrimination where a person ‘reasonably thinks that— (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic, (b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or (c) participation in an activity by persons who share a protected characteristic is disproportionately low’. In 2020, some guidance was provided in this regard by the Supreme Court, in a case concerning social housing provided exclusively to the members of a minority Jewish community.⁴⁶²

The scope for positive action is often a matter clarified through case law. In **Cyprus**, the Supreme Court had developed a practice of declaring void and unconstitutional any law introducing positive action that was challenged.⁴⁶³ 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.⁴⁶⁴ In **Croatia**, the most important legal discussion related to positive action measures aimed at ensuring the representation of ethnic minorities when employing civil servants and judges. In **Bulgaria**, the case law is currently ambivalent with regards to positive action measures, notably following a court decision from 2018, confirmed on appeal in 2020, ruling that scholarships reserved for Roma pupils were directly discriminatory against non-Roma people.⁴⁶⁵ In **Romania**, the national equality body held in 2021 that positive action measures are not only allowed but required with regard to students with special educational needs.⁴⁶⁶

459 A specific exception is made for positive action measures for older persons and persons with disabilities. See Act on the Prohibition of Discrimination in the Labour Market etc., Section 9(3).

460 Belgium, Executive regulation dated 11.02.2019, OJ (*Moniteur belge*), 01.03.2019.

461 Structural disadvantage is defined as ‘suffering disadvantage in several fields at the same time which are not temporary in nature.’ (Tweede Kamer, 2001-2002, 28 169, p. 17).

462 United Kingdom, Supreme Court, decision of 16 October 2020, *R (on the application of Z and another) v Hackney London Borough and another*, [2020] UKSC 40.

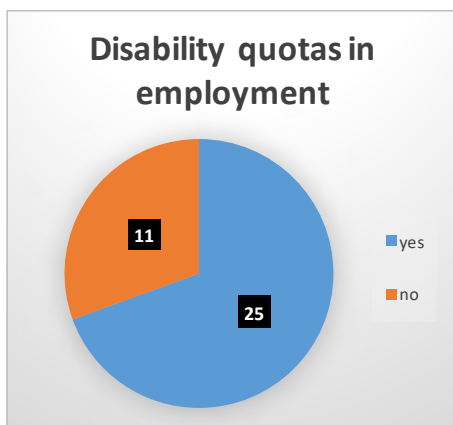
463 See, for example, Cyprus Supreme Court, *Charalambos Kittis et al v The Republic of Cyprus* (2006), Appeal case No. 56/06 (08.12.2006).

464 Cyprus, Supreme Court, *Costas Tsikas et al v Republic of Cyprus through the Committee of Educational Service*, Ref. Nos 1519/2010 and 1520/10, 03.09.2015, 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%1%E9%F9%EC%E1%2A%20and%202015.

465 Bulgaria, Supreme Administrative Court, Decision No. 458 of 13.01.2020 in case No. 5375/2019, confirming the decision of Sofia City Administrative Court No. 7471 of 10.12.2018 in case No. 9628/2018.

466 Romania, National Council for Combating Discrimination, 21 July 2021, *Zane Andrei v the Bucharest University and the Ministry of Education*, Decision 561 in case No. 1037/2020.

Several countries have introduced legal duties to promote equality. In some countries, these duties take the form of broad obligations to advance equality contained in national constitutions (e.g. **Greece**, Article 116(2) or **Spain**, Article 9(2)). In other countries, non-discrimination law places a specific duty on some or all public authorities, for example in **Bulgaria**, where all authorities are required to take measures whenever necessary to equalise opportunities for disadvantaged groups – prioritising measures for victims of multiple discrimination – and to guarantee participation by ethnic minorities in education.⁴⁶⁷ In practice however, no such measures are known to exist. In **Finland**, the 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.⁴⁶⁸ **Swedish** anti-discrimination law requires employers as well as education providers to carry out continuous goal-oriented work with regards to all grounds protected by Swedish law. However, there are still provisions on positive duties that are limited to the ground of gender. In **Lithuania**, public and private entities with more than 50 employees have an obligation to adopt measures for promoting equality policies in the workplace.⁴⁶⁹ In the **United Kingdom**, since 2011, all public authorities are 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’.



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 persons with disabilities in **Albania, Austria, Belgium** (in the public sector), **Bulgaria, Croatia, Cyprus** (in the wider public sector), **Czechia**,⁴⁷⁰ **France, Germany, Greece, Hungary**,⁴⁷¹ **Ireland, Italy, Luxembourg, Malta, Montenegro, the Netherlands, Poland, Portugal**,⁴⁷² **Romania, Serbia, Slovakia, Slovenia, Spain and Türkiye**. However, alternatives to employing persons with disabilities, such as paying a fee or tax, are almost always offered. In **Ireland**, a policy objective of the Government is for 3 % of employees in the civil and public service to be persons 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.⁴⁷³ The Irish Government has undertaken to progressively increase the statutory target towards 6 % by 2024.⁴⁷⁴ Similarly, in the **Netherlands**, the Government has adopted specific targets to encourage employers to employ persons with disabilities.

467 Bulgaria, Protection Against Discrimination Act, Article 11.

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

469 Lithuania, Labour Code, 2016, No. XII-2603, Article 26. Available in Lithuanian at: <https://www.e-tar.lt/portal/lt/legalAct/f6d686707e7011e6b969d7ae07280e89>.

470 In Czechia, 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.

471 In Hungary, the quota covers persons with ‘an altered ability to work’, i.e. persons whose ‘health status’ is assessed by the rehabilitation authority to be 60 % or less. This category includes, but is not limited to, persons with disabilities within the meaning of the Employment Equality Directive.

472 In Portugal, the quotas are different in the private and the public sectors. However, it is not possible to determine whether the quotas are being enforced or not, as no relevant data is available.

473 Irish National Disability Authority (2016), ‘Report on compliance with Part 5 of the Disability Act 2005 for 2015’, <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>.

474 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>.

These targets apply to public and private sector employers with more than 25 employees and when employers are not able to comply with these requirements, a 'quota charge' may be imposed. As the targets were met only by the private sector, the quota charge was levied on the public sector, taking effect as of 1 January 2018.⁴⁷⁵

In countries where a quota exists, the funds collected from employers who fail to meet the quota (whether in the form of a fine, a fee or a tax) are often earmarked to benefit persons with disabilities specifically. This is the case in **Albania, Austria, Croatia, France, Germany, Italy, Montenegro, Poland, Portugal** (private sector only), **Serbia** and **Slovenia**. However, in the following countries, such funds are paid to the general state budget: **Bulgaria, Czechia, Romania** and **Slovakia**. In countries such as **Ireland**, the quotas are not strictly binding, and there are no sanctions for employers who fail to comply with the quota.

475 This is done by a ministerial decree, see *Regeling activering quotaheffing*, *Staatscourant* 2017, No. 58942, <https://zoek.officielebekendmakingen.nl/stcrt-2017-58942.html>.

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 **Austria** (in cases concerning disability), **Italy**, **Spain** and **Sweden**, or separately, as for example in **Albania**, **Croatia**, **Estonia**, **Finland**, **Germany**, **Hungary**, **Malta**, **Montenegro**,⁴⁷⁶ **North Macedonia**, **Poland**, **Serbia**, **Slovakia** and **Slovenia**, or both, as in **Portugal**.⁴⁷⁷ 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 either in criminal proceedings involving an offence punishable by imprisonment of a maximum of two years, or in civil proceedings where it can be ordered by the judge.

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, while specific non-discrimination procedures include notably quasi-judicial equality bodies.

Labour inspectorates are charged with enforcing employment law, including equal treatment provisions, in **Albania**, **Czechia**, **Finland**,⁴⁷⁸ **France**, **Italy**, **Latvia**, **Montenegro**, **Poland**, **Portugal**, **Slovakia**, **Slovenia** and **Spain**. In **Lithuania**, individuals have the option to directly apply to labour dispute commissions⁴⁷⁹ or courts. The commissions have the power to award the payment of salaries, compensation and material and immaterial damages in cases of unfair dismissal, but can also function as mediators. Similarly, in **Estonia**, labour dispute committees have an important role in resolving labour disputes, including those involving discrimination. In **Hungary**, **Slovakia**, **Slovenia** and **Spain**, for instance, victims can also submit complaints to other inspectorates, such as in the areas of education or consumer protection. In **Ireland**, the previous specialised equality tribunal was dismantled in 2015, when

476 Attempted alternative dispute resolution is mandatory in Montenegro for employees who consider themselves victims of discrimination; for former employees it is optional.

477 In Portugal, conciliation is a mandatory part of labour court proceedings, while mediation is available as an option in all areas, including for some criminal offences.

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

479 Labour dispute commissions are composed of three members: a chairman (state official, appointed by the Labour Inspectorate), a representative of an employer organisation and a representative of a trade union.

its functions were grouped together with those of all bodies involved with workplace relations into the new Workplace Relations Commission.⁴⁸⁰ This body, which specialises in workplace-related conflicts and issues, also hears discrimination cases falling within the scope of the Equal Status Acts 2000–2018, 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 **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 may provide an impartial conciliation procedure upon application by victims of discrimination in the private sphere. If approved, the conciliation agreement is legally binding for the parties. The Chancellor of Justice has only made use of this procedure once since 2012, however, and in that case the agreement was not approved. In cases of discrimination in the public sphere, the Chancellor of Justice can conduct ombudsman-like procedures with non-legally binding results. 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, the National Commission for the Promotion of Equality and the UNCRPD Redress Panel, which was established in 2021. 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 and the **Norwegian** Equality and Non-Discrimination Tribunal.⁴⁸¹ In **Iceland**, the Equality Complaints Committee has a mandate to issue binding decisions but it cannot impose sanctions.

In **Hungary**, the mandate of the previous equality body, the Equal Treatment Authority, has been transferred to the Ombudsman (Commissioner for Fundamental Rights) as of January 2021. The Ombudsman can thus act under the equality body mandate, i.e., by taking action against any discriminatory act and imposing severe sanctions on those violating the prohibition of discrimination. It can also act under its traditional ombudsman mandate, investigating cases of discrimination by any public authority or public service provider, provided that all administrative remedies have been exhausted or none exist.⁴⁸² 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 **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 simultaneously, which in practice creates difficulties for the parties, the equality

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

481 Further information regarding sanctions can be found in section 4.5 below.

482 Claimants need to specify whether they want their complaint to be handled according to the equality body procedures or those for the general Ombudsman mandate. This will be further discussed below, in section 5.

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.

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.⁴⁸³ In **Poland**, under the Labour Code,⁴⁸⁴ 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. 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. In **Sweden**, since 2017 complaints of violation of the Discrimination Act in respect of education can be lodged with the Higher Education Appeals Board. However, the board lacks the power to issue any kind of discrimination compensation order and can only require the correction of the discriminatory act or omission.⁴⁸⁵

4.1.2 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 barrier to effective access to justice is the lack of effective remedies, including compensation, for victims of discrimination.⁴⁸⁶

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. **Croatia, Hungary, Lithuania, Slovakia, Türkiye** and the **United Kingdom**). In **Greece**, the legal fees are particularly high when the respondent is a public administration, as procedural requirements in such cases imply that the assistance of a lawyer is required first for the administrative procedure establishing the admissibility of the complaint, and then for the procedure before the administrative courts. An additional factor that may discourage victims from initiating legal action is the level of court fees in some countries, such as in **Czechia** and **Slovakia**. Similarly, the **Belgian** equality body Unia highlighted in its 2017 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

483 Unia (2017), *Evaluation Report* (of the Anti-Discrimination Federal Acts), February 2017, pp. 10 and 58, available at: [https://www.unia.be/files/Documenten/Publicaties_docs/Evaluation_2e_version_LAR_LAD_Unia_PDF_\(Francophone\).pdf](https://www.unia.be/files/Documenten/Publicaties_docs/Evaluation_2e_version_LAR_LAD_Unia_PDF_(Francophone).pdf).

484 Poland, Labour Code, Article 183d.

485 Sweden, Act 2017:282 Changing the Discrimination Act, adopted 13.04.2017.

486 For further information, please see section 4.5 below.

courts due to numerous obstacles, including very high costs and the risk of paying a procedural indemnity if the case is dismissed.⁴⁸⁷ The system of ordering the losing party to pay the winning party's legal fees and expenses is also particularly detrimental in some countries. In **Sweden** for instance, a claimant lost his case of alleged disability discrimination in employment at second instance in 2020 and was thus ordered to pay a total of more than EUR 20 000 in court fees to the winning party (the state).⁴⁸⁸ To avoid paying such sums, individual victims, as well as NGOs representing them, generally bring discrimination complaints as small claims cases, which has severe consequences, notably on the available remedies. While the courts may decide in a discrimination case that each party will bear its own costs, this is not a common practice.⁴⁸⁹ In a similar vein, the procedures under the **Bulgarian** Protection Against Discrimination Act are explicitly exempt from all costs, both state fees and expenses (Articles 53 and 75(2)). In practice, however, this provision is not always respected as the losing party is generally ordered to pay the winning party's fees and expenses.⁴⁹⁰ The case law of the Supreme Administrative Court is not settled with regard to this practice, causing legal uncertainty.

Procedural barriers to access to justice: Compliance of national procedural law with EU non-discrimination law⁴⁹¹

The case concerned an air passenger who considered himself to have been a victim of racial discrimination by an airline company. Before the national court, the respondent availed itself of a procedure that allowed it to acquiesce to the victim's claim for compensation and thus bring an end to the proceedings while denying the discrimination. The national court was thus obliged to order the payment without being able to draw any conclusion regarding the existence of the alleged discrimination.

The Court of Justice first concluded that where the respondent does not recognise the alleged discrimination, the victim must be able to obtain a ruling on the possible breach of the rights that the procedures referred to in Article 7 of the Directive are intended to enforce. The payment of the sum claimed cannot ensure 'effective judicial protection for a person who requests a finding that there was a breach of his or her right to equal treatment'. Such a payment is not sufficiently compensatory for the claimant nor a sufficient deterrent to the respondent, who considered this procedure more advantageous, in terms of cost and reputation, than responding to the allegations of discrimination in court. The availability of criminal procedures cannot remedy the failure of civil law remedies to comply with the Directive, notably due to the rules on the burden of proof applicable in criminal procedures that are unfavourable to the victim.

The Court thus concluded that Articles 7 and 15 of the Directive, read in the light of Article 47 of the Charter, must be interpreted as precluding a national law such as that at hand.

Another potential barrier is posed by short time limits for bringing a case, as the directives leave it to the national legislature to set any time limits it deems appropriate. 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 2000-2018 require a complainant to notify the respondent in writing within two months of the date of the 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

487 Unia (2017), *Evaluation Report* (of the Anti-Discrimination Federal Acts), February 2017, pp. 10 and 58-59, available at: [https://www.unia.be/files/Documenten/Publicaties_docs/Evaluation_2e_version_LAR_LAD_Unia_PDF_\(Francophone\).pdf](https://www.unia.be/files/Documenten/Publicaties_docs/Evaluation_2e_version_LAR_LAD_Unia_PDF_(Francophone).pdf).

488 Sweden, Labour Court, decision of 18 November 2020 in case No. 58/2020.

489 For one recent example of such a court decision, see Lund District Court, decision of 19 May 2021 in case No. T 4019-19, *Malmö mot Diskriminering (MmD) v Sweden through Lund University*.

490 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).

491 CJEU, Judgment of 15 April 2021, *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, C30/19, ECLI:EU:C:2021:269.

with the possibility of an extension, there is concern that such short time limits can be problematic for victims, especially persons with literacy difficulties, inadequate command of the state's official languages or disabilities. The three-month time limit in **Greece** is very strict, regardless of the sector, while in **Latvia** the three-month time limit to bring a discrimination claim in employment is much shorter than the two-year time limit that is generally applicable in other labour disputes. In **Sweden**, the very short 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. 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 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.⁴⁹² 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, Croatia, Cyprus, Malta, Portugal** and **Serbia**. There are serious concerns in **Hungary** and **Slovakia** that judicial proceedings can take more than 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 have passed by which the victim can apply to the court.⁴⁹³ A similar situation exists in **Finland**. In 2021, the European Court of Human Rights issued a decision against **Croatia** determining a violation of Article 6 (1) of the European Convention of Human Rights due to the excessive length of anti-discrimination proceedings before domestic courts, which lasted over nine years.⁴⁹⁴ There have been several such decisions in previous years.⁴⁹⁵

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 **Austria, Belgium** and **Italy** there is no systematic publication of decisions by either the courts or the equality body. By contrast, there is an encouraging practice in the **Netherlands** of publishing yearly reports containing detailed data about all discrimination complaints/reports received by a number of different bodies, thus providing invaluable information for research and analysis purposes.

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].'

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

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

494 European Court of Human Rights, *Salameh v Croatia*, Application No. 38943/15, 14 October 2021.

495 European Court of Human Rights, *Kirncic and Others v Croatia*, Application No. 31386/17, 30 July 2020; *Mirjana Maric v Croatia*, Application No. 9849/15, 30 July 2020.

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 **Albania, Austria, Belgium, Bulgaria, Croatia, Cyprus,⁴⁹⁶ Czechia, Estonia,⁴⁹⁷ France, Germany, Greece,⁴⁹⁸ Hungary, Iceland, Ireland, Italy, Lithuania, Malta, Montenegro, North Macedonia, Norway, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain 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, Latvia, Liechtenstein, the Netherlands, Poland and Türkiye**).

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, trade unions and NGOs must have been in existence for over five years to act either on behalf or in support of victims of discrimination, before any jurisdiction.⁴⁹⁹ 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; any legal persons that state as their objective the defence of human rights or the fight against discrimination and whose activities satisfy certain conditions of effectiveness contained in the Civil Procedure Code; 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 **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 Law 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**, the 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 as well as disability, associations may engage in proceedings in support or on behalf of complainants only if they are included in a list approved by a decree of the Department for Equal Opportunities.⁵⁰⁰ Regarding the other grounds of discrimination covered by Directive 2000/78/EC, however, standing to litigate is much broader and is accorded on an ad hoc basis to any organisation or association regarded as having a ‘legitimate interest’ in the enforcement of the relevant legislation.⁵⁰¹ In addition, in the field of employment, trade unions have legal standing to engage on behalf or in support of victims of discrimination on all grounds.

496 Only in the private sector.

497 In Estonia, the legal standing of organisations is limited to quasi-judicial proceedings before the Gender Equality and Equal Treatment Commissioner and conciliation proceedings before the Chancellor of Justice. No such standing is provided before the courts.

498 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.

499 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; Articles L131-1 and ff of the General Code of Public Service in the public sector.

500 Italy, Legislative Decree No. 215/2003, Article 5. See also Decree of the Department for Equal Opportunities of 6.09.2018. Further information available at: <https://www.unar.it/portale/associazioni>.

501 Italy, Legislative Decree No. 216/2003. Article 5.

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. In **Cyprus**, non-discrimination law provides that organisations are entitled to engage on behalf of victims if they have a 'legitimate interest'. This contrasts however with the constitutional principle limiting legal standing to individuals who are personally aggrieved. Furthermore, since 2017, the equality body only appears to be accepting complaints from victims and not, as previously, from NGOs representing them.⁵⁰² 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), any NGO that seeks to protect victims of discrimination and trade unions can intervene as a third party in court proceedings, but only upon invitation by the court. In **Norway**, organisations must have anti-discrimination work as their sole or partial purpose in order to have legal standing in cases regarding equality.

In **Austria**, one specific statutory organisation, the Litigation Association of NGOs Against Discrimination, has been expressly 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, while non-members can intervene before the courts if they prove their legal interest in the case. In disability-related cases concerning the workplace, the **Austrian** National Council of Persons with Disabilities has been given an explicit right of intervention,⁵⁰³ while interventions by the Litigation Association in the same field have also been accepted by the courts.⁵⁰⁴ In **Denmark**, the Danish Institute for Human Rights can bring cases of principle to the quasi-judicial equality body, the Board of Equal Treatment, including cases of general public interest.⁵⁰⁵ This competence proved very useful in 2021 when the Institute brought several such test cases leading to important rulings on principle by the Board.⁵⁰⁶ 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 interacts 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 **Albania, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia,**⁵⁰⁷ **France, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Malta, Montenegro,** the **Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden** and **Türkiye**. However, the conditions for associations to engage on behalf of victims of discrimination as well as the scope of such potential action vary among the countries. **Spanish** Act 62/2003 transposing the directives 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

502 See notably Filenews (2018), 'Quarrel over the responsibilities of the Commissioner for Administration', 26 April 2018, available at: <https://www.philenews.com/eidiseis/politiki/article/517554>.

503 Austria, Act on the Employment of Persons with Disability, Section 7q.

504 Austria, Linz Regional Court, *F. v Linz Linien AG*, case No. 33C1725/127/14, decision of 15 July 2013.

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

506 See, for instance, Board of Equal Treatment, Decisions Nos. 9134 and 9135 of 25 February 2021.

507 In Estonia, the legal standing of organisations to act on behalf of victims of discrimination is limited to quasi-judicial proceedings before the Gender Equality and Equal Treatment Commissioner and conciliation proceedings before the Chancellor of Justice. No such standing is possible before the courts.

approval, in any judicial procedure in order to make effective the principle of equal treatment based on racial or ethnic origin' (Article 31). 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 and the Supreme Court, but Constitutional Court proceedings remain excluded.⁵⁰⁸ 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 addition, trade unions and the Chamber of Labour may act on behalf of workers in employment-related cases. In **Latvia**, organisations and foundations whose aims are the protection of human rights and individual rights may represent victims of discrimination in court, but only before the lower instance courts and not before the Court of Cassation.⁵⁰⁹ However, in 2003, the Constitutional Court found a similar provision to be in violation of the Constitution, and it was repealed.⁵¹⁰

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.⁵¹¹ In practice however, the Ombudsperson does handle complaints lodged by organisations, generally by initiating proceedings 'on its own initiative' on the basis of the information provided. 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.⁵¹² Similarly, in **Ireland**, any individual or body may be authorised by an individual claimant to represent them before the Workplace Relations Commission and the Labour Court, but not before a civil court.

Swedish NGOs initiate strategic litigation to challenge the lack of assistance for pupils with dyslexia when taking national exams

In Sweden, children with dyslexia are allowed to use certain assistance devices to help them read in school. During the national exams however, such devices are not allowed. The schools, run by local authorities, refer in this regard to instructions issued by the National Education Authority.

In 2018, two NGOs working with issues related to disability joined forces with a local anti-discrimination bureau and a relatively new fund set up to help individuals bring strategic cases, to challenge before the courts the refusal to allow the use of assistance devices during national exams. Three cases were selected, and lawsuits were filed before three different courts, as well as a claim against the national Government due to the actions of the National Education Authority.

In 2019, the three initial cases were decided by three district courts. In the first two cases, the claimants lost as the courts applied a restrictive view on, for example, the issues of indirect discrimination and inaccessibility.⁵¹³ In the third case, the first instance court determined that the local authority was liable for indirect discrimination as well as discrimination in the form of inaccessibility. The court held that the

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

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

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

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

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

513 Sweden, District Court of Södertörn, case No. FT 7843-18, decision of 27.06.2019, *SL v Huddinge kommun*; District Court of Malmö, case No. FT 11836-18, decision of 12.11.2019, *LK v Malmö stad*.

local authority should have disregarded the guidelines of the Education Authority if respecting them meant violating the Discrimination Act.⁵¹⁴ At second instance, the first two decisions were confirmed,⁵¹⁵ while the third decision was quashed.⁵¹⁶ No discrimination was thus found in any of the cases. The Supreme Court did not grant leave to appeal any of the decisions.

In 2021, the case against the Government was also decided. The district court determined that the Education Authority was not liable as it is not an 'education provider' within the meaning of the Discrimination Act. With regard to the claim for damages due to a violation of the European Convention on Human Rights, the court, referring to the reasoning in the earlier dyslexia cases, held that the guidelines of the Education Authority (recommending longer time and a quiet room to take the exams) were proportionate to the goals of the exams. The reasonableness of the accommodations provided was essentially assumed.⁵¹⁷ The case is pending appeal.

The **Hungarian** Equal Treatment Act provides that 'non-governmental and interest representation organisations' as well as the Ombudsman, acting under the equality body mandate, may act on behalf of the victim in proceedings launched due to the violation of the equal treatment requirement.⁵¹⁸ The act specifies that such organisations include social organisations whose objectives, as set out in their 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 ground(s) or the protection of human rights.⁵¹⁹ 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, their finances and the circumstances of the case, and on condition that consent is given. Furthermore, the right of the Equality Ombudsman to bring a case to court is subsidiary to the right of a trade union to represent its members. Only where the trade union does not bring a case (or where the victim is not a member of a trade union) can the Ombudsman decide to do so.

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 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 **Türkiye**, 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.

514 Sweden, District Court of Örebro, case No. FT 7843-18, decision of 14.11.2019, *HD v Örebro kommun*.

515 Sweden, Svea Appeal Court, decision of 13 March 2020 in case No. FT 8377-19, *SL v Huddinge kommun*; Skåne and Blekinge Appeal Court, decision of 17 June 2020 in case No. FT 3697-19, *LK v Malmö kommun*.

516 Sweden, Göta Appeal Court, decision of 24 August 2020 in case No. FT 3960-19, *Örebro kommun v HD*.

517 Sweden, District Court of Solna, case No. FT 10318-20, decision of 22 December 2021, *LK v Sweden through the Chancellor of Justice*.

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

519 Hungary, Equal Treatment Act, Article 3.

Table 8: Legal standing of organisations in court (or before the national equality body) in discrimination cases

Country	Legal standing to act on behalf of victims	Legal standing to act in support of victims
ALBANIA	Law on Protection from Discrimination, Arts. 32(1)b, 33(1), 33(2) and 34(3)	No ⁵²⁰
AUSTRIA	Act on the Equal Treatment Commission and the National Equality Body, Sec. 12/2 ⁵²¹⁵²²	Equal Treatment Act (with limitations), Sec. 62 ⁵²³
BELGIUM	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
BULGARIA	Protection Against Discrimination Act, Art. 71(2) ⁵²⁴	Protection Against Discrimination Act, Art. 71(2)
CROATIA	Civil Procedure Act, Art. 434.a ⁵²⁵	Anti-discrimination Act, Art. 21
CYPRUS	Equal Treatment in Employment and Occupation Law, Art. 14	Equal Treatment in Employment and Occupation Law, Art. 14
	Equal Treatment (Racial or Ethnic origin) Law, Art. 12	Equal Treatment (Racial or Ethnic origin) Law, Art. 12
	Law on Persons with Disabilities, Art. 9D	Law on Persons with Disabilities, Art. 9D
CZECHIA	Anti-Discrimination Act, Sec. 11	No
	Civil Procedure Code, Sec. 26(3)	
DENMARK	Administration of Justice Act, Sec. 260 ⁵²⁶	Administration of Justice Act, Sec. 252
ESTONIA	Chancellor of Justice Act, Art. 23(2) ⁵²⁷	No ⁵²⁸
	Equal Treatment Act, Art. 17(1)	
FINLAND	Non-Discrimination Act, Sec. 21 ⁵²⁹	No ⁵³⁰
FRANCE	Law relating to the adaptation of National Law to Community Law in matters of discrimination, Art. 6	Law relating to the adaptation of National Law to Community Law in matters of discrimination, Art. 6 ⁵³¹
	Law relating to the fight against discrimination, Art. 2	Law relating to the fight against discrimination, Art. 2
GERMANY	No	General Equal Treatment Act, Sec. 23

520 The law is silent but according to Article 182 of the Labour Code, trade unions are entitled to act in support of their members. Furthermore, the Commissioner for Protection against Discrimination is usually requested by courts to attend the entire court proceedings as an interested party to the trial.

521 Representation before the Equal Treatment Commission.

522 The Act on the Labour and Social Courts, sec. 40/1/2 also allows representation by the Chamber of Labour and trade unions to represent workers in workplace related cases before courts of first and second instance.

523 Right to intervention in support of a victim for the Litigation Association of NGOs Against Discrimination.

524 Also, Administrative Procedure Code, Article 18(2).

525 Only trade unions and employers' organisations have standing to act on behalf of victims of discrimination. As a rule, associations cannot represent an individual victim in court, with the exception of lawyers employed by the trade unions who can represent workers in labour disputes.

526 This provision is limited to the field of employment, and provides more restricted legal standing to NGOs than to trade unions. Furthermore, the Public Administration Act provides legal standing for associations in front of the Board of Equal Treatment in all fields.

527 Only in conciliation procedures before the Chancellor of Justice (private sphere only).

528 As regards civil procedures, judicial interpretation is however required of Articles 213 and 216 of the Code of Civil Procedure.

529 Organisations can only act on behalf of victims before the Non-Discrimination and Equality Tribunal in cases outside employment. They cannot act on behalf of victims in court.

530 However, the Non-Discrimination Act (Section 27) requires that a court must, in cases concerning the application of the act, allow the Non-Discrimination Ombudsman the opportunity to be heard insofar as the matter pertains to the authority of the Ombudsman. Additionally, the prosecutor must allow the Non-Discrimination Ombudsman the opportunity to be heard prior to bringing charges for discrimination (Chapter 11, Section 11 of the Criminal Code).

531 Also, Law of social modernisation No. 2002-73, Article 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, Article 3 and Decree No. 2008799 on the Code of Administrative Justice Article 2 relating to all fields.

Country	Legal standing to act on behalf of victims	Legal standing to act in support of victims
GREECE	Equal Treatment Law, Art. 8(3) ⁵³²	Equal Treatment Law, Art. 8(3-4) ⁵³³
HUNGARY	Equal Treatment Act, Art. 18(1)	Equal Treatment Act, Art. 18(2) ⁵³⁴
ICELAND	Act on Administration of Equality, Art 9	No ⁵³⁵
	Act on Civil Procedure, Arts. 16(1) and 25(3)	No ⁵³⁶
IRELAND	Employment Equality Acts 1998-2021, Sec. 77(11) ⁵³⁷	Employment Equality Acts 1998-2021, Sec. 79(1) ⁵³⁸
	Equal Status Acts 2000-2018, Sec. 25(A) ⁵³⁹	Equal Status Acts 2000-2018, Sec. 25(1) ⁵⁴⁰
ITALY	Legislative Decree No. 215/2003 Implementing Directive 2000/43/EC, Art. 5	Legislative Decree No. 215/2003 Implementing Directive 2000/43/EC, Art. 5
	Legislative Decree No. 216/2003 Implementing Directive 2000/78/EC, Art. 5	Legislative Decree No. 216/2003 Implementing 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
LATVIA	Law on Associations and Foundations, Art. 10(3) ⁵⁴¹	Administrative Procedure Law, Art. 183
	Law on Trade Unions, Art. 12(4)	
LIECHTENSTEIN	Act on Equality of Persons with Disabilities, Art. 31 ⁵⁴²	Code of Civil Procedure Art. 17
LITHUANIA ⁵⁴³	Law on Equal Treatment, Art. 12(2)	Law on Equal Treatment, Art. 12(2)
LUXEMBOURG	No	General Anti-Discrimination Law, Arts. 7 and 18
MALTA	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 Disabilities) Act, Art. 33A	Equal Opportunities (Persons with Disabilities) Act, Art. 33A
MONTENEGRO	Law on the Prohibition of Discrimination, Arts. 21(4), 22(2) and 30	Law on Civil Procedure, Art. 205 ⁵⁴⁴
NETHERLANDS	Civil Code, Arts. 3:305a and 3:305b	Civil Code, Art. 3:305a
NORTH MACEDONIA	Law on Prevention and Protection Against Discrimination, Art. 23(2)	Law on Prevention and Protection Against Discrimination, Art. 40

532 Article 8(3) is to be read in conjunction with the general requirements laid down by Greek procedural statutes (Article 62 of the Code of Civil Procedure).

533 Article 8(3) and (4) are to be read in conjunction with the general requirements laid down by Greek procedural statutes (Article 62 of the Code of Civil Procedure).

534 In Hungary, standing to engage in support of victims is only available in administrative procedures, and not before courts.

535 Judicial interpretation of Article 6 of Act on Administration of Equality is needed in order to clarify whether action 'in support of victims', as set out in the directive, is permissible.

536 Judicial interpretation of Article 25(3) of the Act on Civil Procedure is needed as there are no explicit provisions setting out the right of organisations to act in support of victims in discrimination cases. In any case, the victim would have to be a member of the association, which would have to have a 'legally protected interest', and a case could only be brought to recognise certain rights of the member or to relieve the member of certain duties.

537 Only before the Workplace Relations Commission and Labour Court.

538 Only before the Workplace Relations Commission and Labour Court.

539 Only before the Workplace Relations Commission and Labour Court.

540 Only before the Workplace Relations Commission and Labour Court.

541 Except in Cassation cases where the right to legal representation is reserved to the person participating to the case or their advocate (defence counsel).

542 In the field of employment, accessibility of services and goods, education and integration.

543 It remains to be seen how Article 12(2) of the Law on Equal Treatment will be implemented, notably in conjunction with the relevant provisions of the Code of Civil Procedure.

544 In addition, the Law on the Prohibition of Discrimination also provides legal standing to act in support of victims to the Protector of Human Rights.

Country	Legal standing to act on behalf of victims	Legal standing to act in support of victims
NORWAY ⁵⁴⁵	Dispute Act, Secs. 3-3(4)	Dispute Act, Secs. 15-7
	Equality and Anti-Discrimination Act, Sec. 40	Mediation and procedure in civil disputes Act, Section 157
POLAND	Act on Code of Civil Procedure, Arts. 8, 61 and 462	Act on Code of Civil Procedure, Arts. 8, 61 and 462
PORTUGAL ⁵⁴⁶	Law 93/2017 establishing the legal regime for the prevention, prohibition and combating of discrimination on the grounds of racial and ethnic origin, nationality, ancestry and territory of origin, Art. 12(1)	Law 93/2017 establishing the legal regime for the prevention, prohibition and combating of discrimination on the grounds of racial and ethnic origin, nationality, ancestry and territory of origin, Art. 12(1)
	Labour Code, Arts. 443(1)(d) and 477(d)	Labour Code, Arts. 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	
ROMANIA	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
SERBIA	Law on the Prohibition of Discrimination, Art. 35(3)	Law on the Prohibition of Discrimination, Art. 35(3-4)
	Civil Procedure Code, Art. 85(3)	Civil Procedure Code, Arts. 215-217
SLOVAKIA	Anti-discrimination Act, Sec. 10	Civil Dispute Act, Sec. 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. 31 ⁵⁴⁷	No
	General Law on the Rights of Persons with Disabilities and their Social Inclusion, Art. 76	
	Law on Social Jurisdiction, Art. 20	
SWEDEN ⁵⁴⁸	Discrimination Act Ch. 6, Sec. 2	No
TÜRKIYE	Law on Unions and Collective Agreements, Art. 26(2) ⁵⁴⁹	No ⁵⁵⁰
UNITED KINGDOM	No	Yes ⁵⁵¹

545 In addition, legal standing for organisations to act on behalf of victims of discrimination is also provided by the Working Environment Act, Sec. 13-10.

546 The Decree law 106/2013, which defines the statutes for NGOs of persons with disabilities and the state support for those organisations, also provides legal standing to disability NGOs to act on behalf of victims.

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

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

549 Limited to trade unions and only on behalf of their members in cases concerning employment and social security issues. Similar provisions are applicable in the public sector (Law on Trade Unions of Civil Servants and Collective Agreements No. 4688, Article 19(2)-f).

550 The laws on civil, administrative and criminal procedure provide some standing to organisations that can demonstrate that they have been 'harmed', although in practice these provisions are interpreted narrowly and it is uncertain whether these provisions apply in cases of discrimination.

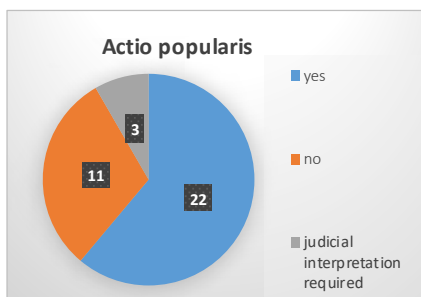
551 Organisations may do that which they are not prohibited from doing, and no law prohibits the provision of support to litigants.

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 2011,⁵⁵² 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.⁵⁵³ 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* (claims by organisations acting in the public interest on their own behalf, without a specific victim to support or represent).⁵⁵⁴ 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 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’.⁵⁵⁵



Actio popularis is permitted by national law for discrimination cases in 22 countries (**Albania**,⁵⁵⁶ **Austria**, **Belgium**,⁵⁵⁷ **Bulgaria**, **Croatia**, **France**, **Germany**,⁵⁵⁸ **Hungary**, **Italy**, **Liechtenstein**,⁵⁵⁹ **Luxembourg**, **Malta**,⁵⁶⁰ **Montenegro**,⁵⁶¹ the **Netherlands**, **North Macedonia**, **Norway**, **Portugal**, **Romania**, **Serbia**, **Slovakia**, **Spain**⁵⁶² and **Türkiye**). For example, in **Hungary**, social and interest representation organisations, the Ombudsman and the Public Prosecutor can bring *actio popularis* claims, provided that the violation of the

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

553 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.

554 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.

555 CJEU, Judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, C-54/07, ECLI:EU:C:2008:397.

556 *Actio popularis* is permitted before the administrative courts by law and before the Commissioner for Protection from Discrimination through its practice.

557 The equality body Unia, as well as registered associations and representative workers' organisations, can bring actions on their own behalf to challenge alleged breaches of the non-discrimination legislation.

558 This option exists notably on the basis of disability law and consumer protection law.

559 This option is nevertheless restricted. Articles 27 to 29 and 31 of the Act on Equality of Persons with Disabilities entitle associations for persons with disabilities to make legal claims on their own behalf for accessibility in public places (public buildings, roads and traffic areas, as well as public transport systems).

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

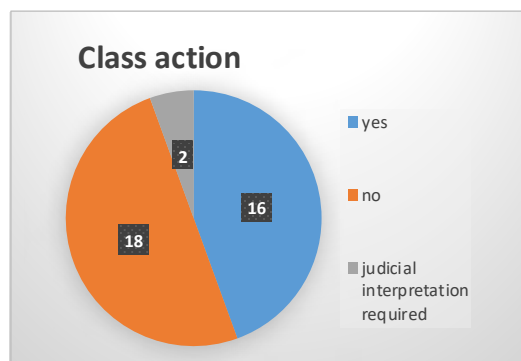
561 In Montenegro, anyone can initiate a procedure for the protection of public interest before the Constitutional Court (Article 150 of the Constitution).

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

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** however, such action is possible only in cases of discrimination on the ground of disability and can be brought by a limited number of organisations.

There are three countries in which judicial interpretation would be required. In the **United Kingdom**, the Senior Courts 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)). 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.⁵⁶³ In **Iceland**, the wording of the 2018 provisions regarding legal standing in discrimination cases is not sufficiently clear regarding the potential requirement for an identified victim.

Although *actio popularis* is not permitted by law for discrimination cases in **Cyprus**, it should be noted that the equality body used to accept and investigate complaints from organisations acting in the public interest on their own behalf without a specified victim. Since 2017 however, this practice appears to have changed.⁵⁶⁴ Finally, as of 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.⁵⁶⁵



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 16 countries: **Albania, Bulgaria, Denmark, France, Germany, Iceland,**⁵⁶⁶ **Italy, Liechtenstein, Lithuania, Montenegro, the Netherlands, North Macedonia, Norway, Portugal, Slovakia, Slovenia** and **Sweden**. In **Germany**, it still remains to be seen whether the procedure for consumer rights’ class action that was introduced in 2018⁵⁶⁷ could be relevant for discrimination law. In **Lithuania**, the

law does not allow associations, organisations or trade unions to represent a class action, but it does allow class action through representation by a lawyer. **Swedish** law allows the filing of a class action in a district court for claims arising from the same issue, but only for cases outside the employment field.⁵⁶⁸ In **Slovenia**, the 2017 Class Actions Act aimed to facilitate access to justice, prevent the unlawful conduct of perpetrators and enable access to compensation in cases of mass rights violations. In **France**, the legislation adopted in 2016 to create a procedure for class action specifically in cases of alleged discrimination contains several limitations and restrictions. These were highlighted by the Defender of

563 Supreme Administrative Court of Lithuania, Administrative case No A492-2078/2013, Decision of 7 November 2013.
 564 See notably Filenews (2018), ‘Quarrel over the responsibilities of the Commissioner for Administration’, 26 April 2018, available at: <https://www.philenews.com/eidiseis/politiki/article/517554>.
 565 Denmark, Section 1(7) of Consolidated Act No. 1230 of 2 October 2016.
 566 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.
 567 Germany, Act to introduce civil model declaratory proceedings, 12 July 2018, with effect from 1 November 2018.
 568 Sweden, Group Proceedings Act (2002:599).

Rights, the national equality body, in an opinion addressed to the Parliament in February 2020.⁵⁶⁹ The opinion highlighted in particular certain procedural difficulties related to the exclusive exercise of the class action procedure in the employment field by trade unions, as well as the need to create a fund to ensure financing of class actions.

Judicial interpretation is still required in two countries: **Cyprus** and **Malta**.

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. In **Romania**, aggregate claims by more than one victim arising from the same event would be annexed to the complaint both before the equality body and before the court.

Neither *actio popularis* nor class action is permitted in discrimination cases in the following countries: **Czechia, Estonia, Finland, Greece, Ireland, Latvia** and **Poland**.

4.3 Burden of proof⁵⁷⁰

As a result of the difficulties inherent in proving discrimination, Article 8 of the Racial Equality Directive and Article 10 of the Employment Equality Directive lay down that people who feel they have faced discrimination must only establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination.⁵⁷¹ 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.⁵⁷² **Portuguese** law states that the principle does not apply to criminal procedures or 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, or in conciliation proceedings before the Chancellor of Justice. 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.⁵⁷³ In **Bulgaria**, the shift of the burden of proof is applicable to both judicial proceedings and proceedings before the equality body. 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. In **Czechia**, the Constitutional Court's case law shows that in order to trigger the shift in the burden of proof, the claimant must (a) claim and prove that he/she was disadvantaged or treated in an unusual way, and (b) claim (but not necessarily prove) that such disadvantage or unusual treatment occurred as a result of

569 France, Defender of Rights (2020), Opinion No. 20-01 of 5 February 2020, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=31380&opac_view=-1.

570 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>.

571 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).

572 France, *Conseil d'Etat*, No. 298348, 30 October 2009. A recent analysis of the regulation on the shift of the burden of proof in discrimination cases can be found in Ringelheim, J. (2019) 'The burden of proof in anti-discrimination proceedings. A focus on Belgium, France and Ireland', in *European Equality Law Review*, issue 2019/2, pp. 49-64.

573 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.

some of the discrimination grounds.⁵⁷⁴ The claimant has also to demonstrate the existence of the specific ground of discrimination when it is not entirely clear in the claimant's situation. If all these conditions are fulfilled, the burden of proof is transferred to the respondent.

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. No explicit provision exists regarding the shift of the burden of proof in discrimination cases in social protection and social advantages. Similarly, in **Albania**, the shift of the burden of proof does not apply to access to goods and services in the private sector. The provision on the burden of proof in the **Austrian** 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'.⁵⁷⁵ In 2019, the **French** Court of Cassation explicitly revised its long-standing interpretation of the burden of proof in cases where discrimination allegedly arises from a collective agreement.⁵⁷⁶ In such cases, the claimant was previously considered to bear the burden of establishing that the differential treatment created arbitrary differences in treatment of persons in comparable situations that was foreign to any professional consideration.⁵⁷⁷ In **Sweden**, although the rule on the shift in the burden of proof applies in both the general court system and before the Labour Court, the two systems appear to differ in their implementation of the rule.

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

In 2017, for the first time, there was a situation where the labour court dealt with a case that was fairly identical with another case submitted to the general court system one year earlier. In both cases the focus was on implementation of the burden of proof.

These cases turned on whether disposable sleeves are an alternative to bare lower arms for a Muslim dental student (district court)⁵⁷⁸ or a Muslim dentist (labour court).⁵⁷⁹ The focus was on the application of health and safety regulations, the desire of those involved not to work with their lower arms exposed due to religious reasons and whether or not an application of this rule constituted indirect discrimination.

Two experts were questioned in those cases on the necessity of having bare arms for hygienic standards and provided opposing opinions. The district court, in a case involving the education of dental students, concluded that the opinions of both experts were credible, but that the defendant bore the burden of proof. Therefore, the defendant lost the case since it was not able to prove that disposable forearm protection would increase the risk of infection.

On the other hand, the labour court came to the opposite judgment, even though it was deciding a case based on the essentially the same evidence. The labour court said that when the employer had presented the genuinely objective theoretical hygienic reasons, the burden of proof shifted back to the claimant, even though the experts were deemed to be equally credible. Since the Equality Ombudsman failed to disprove the assertions of the employer's expert, the Equality Ombudsman lost the case. The main argument for this outcome was that, when the patient's security is at risk, the employer must be allowed a wide margin of appreciation to set hygienic rules (*försiktighetsprincipen* – the duty-of-care principle) and thus any remaining doubt must fall on the claimant.

574 Czechia, Constitutional Court, No. III. ÚS 880/15, 8 October 2015, http://nalus.usoud.cz/Search/GetText.aspx?sz=3-880-15_1.

575 The Act on the Employment of Persons with Disabilities and the Federal Disability Equality Act contain the same wording.

576 France, Court of Cassation, Social Chamber, decision of 3 April 2019, case No. 17-11970.

577 See for instance France, Court of Cassation, Social Chamber, decision of 1 July 2009, No. 07-42675.

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

579 Swedish Labour Court, *Equality Ombudsman v Peoples Dentist of Stockholm County*, Judgment No. 65/2017 of 20 December 2017. Available at: <https://www.arbetsdomstolen.se/media/n2bn4bbn/65-17.pdf>.

With regards to the directives' provision on the shift of the burden of proof, the meaning of the terms 'facts from which it may be presumed that there has been direct or indirect discrimination' was one of several questions put before the Court of Justice of the European Union in the *Firma Feryn* case.⁵⁸⁰ The Court concluded in this regard that 'statements by which an employer publicly lets it be known that, under its recruitment policy, it will not recruit any employees of a certain ethnic or racial origin may constitute [such] facts.'⁵⁸¹ 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.'⁵⁸²

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** and **Spain**.

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 at federal level 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.⁵⁸³ In **Ireland**, the protection against victimisation is also limited, in that such complaints may only be referred against the complainant's employer and not, for instance, against a trade union.⁵⁸⁴

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. 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.

A few countries have gone further than the requirements of the directives. For example, in the **United Kingdom**, it is not required that the perpetrator of the victimisation should have been involved in the initial complaint. For example, an employer who refuses to employ a person because he or she

580 CJEU, Judgment of 10 July 2008, *Firma Feryn*, C-54/07, ECLI:EU:C:2008:397.

581 CJEU, Judgment of 10 July 2008, *Firma Feryn*, C-54/07, ECLI:EU:C:2008:397, para 31.

582 CJEU, Judgment of 25 April 2013, *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*, C81/12, ECLI:EU:C:2013:275.

583 In its judgment of 20.06.2019, *Hakelbracht* (C-404/18), the CJEU found that the provision of the Belgian Gender Act that provides protection against victimisation is incompatible with EU law. The relevant provision uses the same wording as that of Belgian law transposing Directives 2000/43/EC and 2000/78/EC.

584 Ireland, Labour Court, *Association of Secondary Teachers, Ireland v Dunbar*, Decision No. EDA2811 of 25 August 2011, available at: <https://www.workplacelrelations.ie/en/cases/2011/august/eda1128.html>.

complained of discrimination or assisted a victim of discrimination in a previous job would still be liable for victimisation. In **Bulgaria**, protection is explicitly accorded for victimisation by presumption and by association. Furthermore, the Supreme Administrative Court held in 2021 that no specific proof is required of a causal link between the initial complaint against the employer and the adverse treatment amounting to victimisation.⁵⁸⁵

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.

Table 9: Prohibition of victimisation in national law (in the case of decentralised states only federal law is indicated)

Country	Legislation	Protection extended outside employment
ALBANIA	Law on Protection from Discrimination, Article 3(17)	Yes
AUSTRIA	Equal Treatment Act, Sections 27, 39	Yes
	Federal Equal Treatment Act, Sec. 20b	No
	Act on the Employment of Persons with Disabilities, Sec. 7i/2	No
	Federal Disability Equality Act, Sec. 9/5	Yes ⁵⁸⁶
BELGIUM	Racial Equality Federal Act, ⁵⁸⁷ 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	Equal Treatment in Employment and Occupation Law, Art. 10	No
	Equal Treatment (Racial or Ethnic origin) Law, Art. 11	Yes
	Law on Persons with Disabilities, Art. 9E	Yes
CZECHIA	Anti-Discrimination Act, Sec. 4(3)	Yes
DENMARK	Act on Prohibition of Discrimination in the Labour Market etc., Sec. 7(2)	No
	Ethnic Equal Treatment Act, Sec. 8	Yes
	Act on the Prohibition of Discrimination due to Disability, Sec. 9	Yes
ESTONIA	Equal Treatment Act, Art. 3(6)	Yes
FINLAND	Non-Discrimination Act, Sec. 16	Yes
FRANCE	Law relating to the adaptation of National Law to Community Law in matters of discrimination, Arts. 2 and 3	Yes
GERMANY	General Act on Equal Treatment, Sec. 16	No
GREECE	Equal Treatment Law, Art. 10	Yes
HUNGARY	Equal Treatment Act, Art. 10(3)	Yes
ICELAND	Racial Equality Act, Art. 13	Yes
	Labour Equality Act, Art. 13	No
IRELAND	Employment Equality Acts 1998-2021, Secs. 14, 74(2)	No
	Equal Status Acts 2000-2018, Sec. 3(2)(j)	Yes

585 Bulgaria, Supreme Administrative Court, Decision No. 7293 of 16 June 2021 in case No. 2405/2021.

586 The Federal Disability Equality Act includes protection against victimisation outside the employment field only.

587 Belgian law only protects victims, their representatives and witnesses against victimisation while the EU directives cover 'all persons' involved.

Country	Legislation	Protection extended outside employment
ITALY	Legislative Decree No. 215/2003 Implementing Directive 2000/43/EC, Art. 4bis	Yes
	Legislative Decree No. 216/2003 Implementing Directive 2000/78/EC, Art. 4bis	No
LATVIA	Labour Law, ⁵⁸⁸ Art. 9(1)	Yes
LIECHTENSTEIN	Act on Equality of Persons with Disabilities, Art. 23(4)	Yes
LITHUANIA	Law on Equal Treatment, Art. 7(8)	No
	Labour Code, Art. 26(2)(5)	No
LUXEMBOURG	General Anti-Discrimination Law, ⁵⁸⁹ Arts. 4 and 18	Yes
MALTA	Employment and Industrial Relations Act, Art. 28	No
	Equal Treatment of Persons Order, Art. 7	Yes
	United Nations Convention on the Rights of Persons with Disabilities Act, Part A of the Fourth Schedule	Yes
MONTENEGRO	Law on the Prohibition of Discrimination, Art. 4.	Yes
NETHERLANDS	General Equal Treatment Act, Arts. 8 and 8a	Yes
	Disability Discrimination Act, Arts. 9 and 9a	Yes
	Age Discrimination Act, Arts. 10 and 11	Yes
NORTH MACEDONIA	Law on Prevention and Protection Against Discrimination, Art. 11	Yes
NORWAY	Equality and Anti-Discrimination Act, Sec. 14	Yes
POLAND ⁵⁹⁰	Equal Treatment Act, Art. 17	Yes
PORTUGAL	Labour Code, Arts. 129(1), 331(1)(a)-(d), 351(1)(3), 381(b)	No
	Law 93/2017 establishing the legal regime for the prevention, prohibition and combating of discrimination on the grounds of racial and ethnic origin, nationality, ancestry and territory of origin, Art. 13	Yes
ROMANIA	Ordinance (GO) 137/2000 regarding the prevention and the punishment of all forms of discrimination, Art. 2(7)	Yes
SERBIA	Law on the Prohibition of Discrimination, Art. 9	Yes
SLOVAKIA	Anti-discrimination Act, Sec. 2a(1) and (8)	Yes
	Labour Code, Sec. 13(3)	No
SLOVENIA	Protection Against Discrimination Act, Arts. 7(4) and 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, Secs. 18-19	Yes ⁵⁹¹
TÜRKIYE	Law on Human Rights and Equality Institution of Türkiye, Art. 4(2)	Yes
UNITED KINGDOM	(GB) Equality Act, Sec. 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, Sec. 55	Yes
	(NI) Employment Equality (Age) Regulations, Reg. 4	No

588 Protection against victimisation is also provided outside the employment field by the following laws: the 1995 Law on Social Security, Article 34(2), the 1999 Law on Consumer Protection, Article 3¹(10), and the 2012 Law on Prohibition of Discrimination against Natural Persons – Parties to Legal Transactions, Article 6.

589 The Public Sector Law of 29 November 2006 also includes protection against victimisation in the public sector.

590 The Labour Code also prohibits victimisation.

591 The protection applies to all areas covered by the Discrimination Act.

4.5 Sanctions and remedies⁵⁹²

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 meaning of this concept must be determined in each case in the light of individual circumstances.

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 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.⁵⁹³ Finally, the **Polish** Equal Treatment Act only refers to ‘compensation’ (which in Polish law is generally interpreted to cover only material damage), and case law shows discrepancies in whether different courts consider that compensation for non-material damage can be awarded in discrimination cases.⁵⁹⁴

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 administrative fines between the equivalents of EUR 125 and EUR 1 250 – amounts that would be dissuasive to the majority.⁵⁹⁵ 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 particularly in cases where the respondent was a public authority and where it found that discrimination had taken place, and only

592 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, C. (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.

593 Criminal sanctions may be applicable, depending on the interpretation of the court.

594 For a positive example, see Poland, Regional Court of Warsaw, judgment of 29 September 2020, No. V Ca 2686/19 (not published).

595 Bulgaria, Protection Against Discrimination Act, Articles 78-80.

rarely issued fines. Following the CJEU decision, the NCCD has increasingly issued fines and has begun to increase their amount.⁵⁹⁶ 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. Furthermore, the Ombudsman has not yet issued any binding decisions or imposed any fines. The Equality Tribunal in **Norway** has the competence to issue administrative decisions, including the ability to award compensation. The **Danish** Board of Equal Treatment issues binding decisions and can award compensation. Its decisions can be appealed before the civil courts. In **Slovakia**, the Offices of Labour, Social Affairs and Family are entitled to investigate complaints regarding discriminatory job-announcements. When the Labour Office finds a violation, it can impose a fine of up to EUR 33 193. However, in practice the Labour Offices face difficulties in identifying the entity which published the discriminatory announcement and therefore to impose sanctions on the responsible person and/or company. In **Cyprus**, employers with more than 19 employees may be required by the court to reinstate an employee whose dismissal was either: (i) manifestly unlawful or (ii) unlawful and made in bad faith.

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.

Compensation for discrimination in education in Hungary: the Gyöngyöspata debate

In 2015, the Supreme Court of Hungary (Curia) concluded in an *actio popularis* lawsuit that the Roma pupils in a primary school in Gyöngyöspata had been segregated and received lower quality education. Based on the Curia's final decision, 63 former Roma pupils launched a lawsuit for damages against the school, the Municipal Council and the central school maintainer (KLIK) for the long-term disadvantages they had suffered as a result of their substandard education.

In October 2018, the first instance court concluded that the respondents had violated the claimants' right to equal treatment and awarded compensation for non-pecuniary damage to 60 claimants.⁵⁹⁷ In September 2019, the Appeals Court upheld, in essence, the decision that non-pecuniary damages were to be paid to victims of segregation and discrimination in education, as it is common knowledge that segregation causes a feeling of humiliation and inferiority and hinders the children concerned in overcoming their sociocultural disadvantages.⁵⁹⁸ In addition, substandard education also puts the victims at a disadvantage in all areas of life, including studies and employment. The court granted EUR 1 400 (HUF 500 000) for each school year when a complainant was segregated and received inferior education, and EUR 833 (HUF 300 000) for each year when a complainant was segregated but the substandard quality of education was not proven.

The respondents requested an extraordinary review by the Curia, and while that review was still pending, a fierce Government campaign was launched claiming that the granting of monetary compensation to the Roma victims was unjust and destructive and that the claimants received money without any work, whereas 'Hungarians' would have to work hard for years for such amounts of money.⁵⁹⁹ The campaign relativised the significance of segregation, depicted the Roma as not belonging to the community

596 Romania, National Council for Combating Discrimination (2022), *2021 Annual Report*, available at: <https://www.cncd.ro/wp-content/uploads/2022/04/Raport-de-activitate-CNCD-2021-.pdf>; and NCCD (2020), *2019 Annual Report*.

597 Hungary, Eger Regional Court, Judgment No. 12.P.20.489/2015/402, of 16 October 2018.

598 Hungary, Debrecen Appeals Court, Judgment No. P.f.I.20.123/2019/16, of 16 September 2019.

599 Index (2020), 'According to Orban, segregation compensation for Gypsy students in Gyöngyöspata is money received without any work', news article, 9 January 2020, available at: https://index.hu/belfold/2020/01/09/orbaninfo-gyongyospata_gyori_gyerekyilkos_birosagi_iteletek_biralat/.

of Hungarians, and promoted ‘remedies’ in the form of services provided to the victims instead of monetary compensation.⁶⁰⁰

In May 2020, the Curia upheld the second instance judgment, clarifying that *in integrum restitutio* is inconceivable with respect to the humiliation and frustration caused by segregation. The provision of in-kind compensation for violations of inherent personality rights (such as the right to dignity and non-discrimination) would also be conceptually impossible, as this type of compensation is only applicable if the damage occurred in so-called replaceable items (such as crops). The Curia concluded that moral damage may only be compensated with money.⁶⁰¹

In June 2020, a legislative proposal was submitted by the ruling party’s MP for the Gyöngyöspata region to amend the National Public Education Act, excluding the possibility of demanding pecuniary compensation for moral damage caused by violations of inherent personal rights committed by educational institutions. Instead, in such cases, ‘the moral damages shall be granted by the court in the form of educational or training services’ either provided or purchased by the violator.

The amendment was adopted by Parliament on 3 July and entered into force on 22 July.⁶⁰²

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. In particular, as noted by the Court in its ruling in *Asociația Accept* in 2013,⁶⁰³ the ‘severity of the sanctions must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect (...), while respecting the general principle of proportionality.’⁶⁰⁴ It further noted that ‘a purely symbolic sanction cannot be regarded as being compatible with the correct and effective implementation of Directive 2000/78’. 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.⁶⁰⁵ Upper limits are not acceptable, except for situations where the damage was not caused through discrimination alone.⁶⁰⁶

There appear to be no limits either in relation to pecuniary or non-pecuniary damages in the national laws of **Albania, Belgium, Bulgaria,**⁶⁰⁷ **Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany,**⁶⁰⁸ **Greece, Iceland, Italy, Liechtenstein, Lithuania, Luxembourg, Montenegro, the Netherlands,**⁶⁰⁹ **North Macedonia, Norway, Poland, Portugal, Romania, Serbia, Slovakia,**⁶¹⁰ **Spain, Sweden** and the **United Kingdom**. In **Poland**, there is a *minimum* level of compensation, which is linked to the minimum wage. 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. These guiding criteria were

600 Index (2020), ‘Orbán: “I have already been killed eight times by the Soros network”’, news article, 17 January 2020, available at: https://index.hu/belfold/2020/01/17/orban_engem_mar_nyolcszor_olt_meg_soros_halozata/.

601 Hungary, Supreme Court (Curia), Judgment No. Pfv.IV.21.556/2019/22 of 12 May 2020.

602 Hungary Act LXXXVII of 2020 on the Amendment of Act CXC of 2011 on National Public Education.

603 CJEU, Case C-81/12, *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*, judgment of 25.04.2013, ECLI:EU:C:2013:275.

604 With regard to the ‘genuinely dissuasive effect’ of sanctions, the Court cited Case C383/92 *Commission v United Kingdom*, 8.06.1994, ECLI:EU:C:1994:234 and Case C180/95 *Draehmpaehl*, 22.04.1997, ECLI:EU:C:1997:208. With regard to the general principle of proportionality in relation to sanctions, the Court cited Case C101/01 *Lindqvist*, 06.11.2003, ECLI:EU:C:2003:596, and Case C430/05 *Ntounik and Pikoulas*, 5.07.2007, ECLI:EU:C:2007:410.

605 CJEU, Case C-271/91, *Marshall v Southampton and South West Hampshire Area Health Authority*, judgment of 2.08.1993 (‘Marshall II’), paras 25-26.

606 CJEU, Case C-180/95, *Draehmpaehl v Urania Immobilienservice*, judgment of 22.04.1997, ECLI:EU:C:1997:208.

607 In Bulgaria, according to settled case law (not specific to non-discrimination law), legal persons cannot claim compensation for non-material damage. See for instance, Sofia City Court, Decision No. 5103 of 11.07.2018 in case No. 1693/2016.

608 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).

609 Dutch law provides for a limit on compensation, applicable only in administrative law proceedings.

610 The Slovakian Labour Code provides however for an upper limit 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.

increased by 50 % in 2020.⁶¹¹ In **Slovenia**, the Protection Against Discrimination Act stipulates the right of victims of discrimination to claim compensation of between EUR 500 and EUR 5 000. However, it is not clear how these provisions relate to the general rules of tort law, which contains no upper limit on the compensation. In **Hungary**, if discrimination is manifested in the unlawful termination of employment, the Labour Code establishes an upper limit of 12 months of salary as compensation for lost income.⁶¹² However, if the court orders the reinstatement of the unlawfully dismissed employee, the employment is regarded as continuous. The employee will then receive their lost income as 'unpaid salary' and not as 'damages', without any upper limit. In **France**, since 2017, the Labour Code has provided for mandatory scales and ceilings regarding the damages awarded in relation to the dismissal of an employee. However, the mandatory scale does not apply when the judge finds that the dismissal is null and void because it breaches a fundamental right or constitutes harassment or discrimination prohibited by law.

In **Latvia**, there is no maximum amount for compensation under civil law, but the Reparation of Damages caused by State Administrative Institutions Act sets maximum amounts of compensation for different categories of harm, such as EUR 30 000 if life has been endangered or grievous harm has been caused to health. **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.

German Federal Labour Court provides guidance on compensation

The claimant has severe disabilities. He applied for employment at a public health insurance company but was not invited to an interview. The courts upheld his claim that the failure to invite him to an interview was sufficient to establish an assumption that he had not been considered for the post due to his disabilities. The burden of proof was thus shifted to the respondent, who did not refute the assumption.

The Federal Labour Court was called upon to clarify the standards for the compensation awarded according to Section 15.2 of the General Act on Equal Treatment. It emphasised that the sanction serves as both compensation and prevention of further discrimination. Contrary to the findings of the lower instance court, the Federal Labour Court clarified that the amount of compensation cannot be reduced due to various factors. Notably, the fact that the employer employed more persons with severe disability than it was legally obliged to, is unrelated to – and thus irrelevant in calculating – the amount of compensation in the specific case. Other irrelevant factors included the fact that the position was part time and that the employer had behaved in a polite and respectful manner vis-à-vis the claimant. Finally, the fact that the employer is a public entity did not diminish its responsibility under anti-discrimination law. The court finally awarded compensation of EUR 4 100.⁶¹³

The practice of courts with regards to sanctions in general and the award of compensation in particular varies considerably. There are several countries where some worrying trends can be noted in this regard. In **Czechia**, in the majority of discrimination cases brought before the courts, compensation for non-pecuniary damage is considered to be a subsidiary measure which is only awarded in case of particularly serious violations.⁶¹⁴ In **France** and the **Netherlands** for instance, courts are generally reluctant to award substantial amounts when calculating pecuniary loss, and the amounts awarded remain rather low. In **Greece**, on the other hand, there are no known cases on any ground where compensation has been awarded. In **Finland**, a study published in 2020 showed that compensation due to a violation of the Non-

611 Croatia, Supreme Court, decision of the second session of the civil department of 5 March and 15 June 2020, No. Su-IV-47/2020-5, available at: http://www.vsrh.hr/custompages/static/HRV/files/PravnaShvacanja/zadnja_verzija_VSRH_GO_2020_Su-IV-47-2020-5_2020-3-5_sjed02.pdf.

612 Hungary, Labour Code, Article 82(2).

613 Germany, Federal Labour Court, decision of 28 May 2020 in case No. 8 AZR 170/19, available at: <https://www.bundesarbeitsgericht.de/wp-content/uploads/2021/01/8-AZR-170-19.pdf>.

614 See, notably: Public Defender of Rights (Ombudsman) (2020), *Discrimination case law of Czech courts 2015-2019*, available at: https://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyzkum/2020-vyzkum_judikatura-DIS.pdf.

Discrimination Act was awarded on only three occasions between 2015 and 2019. One of the conclusions in this regard was that the risk of having to pay the respondent's legal costs acts as a deterrent for potential claimants.⁶¹⁵

Low levels of compensation, coupled with the length of time it can take to obtain a decision casts doubt on the effectiveness of remedies. Their dissuasiveness is also questionable, in particular as far as larger employers are concerned. In this regard, **Spanish** and **Portuguese** legislation present an interesting approach, as company turnover can in some cases be used to determine the level of penalties. **Denmark** and **Norway** are also interesting in this regard, as quasi-judicial equality bodies can award compensation to victims in these countries.⁶¹⁶ Another practice worth highlighting is the awarding of punitive damages, for example in **Italy**.⁶¹⁷ In **Sweden**, a 2021 district court ruling clarified that compensation for non-material damage due to discrimination has a preventive purpose that goes beyond simply compensating the individual victim, and thus, in the case in question, the widow of the victim who had died in relation to the discrimination could inherit his right to compensation.⁶¹⁸

615 Nieminen, K., Jauhola, L., Lepola, O., Rantala, K., Karinen, R., Luukkonen, T. (2020), *Aidosti yhdenvertaiset, Yhdenvertaisuuslain arviointi* (Study commissioned by the Prime Minister's Office on the implementation of the Non-Discrimination Act), p. 62.

616 In Norway, the Equality Tribunal can award damages for economic losses and, in fields other than employment, damages for non-pecuniary injury.

617 See, for instance: Italy, Supreme Court, Judgment of 15 December 2020, *T.C. v Associazione diritti LGBTI – Rete Lenford*, No. 28646, available at: https://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/28646_12_2020_no-ndex.pdf; CJEU, 23 April 2020, C-507/18.

618 Sweden, Göteborg District Court, *Equality Ombudsman (DO) v Region Västra Götaland*, decision of 26 May 2021 in case No. T 17336-19.

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.'

In June 2018, the European Commission issued a Recommendation on standards for equality bodies, encouraging Member States to ensure greater independence, extended competences and adequate resources for their national specialised bodies, among other things. Although the Recommendation is not binding, it is noteworthy that it calls for the 'independence' of equality bodies, although the Directive only requires the independent exercise of their functions.⁶¹⁹

In 2021, the Commission published its third implementation report on the Racial Equality and Employment Equality Directives, accompanied by a staff working document analysing the implementation of the 2018 Recommendation. The Commission concluded that a 'limited and unequal level of implementation of the Recommendation continues to hinder some equality bodies in effectively exercising their role', which leads to 'different levels of protection against discrimination across the EU'.⁶²⁰ On the basis of this finding, the Commission announced its intention to propose new legislation to strengthen the role of national equality bodies by the end of 2022.⁶²¹

All EU Member States have designated a specialised body for the promotion of equal treatment irrespective of racial or ethnic origin, as required by Article 13 of the Racial Equality Directive. All the candidate countries covered by this report have also set up such 'specialised bodies', as have the three EEA countries and the United Kingdom.

When transposing Article 13 of the Racial Equality Directive, some Member States, such as **France, Germany, Greece, Hungary, Italy, Romania, Slovenia** and **Spain**, opted to set up completely new bodies. Bodies that already existed but which were given the functions designated by Article 13 include the **Cypriot** Ombudsman, the **Estonian** Chancellor of Justice and the Gender Equality and Equal Treatment Commissioner, the **Lithuanian** Equal Opportunities Ombudsperson, the **Maltese** National Commission for the Promotion of Equality, the **Slovak** National Centre for Human Rights and the **Croatian** Ombudsperson.

In the past 10 years, a trend has arisen of merging 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.⁶²² In the **Netherlands**, the Human Rights Institute was established in November 2011,⁶²³ replacing the previous Equal Treatment Commission. Similarly, in 2014, the **Irish** Equality Authority and the Human Rights Commission were merged into the Irish Human Rights and Equality

619 European Commission (2018), Commission Recommendation of 22.06.2018 on standards for equality bodies, C(2018) 3850 final, Brussels.

620 European Commission (2021), *Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive')*, Brussels, 19.03.2021, COM(2021) 139 final, p.14, available at: https://ec.europa.eu/info/sites/default/files/report_on_the_application_of_the_racial_equality_directive_and_the_employment_equality_directive_en.pdf.

621 After the cut-off date of this report, on 7 December 2022, the Commission presented two proposals for the adoption of directives on binding standards for equality bodies, see COM(2022) 688 final and COM(2022) 689 final, both available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination-0/tackling-discrimination/equality-bodies_en.

622 France, Act No. 2011-333 of 29 March 2011 creating the Defender of Rights.

623 Netherlands, Act of 24 November 2011 on the establishment of the Netherlands Institute for Human Rights, Staatsblad 2011, 573.

Commission.⁶²⁴ 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.⁶²⁵ More recently, on 1 December 2020, the **Hungarian** Equal Treatment Authority, which had been established in 2004, was abolished and its tasks and competences were transferred to the Ombudsman. As of 1 January 2021, claimants may decide whether their complaints should be handled by the Ombudsman in his original capacity or in his capacity as successor to the Equal Treatment Authority. The institutional transfer has been criticised in particular for the haste with which it took place, the lack of consultation with relevant stakeholders and the risk of ‘downgrading’ the issue of non-discrimination.⁶²⁶

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. As a result, there are significant differences between the equality bodies established in the Member States in terms of their mandate, competences, structures, resources and operational functioning. There are undeniable advantages with instituting multiple-ground bodies, such as facilitating access for complainants, cost-effectiveness and capacity to deal with intersectionality and multiple discrimination. Such bodies may also face challenges however, such as implementing different standards of protection for different grounds of discrimination and ensuring balanced visibility for and relevance to all grounds covered by their mandate. Interpretations given by national courts of concepts may differ between the grounds protected.

624 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>.

625 Sweden, Equality Ombudsman Act (2008:568).

626 See, notably, MEOSZ (National Federation of Organisations of People with a Physical Disability) (2020), ‘MEOSZ says effective enforcement could be jeopardised by the abolition of the Equal Treatment Authority’, press release, 16 November 2020, <http://www.meosz.hu/blog/a-meosz-szerint-veszelybe-kerulhet-a-hatekony-jogervenyesites-az-ebh-megszuntetesevel/>; Civilisation Coalition (2020), ‘The merger of the Equal Treatment Authority into the Office of the Commissioner for Fundamental Rights is a very bad step’, press release, 19 November 2020, <https://civilizacio.net/hu/hirek-jegyzetek/nagyon-rossz-lps-az-egyenl-bnsmd-hatsg-beolvasztsa-az-alapvet-jogok-biztosnak-hivatalba>; and ILGA Europe (2020), ‘ILGA-Europe is alarmed by Hungarian Parliament’s moves to abolish the national Equal Treatment Authority’, press release, 10 November 2020, <https://www.ilga-europe.org/resources/news/latest-news/ilga-europe-alarmed-hungarian-parliaments-moves-abolish-national-equal>. See also Venice Commission (2021), *Hungary – Opinion on the amendments to the Act on Equal Treatment and Promotion of Equal Opportunities and to the Act on the Commissioner for Fundamental Rights as adopted by the Hungarian parliament in December 2020, adopted by the Venice Commission at its 128th Plenary Session*, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2021\)034-eu](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)034-eu).

Table 10: Relevant specialised bodies dealing with racial/ethnic origin, and the grounds and competencies covered by their mandates

Country / Specialised body	Grounds covered by the mandate	Competences covered by the mandate					
		Independent assistance to victims	Independent surveys	Independent reports	Recommendations	Quasi-judicial functions	Binding decisions
ALBANIA Commissioner for Protection from Discrimination ⁶²⁷	Race, colour, ethnicity, language, citizenship, political, religious or philosophical beliefs, economic, education or social situation, gender, gender identity, sexual orientation, characteristics of sex, life with HIV/AIDS, pregnancy, parentage, parental responsibility, age, family or marital condition, civil status, residence, health status, genetic predispositions, appearance, disability, affiliation with a particular group or for any other grounds.	Yes	Yes	Yes	Yes	Yes	Yes
AUSTRIA Equal Treatment Commission ⁶²⁸	Gender, ethnic affiliation, religion, belief, age, sexual orientation.	No	No	No ⁶²⁹	Yes	Yes	No
National Equality Body ⁶³⁰	Gender, ethnic affiliation, religion, belief, age, sexual orientation.	Yes	Yes	Yes	Yes	No	N/A
BELGIUM Inter-federal centre for Equal Opportunities and Opposition to Racism and Discrimination (Unia) ⁶³¹	Alleged race, colour, descent, national or ethnic origin, nationality, age, sexual orientation, civil status, birth, property (<i>fortune</i>), religious or philosophical belief, state of health, disability, physical or genetic features, political opinion, trade union opinion (<i>conviction syndicale</i>) and social origin.	Yes	Yes	Yes	Yes	No	N/A
BULGARIA Protection Against Discrimination Commission ⁶³²	Race, ethnicity, gender, 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

627 Albania, Law on Protection from Discrimination, Articles 21-33.

628 Austria, Act on the Equal Treatment Commission and the National Equality Body, Sections 1, 2, 11-14.

629 The Equal Treatment Commission also publishes reports about its work and summarises the general situation, but this is not part of its mandate by law.

630 Austria, Act on the Equal Treatment Commission and the National Equality Body, Sections 3-5.

631 Belgium, 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, Article 2.

632 Bulgaria, Protection Against Discrimination Act, Articles 4(1), 40 and 47.

Country / Specialised body	Grounds covered by the mandate	Competences covered by the mandate					
		Independent assistance to victims	Independent surveys	Independent reports	Recommendations	Quasi-judicial functions	Binding decisions
CROATIA People's Ombudsperson ⁶³³	Race or ethnic origin or colour, language, religion, political or other belief, national or social origin, property, trade union membership, education, social status, age, health condition, genetic heritage.	Yes	Yes	Yes	Yes	No	N/A
CYPRUS Office of the Commissioner for Administration and the Protection of Human Rights (Ombudsman) ⁶³⁴	Race, community, language, colour, religion, political or other beliefs, national or ethnic origin, disability, age and sexual orientation (<i>explicitly listed</i>). In addition, all rights guaranteed by the Constitution (including 'any ground whatsoever'), in the ECHR and its protocols (including Protocol 12), 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.	Yes ⁶³⁵	Yes	Yes	Yes	Yes	Yes ⁶³⁶
CZECHIA Public Defender of Rights ⁶³⁷	Sex, race, ethnic origin, sexual orientation, age, disability, religion, belief or other conviction, 'nationality' (<i>národnost</i>), EU citizenship. ⁶³⁸	Yes	Yes	Yes	Yes	No	N/A
DENMARK Institute for Human Rights – The National Human Rights Institute of Denmark ⁶³⁹	Race, ethnic origin, gender, sexual orientation, gender identity, gender expression or gender characteristic. ⁶⁴⁰	Yes	Yes	Yes	Yes	No	N/A

633 Croatia, Anti-discrimination Act, Article 12(1). The People's Ombudsperson 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.

634 Cyprus, Combating of Racial and other forms of Discrimination (Commissioner) Law No. 42(I)/2004, Articles 5 and 7.

635 Judicial interpretation may be required to determine whether the mandate of the Cypriot body to issue reports containing recommendations in response to victims' complaints can constitute 'independent assistance'.

636 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.

637 Czechia, Act No. 349/1999, on the Public Defender of Rights, Article 21(b).

638 In addition, the Anti-discrimination Act contains a reference to Regulation (EU) No. 492/2011. In situations relating to the free movement of workers where the said regulation applies, EU citizenship is also deemed a discrimination ground.

639 Denmark, Act No. 553 of 18 June 2012.

640 The mandate stipulated in the Act only covers gender, race and ethnic origin. According to Parliament Decision B15 of 17 December 2010, the DIHR is also responsible for monitoring the Danish implementation of the UN Convention on Rights of Persons with Disabilities. In practice, the DIHR has a broad human rights mandate and deals with all discrimination grounds, including gender, age, disability, sexual orientation, religion and faith, ethnicity and race.

Country / Specialised body	Grounds covered by the mandate	Competences covered by the mandate					
		Independent assistance to victims	Independent surveys	Independent reports	Recommendations	Quasi-judicial functions	Binding decisions
Board of Equal Treatment ⁶⁴¹	Protected grounds in employment: gender, race, skin colour, religion or belief, political opinion, sexual orientation, gender identity, gender expression or gender characteristics, age, disability, national origin, social origin, ethnic origin. Protected grounds outside employment: gender, sexual orientation, gender identity, gender expression or gender characteristics, disability, race and ethnic origin.	No	No	No	No	Yes	Yes
ESTONIA Gender Equality and Equal Treatment Commissioner ⁶⁴²	<u>Employment</u> : Gender, pregnancy, childbirth, parenting, family-related duties, other circumstances related to gender, ethnic origin, race, colour of skin, religion or other beliefs, age, disability and sexual orientation. ⁶⁴³ <u>Beyond employment</u> : Gender, pregnancy, childbirth, parenting, family-related duties, other circumstances related to gender, ethnic origin, race, colour of skin.	Yes	Yes	Yes	Yes	Yes	No
Chancellor of Justice ⁶⁴⁴	<u>Public sector</u> : any ground. <u>Private sector</u> : gender, race, ethnic origin, colour of skin, 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	Yes	Yes	Yes ⁶⁴⁵	Yes ⁶⁴⁶
FINLAND Non-Discrimination Ombudsman ⁶⁴⁷	Origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health or other personal characteristics.	Yes ⁶⁴⁸	Yes	Yes	Yes ⁶⁴⁹	No	N/A

641 Denmark, Act on the Board of Equal Treatment.

642 Estonia, Equal Treatment Act, Articles 15-22.

643 The Equal Treatment Act does not preclude the Commissioner from exercising its mandate in relation to any other ground, in the area of labour relations, in particular due to family-related duties, social status, representation of the interests of employees or membership in an organisation of employees, level of language proficiency or duty to serve in defence forces.

644 Estonia, Chancellor of Justice Act, Articles 19-35¹⁶.

645 Only in conciliation procedures.

646 Only in conciliation procedures.

647 Finland, Act on the Non-Discrimination Ombudsman, Section 1.

648 This assistance is limited in the field of employment as the Non-Discrimination Ombudsman does not have authority to investigate and give recommendations in the field of employment.

649 Limited in employment.

Country / Specialised body	Grounds covered by the mandate	Competences covered by the mandate					
		Independent assistance to victims	Independent surveys	Independent reports	Recommendations	Quasi-judicial functions	Binding decisions
Non-Discrimination and Equality Tribunal ⁶⁵⁰	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.	No	No	No	No	Yes	Yes
FRANCE Defender of Rights ⁶⁵¹	Any ground protected by national law ⁶⁵² and international conventions ratified by France.	Yes	Yes	Yes	Yes	No	N/A
GERMANY Federal Anti-Discrimination Agency ⁶⁵³	Race or ethnic origin, sex, religion or belief ⁶⁵⁴ (<i>Weltanschauung</i>), disability, age, sexual identity.	Yes	Yes	Yes	Yes	No	N/A
GREECE Ombudsman ⁶⁵⁵	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 Commissioner for Fundamental Rights ⁶⁵⁶	Sex, racial affiliation, colour of skin, nationality, belonging to a national minority, mother tongue, disability, health condition, religion or belief, political or other opinion, family status, maternity (pregnancy) or paternity, sexual orientation, gender 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	Yes	Yes	Yes	Yes	Yes

650 Finland, Act on National Non-Discrimination and Equality Tribunal.

651 France, Organic Law No. 2011-333 of 29 March 2011 creating the Defender of Rights, Article 4(3).

652 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 specific religion, physical appearance, last name, family situation, trade 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, refusal to be victim of bullying, banking residence, loss of autonomy, holding of a local political mandate. Grounds covered by national jurisprudence (such as condition of fortune, birth, property, language) are also included.

653 Germany, General Act on Equal Treatment, Section 25.

654 Not for civil law.

655 Greece, Law No. 2477/1997, Article 1 and Equal Treatment Law No. 4443/2016, Article 14.

656 Equal Treatment Directorate within the Office of the Commissioner for Fundamental Rights.

Country / Specialised body	Grounds covered by the mandate	Competences covered by the mandate					
		Independent assistance to victims	Independent surveys	Independent reports	Recommendations	Quasi-judicial functions	Binding decisions
ICELAND Centre for Equality ⁶⁵⁷	Gender, race, ethnic origin, religion, belief, disability, reduced capacity to work, age, sexual orientation, gender identity, gender expression and sex characteristics.	No ⁶⁵⁸	Yes	Yes	Yes	No ⁶⁵⁹	N/A
Equality Complaints Committee ⁶⁶⁰	Gender, race, ethnic origin, religion, belief, disability, reduced capacity to work, age, sexual orientation, gender identity, gender expression and gender characteristics.	No	No	No	No	Yes	Yes
IRELAND Irish Human Rights and Equality Commission ⁶⁶¹	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 National Office against Racial Discrimination – UNAR ⁶⁶²	Racial or ethnic origin, religion or personal belief, disability, age and sexual orientation, nationality, Roma, Sinti and Travellers. ⁶⁶³	Yes ⁶⁶⁴	Yes	Yes	Yes	No	N/A
LATVIA Ombudsman ⁶⁶⁵	Grounds not specified, hence any ground.	Yes	Yes	Yes	Yes	No	N/A
LIECHTENSTEIN Association for Human Rights in Liechtenstein ⁶⁶⁶	Human rights. ⁶⁶⁷	Yes	Yes	Yes	Yes	No	N/A

657 Iceland, Act on the Administration of Equality No. 151/2020, Act on Equal Treatment Irrespective of Race or Ethnic Origin, Article 5 and Act on Equal Treatment in the Labour Market, Article 5.

658 Even if the Centre for Equality were to provide assistance to victims in practice, judicial interpretation of both the Racial Equality Act and the Labour Equality Act is needed.

659 The Centre can impose per diem fines on institutions, enterprises or organisations that fail to comply with its requests for information in relation to suspected discrimination. Furthermore, when a party fails to comply with a ruling of the Equality Complaints Committee, the Centre may instruct the party to take satisfactory remedial measures or else pay per diem fines until the instructions are complied with.

660 Iceland, Act on Equal Rights and Equal Status of Women and Men, Articles 5-7; Act on Equal Treatment Irrespective of Race or Ethnic Origin, Articles 5-6; Act on Equal Treatment in the Labour Market, Articles 56.

661 Ireland, Irish Human Rights and Equality Commission Act 2014, Sections 9 and 44.

662 Italy, Legislative Decree No. 215/2003 Implementing Directive 2000/43/EC, Article 7.

663 UNAR's remit has been extended to cover all grounds of discrimination listed in Article 19 of the TFEU, through a ministerial directive issued in 2010 and renewed up to 2019. The annual reports reflect this extension of responsibilities by reporting on activities related to grounds such as sexual orientation and gender, age, disability, religion, Roma, Sinti and Travellers, race and ethnic origin, and nationality.

664 As the equality body is set up as an office within the structure of the state administration, it cannot be affirmed that the body can exercise its competencies independently.

665 Latvia, Law on Ombudsman, Article 11(2).

666 Liechtenstein, Law on the Association for Human Rights in Liechtenstein, Article 4. Please note that the Association for Human Rights in Liechtenstein has not been officially designated as the body dealing with discrimination on the basis of race and ethnic origin. It is nevertheless the body that deals with human rights.

667 The Law on the Association for Human Rights in Liechtenstein does not provide for a list of grounds. The mandate is generally held and refers to human rights.

Country / Specialised body	Grounds covered by the mandate	Competences covered by the mandate					
		Independent assistance to victims	Independent surveys	Independent reports	Recommendations	Quasi-judicial functions	Binding decisions
LITHUANIA Equal Opportunities Ombudsperson ⁶⁶⁸	Gender, race, citizenship, nationality, origin, age, sexual orientation, disability, ethnic origin, language, social status, religion, belief, convictions or views.	No ⁶⁶⁹	Yes	Yes	Yes	Yes	Yes ⁶⁷⁰
LUXEMBOURG Centre for Equal Treatment ⁶⁷¹	Race, ethnic origin, religion or belief, disability, age, gender, sexual orientation, nationality.	Yes	Yes	Yes	Yes	No	N/A
MALTA National Commission for the Promotion of Equality ⁶⁷²	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 Protector of Human Rights and Freedoms ⁶⁷³	Race, skin colour, national affiliation, social or ethnic origin, affiliation to a minority nation or minority national community, language, religion or belief, political or other opinion, sex, sex change, gender identity, sexual orientation and/or intersex characteristics, 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.	Yes	Yes	Yes	Yes	No	N/A
NETHERLANDS Netherlands Institute for Human Rights ⁶⁷⁴	Racial/ethnic origin, 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 ⁶⁷⁵
Anti-Discrimination Services ⁶⁷⁶	Racial/ethnic origin, religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality, civil (or marital) status, disability, age.	Yes	No	No	No	No	N/A

668 Lithuania, Law on Equal Treatment, Articles 14-30.

669 In practice, the Ombudsperson is doing consultancy work, and, possibly advising the applicants with regard to which procedural ways to pursue justice.

670 The Ombudsperson's administrative sanctions are binding but not her/his recommendations.

671 Luxembourg, Law of 28 November 2006, Article 8.

672 Malta, Equality for Men and Women Act, Article 11.

673 Montenegro, Law on the Protector of Human Rights and Freedoms, Article 27(1) and Law on the Prohibition of Discrimination, Article 21.

674 Netherlands, Netherlands Institute for Human Rights Act, Articles 9-13.

675 The NIHR's opinions are, however, widely considered to be effective and well-respected.

676 Netherlands, Local Anti-discrimination Services Act, Article 2. There are approximately 40 such local anti-discrimination services, including regional ones catering to several smaller municipalities.

Country / Specialised body	Grounds covered by the mandate	Competences covered by the mandate					
		Independent assistance to victims	Independent surveys	Independent reports	Recommendations	Quasi-judicial functions	Binding decisions
NORTH MACEDONIA Commission for Prevention and Protection against Discrimination ⁶⁷⁷	Race, skin colour, origin nationality or ethnicity, sex, gender, sexual orientation, gender identity, belonging to a marginalised group, language, citizenship, social origin, education, religion or religious belief, political conviction, other convictions, disability, age, family or marital status, property status, health condition, personal capacity and social status or upon any other grounds.	Yes	Yes	Yes	Yes	Yes	No
NORWAY Equality and Anti-discrimination Ombud ⁶⁷⁸	Gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age, membership of a trade union, political affiliation or combinations of these factors.	Yes	Yes	Yes	Yes	No	N/A
Equality and Anti-discrimination Tribunal ⁶⁷⁹	Gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age, membership of a trade union, political affiliation or combinations of these factors.	No	No	No	Yes ⁶⁸⁰	Yes	Yes ⁶⁸¹
POLAND Commissioner for Human Rights ('Ombudsman') ⁶⁸²	No grounds specified, hence any ground.	Yes ⁶⁸³	Yes	Yes	Yes	No	N/A

677 North Macedonia, Law on Prevention and Protection against Discrimination, Articles 1, 14 (Articles 14-22 are all on the Commission; Articles 23-31 are on the procedure before the Commission).

678 Norway, Act on the Equality and Anti-discrimination Ombud and the Equality and Anti-discrimination Tribunal, Articles 1 and 5.

679 Norway, Act on the Equality and Anti-discrimination Ombud and the Equality and Anti-discrimination Tribunal, Article 1. This body exercises tribunal-like functions.

680 Concerning decisions made by the public administration: see, Act on the Equality and Anti-discrimination Ombud and the Equality and Anti-discrimination Tribunal, Article 14.

681 Only in relation to private parties, not in relation to public entities.

682 Poland, Act on the Commissioner for Human Rights, Article 1.

683 Judicial interpretation is required as the competences of the Ombudsman are limited regarding conflicts between private parties.

Country / Specialised body	Grounds covered by the mandate	Competences covered by the mandate					
		Independent assistance to victims	Independent surveys	Independent reports	Recommendations	Quasi-judicial functions	Binding decisions
PORTUGAL High Commission for Migration ⁶⁸⁴	Race and ethnic origin, colour, nationality, religion, ancestry and territory of origin. ⁶⁸⁵	Yes ⁶⁸⁶	Yes	Yes	Yes	No	N/A ⁶⁸⁷
ROMANIA National Council for Combating Discrimination ⁶⁸⁸	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	Yes	Yes
SERBIA Commissioner for the Protection of Equality ⁶⁸⁹	Race, skin colour, ancestry, citizenship, language, religious or political beliefs, sex, gender, gender identity, sexual orientation, sex characteristics, level of income, financial position, 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 Slovak National Centre for Human Rights ⁶⁹⁰	Sex, religion or belief, race, affiliation to 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, unfavourable state of health, duties to family, membership of or involvement in a political party or political movement, a trade union or other association.	Yes	Yes	Yes	Yes	Yes	No

684 Portugal, Decree-law 31/2014, Article 1. While the High Commission for Migration (HCM) is the formally designated equality body, it is the Commission for Equality and Against Racial Discrimination – CEARD (an entity within the HCM) which exercises the equality body mandate in practice.

685 The High Commission for Migration has a mandate to deal with skin colour, nationality, race or ethnic origin and religion. Within this body, the Commission for Equality and Against Racial Discrimination is competent to deal with the grounds of race, ethnic origin, colour, nationality, ancestry and territory of origin.

686 As the independence of the equality body is not stipulated in law, due to potential political influence, it cannot be affirmed that the body can exercise its competencies independently.

687 Although the equality body is not considered to be a quasi-judicial institution, it can issue binding decisions and impose sanctions that can be appealed in courts.

688 Romania, Ordinance (GO) 137/2000 regarding the prevention and the punishment of all forms of discrimination, Article 16 and following.

689 Serbia, Law on Prohibition of Discrimination, Article 1(2).

690 Slovakia, Act No 308/1993 on Establishing the Slovak National Centre for Human Rights, Section 1, paras 1, 2a, e, f, g, h and Section 1(3) and (4).

Country / Specialised body	Grounds covered by the mandate	Competences covered by the mandate					
		Independent assistance to victims	Independent surveys	Independent reports	Recommendations	Quasi-judicial functions	Binding decisions
SLOVENIA Advocate of the Principle of Equality ⁶⁹¹	Gender, language, ethnicity, race, religion or belief, disability, age, sexual orientation, gender identity, gender expression, social standing, economic situation, education, any other personal characteristic.	Yes	Yes	Yes	Yes	Yes	Yes ⁶⁹²
SPAIN Council for the Elimination of Racial or Ethnic Discrimination ⁶⁹³	Racial and ethnic origin.	Yes ⁶⁹⁴	Yes	Yes	Yes	No	N/A
SWEDEN Equality Ombudsman ⁶⁹⁵	Sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation, age.	Yes	Yes	Yes	Yes	No	N/A
TÜRKIYE Human Rights and Equality Institution ⁶⁹⁶	Race, gender, colour, language, religion, belief, denomination, philosophical and political opinion, ethnic origin, wealth, birth, marital status, health, disability and age.	Yes ⁶⁹⁷	No	Yes	Yes ⁶⁹⁸	Yes	No
UNITED KINGDOM Great Britain: Equality and Human Rights Commission ⁶⁹⁹	Age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation, human rights. ⁷⁰⁰	Yes	Yes	Yes	Yes	No	N/A
Northern Ireland: Equality Commission for Northern Ireland ⁷⁰¹	Sex, sexual orientation, disability, race, religion and political opinion, age. ⁷⁰²	Yes	Yes	Yes	Yes	No	N/A

691 Slovenia, Protection Against Discrimination Act, Articles 19-32.

692 The decisions are binding by law, but not enforceable.

693 Spain, Law on Fiscal, Administrative and Social Measures, Article 33.

694 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.

695 The entire Equality Ombudsman Act.

696 Türkiye, Law on the Human Rights and Equality Institution of Türkiye, Articles 8-14.

697 However, since its establishment, there are no records of the Institution having provided any independent assistance to victims of discrimination.

698 However, since its establishment, no recommendation has been issued or published by the Institution.

699 UK, Equality Act 2006, Sections 1-43.

700 The mandate of the EHRC does not establish a determined list of grounds, but rather refers to a duty to uphold equality and diversity. The EHRC website refers to the grounds listed in the Equality Act 2010, as indicated here.

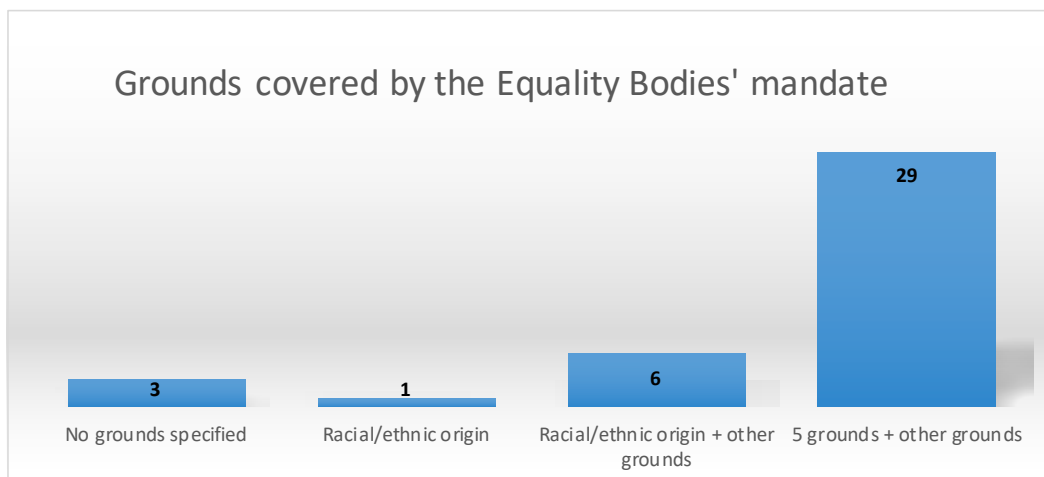
701 UK, Northern Ireland Act, Sections 73-74.

702 The mandate of the ECNI does not establish a determined list of grounds, but its website indicates the grounds as listed here. However, the ECNI is also responsible for overseeing the duty to promote equality of opportunity, which covers a different list: persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; between men and women generally; between persons with a disability and persons without; and between persons with dependants and persons without.

All countries included in this report have a specialised body that at least deals with race and ethnicity. Three countries (**Estonia**,⁷⁰³ the **Netherlands**⁷⁰⁴ and the **United Kingdom**) have two specialised bodies each. This makes a total of 39 bodies relevant for the purposes of examining the competences according to Article 13 of the Racial Equality Directive.

In **Austria, Denmark, Finland, Iceland** and **Norway** 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**, the National Non-Discrimination and Equality Tribunal in **Finland**, the Equality Complaints Committee in **Iceland** and the Equality and Anti-discrimination Tribunal in **Norway**.⁷⁰⁵ 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 competences of the equality bodies.

Of the 39 relevant bodies, the **Spanish** specialised body is the only one dealing exclusively with race and ethnicity.⁷⁰⁶ In **Austria, Croatia, Denmark, Malta, Portugal** and **Türkiye** 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, Liechtenstein** and **Malta** the ground of disability is covered by separate structures. It is interesting to note that some countries have chosen an open-ended list of grounds, for example, **Albania, Estonia** (Chancellor of Justice – public sector ombudsman-like proceedings), **Finland, Hungary, Montenegro, Romania, Slovakia** and **Slovenia**. In **Bulgaria, Estonia** (Chancellor of Justice – private sector conciliation proceedings) and **France**, the mandates of the equality bodies cover any ground as prescribed by law. In 26 countries, 29 bodies deal with the five grounds protected by the two anti-discrimination directives and other grounds.⁷⁰⁷ In **Liechtenstein, Latvia** and **Poland** no grounds are specified under the competences of the body.



703 In Estonia, only one of the equality bodies, the Gender Equality and Equal Treatment Commissioner, effectively exercises its mandate related to the promotion of equality and non-discrimination.

704 In the Netherlands, the anti-discrimination services at local level have the task of assisting victims of discrimination and monitoring their situation.

705 For the purposes of this report, only one specialised body has been counted on the national level for these five countries. See below, pp. 120-121, for further information regarding these quasi-judicial bodies.

706 After the cut-off date for this report, on 12 July 2022, a new Comprehensive Law 15/2022 was adopted 'on equal treatment and non-discrimination', establishing a new specialised equality body competent to cover the grounds of birth, racial or ethnic origin, sex, religion, conviction or opinion, age, disability, sexual orientation or identity, gender expression, illness or health condition, serological status and/or genetic predisposition to pathologies and disorders, language, socio-economic status, or any other personal or social condition or circumstance.

707 The 28 bodies are Albania, Belgium, Bulgaria, Cyprus, Czechia, Estonia (both the Gender Equality and Equal Treatment Commissioner and the Chancellor of Justice), Finland, France, Germany, Greece, Hungary (Equal Treatment Authority), Iceland, Ireland, Italy, Lithuania, Luxembourg, Montenegro, the Netherlands (both the Netherlands Institute for Human Rights and the local anti-discrimination facilities), North Macedonia, Norway, Romania, Serbia, Slovakia, Slovenia, Sweden and the United Kingdom (the Equality and Human Rights Commission and the Equality Commission for Northern Ireland).

5.2 Competencies of equality bodies

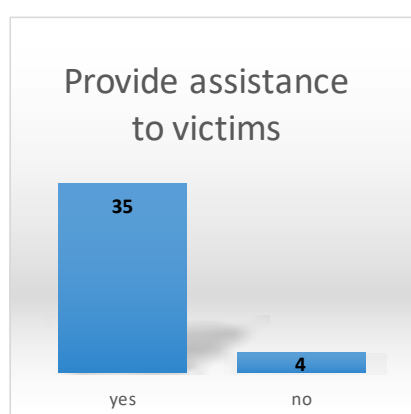
Article 13, Racial Equality Directive:

'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.

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. Some specialised bodies provide support in taking legal action – for example the **Belgian, British, Croatian, Finnish, Hungarian, Irish, Montenegrin, Northern Irish, Serbian** and **Swedish** bodies. Others give their opinion – binding or not – on complaints submitted to them, e.g. the **Austrian** Equal Treatment Commission, the **Bulgarian** Protection Against Discrimination Commission, the **Netherlands** Institute for Human Rights, 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. Furthermore, in a number of countries, the specialised body has legal standing to bring discrimination complaints on behalf and/or in support of the victims. This is the case for instance of the **Slovak** National Centre for Human Rights which may bring complaints on behalf or not of identified victims and join civil court proceedings as an intervening party. Some specialised bodies also have legal standing to initiate strategic litigation, such as the cases that have been initiated by the **Serbian** equality body concerning Roma discrimination.



Out of the 39 specialised bodies, 35 have a mandate to provide independent assistance to victims and four do not. The countries with a relevant body that officially lacks a mandate to provide such assistance are: **Estonia** (the Chancellor of Justice, which nevertheless does so in practice), **Iceland** (the Centre for Equality),⁷⁰⁸ **Lithuania** and the **Netherlands** (the Netherlands Institute for Human Rights).⁷⁰⁹ 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

708 The Icelandic Centre for Equality has a mandate to mediate cases of discrimination, which could be seen as a form of assistance to victims.

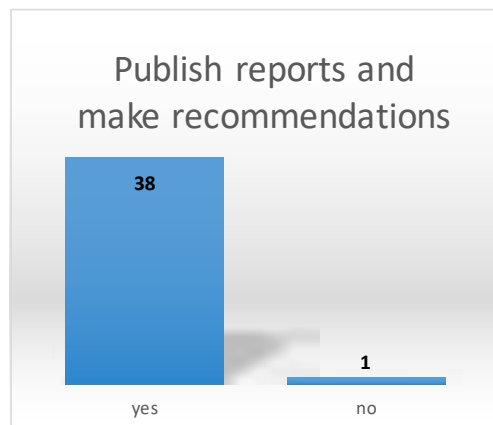
709 In the Netherlands, the local anti-discrimination services have such a mandate.

administrative procedures to pursue justice. While the remit of the **Cypriot** body includes publishing reports containing recommendations in response to victims’ complaints, it is arguable whether this can be interpreted as ‘independent assistance’. Finally, the **Spanish** equality body has established a Network of Centres of Assistance for Victims of Racial or Ethnic Discrimination, which handles cases for possible victims of discrimination. It involves eight NGOs that follow a formal protocol set up by the equality body.

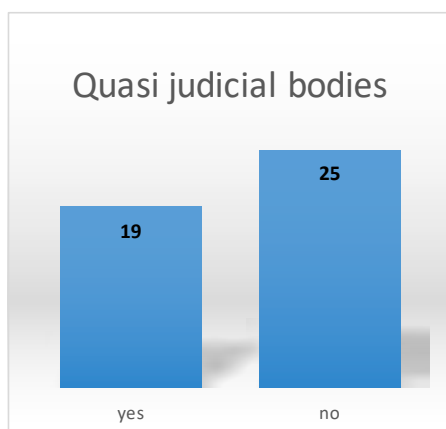


Of the 39 specialised bodies, 36 have a mandate to conduct independent surveys while the **Estonian** Chancellor of Justice, the **Dutch** anti-discrimination services and the Human Rights and Equality Institution of **Türkiye** do not. **Türkiye** is, however, the only country where no specialised body can exercise this competence. In **Estonia** and the **Netherlands**, there are separate bodies holding such a mandate.

National equality bodies are also required to have a mandate to publish independent reports and to make recommendations. There are specialised bodies with such a mandate in all the countries covered. In the **Netherlands**, only one of the two designated bodies (Netherlands Institute for Human Rights) has such a mandate, as the competences of the two national bodies are designed to be complementary. However, the implementation of this mandate in practice varies greatly among the different countries, as can be seen in the nature and number of surveys and reports published and recommendations issued. Furthermore, their independent nature is often questionable in practice (see below for more on the independence of equality bodies).



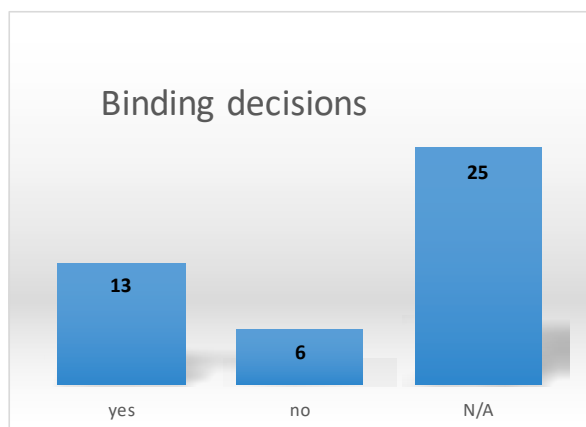
Most bodies can arrange for conciliation between the parties and most can review and comment on legislative proposals and the reform of existing laws.



Although this is not required by the Racial Equality Directive, some specialised bodies are also quasi-judicial institutions, the decisions of which are – in some cases – binding. Tribunal-like, quasi-judicial bodies exist parallel to the specialised bodies in **Austria, Denmark, Finland, Iceland** and **Norway** and they are also included in the analysis of this section, making a total of 44 bodies. Only 19 of these 44 bodies are quasi-judicial institutions: in **Albania** (the Commissioner for Protection from Discrimination), **Austria** (the Equal Treatment Commission), **Bulgaria** (the Protection Against Discrimination Commission), **Cyprus** (the Ombudsman), **Denmark** (the Board of Equal Treatment), **Estonia** (the Chancellor of Justice – in private sector conciliation proceedings – and the Gender Equality and

Equal Treatment Commissioner), **Hungary** (the Ombudsman), **Iceland** (Equality Complaints Committee), **Lithuania** (the Equal Opportunities Ombudsperson), the **Netherlands** (the Netherlands Institute for Human Rights), **North Macedonia** (the Commission on Prevention and Protection against Discrimination), **Norway** (the Equality and Anti-Discrimination Tribunal), **Romania** (the National Council on Combating

Discrimination), **Serbia** (the Commissioner for the Protection of Equality), **Slovenia** (the Advocate of the Principle of Equality) and **Türkiye** (the Human Rights and Equality Institution). 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. In addition, the **Slovak** National Centre for Human Rights is considered to be a quasi-judicial institution, although that is a matter of interpretation. In contrast, the **Portuguese** equality body (the High Commission for Migrations) exercises tribunal-like functions but is not considered to be a quasi-judicial body as it is not an independent administrative entity.



Among these 19 bodies, 13 can issue binding decisions.⁷¹⁰ This is the case for the **Albanian, Bulgarian, Cypriot,⁷¹¹ Danish,⁷¹² Estonian,⁷¹³ Finnish, Hungarian, Icelandic, Lithuanian,⁷¹⁴ Norwegian, Romanian, Serbian and Slovenian** bodies. Nevertheless, in the **Netherlands**, the decisions of the Netherlands Institute for Human Rights are very much respected by both parties due to the long experience, expertise and practice of the equality body.⁷¹⁵ In **Norway**, the Equality and Anti-Discrimination Tribunal's decisions are binding in relation to private parties, and in relation to public entities acting as employers. In

Slovenia, the equality body has the power to issue binding decisions, but it lacks the instruments to implement them. In **Serbia**, the equality body's decisions are binding, but perpetrators who fail to respect them cannot be punished.

Whether or not the specialised bodies are quasi-judicial institutions, 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 such 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 both for gaining a better understanding 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.

Some specialised bodies have specific responsibilities or powers that are not necessarily listed in Article 13(2) of the Racial Equality Directive.

710 In addition, although the Portuguese High Commission for Migration is not a quasi-judicial body, it can issue binding decisions and impose administrative sanctions. Similarly, the Turkish Human Rights and Equality Institution can issue binding decisions and impose fines, but it does not do so in practice.

711 In practice, the Cypriot equality body does not issue decisions but prefers recommendations or mediation. Its recommendations are generally taken into serious consideration by the private and public sectors, although very few decisions have been issued against the latter since the inception of the body in 2004.

712 The Board of Equal Treatment.

713 The Chancellor of Justice only in private sector conciliation procedures.

714 The Equal Opportunities Ombudsperson can only issue binding decisions to stop discriminatory advertisement campaigns. All other decisions by the Ombudsperson are non-binding.

715 Further information regarding sanctions imposed by equality bodies can be found in section 4.5 above.

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

- In **Austria**, the National Equality Body can initiate administrative and penal proceedings before local administrative departments regarding the duty to advertise jobs and housing without discrimination. The National Equality Body is also involved in the assessment process of proposed legislation.
- In **Estonia**, the Gender Equality and Equal Treatment Commissioner and the Chancellor of Justice have the power to ‘analyse the effect of the implementation of legislation to the condition of the members of the society’.
- In **Finland**, the Ombudsman can act as the legal assistant for the victim in the court. The Ombudsman can also promote information exchange, education and training on equal treatment and non-discrimination. It is often invited to give lectures and presentations on its work and is regularly consulted by the ministries when preparing legislation.
- 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 **Hungarian** Ombudsman, acting as a successor to the abolished Equal Treatment Authority, may initiate an *actio popularis* with a view to protecting the rights of persons and groups whose rights have been violated.⁷¹⁶
- In **Ireland**, the Irish Human Rights and Equality Commission has the competence to prepare draft codes of practice for the elimination of discrimination and the promotion of equality of opportunity. Furthermore, it may serve a ‘substantive notice’ following an equality review or the preparation of an equality action plan. Where it appears to the body 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.
- The **Netherlands** Institute for Human Rights has the power to advise organisations (including governmental bodies) whether their employment practices contravene non-discrimination law.
- 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.

By contrast, some concerns can be highlighted in relation to the equality bodies in particular countries. For instance, in **Germany**, the position of head of the equality body has not been properly filled since 2018, due to delays in the appointment procedure. These delays have mainly been caused by court proceedings initiated against the proposed appointment due to the failure of the Government to respect the ‘best selection principle’.⁷¹⁷ In some countries there is concern that specialised bodies are too close to Government, thereby jeopardising the independence of their work. For instance, the independence of the **Portuguese** equality body (the High Commission for Migration) 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. Similar concerns arise in relation to the **Turkish** Human Rights and Equality Institution as well as the **Italian** National Office against Racial Discrimination, which operates as a ministerial department, is fully dependent on the Department for Equal Opportunities and reports to the Prime Minister. The **Spanish** Council for the Elimination of Racial or Ethnic Discrimination is attached to the Ministry of the Presidency, Relations with Parliament 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

716 This procedure is only available where not all concerned individuals can be identified.

717 Germany, Berlin Administrative Court, case No. 7 L 218.18, decision of 8 February 2019.

council.⁷¹⁸ 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 **Poland**, the previous Ombud faced challenges as some political parties as well as a prominent legal think tank attacked its activities in support of the LGBTI community. There are concerns in **Hungary** that similar considerations contributed to the hasty abolition of the Equal Treatment Authority, which had also been vocal in its support for the LGBTI community. Furthermore, concerns have been raised regarding the (lack of) independence in practice of the Ombudsman, which has now taken over the equality body mandate in Hungary.⁷¹⁹ In **Belgium**, the coalition Government of Flanders announced in September 2019 its intention to withdraw from Unia and set up a separate equality body for Flanders.⁷²⁰ Despite criticism and concerns expressed by different stakeholders, the Flemish Government approved a preliminary draft decree in December 2021, establishing the Flemish Human Rights Institute.⁷²¹ The current cooperation agreement binds Flanders to Unia until March 2023. In **Cyprus**, the independence of the equality body is undermined by the absence of objective criteria for the appointment of the ombudsman and the lack of opportunities for candidates other than the one proposed by the Executive to be considered. The appointment in 2017 of the current ombudsman raised objections from NGOs, journalists and political parties who considered the appointment to be highly political and motivated by the appointee’s close links with important media outlets. Since then, the ombudsman’s work related to equality and non-discrimination issues is almost exclusively exercised without reference to the specific non-discrimination legal framework. Instead, the institution issues reports and examines complaints from the perspective of general administrative law or on the basis of its mandate to monitor the national implementation of the UN CRPD.⁷²² In **Bulgaria**, although both Parliament and the President adopted rules in 2017 on the nomination of candidates for the equality body, the President’s decision-making process remains discretionary and non-transparent under these rules. Similarly, the appointment procedure for the members of the new equality body established in **North Macedonia** in 2021 raised concern due to the lack of any substantial debate in Parliament and of any assessment of the candidates’ compatibility with the criteria established by law. Similar concerns were raised in 2020 by the European Commission against Racism and Intolerance (ECRI) in its report on **Slovakia**.⁷²³ In **Poland**, there is evidence that the budget cutbacks on the equality body are disproportionate compared to other public bodies and may undermine the work of the body. In the **Netherlands**, there are important differences between the local anti-discrimination services throughout the country. While some are well financed and clearly independent, others do not receive the planned funding and operate under the supervision of local authorities.

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 **Greece, Hungary, Ireland, Latvia** and the **United Kingdom**. In **Romania**, although the budget of the equality body has been increasing, in 2019, out of the 97 posts that were needed, only 73 were budgeted and 71 posts were actually occupied.⁷²⁴ Similarly, in **Serbia**, only some 60 % of the recommended staff capacity is filled.⁷²⁵ In **Iceland**, the mandate of the Centre for Equality was significantly expanded in 2018 to cover not only gender but also the five grounds covered by the EU non-discrimination directives as well as some

718 Spain, Royal Decree 1262/2007 (modified by Royal Decree 1044/2009) details the composition of the Council.

719 See notably Sub-Committee on Accreditation of the Global Alliance of National Human Rights Institutions (2021), *Report and Recommendations of the Virtual Session of the Sub-Committee on Accreditation (SCA)*, 14-24 June 2021.

720 <https://www.unia.be/fr/articles/unia-reagit-a-la-decision-de-la-flandre-darreter-leur-cooperation>.

721 For further information, see: <https://docs.vlaamsparlament.be/pfile?id=1861068>. The Decree was adopted after the cut-off date, on 28 October 2022.

722 For further information, see European network of legal experts in gender equality and non-discrimination (2021), *Country report Non-discrimination: Cyprus 2021*, November 2021, available at: <https://www.equalitylaw.eu/downloads/5529-cyprus-country-report-non-discrimination-2021-1-91-mb>.

723 European Commission against Racism and Intolerance (ECRI) (2020), *ECRI report on the Slovak Republic: 6th monitoring cycle*, Council of Europe, 1 October 2020. Available at: <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/slovak-republic>.

724 Romania, National Council for Combating Discrimination (2022), 2021 Annual Report, available at: <https://www.cncd.ro/wp-content/uploads/2022/04/Raport-de-activitate-CNCD-2021-.pdf>.

725 Serbia, Commissioner for the Protection of Equality (2022), *Regular annual report of the Commissioner for the Protection of Equality for 2021*, Belgrade, p. 27.

additional grounds. It is cause for concern that additional resources required to develop the expertise and activities of the Centre have not yet been provided.

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 formulation of these articles and the interpretation by some Governments that they are only bound to take some steps towards achieving the objectives of these articles. The provisions do not seem to be very well implemented in, for example, **Bulgaria, Cyprus, Czechia, Luxembourg and Türkiye**. 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, such activities are organised by Government ministries, through for instance the publication of basic information on the principle of equal treatment or information campaigns through the media and the organisation of seminars (for example in **Finland, Germany, Malta and Sweden**). In **Slovakia**, the Ministry of Labour, Social Affairs and Family runs a website that provides a wide range of information for the general public concerning discrimination.⁷²⁶ In **Latvia**, the Society Integration Fund is running a campaign (2018-2022) to raise awareness and provide training, in particular for employers.

726 The website is available in Slovak at: <http://www.gender.gov.sk/diskriminacia/>.

In most countries however, the dissemination of information about anti-discrimination law is mainly carried out by the national equality body. Therefore, the mandates of specialised bodies in most countries include awareness-raising activities, for instance in **Albania, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Lithuania, Malta, the Netherlands, Norway, Romania, Slovenia, Sweden** and the **United Kingdom**. The **Romanian** 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. In **Greece**, the Ombudsman actively participates in educational programmes, conferences and workshops aimed at disseminating information and raising awareness about the principle of equal treatment. 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. Where the equality body only has powers relating to race and ethnic origin however, other arrangements must be made for the grounds of religion and belief, age, disability and sexual orientation.

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 **France**, all hiring committees of organisations of more than 300 employees are obliged to undertake training to correct discriminatory biases and implement transparent processes.⁷²⁷

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, notably **Belgium, Finland, France, Greece** and **Slovakia**. 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 Persons with Disabilities brings together representatives of NGOs and state institutions to promote the full integration of persons with disabilities in political, economic and social life based on the principle of equality. In **Spain**, structures for dialogue include the National Disability Council, which represents various kinds of associations of persons with disabilities. Its functions include issuing reports on draft regulations on equal opportunities, non-discrimination and universal accessibility. The **French** Disability Act of 2005 created a National Consultative Council of Persons with Disabilities as well as local counterparts, which are competent for all decisions relating to the support of persons with disabilities. The same law creates an obligation on the social partners to hold annual negotiations on measures necessary for the professional integration of persons with disabilities.

Specific structures dealing with Roma have also emerged over the past decade. 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. In **Finland**, the Advisory Board on Romani Affairs was established in 1956, with the remit of enhancing the equal participation of the Roma population in Finnish society, improving their

727 France, Law No. 2017-86 of 27 January 2017 on equality and citizenship, Article 61 bis. Available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033934948&dateTexte=20180831>.

living conditions and socioeconomic 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 the context of the development of a National Strategy for Roma Integration, the **Austrian** Federal Chancellery set up a National Contact Point for Roma 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 **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.⁷²⁸ In 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. In 2018, the **Greek** Ministry of Labour, Social Security and Social Solidarity established 'multi-centres' located close to Roma schools and settlements, to provide services to facilitate integration, particularly of Roma children. In addition, a Roma Human Rights Advocacy and Defence Observatory was established in 2021 to collect, process and forward complaints of discrimination against Roma, as part of a project funded by the Active Citizens Fund.⁷²⁹

Generating dialogue with social partners and civil society is also often the role of the specialised equality bodies. This is the case for the **Irish** Human Rights and Equality Commission, 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 scenarios and solutions to enhance diversity within workplaces.⁷³⁰ In addition, Unia regularly concludes and renews memoranda of understanding with different stakeholders such as trade unions and representative organisations. In 2020, a support committee in the field of racial discrimination was also set up, bringing together civil society organisations, academics and social partners. Finally, in **Greece**, although the Economic and Social Council was formally entrusted with this task, in practice it is exercised by the national equality body, the Ombudsman.

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.

6.2.1 Ensuring the compliance of national legislation

Among the Member States, **Greece** is the only country where the legislation transposing the directives explicitly (and automatically) repeals any discriminatory laws.⁷³¹ In addition, the **Bulgarian** Protection Against Discrimination Act requires 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

728 Hungary, Government Resolution 1048/2013 of 12 February 2013.

729 Further information is available on the project's website, available at: <https://www.romproject.gr/drasesis>.

730 For more details on this initiative, see the website www.ediv.be/.

731 Greece, Law No. 4443/2016, Article 23.

applying it.⁷³² In addition to this general mainstreaming duty, all public authorities have a duty to take all possible and necessary measures to achieve the aims of the act.⁷³³ However, in practice the public authorities do not implement these provisions. In **North Macedonia**, the new Act on the Prohibition and Protection against Discrimination, adopted in October 2020, contains a transitional provision stipulating that all national regulations, including legislation, should be brought in line with the new law within a period of two years.⁷³⁴ In **Malta**, the draft Equality Act, which has been going through the enactment process since 2014, appears to be encountering some resistance due to a clause that would ensure the supremacy of the law, when enacted, above all other national legislation.⁷³⁵

In all other Member States, compliance with Articles 14(a) of the Racial Equality Directive and 16(a) of the Employment Equality Directive relies on constitutional equality guarantees and/or general principles of legal interpretation such as *lex specialis derogat legi generali* and *lex posteriori derogat legi priori*. Discriminatory laws and regulations must therefore be challenged in court, with varying levels of procedural barriers among the Member States. 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, Labour Code and administrative law principles 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 Law as *lex specialis*. However, due to the limitations established by the Constitutional Court, neither the NCCD⁷³⁶ nor the civil courts⁷³⁷ can set aside discriminatory legal provisions. In contrast, the **Croatian** Constitutional Court declared that national legislation on foster care was discriminatory towards same-sex couples, and thus instructed lower courts on how the legislation should be interpreted and applied in compliance with the principle of equality.⁷³⁸

In **Belgium**, the approach to potentially discriminatory laws and regulations is particularly problematic. Both the General Anti-Discrimination Federal Act and the Racial Equality Federal Act contain so-called safeguard provisions ensuring that these acts will not apply to differences in treatment imposed by (or by virtue of) another piece of legislation. Laws and regulations contrary to the non-discrimination legislation would thus need to be either referred by national courts to the Constitutional Court to be declared unconstitutional by the latter (in case of incompatibility with Article 10 or 11 of the Constitution, enshrining the principles of equality and non-discrimination), or deprived of application in the case at hand by any national court where they are incompatible with EU law or international human rights law. Similarly, in **Ireland**, there is concern that the Equal Status Acts 2000-2018 remain subordinate to other legislative enactments, because Section 14(1)(a)(i) provides that nothing in the Equal Status Act will prohibit any action taken under any other enactment.⁷³⁹

732 Bulgaria, Protection Against Discrimination Act, Article 6(2).

733 Bulgaria, Protection Against Discrimination Act, Article 10.

734 North Macedonia, Act on the Prohibition and Protection against Discrimination, Article XXX.

735 The explicitly listed exceptions would be the Constitution, the European Convention Act and any future act of Parliament amending the law.

736 Constitutional Court of Romania, Decision No. 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.

737 Constitutional Court of Romania, Decision No. 818, 3 July 2008, *Official Gazette* 537 of 16 July 2008.

738 Croatia, Constitutional Court, Decision No. U-I-144/2019 of 29 January 2020, available at: <https://sljeme.usud.hr/usud/praksaw.nsf/fOdluka.xsp?action=openDocument&documentId=C12570D30061CE54C12585060030E2EC>.

739 For an extensive analysis of this specific exception under Irish law, please see Walsh, J. (2019), 'Primacy of national law over EU law? The application of the Irish Equal Status Act' in *European Equality Law Review* 2019/2, pp. 35-48.

6.2.2 Ensuring compliance of contractual clauses and other rules

Most Member States have not inserted any specific provisions in their anti-discrimination legislation to ensure that discriminatory clauses in contracts, collective agreements and other rules are or may be declared null and void or are amended. Instead, countries such as **Croatia, Czechia, Denmark, Estonia, France, Hungary, Italy, Latvia, Poland, Portugal, Romania, Slovakia** and **Slovenia** rely on constitutional guarantees or general provisions in labour and/or civil law to ensure compliance with Articles 14(b) of the Racial Equality Directive and 16(b) of the Employment Equality Directive.

In many other Member States however, explicit non-discrimination provisions stipulate either that such clauses and rules *are* declared null and void or that they are inapplicable (**Belgium, Finland, Germany, Greece, Ireland, Malta**, the **Netherlands** and **Spain**⁷⁴⁰) or that they *may be found* to be so (**Cyprus, Luxembourg** and **Sweden**). For example, in **Luxembourg**, the Labour Code contains the same wording as that of Article 16(b) of the Employment Equality Directive,⁷⁴¹ while all the **Belgian** anti-discrimination laws stipulate that contractual clauses as well as any ‘provisions’ contrary to the prohibition of discrimination, shall be considered null and void. Similarly, 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 1998–2021 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 Workplace Relations Commission 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.

Finally, in **Austria, Bulgaria** and **Lithuania**, there are neither specific non-discrimination provisions nor general provisions of labour or civil law declaring that contractual clauses and other rules are null and void if they are contrary to the principle of equality.

740 In Spain, the relevant clause is only applicable in the area of employment. See Royal Legal Decree 2/2015 of 23 October 2015 (‘Workers’ Statute’), Article 17(1).

741 Luxembourg, Labour Code, Article L. 253-3, as introduced by Article 18 of the Law of 28 November 2006.

7 Conclusion

Twenty-two 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.

Transposition gaps can still be observed in several Member States with regard to the definition of different forms of discrimination. To give a few examples, in some countries hypothetical and/or past comparators are excluded from the definition of direct discrimination and in others the category of job seekers does not fall under the personal scope of the duty to provide reasonable accommodation. Gaps may also appear in the transposition of the material scope of the directives in national legislation. This is mainly visible when it comes to the areas of social protection, social advantages or with regard to public employment or the self-employed. It may be said that while there are still minor gaps in the transposition of specific aspects of certain anti-discrimination provisions in a few Member States, the main issue is the implementation of such legislation (and of both European directives) and the judicial interpretation by national courts and the CJEU.

As regards the implementation of the EU anti-discrimination directives, shortcomings remain in national legislation. For instance, in many countries, the legal conditions required to claim the right to reasonable accommodation in employment are highly restrictive and the definitions of disability are often based on a medical rather than a human rights approach. Moreover, it is not clear from the wording of several national laws whether the failure to provide reasonable accommodation would amount to discrimination. Issues can also be observed in relation to the liability of the employer for harassment of one of their employees carried out by a third party (clients, other employees, etc.). Such legal vacuums in national legislation are reducing the protection provided by the directives.

Legal vacuums in national laws can be – and sometimes have been – solved by the interpretation given by national courts. However, there are countries where leading case law is missing to the detriment of legal certainty regarding some fundamental aspects of anti-discrimination law. In that regard, the CJEU plays an increasingly important role and the number of preliminary references lodged before the CJEU continues to rise.⁷⁴²

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, although some welcome

742 In 2021, see for example: Grand Chamber judgment of 26 January 2021, *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, C-16/19, ECLI:EU:C:2021:64 (disability); Grand Chamber judgment of 15 April 2021, *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, C-30/19, ECLI:EU:C:2021:269 (racial or ethnic origin); judgment of 15 April 2021, *AB v Olympiako Athlitiko Kentro Athinon – Spyros Louis*, C-511/19, ECLI:EU:C:2021:274 (age); and Grand Chamber judgment of 15 July 2021, *IX v WABE eV and MH Müller Handels GmbH v MJ*, joined cases C804/18 and C-341/19, ECLI:EU:C:2021:594 (religion or belief).

guidance was finally provided by the CJEU on this issue in 2018.⁷⁴³ Worrying developments can also be observed with regard to the prohibition of direct discrimination and the fact that it may under certain circumstances be generally justified.

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. Another crucial barrier to effective enforcement highlighted by the country reports is the 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.

Equality bodies have played a fundamental role in the enforcement of non-discrimination legislation in the past few years. By assisting victims of discrimination, they are contributing to improve victims’ access to rights and justice. Equality bodies also perform important duties at the institutional level by providing recommendations and policy advice to Governments, supporting good practices and positive equality obligations. Lastly, they are major actors in raising awareness in society through campaigns, media work, training of professionals, etc. and providing information on the available mechanisms for claiming rights. This activity is necessary in order to reduce the discrepancy between the levels of discrimination experienced and discrimination that is being reported. However, shortcomings have been observed concerning equality bodies and the impossibility of their effectively fulfilling the role they are given by the Racial Equality Directive,⁷⁴⁴ whether it be due to insufficient resources, a restricted scope of activities or a lack of independence from Government and public authorities.

Filling these remaining gaps in anti-discrimination law and its implementation cannot merely be perceived as a technical issue. More than two decades 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. Although formal equality has been obtained in most national legislation, stronger efforts need to be made in order to achieve substantive equality. This objective continues to inspire and drive the ambitions of the European network of legal experts in gender equality and non-discrimination.

743 CJEU, Grand Chamber judgment delivered on 17 April 2018, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, C-414/16, ECLI:EU:C:2018:257; judgment delivered on 11 September 2018, *IR v JQ*, C-68/17, ECLI:EU:C:2018:696.

744 Most equality bodies deal not only with race and ethnicity but with other protected grounds, including, but not only, the four protected grounds of the Employment Equality Directive (religion or belief, disability, age and sexual orientation). For more information on equality bodies, see Chapter 5 above.

Annex 1. Main national specific anti-discrimination legislation

The information in these tables is based on the updated executive summaries and country reports for the European network of legal experts in gender equality and non-discrimination which contain information valid as at 1 January 2022. 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.¹ Dates of latest amendments refer to amendments that are of relevance for non-discrimination law.

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
ALBANIA	Article 18 of the Constitution	Law on Protection from Discrimination adopted 4 February 2010, as last amended in 2020	Gender, race, colour, ethnicity, language, gender identity, sexual orientation, citizenship, political, religious or philosophical beliefs, economic, education or social situation, pregnancy, parentage, parental responsibility, gender identity, characteristics of sex, life with HIV/AIDS, pregnancy, parentage, parental responsibility, age, family or marital condition, civil status, residence, health status, genetic predispositions, appearance, disability, affiliation with a particular group or any other ground
		Law on the Inclusion and Accessibility of Persons with Disabilities adopted 24 July 2014	Disability
AUSTRIA	Article 7 Federal Constitutional Act, Article 2 Basic Law	Federal Equal Treatment Act of 23 June 2004, as last amended in 2019	Gender, ethnic affiliation, religion, belief, age, sexual orientation
		Equal Treatment Act of 23 June 2004, as last amended in 2013	Gender, ethnic affiliation, religion, belief, age, sexual orientation
		Act on the Employment of Persons with Disabilities of 10 August 2005, as last amended in 2021	Disability
		Styrian Equal Treatment Act of 28 October 2004, as last amended in 2017	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 2021	Race, ethnic origin, religion, belief, disability, age, sexual orientation, sexual identity, gender, pregnancy, maternity
		Viennese Anti-discrimination Act of 8 September 2004, as last amended in 2018	Race, ethnic origin, religion, belief, age, sexual orientation, sexual identity, gender, pregnancy, maternity

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 that specific ground, and has been included in footnotes where anti-discrimination law also covers them.

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
AUSTRIA	Article 7 Federal Constitutional Act, Article 2 Basic Law	Lower Austrian Anti-discrimination Act of 26 January 2017, as last amended in 2018	Gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
		Lower Austrian Equal Treatment Act of 11 July 1997, as last amended in 2020	Gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
		Carinthian Anti-discrimination Act of 28 December 2004, as last amended in 2021	Gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
		Carinthian Equal Treatment Act of 23 September 2021	Gender, racial or ethnic origin, religion or belief, disability, age, sexual orientation
		Vorarlbergian Anti-discrimination Act of 19 May 2005, as last amended in 2021	Gender, ethnic affiliation, religion, belief, disability age, sexual orientation
		Upper Austrian Anti-discrimination Act of 6 May 2005, as last amended in 2021	Gender, racial or ethnic origin, religion, belief, disability age, sexual orientation
		Burgenlandian Anti-discrimination Act of 5 October 2005, as last amended in 2020	Gender, ethnic affiliation, religion, belief, disability, age, sexual orientation
		Tyrolian Equal Treatment Act of 11 January 2005, as last amended in 2019	Gender, ethnic affiliation, religion, belief, disability, age, sexual orientation
		Tyrolian Anti-discrimination Act of 31 March 2005, as last amended in 2019	Gender, ethnic affiliation, religion, belief, disability, age, sexual orientation
		Salzburg Equal Treatment Act of 31 March 2006, as last amended in 2020	Gender, racial or ethnic origin, religion, belief, disability, age, sexual orientation
BELGIUM	Articles 10 and 11 of the Constitution	Racial Equality Federal Act of 30 July 1981, ² as last amended in 2019	Alleged race, colour, descent, ethnic and national origin and nationality
		General Anti-discrimination Federal Act of 10 May 2007, ³ as last amended in 2019	Age, sexual orientation, civil status, birth, property (<i>fortune</i>), religious or philosophical belief, actual or future state of health, disability, physical or genetic features, political opinion, trade union opinion (<i>conviction syndicale</i>) and language and social origin
		Flemish Region: Decree on proportionate participation in the employment market of 8 May 2002 as last amended in 2021	Sex, alleged race, ethnic origin, religion or belief, disability, age and sexual orientation

² Formal title: Act Criminalising Certain Acts inspired by Racism or Xenophobia.

³ Formal title: Act on the Fight against Certain Forms of Discrimination.

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
BELGIUM	Articles 10 and 11 of the Constitution	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 2019	Sex, alleged race, religion or belief, disability, age, sexual orientation, nationality, colour, descent, national or ethnic origin, social origin or condition, civil status, family status, birth, property (<i>fortune</i>), political opinion, trade union opinion (<i>conviction syndicale</i>), language, state of health, physical or genetic features, pregnancy, childbirth, motherhood, breastfeeding, gender reassignment, gender identity and gender expression
		Region of Brussels-Capital: Ordinance aiming to combat discrimination and promote equal treatment of 5 October 2017	Alleged race, religious or philosophical belief, age, disability, sex, sexual orientation, political opinion, civil status, birth, property (<i>fortune</i>), language, state of health, physical or genetic features, pregnancy, childbirth, motherhood, gender reassignment, gender identity and gender expression, nationality, colour, descent, national or ethnic origin, social origin or condition, trade union opinion (<i>conviction syndicale</i>)
		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 2019	Sex, alleged race, religious, philosophical or political conviction, disability, age, sexual orientation, civil status, birth, property (<i>fortune</i>), language, actual or future state of health, physical or genetic features, pregnancy, childbirth, motherhood, gender reassignment, nationality, colour, descent, national, ethnic or social origin, trade union opinion (<i>conviction syndicale</i>)
		Region of Brussels-Capital: Framework Ordinance to ensure a Diversity Policy and to combat discrimination in the local Brussels Civil Service of 25 April 2019	Sex, alleged race, religious, philosophical or political conviction, disability, age, sexual orientation, trade union opinion (<i>conviction syndicale</i>), civil status, birth, property (<i>fortune</i>), language, state of health, physical or genetic features, pregnancy, childbirth, motherhood, gender reassignment, gender identity and gender expression, nationality, colour, descent, national or ethnic origin, social origin or condition

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
BELGIUM	Articles 10 and 11 of the Constitution	<i>Commission communautaire française (COCOF)</i> : Decree on the Fight Against certain forms of discrimination and on the implementation of the principle of equal treatment of 9 July 2010	Sex, alleged race, religious, philosophical or political conviction, disability, age, sexual orientation, civil status, birth, property (<i>fortune</i>), trade union opinion (<i>conviction syndicale</i>), language, actual or future state of health, physical or genetic features, pregnancy, motherhood, childbirth, gender reassignment, nationality, colour, descent and national, ethnic or social origin
		Decree on the fight against certain forms of discrimination (French Community) of 12 December 2008, as last amended in 2015	Sex, alleged race, national or ethnic origin, social origin, religious or philosophical belief, disability, age, sexual orientation, nationality, colour, descent, pregnancy, childbirth, motherhood, gender reassignment, gender identity and gender expression, civil status, birth, property (<i>fortune</i>), political opinion, trade union opinion (<i>conviction syndicale</i>), language, actual or future state of health, physical or genetic features
		Decree aimed at fighting certain forms of discrimination (German-speaking Community) of 19 March 2012, as last amended in 2016	Sex, alleged race, national or ethnic origin, religious or philosophical belief, disability, age, sexual orientation, nationality, colour, descent, social origin, pregnancy, childbirth, motherhood, parenthood, transgender, civil status, birth, property (<i>fortune</i>), political opinion, trade union opinion (<i>conviction syndicale</i>), language, actual or future state of health, physical or genetic features
		Decree establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy (Flemish Community/Region) of 10 July 2008, as last amended in 2018	Sex, alleged race, religious or philosophical belief, disability, age, sexual orientation, nationality, colour, descent, national or ethnic origin, social position, civil status, family status, birth, property (<i>fortune</i>), political opinion, trade union opinion (<i>conviction syndicale</i>), language, state of health, physical or genetic features, pregnancy, childbirth, motherhood, gender reassignment, gender identity and gender expression
BULGARIA	Article 6 of the Constitution	Protection Against Discrimination Act of 16 September 2003, as last amended in 2018	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
		People with Disabilities Act of 18 December 2018	Disability

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
CROATIA ⁴	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 ⁵
		Act on Professional Rehabilitation and Employment of Persons with Disability of 18 December 2013 as last amended in 2018	Disability
CYPRUS	Article 28 of the Constitution	Equal Treatment (Racial or Ethnic Origin) Law No. 59 (1)/2004, as last amended in 2006	Racial and ethnic origin
		Equal Treatment in Employment and Occupation Law No. 58 (1)/2004, as last amended in 2009	Racial and ethnic origin, religion or belief, age, sexual orientation
		Law on Persons with Disabilities No. 127(I)/2000, as last amended in 2015	Disability
CZECHIA	Article 3 of the Charter of Fundamental Rights and Freedoms (part of the Constitutional order)	Anti-Discrimination Act No. 198/2009 of 23 April 2009, as last amended in 2017	Race, colour, ethnic origin, 'nationality' (<i>národnost</i>), sex, sexual orientation, age, disability, religion or belief.
DENMARK	None ⁶	Act on Prohibition of Discrimination due to Race etc., of 9 June 1971, as last amended in 2022	Race, skin colour, national or ethnic origin, belief, sexual orientation, gender identity, gender expression or gender characteristics
		Act on Prohibition of Discrimination in the Labour Market etc., of 24 May 1996, as last amended in 2022	Race, skin colour, religion or belief, political opinion, sexual orientation, gender identity, gender expression or gender characteristics, 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
		Act on the Prohibition of Discrimination due to Disability of 8 June 2018, as last amended in 2020	Disability

4 In addition, protection against discrimination on the ground of sexual orientation is provided by the Same-sex Life Partnership Act of 15 July 2014.

5 It is noted that, given the specific wording of the Anti-discrimination Act, which refers to 'gender identity, expression or sexual orientation', there is common confusion as to whether gender identity and expression constitute separate discrimination grounds or not. The Ombudsperson interprets it as one discrimination ground.

6 The Constitution of Denmark does not contain a general provision prohibiting discrimination or a general equality clause. 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.

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
ESTONIA	Article 12 of the Constitution	Equal Treatment Act of 11 December 2008, as last amended in 2017 ⁷	Ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation,
FINLAND	Article 6(1-2) of the Constitution	Non-Discrimination Act of 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
FRANCE	Preamble to the Constitution of 1946, Article 1 of the Constitution	Law No. 2008-496 relating to the adaptation of National Law to Community Law in matters of discrimination of 27 May 2008, as last amended in 2017	Origin, sex, pregnancy, belonging, whether real or supposed to an ethnic origin, a nation, a race or a specific religion, morals, sexual orientation, gender identity, age, family situation, genetic characteristics, physical appearance, last name, health, disability, loss of autonomy, union activities, political convictions, place of residence, capacity to express oneself in another language than French, apparent economic vulnerability, banking residence, loss of autonomy.
		Law No. 2005-102 for equal opportunities and integration of persons with Disabilities of 11 February 2005, as last amended in 2014	Disability
		Law No. 2001-1066 of 16 November 2001 on the fight against discrimination	Mores, origin, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed, to an ethnic origin, a nation, or a race, religion, physical appearance, last name, family situation, philosophical convictions, trade union activities, political opinions, age, health, disability
GERMANY	Articles 3 and 33(3) of the Basic Law	General Act on Equal Treatment of 14 August 2006, as last amended in 2013	Race or ethnic origin, sex, religion or belief ⁸ (<i>Weltanschauung</i>), disability, age, sexual identity
		Act on Equal Opportunities for Persons with Disabilities of 27 April 2002, as last amended in 2021	Disability
GREECE	Article 5(2) of the Constitution	Law 927/1979 on Punishing Act or Activities Aiming at Racial Discrimination, of 22 June 1979, as last amended in 2014	Race or ethnic origin, religion

7 In addition, Art. 2(3) of the Equal Treatment Act stipulates that any ground not listed here, in particular the grounds of family-related duties, social status, representation of the interests of employees or membership of an organisation of employees, level of language proficiency or duty to serve in defence forces, may be the subject of 'requirements of equal treatment' in labour relations only.

8 In Germany, belief is not an explicitly protected ground in civil law.

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
GREECE	Article 5(2) of the Constitution	Law 4443/2016 'On the 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 December 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 Equal Opportunities of 28 December 2003, as last amended in 2021	Sex, racial affiliation, colour of skin, nationality (not in the sense of citizenship), belonging to a national minority, mother tongue, disability, health condition, religion or belief, political or other opinion, family status, maternity (pregnancy) or paternity, sexual orientation, gender 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 2017	Disability
ICELAND	Article 65 of the Constitution	Act on Equal Treatment irrespective of Race or Ethnic Origin No. 85/2018 of 12 June 2018, as last amended in 2021	Race, ethnic origin
		Act on Equal Treatment in the Labour Market No. 86/2018 of 12 June 2018, as last amended in 2021	Gender, race, ethnic origin, religion, belief, disability, reduced capacity to work, age, sexual orientation, gender identity, gender expression and gender characteristics
		Act on Services for Persons with Long-Term Support Needs No. 38/2018 of 9 May 2018	Disability
IRELAND	Article 40.1 of the Constitution	Employment Equality Acts 1998-2021 of 18 June 1998, as last amended in 2021	Gender, age, race, religion, family status, disability, civil status, sexual orientation, membership of the Traveller community
		Equal Status Acts 2000-2018 of 26 April 2000, as last amended in 2018	Gender, age, race, religion, family status, disability, civil status, sexual orientation, membership of the Traveller community, housing assistance

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
ITALY	Article 3 of the Constitution	Legislative Decree No. 215/2003 Implementing Directive 2000/43/EC on equality of treatment between persons irrespective of racial or ethnic origin of 9 July 2003, as last amended in 2011	Race and ethnic origin
		Legislative Decree No. 216/2003 Implementing Directive 2000/78/EC for equal treatment in employment and occupation of 9 July 2003, as last amended in 2013	Religion or belief, age, disability and sexual orientation
		Act No. 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 ⁹	Article 91 of the Constitution	Labour Law of 20 June 2001, as last amended in 2019	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 – Parties to Legal Transaction of 19 December 2012, as last amended in 2021	Gender, age, religious, political or other conviction, sexual orientation, disability, race or ethnic origin
		Law on Social Security of 7 September 1995, as last amended in 2015	Race, colour, gender, age, disability, health condition, religious, political or other conviction, national or social origin, property or family status or other circumstances
		Consumer Rights Protection Law of 18 March 1999, as last amended in 2010	Gender, race, ethnic origin, disability
		Education Law of 29 October 1998, as last amended in 2017	Property and social status, race, ethnic origin, gender, religious and political belief, state of health, employment and place of residence.
LIECHTENSTEIN ¹⁰	⁻¹¹	Act on Equality of Persons with Disabilities of 25 October 2006, as last amended in 2017 ¹²	Disability

9 There is no general anti-discrimination law in Latvia.

10 There is no general anti-discrimination legislation in Liechtenstein.

11 The only equality clause in the Constitution of Liechtenstein (Article 31) regards gender equality.

12 Please note that the Criminal 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
LITHUANIA	Article 29 of the Constitution	Law on Equal Treatment of 18 November 2003, as last amended in 2018	Gender, race, nationality, ¹³ citizenship, ¹⁴ language, origin, social status, belief, convictions or views, age, sexual orientation, disability, ethnic origin or religion
		Law on Social Integration of Persons with Disabilities of 28 November 1991, as last amended in 2018	Disability
LUXEMBOURG	Article 10bis of the Constitution (for nationals only)	Law of 28 November 2006, ¹⁵ as last amended in 2008 (General anti-discrimination Law)	Religion or belief, disability, age, sexual orientation, race or ethnic origin, nationality
		Law of 29 November 2006, (Public Sector Law) ¹⁶	Religion or belief, disability, age, sexual orientation, race or ethnic origin
		Law of 12 September 2003 on persons with Disabilities, 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 2020	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
		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
		Equal Opportunities (Persons with Disabilities) Act of 10 February 2000, as last amended in 2021	Disability
		United Nations Convention on the Rights of Persons with Disabilities Act of 17 August 2021	Disability
		Equal Treatment of Persons Order of 3 April 2007	Racial and ethnic origin

13 The term used in the Law on Equal Treatment is 'tautybė', which refers to belonging to a national minority and is not used with the meaning of 'citizenship'.

14 This ground only applies to citizens of the EU and EEA countries and their family members.

15 Full title of the law: Law of 28 November 2006, (1) transposing Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, (2) transposing Council Directive 2000/78/EC of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, (3) amending the Labour Code and introducing in Book II a new title V on equality of treatment in the area of employment and work, (4) amending articles 454 and 455 of the Criminal Code, (5) amending the law of 12 September 2003 on persons with Disabilities.

16 Full title of the law: Law of 29 November 2006, (1) the amended law of 16 April 1979 establishing the general statute of state civil servants, (2) the amended law of 24 December 1985 establishing the general statute of municipal civil servants.

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
MONTENEGRO	Articles 7, 8 and 25 of the Constitution	Law on the Prohibition of Discrimination of 6 August 2010, as last amended in 2017	Race, skin colour, national affiliation, social or ethnic origin, affiliation to a minority nation or minority national community, language, religion or belief, political or other opinion, sex, sex change, gender identity, sexual orientation and/or intersex characteristics, 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 of 26 June 2015, as last amended in 2015	Disability
NETHERLANDS	Article 1 of the Constitution	General Equal Treatment Act of 2 March 1994, as last amended in 2019	Race, religion and belief, political opinion, hetero or homosexual orientation, sex (including gender), 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
NORTH MACEDONIA	Articles 9 and 54 of the Constitution	Law on Prevention and Protection Against Discrimination of 30 October 2020	Race, skin colour, origin, nationality or ethnicity, sex, gender, sexual orientation, gender identity, belonging to a marginalised group, language, citizenship, social origin, education, religion or religious belief, political conviction, other convictions, disability, age, family or marital status, property status, health condition, personal capacity and social status or any other grounds
NORWAY	Article 98 of the Constitution.	Equality and Anti-Discrimination Act of 16 June 2017	Gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age or combinations of these factors.
		Working Environment Act of 17 June 2005, as last amended in 2019	Age, political affiliation, membership of a trade union, part-time/ temporary work

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
POLAND	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, ¹⁷ as last amended in 2016	Gender, race, ethnic origin, nationality, citizenship, ¹⁸ religion, belief, political opinion, disability, age and sexual orientation
PORTUGAL	Article 13(2) of the Constitution	Law 93/2017 establishing the legal regime for the prevention, prohibition and combating of discrimination on the grounds of racial and ethnic origin, nationality, ancestry and territory of origin of 23 August 2017	Racial and ethnic origin, colour, nationality, ancestry and territory of origin
		Law 7/2009 Labour Code, as last amended in 2022	Ancestry, age, sex, sexual orientation, gender identity, civil status, family situation, economic situation, education, origin or social condition, genetic heritage, reduced work capacity, disability, chronic illness, nationality, ethnic origin or race, territory of origin, language, religion, political or ideological convictions and trade union affiliation
		Law 46/2006 which prohibits and punishes discrimination based on disability and on a pre-existing risk to health as last amended in 2021	Disability and pre-existing risk to health
ROMANIA	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 2020	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 448/2006 on the protection and promotion of the rights of persons with a handicap of 6 December 2006, as last amended in 2021	Disability
SERBIA	Article 21(3) of the Constitution	Law on the Prohibition of Discrimination of 26 March 2009, as last amended in 2021	Race, skin colour, ancestry, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, sex, gender, gender identity, sexual orientation, sex characteristics, level of income, financial position, 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

17 Referred to in this report as the 'Equal Treatment Act'.

18 Citizenship is only protected for workers exercising their freedom of movement under EU law.

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
SERBIA	Article 21(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(1) 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
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, as last amended in 2020	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 Persons with Disabilities of 16 November 2010, as last amended in 2017	Disability
SPAIN	Arts. 14 ¹⁹ and 16 of the Constitution	Law 62/2003, on Fiscal, Administrative and Social measures, of 30 December 2003	Racial or ethnic origin, religion or belief, disability, age, sexual orientation
		RLD 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. 12-13 of the Instrument of Government ²⁰	Discrimination Act (2008:567) of 5 June 2008, as last amended in 2017	Sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation, age.
TÜRKIYE ²¹	Article 10 of the Constitution	Law on the Human Rights and Equality Institution of Türkiye (No. 6701) of 6 April 2016, as last amended in 2018	Sex, race, colour, language, religion, belief, denomination, philosophical and political opinion, ethnic origin, wealth, birth, marital status, health, disability and age

19 Article 14 only regards Spanish citizens.

20 In Sweden, four separate Acts are considered to form the Constitution, including the Instrument of Government (IG). Due to its anti-discrimination provisions, the IG is of relevance here.

21 There is no general anti-discrimination legislation in Türkiye. Sexual orientation is not a protected ground in Türkiye.

Country	Constitutional anti-discrimination provisions	Main specific anti-discrimination legislation	Grounds covered
TÜRKIYE	Article 10 of the Constitution	Law on Persons with Disabilities (No 5378) of 1 July 2005, as last amended in 2021	Disability
UNITED KINGDOM	No written constitution	UK: Equality Act of 16 February 2006, as last amended in 2010 ²²	Sex (incl. gender reassignment, married/ civilly partnered status/ pregnancy), colour, nationality (incl. citizenship), ethnic origins, national origins, disability, sexual orientation, religion or belief, age
		GB: Equality Act of 8 April 2010, as last amended in 2015	Sex (incl. gender reassignment, married/ civilly partnered status/ pregnancy), colour, nationality (incl. 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	Race, ethnic origins, colour, nationality (incl. citizenship), 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 2007	Sexual orientation
		Northern Ireland: Fair Employment and Treatment Order of 16 December 1998, as last amended in 2003	Religious belief, political opinion
		Northern Ireland: Employment Equality (Age) Regulations of 14 June 2006, as last amended in 2011	Age

22 The 2006 Equality Act created the Equality and Human Rights Commission (EHRC) in Great Britain. In addition, it 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.

Annex 2. Signature/ratification of international conventions

	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	ILO Convention No 111 on Discrimination	Convention on the Rights of the Child	Convention on the Rights of Persons with Disabilities
–: not signed, not ratified /: signed X: ratified										
ALBANIA	X	X	X	X	X	X	X	X	X	X
AUSTRIA	X	/	X	X	X	X	X	X	X	X
BELGIUM	X	/	X	X	/	X	X	X	X	X
BULGARIA	X	-	X	X	X	X	X	X	X	X
CROATIA	X	X	/	X	X	X	X	X	X	X
CYPRUS	X	X	X	X	X	X	X	X	X	X
CZECHIA	X	/	/	X	X	X	X	X	X	X
DENMARK	X	-	/	X	X	X	X	X	X	X
ESTONIA	X	/	X	X	X	X	X	X	X	X
FINLAND	X	X	X	X	X	X	X	X	X	x
FRANCE	X	/	X	X	-	X	X	X	X	X
GERMANY	X	/	X	X	X	X	X	X	X	X
GREECE	X	/	X	X	/	X	X	X	X	X
HUNGARY	X	/	X	X	X	X	X	X	X	X
ICELAND	X	/	/	X	/	X	X	X	X	X
IRELAND	X	/	X	X	X	X	X	X	X	X
ITALY	X	/	X	X	X	X	X	X	X	X
LATVIA	X	/	X	X	X	X	X	X	X	X
LIECHTENSTEIN	X	X	-	X	X	X	X	- ¹	X	/
LITHUANIA	X	-	X	X	X	X	X	X	X	X
LUXEMBOURG	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
NETHERLANDS	X	X	X	X	X	X	X	X	X	X
NORTH MACEDONIA	X	X	X	X	X	X	X	X	X	X
NORWAY	X	-	X	X	X	X	X	X	X	X
POLAND	X	-	/	X	X	X	X	X	X	X
PORTUGAL	X	X	X	X	X	X	X	X	X	X
ROMANIA	X	X	X	X	X	X	X	X	X	X
SERBIA	X	X	X	X	X	X	X	X	X	X
SLOVAKIA	X	/	X	X	X	X	X	X	X	X
SLOVENIA	X	X	X	X	X	X	X	X	X	X

1 Liechtenstein is not an ILO member.

-: not signed, not ratified /: signed X: ratified	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	ILO Convention No 111 on Discrimination	Convention on the Rights of the Child	Convention on the Rights of Persons with Disabilities
SPAIN	X	X	X	X	X	X	X	X	X	X
SWEDEN	X	-	X	X	X	X	X	X	X	X
TÜRKIYE	X	/	X	X	-	X	X	X	X	X
UNITED KINGDOM	X	-	/	X	X	X	X	X	X	X

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