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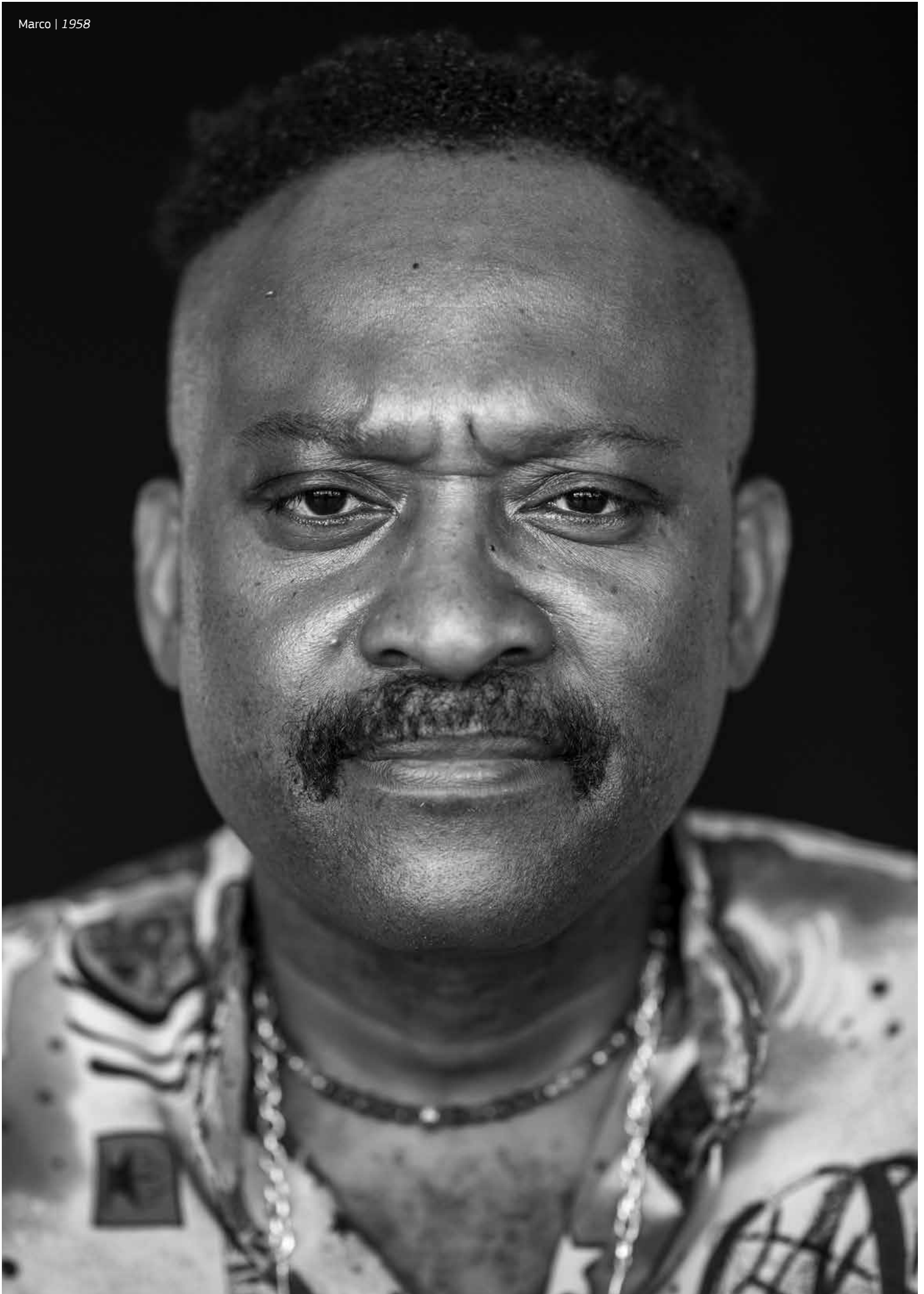
THE EUROPEAN NETWORK OF LEGAL EXPERTS
IN THE NON-DISCRIMINATION FIELD

In this Issue:

- Discrimination and its Sanctions – Symbolic vs. Effective Remedies in European Anti-discrimination Law
- Collective actions under European anti-discrimination law
- European Legal Policy Update
- CJEU/ECtHR Case Law Update
- European Committee of Social Rights Update
- National Legal Developments

European Anti-discrimination Law Review

No 19 - 2014



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in the non-discrimination field (on the grounds of Racial or Ethnic Origin,
Religion or Belief, Disability, Age and Sexual Orientation)

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Introduction

The European Network of Legal Experts in the Non-discrimination Field has been managed by Human European Consultancy and the Migration Policy Group (MPG) since 2004. The Network covers all 28 EU Member States, the Former Yugoslav Republic of Macedonia, Turkey and the EEA countries (Iceland, Liechtenstein and Norway) and works with one national expert per country.

The aim of the Network is to monitor transposition of the two anti-discrimination directives¹ at the national level and to provide the European Commission with independent advice and information. It also produces annual country reports, a comparative analysis of anti-discrimination law, the *European Anti-discrimination Law Review* and various thematic reports. Full information about the Network, its reports, publications and activities can be found on its website: www.non-discrimination.net.

This is the nineteenth issue of the *European Anti-discrimination Law Review* produced by the European Network of Legal Experts in the Non-discrimination Field. Lilla Farkas, who is the ground coordinator for the ground of race and ethnic origin in the European Network of Legal Experts in the non-discrimination field, and a practicing lawyer with experience bringing *actio popularis* and collective action claims to court in Hungary, provide an article exploring collective redress mechanisms in discrimination cases. In a second article, Romanița Iordache, who is the expert for Romania in the European Network of Legal Experts in the non-discrimination field, and Iustina Ionescu who is the expert for Romania in the European Network of Legal Experts in the field of Gender Equality, analyse the case-law of the Court of Justice of the European Union with regards to sanctions in discrimination cases. The particular focus of the article is the *Asociația ACCEPT* case, where Ms Ionescu was the legal counsel representing the organisation ACCEPT.

In addition, there are updates on legal policy developments at the European level and updates from the case law of the Court of Justice of the European Union, the case law of the European Court of Human Rights and decisions of the European Committee of Social Rights. At the national level, the latest developments in non-discrimination law in the EU Member States, the Former Yugoslav Republic of Macedonia, Turkey and the three EEA countries can be found in the section on News. These sections have been prepared and written by the Migration Policy Group (Isabelle Chopin and Catharina Germaine-Sahl) on the basis of information provided by the national experts and their own research. The Review provides an overview of the latest developments in anti-discrimination law and policy (the information reflects, as far as possible, the state of affairs as of 15 June 2014).²

The latest update of the comparative analysis, *Developing anti-discrimination law in Europe – the 27 Member States, Croatia, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared* has been published³. Moreover, two thematic reports on sexual orientation and on the burden of proof are in preparation.

In November 2014, the European Network of Legal Experts in the Non-discrimination Field together with the European Network of Legal Experts in the Field of Gender Equality will organise a legal seminar involving representatives of the Member States, candidate countries and EEA countries, equality bodies and their own members. The theme of this year's legal seminar will be the enforcement of equality and non-discrimination law, and it will deal with the six grounds of discrimination protected at the EU level and involve approximately 200 participants.

Isabelle Chopin
Piet Leunis

¹ Directives 2000/43/EC and 2000/78/EC.

² This section includes a selected number of cases only. For more cases or information please check the Network's website: www.non-discrimination.net.

³ <http://www.non-discrimination.net/content/media/Developing%20Anti-Discrimination%20Law%20in%20Europe%20EN%2029042014%20WEB.pdf>.

Meet ordinary people in this Review,
facing discrimination.

Members of the European Network of Legal Experts in the Non-discrimination Field

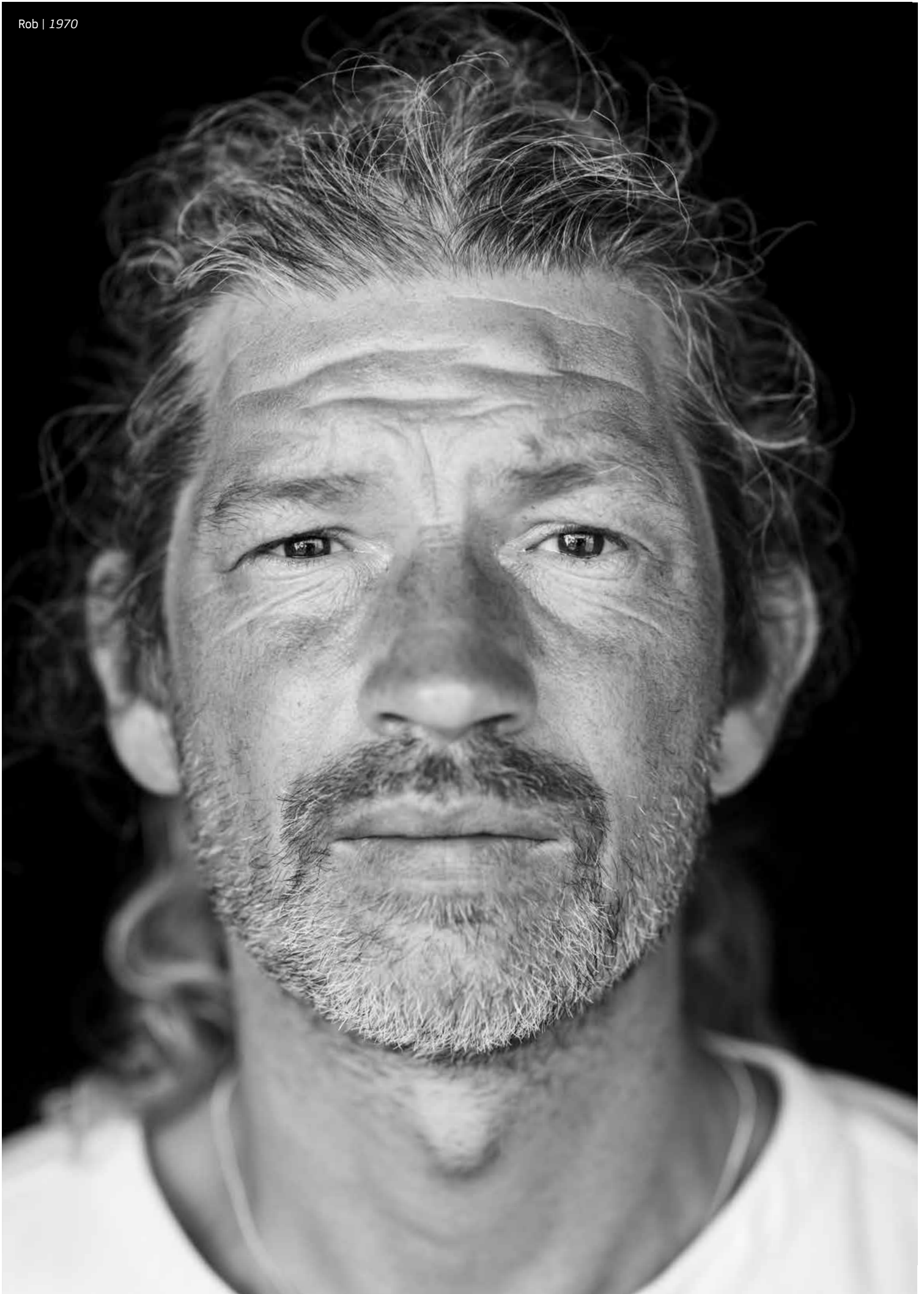
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Discrimination and its Sanctions – Symbolic vs. Effective Remedies in European Anti-discrimination Law

Romanița Iordache, Iustina Ionescu⁴

The right to a remedy is embedded in the very affirmation of the right to non-discrimination. The literature and activists alike claim that the growing concern for substantive equality has led to a redefinition of the term ‘sanctions’, so that this concept no longer only has the narrow sense of punitive, penalising measures, but also embraces remedies that provide relief and redress for victims of discrimination and address discrimination at societal level. Still, is this really the case? While the Equality Directives clearly spell out the duty of the Member States to lay down rules on sanctions applicable to infringements of national provisions adopted pursuant to these Directives and the duty to take all measures necessary to ensure that anti-discrimination provisions are fulfilled, the Equality Directives do not provide detailed information the nature of the remedy. Recently, the Court of Justice of the European Union (CJEU) provided guidance in the 2013 *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării*, C-81/12 (*Asociația ACCEPT*), in which the Luxembourg Court noted that a purely symbolic sanction cannot be regarded as compatible with the correct and effective implementation of the non-discrimination principle and that this requirement should apply individually to each remedy made available.

The only requirement for remedies under European anti-discrimination law is that they must be ‘effective, proportionate and dissuasive’. But what does the concept of ‘effective, proportionate and dissuasive’ mean in the context of anti-discrimination measures? The legal solutions adopted by different Member States and reviewed for the purposes of this article vary. Different concepts of equality, different legal cultures, and different levels of engagement lead to different institutional designs and approaches. This comparative review leads to two different preliminary conclusions. The first is theoretical, and takes the shape of a typology of discrimination remedies. The second conclusion is more of a sobering assessment of the various sanctions provided by anti-discrimination legislation across Europe from the perspective of their actual effectiveness against discrimination and the relating conclusion that a focus on providing civil remedies is linked to a view of discrimination as an infringement of personal rights while a focus on administrative or criminal sanctions evidences a concern for equality and non-discrimination as prized social goods. Given the results of this cursory review, it can be argued that, whereas under the Directives national differences may continue to exist, it is likely that some Member States will have to make more specific provisions regarding remedies available in discrimination cases, so that effective implementation of the concept of effective, proportionate and dissuasive remedies is ensured.

General theory of sanctions in EU anti-discrimination law

The concept of relief and redress in discrimination cases presented as sanctions/remedies/penalties appears in all the Equality Directives although the wording might differ. Thus, paragraph 35 of the preamble to Directive 2006/54/EC mentions ‘effective, proportionate and dissuasive penalties’,⁵ Article 18 mentions

⁴ Romanița Iordache is currently the expert for Romania in the European Network of Legal Experts in the Non-discrimination Field, and a practising lawyer providing pro bono strategic advice to *Asociația ACCEPT* Romania since 2000. Iustina Ionescu is currently the expert for Romania in the European Network of Legal Experts in the field of Gender Equality, and she was the legal counsel representing *Asociația ACCEPT* in C-81/12. The authors would like to thank the national expert members of the European Network of Legal Experts in the Non-discrimination Field who kindly responded to their questions regarding domestic remedies.

⁵ Directive 2006/54/EC, para. 35.

'compensation or reparation'⁶ and Article 25 introduces the notion of 'penalties'.⁷ Article 15 of Directive 2000/43/EC and Article 17 of Directive 2000/78/EC mention 'sanctions' and 'compensation'.

These provisions approach the problem of non-compliance with equality legislation from a variety of angles, enabling a typology to be developed of the various mechanisms: civil/criminal/administrative remedies, victim-focused/perpetrator-focused/broader remedies aiming at societal impact, non-punitive/punitive damages, backward/forward-looking, compensation, non-pecuniary damages or substantive damages aimed at addressing discrimination comprehensively. Regardless of the type of remedy proposed in national legislation (or the combination of remedies available), the emphasis on effectiveness, proportionality and dissuasiveness requires a level of thoughtfulness to ensure the adequacy of sanctions as substantive remedies so that they combat discrimination.⁸

The first gender directives mentioned 'effective means' available to ensure that the principle of equal pay is applied⁹ or measures 'necessary to enable all persons who consider themselves wronged by failure to apply the principle of equal treatment to pursue their claims by judicial process'.¹⁰ In *von Colson and Kamann*, the ECJ held that the principle of effectiveness implies that national procedures must be available in fact that are sufficiently effective to achieve the objective of the Directive,¹¹ must 'guarantee real and effective judicial protection',¹² and 'have a real and deterrent effect on the employer'.¹³ Moreover, if compensation is made available as a remedy, it 'must in any event be adequate in relation to the damage sustained'.¹⁴ These requirements were integrated into the gender directives adopted after 2000. The wording preferred was 'effective, proportionate and dissuasive [...] penalties'¹⁵ or 'compensation/reparation'.¹⁶

Articles 15 of Directive 2000/43/EC and 17 of Directive 2000/78/EC do not aim to harmonise sanctions and remedies for discrimination, they merely require the Member States to lay down effective, proportionate and dissuasive sanctions. In the words of the CJEU, 'Article 17 confers on Member States responsibility for determining the rules on sanctions applicable to infringements of the national provisions adopted pursuant to that directive and for taking all measures necessary to ensure that they are applied. Although it does not call for the adoption of specific sanctions, that article requires that the sanctions applicable to infringements of national provisions adopted to implement that directive must be effective, proportional and dissuasive'.¹⁷

⁶ Directive 2006/54/EC, Art. 18.

⁷ Directive 2006/54/EC, Art. 25.

⁸ Christa Tobler, *Remedies and Sanctions in EC Non-discrimination Law*, 2005, available at: http://www.non-discrimination.net/content/media/Remedies%20and%20Sanctions%20in%20EC%20non-discrimination%20law%20_en.pdf.

⁹ Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, Art. 6.

¹⁰ Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, Art. 6; Council Directive 86/613/EEC on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, Art. 9; Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, Art. 12.

¹¹ Case C-14/83, *Von Colson and Kamann*, para. 18.

¹² *Ibid.*, para. 23.

¹³ *Ibid.*, para. 23.

¹⁴ *Ibid.*, para. 23.

¹⁵ Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Art. 14.

¹⁶ Council Directive 2004/113/EC, Art. 8. Also Directive 2006/54/EC, Art. 18 and Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, Art. 10.

¹⁷ CJEU, C-81/12, *Asociația ACCEPT*, para. 61.

The Directives also aim to ensure that the Member States make available judicial procedures for the enforcement of obligations under these Directives, possibly preceded by an administrative pre-litigation procedure. The European Commission's January 2014 joint report on the state of play in the Member States 13 years after the adoption of the EU's landmark anti-discrimination Racial Equality and Employment Equality Directives notes that while the correct transposition of the rules on sanctions proved to be challenging in the initial stages, currently, 'the sanctions provided for by law are generally appropriate' while national authorities 'still need to make sure they provide effective protection to victims of discrimination on the ground.'¹⁸ Still, the report notes that there are remaining potential grounds for concern 'as regards the availability of remedies in practice and whether sanctions that are imposed in concrete cases comply fully with the requirements of the Directives.' The report specifically mentions the European Commission's intention to closely monitor the standards applied regarding the use of sanctions and remedies in the Member States in response to the worrying tendency to apply the lower level of sanctions provided for by national legislation and the minimum in terms of the level and amount of compensation awarded. In order to justify the need for its continuing monitoring of the remedies provided, the report cites the 2013 *Asociația ACCEPT* case in which the CJEU noted that 'a purely symbolic sanction cannot be regarded as being compatible with the correct and effective implementation of Directive 2000/78.'¹⁹

Responding to discrimination in the EU – comparative overview of remedies provided by courts and national equality bodies²⁰

The richness of the typology of discrimination remedies under national legislation across Europe, as evidenced by the comparative review of the different legal remedies developed in the 28 Member States as well as in the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey, reflects the different legal cultures, varying political contexts at the time of adoption, as well as variable commitment to sanctioning discrimination.

Civil remedies offering relief and redress to victims

Regardless of the different theoretical approaches to the concepts of equality and non-discrimination,²¹ the most obvious taxonomy of remedies categorises remedies depending on whether they are provided by civil, administrative or criminal law. From the perspective of remedies carved out in national legislation to tackle discrimination, the prevailing theory of equality seems to be that discrimination is an infringement of personal rights; hence the most common category is that of civil remedies which offer relief and redress. Civil remedies are victim-focused and include remedies of a personal nature that benefit the victim of discrimination by bringing discrimination to an end, restoring the *status quo antes* and ensuring compensation and damages for harm incurred as well as for future loss of earnings. They might also include the victim's reinstatement in his or her position prior to discrimination in cases of discrimination in employment.

¹⁸ COM(2014)2, 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 and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, available at: http://ec.europa.eu/justice/discrimination/files/com_2014_2_en.pdf (20.01.2014).

¹⁹ CJEU, C-81/12, *Asociația ACCEPT*, para. 64.

²⁰ This section was drafted based on questionnaires completed by the national experts in the European Network of Legal Experts in the Non-discrimination Field.

²¹ McCrudden, Christopher and Kountourous, Harris, 'Human rights and European equality law', in Meenan, Helen (ed), *Equality Law in an Enlarged European Union – Understanding the Article 13 Directives*, Cambridge University Press, Cambridge, 2007. Alternatively, see de Schutter, Olivier, 'Three Models of Equality and European Anti-discrimination Law,' in *Northern Ireland Legal Quarterly*, Vol 57, No 1, 2007.

The most frequent forms of civil remedies in discrimination cases are substantive and moral damages which are usually backward-looking and ordered by a court of law under general tort provisions (Croatia, Denmark, FYR of Macedonia, France, Greece, Hungary, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia). Some countries choose to provide for civil remedies under specific provisions of the anti-discrimination legislation (Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, FYR of Macedonia, Germany, Greece, Ireland, Lithuania, Malta, Norway, Poland, Romania, Slovakia, Slovenia, Spain, Sweden, the United Kingdom). There are also legal systems in which damages for particular types of discrimination are provided for in specific legislation such as labour codes or disability or consumer protection legislation.

The emerging pattern is that there is no limitation on amounts awarded as compensation. This is the case in the national law of Bulgaria, the Czech Republic, Estonia, France, Hungary, Italy, Latvia,²² Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the United Kingdom, the FYR of Macedonia, Iceland, Liechtenstein and Norway. Croatia is a special case as, although the legislation does not establish limits on compensation for damage, the Supreme Court has issued guidelines establishing such limits. Most countries allow compensation for both material and moral damages but this is not always the case.²³ Notably, the amount of compensation awarded in practice varies from country to country – for example, between €185 and €9,259 in the Czech Republic. While there are no limits or guidelines for compensation in Finland, a 2011 study of all discrimination cases decided by district courts indicated that the average compensation awarded was €5,500.²⁴ In Spain, compensation for victims is available only in the field of employment on all protected grounds²⁵ and for the ground of disability in all fields.²⁶ Legislation in Liechtenstein provides various solutions in terms of limitations on compensation awarded, with no maximum provided for cases of discrimination on grounds of disability²⁷ but minimum and maximum limits established for cases of discrimination on grounds of gender.²⁸

Not only the amount of compensation but also who can file the discrimination claim is relevant in ensuring effective legal protection against discrimination. The Directives mention the legitimate interest of NGOs and the importance of national equality bodies (NEBs) in contributing to the fight against discrimination. Though many Member States have created mechanisms allowing increased participation of NGOs and trade unions and/or NEBs in anti-discrimination cases, the comparative review revealed limitations in the provision of *locus standi* to third parties, entities other than the victims, or limitations imposed on NGOs when seeking awards in cases of discrimination against a group before civil courts. The standards provided by the Directives in this regard are minimal and national legislators have wide room to establish different models. Still, generous provisions on the role of NGOs and NEBs in anti-discrimination cases are essential

²² There is no maximum amount for damages awarded under Latvian civil law, yet Art. 14 of the Law on Reparation of Damage caused by State Administrative Institutions sets the maximum amount of non-pecuniary damages for personal harm at €7,114.36 or €9,960.10 in cases of grave personal harm, and €28,457.44 if harm has been caused to life or grave harm has been caused to health. The maximum amount of damages for moral damage is set at €4,268.62 or €7,114.36 in cases of grave moral damage and €28,457.44 if harm has been caused to life or grave harm has been caused to health.

²³ The Polish Equal Treatment Act provides only for compensation for material damage while claims filed under the Civil Code provisions may cover both material and immaterial damage.

²⁴ Aaltonen *et al.* p. 42 in *Riitelemien on pienelle ihmislle raskasta*, a study commissioned by the Ministry of the Interior, 2013, <http://www.intermin.fi/julkaisu/132013?docID=44691>.

²⁵ Spain, Royal Legal Decree 1/1995, Workers' Statute. The Workers' Statute expressly mentions: gender, marital status, age, origin, racial or ethnic origin, social status, religion or belief, disability, political ideas, sexual orientation, affiliation or non-affiliation to a union, language of the State of Spain, or family ties with other workers in a company.

²⁶ Spain, Royal Legal Decree 1/2013, General Law on the Rights of Persons with Disabilities and their Social Inclusion. This law refers to the consequences of the impairment and the integration of persons with disabilities not only in work but also in other fields such as education, social benefits, social security and housing.

²⁷ Liechtenstein, Art. 23 §1 of the Act on Equality of People with Disabilities.

²⁸ Liechtenstein, Art. 7b of the Act on Equality between Women and Men.

in the effective implementation of the Directives. National provisions allowing a proactive role for NGOs and NEBs through recognition of *locus standi* in civil cases and the possibility to seek compensation for themselves (*in nome proprio*) are examples of encouraging models.

Locus standi for NGOs is usually discussed in the context of their right to participate in legal proceedings either on behalf or in support of the victim and less so in terms of *actio popularis*, claims in the public interest without a specific victim to support or represent, challenging institutional forms of discrimination and reducing the risk of further victimisation of potential individual plaintiffs. Third parties, such as NGOs or trade unions, cannot make compensation claims in the majority of Member States if there is no identified victim of discrimination who entrusts them with legal representation. This rule can be found in Austria, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, FYR of Macedonia, France, Germany, Greece, Ireland, Liechtenstein, Lithuania, Norway, Poland, Romania, Slovakia, Slovenia, Spain, Sweden, Turkey and the United Kingdom. To increase the effectiveness of legal protection against discrimination, some countries, such as Luxembourg and Liechtenstein, have taken a different approach and established the possibility for NGOs to seek remedies either in the form of punitive damages or as awards *in nome proprio* in civil cases and thus have the means to pursue their work in the public interest. In Liechtenstein, NGOs might have standing or not depending on the legislation applied and the field in which discrimination occurs; associations for persons with disabilities can make legal claims on their own behalf regarding access to public buildings, public roads and traffic areas, and public transport systems while the legislation on equality between women and men does not give NGOs the right to file an action on behalf of an unidentifiable group of affected persons.²⁹ Luxembourg is the only country where any compensation awarded goes to the association filing the claim, as provided by Article 7 of the framework anti-discrimination law of 28 November 2006.³⁰

In practical terms, civil remedies can be granted through a wide variety of means. The most common seems to be a judicial award of damages. Other specific remedies have been provided through orders annulling the discriminatory provisions of a contract or decision (Belgium, France, Romania), orders requiring respondents to stop violation and refrain from reoffending (Bulgaria, Hungary), orders to provide a plan to remove acts and effects of discrimination (Italy, the United Kingdom), or orders requiring a private apology such as a letter or publication in the media (Croatia, the Czech Republic, Hungary, Italy, Latvia, Romania, Slovakia).

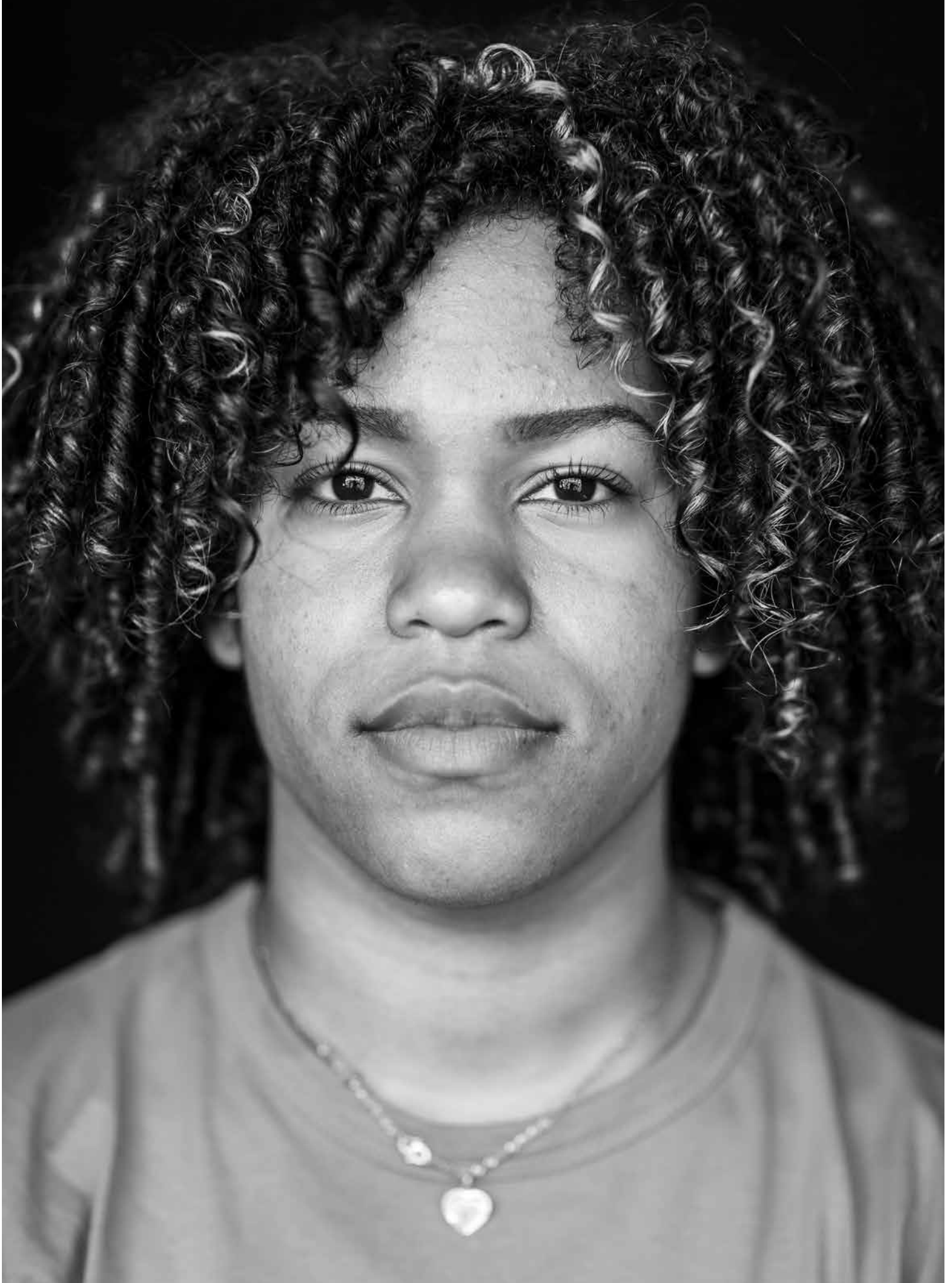
While national differences regarding the actual provision of awards were expected given different legal traditions, different standards of living and different approaches to combating discrimination, this succinct survey also revealed several disturbing trends which raise questions as to the effective implementation of the Directives in some Member States. These include arbitrary limitation of the amount of compensation or the absence of legal or judicial guidelines allowing the courts to establish adequate amounts for compensation, lack of provisions on punitive damages, the possibility to award compensation only in relation to some protected grounds or only in relation to a particular field (usually employment), a limited *locus standi* for NGOs and trade unions or a limited capacity for such entities to claim compensation which would allow them to carry on their work.

Criminal and administrative sanctions punishing the perpetrator

There are a limited number of countries which have chosen to sanction discrimination as a criminal or administrative/minor offence, recognising its impact in affecting not only the dignity of the victim but also in eroding the social fabric. This second type of remedy includes sanctions which address violations of

²⁹ Liechtenstein, *Behindertengleichstellungsgesetz*; BGIG, LGBl. 2006, No 243.

³⁰ Luxembourg, Law of 28 November 2006, the general anti-discrimination law, available at: <http://www.legilux.public.lu/leg/a/archives/2006/0207/a207.pdf>.



the principle of non-discrimination from a criminal law or administrative law perspective – an approach which is also backward-looking but which is aimed at punishing the perpetrator for the sake of protecting a public interest. Equality and non-discrimination in themselves are understood as free-standing ‘prized social goods’ and cease to be perceived as mere norms for the principled distribution of ‘public goods of value’. The very existence of this cluster of criminal and administrative remedies might suggest a more sustained, systematic approach to responding to discrimination. However, the comparative survey not only reveals that a very limited number of countries have opted for this type of remedy³¹ but also evidences in the case of administrative and criminal sanctions (just as in the case of civil remedies) limitations of the punitive mechanisms put in place: limited standing for initiating a criminal or administrative case and limited powers of the authorities mandated to respond to discrimination. The research also shows that the administrative remedies provided for are often inadequate or are available only for particular forms of discrimination or in specific fields (usually employment).

Administrative and criminal sanctions in particular are of a repressive nature and aim at educating the perpetrator as well as the general public. Administrative punitive remedies include administrative warnings or fines, criminal fines, disciplinary measures etc. They can be issued by the national equality body (Bulgaria, Cyprus, Hungary, Lithuania, Portugal and Romania), by the courts (Croatia, Finland, Greece, Italy, Norway, Spain, the United Kingdom) or by specialised entities with powers in relation to labour (Austria, the Czech Republic, Hungary, Slovakia, Portugal) or education (Hungary, Slovakia) or consumer protection (Hungary). In some cases, NEBs can publish non-binding opinions (Austria, the Netherlands), or can issue recommendations and then initiate procedures before the relevant authorities or courts if the recommendations are not implemented (Austria, FYR of Macedonia). A noteworthy limitation in pursuing discrimination cases as minor criminal complaints is that in some countries only victims, prosecutors or national equality bodies can file complaints, thus *de facto* limiting the potential role of NGOs (Austria, Croatia, Finland, Hungary).

In countries where the general anti-discrimination legislation or anti-discrimination clauses in general legislation provide for fines, these can be issued either by a court of law or by national equality bodies and specialised agencies, with the courts being mandated to impose fines for forms of discrimination which are perceived as having a greater impact and categorised as minor offences. Fines ordered by courts seem to be significantly higher than those levied by NEBs, creating a ‘hierarchy of equality’ where a different regime of sanctions is applicable to discrimination depending on the protected ground or *ratione materiae* – the field in which discrimination occurs. In practice, this may raise concerns regarding the accessibility of available legal mechanisms, given that seizing the courts without the professional support of NEBs can be more intimidating and burdensome for victims; hence it becomes more difficult to seek such remedies. Minimum or maximum levels of fines may be established leaving room for discretion, or a flat fine may be specified for a particular offence. In Cyprus, the legislation specifies fines of different amounts depending on whether they are issued by courts³² or by the Equality Body, though so far no orders or fines imposed have been reported.³³ In Croatia, fines applied by courts for minor offences range between

³¹ There are also countries in which the national legislation does not provide for administrative sanctions in cases of discrimination such as Belgium, Denmark, Germany, Liechtenstein, Luxembourg, the Netherlands, Poland, Spain or the United Kingdom.

³² Cyprus, the Equal Treatment (Racial or Ethnic Origin) Law No 59(I)/2004 (31.3.2004) Section 13, the Equal Treatment in Employment and Occupation Law No 58 (I)/2004 (31.3.2004), Section 15 and the Law on Persons with Disabilities No 57(I)/2004 Section 6, amending Section 9 of the Basic Law, provide for sanctions up to a maximum of €6,835 for offences within the competence of the courts.

³³ Cyprus, the Combating of Racial and Some Other Forms of Discrimination Law No 42(I)/ 2004 (19.03.2004), Sections 18, 26(1). When issued by the equality body, fines cannot exceed €598 for discriminatory behaviour, treatment or practice; €427 for racial discrimination in the enjoyment of a right or freedom; €598 for non-compliance with the recommendation of the equality body within the specified time limit; and €85.44 daily for continuing non-compliance after the deadline set by the equality body for violations of the principle of non-discrimination within its competence.

€133 and €46,666. In Estonia, fines for discrimination as minor offences vary from €12 to €1,200 and the pecuniary sanction for discrimination-related criminal offences varies between €96 and €1,600.³⁴ Greek criminal courts can impose a fine of between €1,000 and €5,000.³⁵ Administrative courts can order fines ranging between €400 and €1,000 in FYR of Macedonia, a significant amount given the average salary. Criminal fines can reach a maximum of €75,000 in France. The Slovenian Act Implementing the Principle of Equal Treatment sets different fines for minor offences depending on the perpetrator, with the level of fine depending on the seriousness of the offence and negligence or intent on the part of the offender.³⁶ In Norway, although the legislation allows the Gender Equality and Anti-discrimination Tribunal to apply administrative fines, it has never done so.

In recognition of the need to professionalise a new and challenging area of the law, some of the new Member States have chosen to mandate their national equality bodies to sanction discrimination. The administrative fines vary between €125 and €1,000 in Bulgaria, leaving the NEB in the position to establish the amount applicable for each case. The Hungarian Equal Treatment Authority can impose fines ranging between €167 and €20,000. In Portugal, fines issued by the NEB may vary from €485 to €2,425 for natural persons and are doubled for legal persons, though fines are significantly higher for discrimination in employment.³⁷ The Romanian national equality body could previously issue administrative fines of between €90 and €1,818, which were increased in 2013 to range between €227 and €22,727 in response to the *Asociația ACCEPT* case.

In addition, specialised entities can issue fines in discrimination cases in specific areas, as is the case of the Greek Labour Inspectorate, which can issue an administrative fine of between €500 and €30,000 for cases of discrimination in employment.³⁸ The Hungarian Governmental Office may impose fines for violations of the discrimination prohibition in the field of education of up to €3,330, and the Consumer Protection Authority may order fines where a breach of the equal treatment principle occurs in relation to access to goods and services, the maximum amount of which are determined by the annual revenue of the perpetrator concerned, ranging from €50 to €6,666,670.

Not only the minimum and maximum fines stipulated by law, the number of fines issued or the proportionality between the average fine and the average salary in the country are relevant in assessing the impact of available remedies but also the use of the amounts collected. Thus, in the majority of States the sums paid in fines are directed into the state budget. There are only two considerable exceptions. In Portugal, under Article 14 of Law 18/2004, 10% of fines goes into the NEB's budget to be used for its activities, and in Turkey, administrative fines collected by provincial accessibility commissions for breaches of the non-discrimination principle in relation to accessibility are channelled to the Ministry of Family and Social Policy to be used for accessibility projects, while administrative fines for violations of the Labour Law are directed into the budget of the Institution of Providing Jobs and Employees (ISKUR).

Forward-looking, non-pecuniary remedies

A third and much more interesting category of remedies from the perspective of effectiveness is the one of forward-looking remedies which indicate commitment to tackling the pervasive effects of discrimina-

³⁴ Estonia, Arts 44 and 47 of the Criminal Code.

³⁵ Greece, Art. 16 of Anti-discrimination Law 3304/2005.

³⁶ Slovenia, Art. 24 of the Slovenian Act Implementing the Principle of Equal Treatment: a natural person who commits a minor offence is to be fined from €250 to €1,200, while a legal person or an individual entrepreneur is to be fined from €2,500 to €40,000. An official of a state body or local community where a minor offence has occurred is to be fined from €250 to €2,500.

³⁷ Portugal, Art. 554(4) of the Labour Code: fines vary depending on the employer's turnover and negligence/intent.

³⁸ Greece, Art. 16 of Law 2639/1998.

tion; these are systemic non-pecuniary remedies or substantive remedies which entail both a proactive, constructive approach and a punitive one. From the standpoint of the different theories of equality, this type of remedy indicates an approach to equality as affirmative equality, whereby authorities pursue policies actively to seek to improve the representation of groups.³⁹ This type of remedy aims to introduce systemic changes. Not only do they respond to the victim's suffering (as do civil remedies) or to the State's need to punish minor crimes (as do administrative and criminal remedies), but they create the conditions to prevent further discrimination, to educate and to raise awareness. As noted by the CJEU, 'the mere fact that a specific sanction is not pecuniary in nature does not necessarily mean that it is purely symbolic (see, to that effect, *Feryn*, paragraph 39), particularly if it is accompanied by a sufficient degree of publicity and if it assists in establishing discrimination within the meaning of [Directive 2000/78/EC] in a possible action for damages.'⁴⁰

Tribunals in the United Kingdom or in Ireland⁴¹ can order proactive, positive remedies which include introducing desegregation policies in response to cases of segregation in education, reviewing recruitment policies, diversity auditing, adopting diversity policies or non-discrimination codes,⁴² or a duty to organise equality training. These remedies take into consideration the comprehensive causes leading to discrimination and the overall socio-economic context which needs to be addressed in order to effectively tackle it. Similarly, the Portuguese High Commissioner for Migration may apply a wide list of measures including: publication of the decision, public censure (admonition) of the perpetrators of discriminatory practices, confiscation of property, prohibition of the exercise of a profession or activity which involves a public capacity or depends on authorisation or official approval by public authorities, forfeiture of the right to benefits granted by public bodies or services, forfeiture of the right to participate in trade fairs, forfeiture of the right to participate in public markets, compulsory closing of premises owned by the perpetrators, or suspension of licences and other permits.⁴³

Punitive remedies in this category place discrimination in the wider societal context but also target the systemic character of the discrimination. They might also include orders to desegregate schools (Slovakia), the withdrawal or temporary suspension of authorisations or licences (the Czech Republic, Germany, Hungary, Ireland, FYR of Macedonia, Portugal, Romania), withdrawal of state funds, exclusion from public procurement tenders (Italy),⁴⁴ confiscation of items (the Czech Republic, Portugal) and the obligation to publish the decision or a statement of public apology (Belgium, the Czech Republic, Romania).

In limited cases, the courts or NEBs are mandated to issue specifically-tailored solutions addressing the case: the Austrian Equal Treatment Commission has the duty to provide the perpetrator in a discrimination case with a non-legally binding proposal on how to end the discrimination and to prevent similar incidents in the future. The French Defender of Rights can, after having investigated a claim, make recommendations to take all necessary measures to prevent discrimination or correct inadequate practices. In the UK,

³⁹ De Schutter, Olivier, 'Three Models of Equality and European Anti-discrimination Law', in *Northern Ireland Legal Quarterly*, vol. 57, No. 1, 2007.

⁴⁰ CJEU, C-81/12, para. 68.

⁴¹ The case law of the Irish Equality Tribunal evidences a wide variety of measures, including the creation of an equal opportunities policy; re-training of staff with particular emphasis on disability issues; reviewing recruitment procedures, customer service practices or sexual harassment procedures; formal training of interview boards; equality training for staff; and inviting the complainants and their companions for a complimentary meal or drink.

⁴² Codes of conduct are instruments that may be adopted as a remedy imposed by court order following a court case as a result of a legal requirement, or voluntarily. They reflect an entity's minimum standards of acceptable conduct and core values on a number of issues, including the diversity of its constituency (workforce, beneficiaries, clients and partners). They apply to all aspects of business conduct and are relevant to the conduct of individuals and entire organisations.

⁴³ Portuguese High Commission for Migration available at: <http://www.acidi.gov.pt/>.

⁴⁴ Italy, Art. 44(11) of the Immigration Decree.

the Employment Tribunals or the High Court can make recommendations that ‘within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate.’⁴⁵

The effectiveness of remedies is reflected by their impact. Still, little if no assessment of this aspect could be reported. Few countries had incorporated into their national legal framework a mechanism for monitoring or for following up to assess if recommendations are observed. Notable exceptions include the Bulgarian NEB which has ordered respondents to report to it on measures taken within a specified time limit or the Cypriot NEB which, following the issuing of an order, has the power to monitor and supervise compliance. In the event of a failure to observe an order, the Equality Body may issue a fine for non-compliance although so far, it has issued only recommendations and no fines or orders have been issued. If decisions made by the Danish Board of Equal Treatment are not complied with, the Board, at the request and on behalf of the complainant, must bring the matter before the civil courts. Similar mechanisms are provided in the case of the French Defender of Rights,⁴⁶ the Finnish Discrimination Tribunal⁴⁷ and the Swedish Equality Ombudsman.⁴⁸ Increased awareness of the need to continuously monitor the enforcement of NEB decisions and their impact seems to be an emerging trend. For example, in spite of past criticisms regarding its failure to monitor enforcement of its decisions, in a recent ground-breaking decision the Romanian NEB sanctioned 39 mayors of district capitals for failure to ensure access to public transportation for persons with disabilities. The NEB issued a recommendation for all mayors to review their public transportation contracts, to continue only those contracts which ensured accessibility for persons with physical disabilities, and to publish brief summaries of the case in local newspapers, also mentioning as a novelty its intention to monitor implementation of the recommendations in the next six months.⁴⁹

Sanctions in Romanian law and practice leading to C-81/12

Case C-81/12 originated in a complaint to the Romanian national equality body (NCCD) filed by *Asociația ACCEPT*, a Romanian LGBT rights organisation. The complaint alleged discrimination on the ground of sexual orientation in employment recruitment by SC Fotbal Club Steaua București SA (‘FC Steaua’) and George Becali, a person who identifies himself and is perceived by the media as the main decision-maker in the club. George Becali declared to the mass media that he would never hire homosexuals to play in the football team. When examining an appeal against the NCCD decision, the Bucharest Court of Appeal addressed several questions to the CJEU.

According to the Romanian legislation, there are two main legal venues for sanctioning discriminatory behaviour: a complaint to the NEB, Consiliul Național pentru Combaterea Discriminării (National Council for Combating Discrimination - NCCD) or an action for damages filed to a civil court.⁵⁰ Both procedures are optional and they can be used in parallel. The findings of the NCCD are relevant to any civil case, but they do not bind judges.

⁴⁵ UK, Equality Act 2010, Section 124 (3).

⁴⁶ The French Defender of Rights imposes a deadline to report back on measures undertaken, and, in case of failure to comply, it has the power to adopt a special report.

⁴⁷ The Finnish Discrimination Tribunal may order the payment of a fine on separate application of the petitioner if its initial prohibition order is not followed.

⁴⁸ The Swedish Equality Ombudsman asks the Discrimination Board to order the education provider or the employer who were found to discriminate to fulfil a specific task within a certain time subject to a financial penalty. If the employer or the education provider does not comply, the district court issues a ruling.

⁴⁹ Decision 251 of 30.04.2014 of the Romanian National Council for Combating Discrimination.

⁵⁰ Romania, Government Ordinance 137/2000 regarding the prevention and sanctioning of all forms of discrimination, Arts. 20 and 27.

The NCCD is mandated to investigate the complaint and issue a decision assessing whether an administrative offence was committed or not.⁵¹ If the NCCD finds discrimination, there are two categories of sanctions available: administrative fines and written warnings.⁵² Written warnings are not stipulated explicitly in the Anti-discrimination Law but the NCCD applies the Law on Administrative Sanctions that mentions written warnings as sanctions for administrative offences that are less serious.⁵³ Moreover, even in cases where the NCCD found that discrimination had occurred, it had developed the practice of not applying an administrative fine or a written warning, but of simply issuing a recommendation. These recommendations were not specifically provided for by law and did not have the legal nature of a sanction but were issued by the NCCD allegedly based on its mandate of addressing future discrimination. This practice was contested both by activists and victims, and in 2013 it was finally declared unlawful by the High Court of Cassation and Justice.⁵⁴

It was of particular concern that the NCCD did not impose a fine but non-pecuniary sanctions, whatever the seriousness of discrimination found, if its decision was issued six months after the date on which the relevant facts occurred.⁵⁵ Moreover, irrespective of time limits, the NCCD's tendency at the time of the *Asociația ACCEPT* case was to apply the lower level of sanctions (written warnings and recommendations). Between 2003 and 2010, NCCD reported issuing administrative fines only in 17 out of 124 cases of discrimination under Directive 2000/78/EC (constituting 13.70%).⁵⁶ Accordingly, one of the preliminary questions referred in Case C-81/12 questioned the CJEU about the interpretation of the Romanian legal provisions as prohibiting the application of an administrative sanction after six months from the deed.

In civil court, an action for damages may be filed by a person subjected to discrimination or by an NGO working on human rights and non-discrimination.⁵⁷ However, an action for damages requires the damage suffered by the complainant as a result of the respondent's discriminatory behaviour to be clearly indicated, which puts NGOs in a difficult situation because they cannot indicate specific damage incurred by the NGO itself. In the 14 years of existence of the anti-discrimination law, the authors are not aware of any civil case initiated by an NGO that has led to a court judgment ordering effective, proportionate and dissuasive remedies. Therefore, in these cases, a complaint to the NCCD appears to be the only viable avenue for NGOs.

What does 'effective, proportionate and dissuasive sanction' mean after C-81/12?

The case of *Asociația ACCEPT* is of particular interest to legal entities that under national law have legal standing to bring a complaint of discrimination. The CJEU discussed the need to ensure respect of Article 9 of the Directive ('Defence of rights') together with Article 17. It stated that the sanctions applicable to discrimination must be equally effective, proportionate and dissuasive when a case is brought by an association exercising its legal standing, including when there is no identifiable victim, similar to the *Feryn*

⁵¹ Government Ordinance 137/2000 Art. 19.c.

⁵² Following the proceedings in C-81/12 the legislation was amended and the fines increased. Currently, the fines range between €227 and €22,727. At the time of the *Asociația ACCEPT* case, the fines ranged between €90 and €1,818.

⁵³ Government Ordinance 2/2001 regarding Administrative Offences (Art. 5.(2).a).

⁵⁴ In November 2010, the NCCD decided that public statements made by the Minister of Foreign Affairs constituted racial discrimination. Despite this finding, the NCCD did not apply an administrative sanction, but issued a recommendation. This decision was appealed all the way to the High Court of Cassation and Justice, which decided in April 2013 that the NCCD must apply an administrative sanction when it finds discrimination and that a recommendation cannot be considered an administrative sanction. High Court of Cassation and Justice, Decision No 5026 of 17 April 2013.

⁵⁵ As justification for this approach, the NCCD invokes Art. 7(1) of Government Ordinance 2/2001 on Administrative Offences.

⁵⁶ NCCD, Report on the implementation of the Framework Directive (2000/78/CE) in Romania 2003-2010, pp.174-200.

⁵⁷ Government Ordinance 137/2000, Art. 28.



case.⁵⁸ In this sense, the Luxembourg Court goes beyond the individualistic and remedial approach to sanctions⁵⁹ and develops a more preventive, proactive approach.

The Court stated two important principles in *Asociația ACCEPT*. The first principle is that symbolic sanctions are not compatible with the Directive. The second principle is that each remedy stipulated by national legislation should individually fulfil the criteria of effectiveness, proportionality and dissuasiveness.

The principle that symbolic sanctions are not compatible with the Directive draws on previous principles stated by the Court in its jurisprudence: the principles of effectiveness, proportionality, and equivalence. Below follow illustrations of how the Court applied these principles in *Asociația ACCEPT* and how they intertwine.

The principle of effectiveness ensures that the sanctioning measures may be effectively relied on before the national courts by the persons concerned, meaning that they do not render virtually impossible or excessively difficult the exercise of rights conferred by the Union law.⁶⁰ With regard to the principle of effectiveness, in *Asociația ACCEPT*, the Court pointed out two shortcomings of the national system of available sanctions: (1) as soon as six months elapsed after the date on which the relevant facts occurred, the national equality body (NCCD) no longer ordered fines, but only issued written warnings (para.65), and (2) NGOs could not claim damages in a civil case.

The principle of proportionality means that the severity of the sanctions must be commensurate to the gravity of the breaches, in particular by ensuring a genuinely dissuasive effect.⁶¹ In *Asociația ACCEPT*, the Court instructed the national judge to assess whether a warning, as the only remedy applicable after the lapse of six months, could actually have a dissuasive effect (para. 66). The Court also instructed the national judge to take into account, where appropriate, any repeat offences of the defendant concerned (para. 67). As to the type of sanctions, the Court stressed that proportionality does not necessarily mean that only pecuniary sanctions are acceptable under the Directive; however, non-pecuniary sanctions should be accompanied by a sufficient degree of publicity (para. 69).

The principle of equivalence requires that the detailed procedural rules governing actions for safeguarding rights which individuals derive from Union law are not less favourable than those governing similar domestic actions.⁶² In *Asociația ACCEPT*, the Court stated that because a warning as sanction is generally only imposed in Romanian law for minor offences, 'such a sanction is not commensurate to the seriousness of a breach of the principle of equal treatment within the meaning of [Directive 2000/78]' (para. 70).

The second principle stated by the Court in *Asociația ACCEPT* complements its reasoning regarding the application of the first principle. Essentially, the Court stated that each remedy made available at the national level in cases of discrimination should individually fulfil the criteria of effectiveness, proportionality and dissuasiveness. The Court stressed that the mere existence of an action for damages under the Romanian legislation 'cannot, as such, make good any shortcomings, in terms of effectiveness, proportionality or dissuasiveness of the sanction, that might be identified' by the national judge with respect to the proceedings before the NEB (para. 69).

⁵⁸ CJEU, C-81/12, *Asociația ACCEPT*, para. 62, citing *Feryn* paras. 38 and 40.

⁵⁹ Christa Tobler, *Remedies and Sanctions in EC Non-discrimination Law*, 2005, p.8.

⁶⁰ Case C-180/95, *Nils Draehmpaehl*, para. 24. Also Case C-30/02 *Recheio-Cash & Carry* [2004], ECR I-06051, para. 17.

⁶¹ Case C-383/92 *Commission v United Kingdom* [1994] ECR I-2479, para. 42.

⁶² C-32/76, *Rewe Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para. 6.

Conclusion

Given the interpretation provided by the Court in *Asociația ACCEPT* with regard to the guiding principles for remedies in cases of discrimination and the heterogeneity of the remedies available in the 33 States surveyed, it can be concluded that while the Directives leave it to Member States to carve out the regulatory regime of remedies in cases of discrimination, the requirement of ensuring effectiveness, proportionality and dissuasiveness still holds. As showed by the comparative overview, there is no universal system of remedies for discrimination, and the different solutions have to be assessed in the context of domestic legal frameworks. However, there are some clearly emerging elements. The limited number of proactive remedies and the failure to ensure adequate monitoring of compliance with remedies decided by courts or NEBs in most countries surveyed can affect the dissuasiveness of the remedies granted. The lack of sentencing or compensation guidelines leaving it to the discretion of judges or NEBs to assess the severity of the remedy can affect the proportionality of the remedies. The creation of an 'equality hierarchy' as a result of the limited role of NGOs as potential actors in public interest cases or the provision within the same legal system of different remedies which vary depending on the protected ground or the field in which discrimination occurs may affect the effectiveness of the remedies. Far from falling under the margin of appreciation of the national authorities, it is the Commission's role to scrutinise whether the failure to monitor the effectiveness, proportionality and dissuasiveness of remedies reveals incorrect transposition or application of the Directives but the quality of the remedies also shows the commitment we undertake in our societies to effectively combating discrimination and promoting equality.

Collective actions under European anti-discrimination law

Lilla Farkas⁶³

Findings of the European Network of Legal Experts in the Non-discrimination Field reveal a tension between the nature of discrimination and the enforcement mechanism available at the EU level. The fundamental concern relates to the effective protection under EU law from discriminatory practices as opposed to discrimination arising from a single incident. The ensuing question remains the one that gathered non-governmental organisations in the Starting Line Group in 1992, which later successfully advocated for the adoption of the Racial Equality Directive: what procedural tools facilitate the highest level of protection against discrimination that is institutional and/or structural?

Following (1) a brief summary of the main concerns relating to collective actions, this article examines (2) the historical antecedents of collective enforcement vis-à-vis individuals and Member States elaborated in the NGO proposals leading to the adoption of the Racial Equality Directive and subsequent pieces of EU anti-discrimination legislation. It pays particular attention to (3) *actio popularis* standing which has made possible many of the representative legal actions instituted under domestic law transposing the Anti-discrimination Directives. (4) Focusing on judgments rendered by the Court of Justice of the European Union (CJEU), it assesses the present state of collective actions under European anti-discrimination law, arguing that – similarly to other fields grappling with ‘mass harm’ – here too it is the most effective means of enforcement. (5) Revisiting the enforcement models, this article posits questions on the diverging regulations at Member State level in relation to standing in non-discrimination, competition, consumer and environmental law and sheds light on the role that the unwillingness to embrace proposals relating to collective enforcement has played in the context of anti-discrimination law. Finally, (6) it points to proposals for an improved enforcement model in the non-discrimination context, taking into account recent initiatives emanating from the European Commission in relation to collective redress mechanisms and from academia concerning consumer, environmental and competition law.

1 - Collective actions in a nutshell

Classically, legal conflicts are seen as being limited to two parties: the wrongdoer and the person suffering harm. In the non-discrimination context, however, harm may frequently result from societal and institutional structures and not an individual’s misconduct. Institutional and structural discrimination may cause harm at the individual and group levels, while at the same time being harmful to the public interest. For instance, the police may fail to properly investigate hate crimes due to apparently negligent misconduct by various officials that, once added up, reveal institutional discrimination. The failure of public authorities to contain ‘white flight’ – the migration of ethnic majority children from a given school or school district – may lead to the segregation of ethnic minority and/or immigrant children in schools.

Thus, structural discrimination amounts to practices that may at times harm an individual, while on other occasions lead to the less favourable treatment of a whole group. Whatever the case may be, such discrimination is detrimental to the public interest whether suffered by one or hundreds of individuals.

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Regardless of the quality of tools promoting justice for individuals, unless mechanisms permitting the representation of groups and public interests are in place, access to justice at these levels is hampered. Clearly, groups and the general public are made up of individuals. Curiously, therefore, mechanisms that focus on single instances of discrimination perpetuated against individuals in fact fail to ensure equal treatment to the same individuals at risk of systematic discrimination. They equally fail to protect other members of the public who may suffer collateral damage arising from societal structures that discriminate. It may not be reasonable therefore to expect individuals to fight ad hoc instances of wrongdoing when their lives are shaped by discriminatory practices against which they are unarmed. More importantly, however, tools shall be provided to tackle structural discrimination.

The various reasons why individuals and groups seeking justice under European anti-discrimination law may in fact lack access to justice include the following: complexity of legal provisions relating to anti-discrimination, insufficient financial means to pursue a case, short time limits to bring a case, lack of basic adjustment to accommodate the needs of disabled complainants and the infrequency of litigation.⁶⁴ Further factors may hamper access to justice in cases of institutional and structural discrimination, including the wide array of ways in which a diffuse group of victims may suffer harm, the power imbalance between institutions and private individuals and the lack of awareness of the nature of the discrimination in question.

However, these features are not unique to the non-discrimination field. Similar considerations have triggered academic research into the procedural innovations that may facilitate exercise of consumer, environmental and shareholders' rights. One of the solutions offered by such research is recourse to collective action and the provision of collective redress.

Collective actions range from group actions where individual claims are joined in one lawsuit through class action to representative actions where NGOs sue on behalf of a large number of (un)identified claimants. They also include test case proceedings, whereby a claimant sets a precedent for the others. Collective actions can be brought 'by a single claimant, who can be a private individual, a private legal entity or a public authority, as well as by a group of people' whose claims may be 'aggregated into one total amount or just bound together via a single procedure.'⁶⁵

While all such means serve to enhance access to justice, the focus in this article will be on representative actions, because so far this particular tool has been put to use most frequently when challenging structural discrimination in Europe at the EU as well as at the domestic levels. Specific attention will be paid to the role equality bodies established to promote equal treatment on the grounds of sex, race and ethnic origin play in facilitating access to justice.

The EU agenda relating to the collective enforcement of consumer and environmental rights can serve as a source of inspiration for those active in the non-discrimination field. The European Commission has acknowledged that facilitating consumers' access to justice is of paramount importance and that instead of pursuing individual litigation, the bundling of individual 'claims in a single collective redress procedure, or allowing such a claim to be brought by a representative entity or body acting in the public interest,

⁶⁴ Isabelle Chopin and Catharina Germaine-Sahl, *Developing Anti-Discrimination Law in Europe, The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared*, European Commission, October 2013, pp. 87-90.

⁶⁵ Stefan Wrška, Steven van Uytsel and Mathias Siems, 'Access to justice and collective actions: 'Florence' and beyond', in *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?*, Stefan Wrška, Steven van Uytsel and Mathias Siems (eds), p. 11, Cambridge University Press 2012.

could simplify the process and reduce costs'.⁶⁶ This useful description of 'collective redress' provided by the Commission travels comfortably into the non-discrimination context. Here, collective redress reads as 'a broad concept encompassing any mechanism that may accomplish the cessation or prevention of [discriminatory] practices which affect a multitude of claimants or the compensation for the harm caused by such practices. There are two main forms of collective redress: by way of *injunctive relief*, claimants seek to stop the continuation of [discriminatory practices]; by way of *compensatory relief*, they seek damages for the harm caused.'⁶⁷

Litigation reaching the CJEU and the European Court of Human Rights (ECtHR) aptly demonstrates the strength of collective actions in unveiling and challenging discriminatory practices. Given this article's focus on representative actions and the ECtHR's strict rules on standing, the latter's jurisprudence will not be analysed.⁶⁸ However, there are two aspects of its procedural rules and practices that merit attention, though not yet applied to cases revolving around equal treatment. The ECtHR examines complaints submitted to it by individuals or entities that suffer a violation of rights enshrined in the European Convention on Human Rights and Fundamental Freedoms. In *Gorraiz Lizarraga and others v Spain*⁶⁹ the ECtHR admitted a complaint by individuals who had not themselves exhausted local remedies but whose rights were pursued at the national level by an association of which the individuals were members and which was their co-applicant to the ECtHR. The Court stated that: 'in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively. Moreover, the standing of associations to bring legal proceedings in defence of their members' interests is recognised by the legislation of most European countries. That is precisely the situation that obtained in the present case. The Court cannot disregard that fact when interpreting the concept of "victim". Any other, excessively formalistic, interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory.'⁷⁰ In the same line, standing was provided to both individual women and the organisation representing their interests in the *Dublin Well Woman* case, which indicates that representative standing before the ECtHR may be available to NGOs whose members suffer a violation of rights and would otherwise have standing under the ECHR.⁷¹

2 - A semi-fulfilled need for a strong procedural right

Initiatives aimed at introducing protection at the EU level from race discrimination have cropped up in the European Parliament and elsewhere since the 1980s.⁷² Although 'contemporaneous events', such as the report released by the Stephen Lawrence inquiry in the UK and Jörg Haider's entry into the Austrian governing coalition acted as push factors, they did not seem to explain the most significant innovations

⁶⁶ Commission Staff Working Document Public Consultation: *Towards a coherent European approach to collective redress*, 4 February 2011, p. 3.

⁶⁷ *Ibid.*

⁶⁸ Suffice it to mention that the ECtHR rendered judgments in the 'Roma education cases' that revealed discriminatory practices. For an analysis, see: Sina van den Bogaert, *Roma Segregation in Education: Direct or Indirect Discrimination? An Analysis of the Parallels and Differences between Council Directive 2000/43/EC and Recent ECtHR Case Law on Roma Educational Matters*, 2011, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, pp. 719-754.

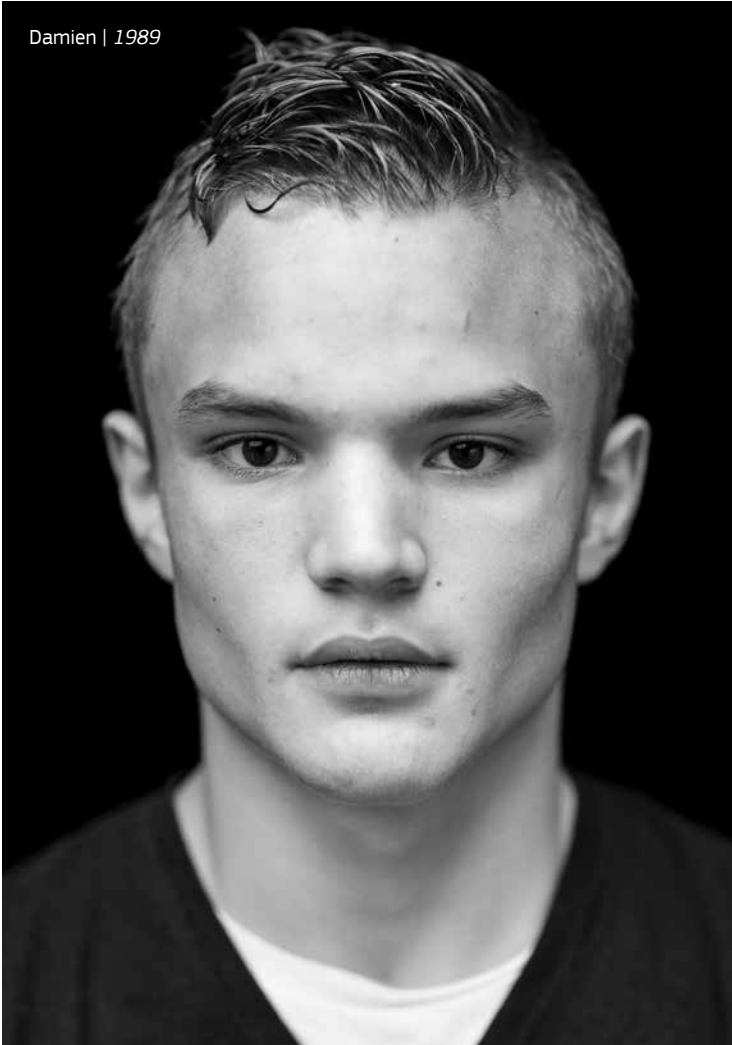
⁶⁹ Application No 62543/00, Judgment of 27 April 2004. The case concerned the flooding of some villages caused by the construction of a dam.

⁷⁰ *Ibid.*, para. 38. A distinction is made between the interests pertaining to an NGO *per se* and the interests it claims to be representing on behalf of the people establishing it in order to represent their interests.

⁷¹ Applications No 14234/88 and 14235/88, *Open Door and Dublin Well Woman v Ireland*, Judgment of 29 October 1992.

⁷² Jan Niessen and Isabelle Chopin, 'The Starting Line and the Racial Equality Directive', in *The Development of Legal Instruments to Combat Racism in a Diverse Europe*, Isabelle Chopin and Jan Niessen (eds), Martinus Nijhoff Publishing, 2004, pp. 95-110.

Damien | 1989



Savitsi | 1993



Miriam | 1984



Douwe | 1979



introduced in the Racial Equality Directive (RED).⁷³ The unique contribution of the Starting Line Group (SLG), a lawyer-led NGO coalition brought together in 1992 to advocate for a right to equal treatment on the ground of race and religion, was its understanding of the importance of the procedural aspects of that substantive right. Looking at the drafts proposed to the European Commission by the SLG, one can arguably notice ‘innovations concerning access to justice to the courts and institutional support for [strategic] litigation’.⁷⁴

Indeed, if one contrasts the procedural elements in the RED – copied and pasted into subsequent directives in this field – with pre-2000 sex discrimination directives, the focus on procedural aspects becomes apparent. Beyond the provisions on the burden of proof and effective, proportionate and dissuasive sanctions that mirrored the case law of the then European Court of Justice, the SLG proposals envisaged a strong role for NGOs in promoting the right of individuals to equal treatment on the ground of race in and outside of courts.

The SLG stressed in its final analysis that ‘[a]ssociations should be entitled to pursue, *regardless of whether this is on behalf of or has the approval of the victims of discrimination*, judicial and/or administrative procedure provided for the enforcement of obligations under national law. The financing, defence or support by any public authority or public institution of racial or religious discrimination by any person, group or organisation must be prohibited’ (emphasis added).⁷⁵ As Adam Tyson recalls, some ‘groups in the European Parliament in particular wanted to see this as a provision requiring the possibility of class action’, while Member States not familiar with such legal tools were ‘strongly opposed’.⁷⁶

Furthermore, the SLG envisaged an independent role for NGOs in providing information to the European Commission, as well as in making recommendations to the Member States. Last, it proposed that a clear role be given to the European Monitoring Centre on Racism and Xenophobia (EUMC).

The final wording of the RED contains less robust measures pertaining to the role of NGOs and the Directive does not foresee an EU wide supervisory role for the EUMC – now the Fundamental Rights Agency – let alone the establishment of a supervisory agency to oversee implementation.

Article 7(2) RED, Article 9(2) of Directive 2000/78/EC (the Employment Equality Directive, the EED), Article 17(2) of Directive 2006/54/EC, and the Recast Gender Directive now all require Member States to 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 the 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 the given

⁷³ Rhonda Evans Case and Terri E. Givens, ‘Re-engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive’ in *Journal of Common Market Studies*, 2010, Volume 48, No. 2, p. 222. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

⁷⁴ Case and Givens, op. cit.

⁷⁵ Article 4.4.d. of the proposal reads as follows: ‘Member States shall ensure that organisations concerned with the defence of human rights and in particular with the combating of racism and xenophobia shall be able to institute or support legal actions in civil, administrative and criminal courts enforcing the rights granted under this Directive ...’ in Isabelle Chopin and Jan Niessen, *Combating Racism in the European Union with Legal Means: A comparison of the Starting Line and the EU Commission’s proposal for a Race Directive*, 2000, pp. 2 and 7 available at http://www.migpolgroup.com/public/docs/98.CombatingRacisminthEuropeanUnionwithLegalMeans-AComparisonoftheStartingLineandtheEUCommissionsproposalforaRaceDirective_2000.pdf.

⁷⁶ Adam Tyson, ‘The negotiation of the EC directive on Racial Discrimination’, in *The Development of Legal Instruments to Combat Racism in a Diverse Europe*, Isabelle Chopin and Jan Niessen (eds), Martinus Nijhoff Publishing, 2004, p. 123.

Directive.⁷⁷ The complainant's approval is the formula that makes the final version deviate strongly from that intended by the SLG.

The right to standing is due to non-governmental organisations and trades unions only as long as they act on behalf or in support of actual victims of discrimination. This can be ensured by giving NGOs the right to represent individuals who have suffered discrimination in administrative or judicial proceedings, to intervene and/or to act as friends of the court (*amicus curiae*). In some Member States trade unions have for some time had the right to act on behalf of their members. It is a positive step that in some countries any NGO or trade union employee can now represent victims in court. However, the relevant provisions do not impose an obligation on Member States to provide for representative, collective or group standing. On the other hand, neither do they preclude that standing to bring representative actions – when no or not all identified victims act as plaintiffs – be provided under national law.

While NGOs enjoy the right to support complainants in the vast majority of Member States, few states allow them to engage in proceedings on behalf of victims of discrimination – particularly in judicial proceedings. Moreover, there is much less willingness to go beyond the minimum requirements of NGO standing.⁷⁸

Thirteen Member States allow NGOs to take action in the public interest, without representing an identified, individual victim (*actio popularis* action), although such standing does not always cover all the fields or all the grounds,⁷⁹ and in some instances, only covers certain types of proceedings,⁸⁰ such as the judicial review of administrative practice in the UK. Five countries out of these 13 are 'new' Member States that did not take part in the negotiation and adoption of the RED. In another two countries, namely Austria and Malta, judicial interpretation is needed to clarify whether *actio popularis* standing exists. Nine Member States allow NGOs to represent victims of discrimination in the form of class actions with the same proviso – for instance, France makes class action available in the field of housing only. Four out of the nine are new Member States. Judicial interpretation is needed in another four countries, namely Austria, Cyprus, Malta and Poland, to establish whether class action is permitted in relation to non-discrimination claims. 'Ten Member States do not provide for collective enforcement in any way.'⁸¹

3 - *Actio popularis*

Prior to discussing *actio popularis* standing, it is perhaps useful to note that although the term itself is borrowed from Roman law, the content of this procedural right as now understood is broader and is basically used for purposes other than those originally envisaged at the time of its conception.⁸² As its inception, *in*

⁷⁷ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment between men and women (recast).

⁷⁸ There are several EU Member States that allow collective actions under the Revised European Social Charter – for instance Belgium, Bulgaria, the Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Portugal and Sweden. Arguments based on the RED can be raised in proceedings under the ESC as well. For details of proceedings and pending collective complaints see: <http://www.coe.int/T/DGHL/Monitoring/SocialCharter/>.

⁷⁹ In Germany, *actio popularis* is available under disability law.

⁸⁰ In Spain, *actio popularis* is available under criminal law.

⁸¹ Isabelle Chopin and Catharina Germaine-Sahl, *Developing Anti-Discrimination Law in Europe, The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared*, European Commission, October 2013, pp. 96-97.

⁸² Peter P. Mercer, 'The Citizen's Right to Sue in the Public Interest: The Roman *Actio Popularis* Revisited', in 21 U. W. Ontario L. Rev. 89 1983, pp. 89-103.

lieu of criminal provisions prohibiting certain acts, *actio popularis* actions were available to any member of the public to sue for the imposition of a sentence to keep to himself or share with the public.⁸³

This procedural right capable of serving group justice needs through private and/or public enforcement sprung up in the wake of the adoption of the RED, EED and the Recast Gender Directive. Prior to the adoption of these Directives, *actio popularis* action had been available across the Member States to challenge the constitutionality or legality of laws, not necessarily pertaining to equal treatment. Recourse to it, however, has also been made in the latter context, such as in the UK, where in the *Prague Airport* case the European Roma Rights Centre used it to challenge immigration practices that directly discriminated against Czech citizens of Romani origin.⁸⁴

Actio popularis has been made available to NGOs and specialised equality bodies through national legislation transposing the EU Anti-discrimination Directives in Bulgaria, Croatia, Hungary, Slovakia and Romania. Case law reports available from the European Network of Legal Experts in the Non-discrimination Field show that NGOs have so far more often had recourse to *actio popularis* actions than specialised equality bodies, therefore at the domestic level the former seem to drive the equality agenda through collective legal challenges in civil courts. NGOs in these countries have standing to institute civil proceedings in their own name, without having to represent an identified individual. *Actio popularis* action can also be used to challenge potentially discriminatory practices prior to the actual implementation of such practices.

Actio popularis is a representative action. The European Commission defines a representative action as ‘an action which is brought by a representative entity, an ad hoc certified entity or a public authority on behalf and in the name of two or more natural or legal persons who claim to be exposed to the risk of suffering harm or to have been harmed in a mass harm situation whereas those persons are not parties to the proceedings’.⁸⁵

In *actio popularis* proceedings individual plaintiffs do not need to be identified. The case is brought by NGOs demonstrating an interest in the protection of the right to equal treatment. Instead of the harm suffered by individual victims, *actio popularis* action focuses on patterns, trends and practices of discrimination. Thus, it is ideal for tackling institutional, structural, or de facto discrimination. As individual victims do not appear in court, there is a minimal risk of victimisation. Not only does the case not revolve around the previous conduct and personal qualities of the individual harmed, requiring her to establish or defend her merits, but it is virtually impossible to make arguments at the individual level, ignoring the harm suffered by a group.

Beyond the usual costs incurred in judicial proceedings – such as lawyers’ and court fees – litigation assisted by NGOs more often than not involves costs that, as a general rule, are not recoverable during court proceedings and must therefore be borne by the organisations themselves. Thus, costs such as maintaining contact with the client or indeed maintaining a client service in order to select cases can be saved. Moreover, considering the number of potential clients and the extensive fact-finding that a case relying on individual victims would require, *actio popularis* action is a hugely cost-effective operation (bearing in mind costs of travel, communication, victim support and legal fees incurred in building and representing the case). Given that the evidence consists primarily of documents pertaining to the wrongdoers’ internal decision-making processes, or of statistics collected prior or during the trial phase revealing actual

⁸³ R. W. Lee, *Elements of Roman Law*, Sweet and Maxwell, 1956, p. 708.

⁸⁴ *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55.

⁸⁵ II.3.(d) of the European 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.

discriminatory practices, there is no need to hear individual parties or witnesses in court. Needless to say, this considerably shortens the length of proceedings.

Actio popularis claims can be designed in any fashion NGOs and/or specialised equality bodies see fit. They can be limited or broadened depending on the way the perpetrators of discrimination would like to portray the reality challenged. It allows private or public entities to confront the most pressing societal issues instead of the ones where individuals suffering discrimination are more likely to come forward. Indeed, members of groups who suffer structural discrimination may become so accustomed to such discrimination that they perceive it as being normal. Moreover, representative action enables the enforcers of rights to prevent impending discrimination from occurring. A further strength lies in its potential to steer public debate away from stigmatising and stereotypical arguments. Furthermore, such claims naturally lend themselves to serving as tools for advocacy, awareness raising and lobbying. The time, human and financial resources otherwise spent on identifying and supporting an actual victim who is ready and willing to mount a challenge as a representative of a whole group may be dedicated to tackling structural discrimination in a strategic, planned and foreseeable manner. *Actio popularis* is beneficial to those members of the group who would otherwise be 'forced' to engage in high-stake judicial proceedings and – as is often the case – risk their emotional well-being by appearing in the media and reliving discrimination during every public testimony they make or even suffer further victimisation because they speak out. On the other hand, single instances of discrimination that do not form part of a pattern or practice – no matter how grave – cannot be challenged via *actio popularis* action.

The weakest link of *actio popularis* litigation has proven to be the imposition of sanctions. The three EU level *actio popularis* actions that challenged discriminatory practices – and not laws – analysed below have also raised this issue, although with the exception of *Asociația ACCEPT* the questions referred to the CJEU may not have been concrete enough to elicit tailor-made guidance. Arguably, in the non-discrimination context the debate on collective actions is still very much focused on standing and not the redress that may be sought through collective enforcement.

Does or should the type of collective action affect the remedies ordered? Is there a difference between joint individual cases arising from the same factual situation and *actio popularis* action taken by public or private entities? What if not all the individuals suffering from the mass harm incurred via structural or institutional discrimination stand up to challenge it? How many applicants are needed to succeed with a claim that would affect strands of public services, such as social housing, health care, education or vocational training – all covered by the RED and the last also by the EED? Such collective actions brought under the RED and EED have not been referred to the CJEU, but have reached the ECtHR. The latter, however, remains resistant to claims seeking reform of entire strands of public services – for instance public education – regardless of the number of individual applicants bringing joint claims. For instance, in the Roma education cases emanating from Greece, the number of applicants rose to 140.⁸⁶ In the context of segregation in schools, however, the ECtHR has more and more to say on the specific or general measures that States should take to end such practices, including enrolment into an integrated school or adult education facility, dividing Roma children between mixed classes in different schools or redrawing the catchment area.⁸⁷

Arguably, the sheer number of applicants has impacted on the ECtHR's rulings, as does the fact that one country is being repeatedly challenged before it for failure to put an end to discriminatory practices or at least to improve the situation. Based on the example of strategic litigation pursuing Roma rights, it has

⁸⁶ *Sampani and Others* was filed by 140 individual applicants. *Sampanis and Others v Greece*, Application no. 32526/05, Judgment of 5 June 2008; *Sampani and Others v Greece*, Application no. 59608/09, Judgment of 11 December 2012, and *Lavida and Others v Greece*, Application no. 7973/10, Judgment of 30 May 2013.

⁸⁷ *Sampani and Others v Greece*, para. 67, and *Lavida and Others v Greece*, para. 73.

been argued that in the EU context too collective claims would be more beneficial in remedying structural discrimination and that there are ‘benefits and limits of the EU’s decision not to harmonise national procedural rules’ in this respect.⁸⁸

The landscape may change if and when the non-discrimination agenda catches up with developments in other areas of EU law, where seeking redress for mass violations appears to be easier. On 11 June 2013, the European Commission issued the Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.⁸⁹ The Recommendation deals with public as well as supplementary private enforcement, while defining a violation of rights granted under Union law as covering ‘all the situations where the breach of rules established at Union level has caused or is likely to cause prejudice to natural and legal persons.’⁹⁰ It focuses on the supplementary private enforcement of rights granted under Union law in the fields of consumer, environmental and personal data protection, competition and financial services legislation, as well as investor protection. The Recommendation seeks to set out principles to be ‘applied *horizontally and equally* in [these] areas but also *in any other areas* where collective claims for injunctions or damages in respect of violations of the rights granted under Union law would be relevant’ (emphasis added).⁹¹

Insofar as collective claims for injunctions or damages appear to be relevant to the right to non-discrimination, the principles set out in the Recommendation ought equally to apply here as well. It appears therefore that they should apply to *actio popularis* in the Member States that already provide for such actions in relation to the non-discrimination directives. On the one hand, this may lead to the amendment or adoption of more rigid rules on standing. In any case, rules of standing should be clear and uniform, also covering issues such as the financing of litigation and the prevention of abuse of the right to seek collective redress. On the other hand, compliance with the Recommendation may have a profound impact on the variety and efficiency of sanctions available in representative actions. At the domestic level, damages either cannot or have not been claimed in *actio popularis* actions challenging discrimination.⁹² Notably, however, it is in respect of injunctive relief where the potential of *actio popularis* action has yet to be explored.

The Recommendation invites Member States to take the necessary measures to implement its principles in national collective redress systems by 26 July 2015.⁹³ They will have obligations to report to the Commission on collective redress procedures – in and out of court.⁹⁴ Finally, the Commission ‘should assess the implementation of the Recommendation on the basis of practical experience by 26 July 2017 at the latest. In this context, the Commission should in particular evaluate its impact on access to justice, on the right to obtain compensation, on the need to prevent abusive litigation and on the functioning of the single market, on SMEs, on the competitiveness of the economy of the European Union and on consumer trust. The Commission should assess also whether further measures to consolidate and strengthen the horizontal approach reflected in the Recommendation should be proposed.’⁹⁵

⁸⁸ M. Dawson, Elise Muir, M. Claes, ‘Enforcing the EU’s rights revolution: the case of equality’ in *European Human Rights Law Review*, 2012/3, p. 290.

⁸⁹ OJ L 201, 267 2013, pp. 60-65.

⁹⁰ *Ibid.*, recital (6) of the Preamble.

⁹¹ *Ibid.*, recital (7) of the Preamble.

⁹² Isabelle Chopin and Catharina Germaine-Sahl, *Developing Anti-Discrimination Law in Europe, The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared*, European Commission, October 2013, pp. 96-97.

⁹³ Chapter VII, para. 38 of the Recommendation.

⁹⁴ *Ibid.*, paras. 39 and 40.

⁹⁵ *Ibid.*, para 41.



4 - *Actio popularis* action before the CJEU

Since the adoption of the 2000 non-discrimination directives, four cases have been referred to the CJEU on the basis of *actio popularis* action, namely *Feryn*, *Age Concern England*, *Test-Achats and Others*, and *Asociația ACCEPT*. From the perspective of collective enforcement, even this small number of cases has already shed light on the most relevant aspects of procedural as well as many substantive issues.

In *Age Concern England* and *Test-Achats and Others*, *actio popularis* action was put to its traditional use, namely to challenge *potentially* discriminatory legislation by means of judicial review and annulment proceedings.⁹⁶ In the former, a charity that promotes the well-being of older people challenged the legality of domestic legislation that allows the dismissal of an employee aged 65 or more by reason of retirement as being contrary to the EED. In the latter, a derogation not subjected to a time limit from the principle of equal treatment between men and women in the field of insurance, contained in Directive 2004/113/EC, was challenged by an association and two individuals. In *Age Concern England*, the CJEU found that it may be justified under the EED for national legislation to authorise in a general manner the dismissal of workers by reason of retirement, if it is a proportionate means to achieve a legitimate social policy objective related to employment policy, the labour market or vocational training. By their public interest nature, these legitimate aims are distinguishable from purely individual reasons particular to the employer's situation. In *Test-Achats and Others*, the CJEU found Article 5(2) of Directive 2004/113/EC (on gender equality in the access to goods and services) to be invalid from 21 December 2012 as it created the risk that the derogation from the 'unisex' premiums and benefits for insurance contracts concluded after 21 December 2007 would persist indefinitely, which was contrary to the principle of equal treatment between men and women.

The most striking feature of these cases is the absolute ease with which these challenges were brought and adjudicated both at the national and EU levels. The standing of the NGOs, whether mounting the legal challenges alone or together with individuals whose rights to equal treatment could potentially be violated, was not disputed. Collective redress was rendered with ease even though both judgments may have considerable economic and financial implications for employers and insurance companies, as well as private individuals. On the one hand, this ease is unsurprising, as many Member States provide *actio popularis* standing for the annulment of legislation in general. On the other hand, it is not self-explanatory why then the same rules on standing and remedies are not automatically available to all those across Europe wishing to challenge practices unlawful on account of discrimination.

Interventions in *Feryn* may shed light on the reasons behind certain Member States' different approaches to *actio popularis* standing and collective redress in the context of the review of discriminatory laws and practices.⁹⁷ In this case, the Belgian equality body used an *actio popularis* action to challenge the recruitment policy of a well-known employer who publicly stated that he would not and has not hired employees of a particular ethnic origin. Advocate General Maduro argued that the facts did not only reveal a potential threat of discrimination, but that such statements amounted to a 'speech act' which constituted direct discrimination based on ethnic origin. Notably, the 'speech act' in the concrete case did not amount to potential but actual discrimination. It transpired from the facts that the employer had in fact refused to hire applicants of Moroccan origin, although the exact number and identity of such applicants remained unknown in the proceedings.⁹⁸ More precisely, however, the personal identity of job applicants – including

⁹⁶ *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform*, Case C-388/07, and *Association belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*, C-236/09.

⁹⁷ *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, Case C-54/07.

⁹⁸ Mr Feryn was reported to say that '[a]part from these Moroccans, no one else has responded to our notice in two weeks ... but we are not looking for Moroccans.' Cited in the Opinion of Advocate General Poiares Maduro, Case C-54/07, 1.3.

their ethnic origin – was known exclusively to the employer but he never disclosed and could not be forced to disclose such personal data.

The Advocate General addressed at length what appeared to be the most controversial part of the referral, namely ‘whether a public interest body is entitled to seek legal redress where the principle of equal treatment has been infringed.’⁹⁹ The United Kingdom and Ireland underlined that Article 7 of the RED ‘was not intended to make it possible, under the laws of the Member States, for public interest bodies to bring an action in the nature of an *actio popularis*.’¹⁰⁰ The Advocate General noted that although the RED did not require Member States to provide standing to public interest bodies to bring judicial proceedings in the absence of an identifiable complainant, they were not precluded from introducing or maintaining more favourable provisions to ensure protection from discrimination on the basis of ethnic origin. Essentially, the RED provides protection from discrimination whether the individuals suffering it are identifiable or not.

The Advocate General sought to distinguish the ‘range of discriminatory behaviour’ from ‘the range of enforcement mechanisms and remedies’.¹⁰¹ He contended that a ‘minimum standard of protection is not the same as a *minimal* standard of protection’, therefore Community rules may not be interpreted as ‘the lowest conceivable’.¹⁰²

However, a ‘simple’ speech act such as that committed in *Feryn* may have graver consequences, because ‘[n]obody can reasonably be expected to apply for a position if they know in advance that, because of their racial or ethnic origin, they stand no chance of being hired.’¹⁰³ That speech conveys a message of exclusion from the labour market and it ‘would lead to awkward results if discrimination of this type were for some reason to be excluded altogether from the scope of the Directive’.¹⁰⁴ Had that been the case, the ‘most blatant strategy of employment discrimination might also turn out to be the most “rewarding”’.¹⁰⁵

Following the line of the Advocate General’s reasoning, the CJEU found that the absence of an identifiable complainant does not mean that there is no direct discrimination based on ethnic origin and that the ‘speech act’ in and of itself was a fact on the basis of which it could be presumed that such discrimination in respect of recruitment had occurred. The CJEU further stated that regardless of there not being an identifiable victim, appropriate sanctions may include a finding of discrimination in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant, a prohibitory injunction ordering the employer to cease the discriminatory practice, as well as a fine. The CJEU has also pointed to the possibility of making an award of damages to the body bringing the proceedings. This latter recommendation is instructive in the context not only of differing national legislation on damages recoverable in *actio popularis* actions, but also with a view to the harmonisation of the rules of collective redress for mass violations, including discriminatory practices such as those obtaining in *Feryn*.¹⁰⁶

Feryn has made the case for national legislation that seeks to provide access to justice against discriminatory practices and in order to achieve that aim establishes strong collective enforcement mechanisms. It has at the same time left the question of what happens in similar situations in countries that choose not to provide protection against the same situations unaddressed. Advocate General Maduro was right in point-

⁹⁹ Ibid., para.12.

¹⁰⁰ Ibid., para.12.

¹⁰¹ Ibid., para.14.

¹⁰² Ibid., para.14.

¹⁰³ Ibid., para.15.

¹⁰⁴ Ibid., para.17.

¹⁰⁵ Ibid., para.17.

¹⁰⁶ Whereas, for example, Bulgarian and Hungarian national legislation does not make damages available to organisations mounting *actio popularis* claims against discrimination, Romanian law may be interpreted as doing so.

ing out the differences between the types of discrimination on the one hand and ‘the range of enforcement mechanisms and remedies’ on the other. Clearly, protection against discriminatory practices such as those obtaining in *Feryn* can be ensured via individual enforcement, but the question then becomes: who should have the right of standing to challenge such practices? Could any job seeker who satisfies the requirements and is of Moroccan origin qualify to be a plaintiff? Should he challenge the relevant discriminatory practices in his own name or in the name of every potential job applicant of Moroccan origin? How will he know the number of potential job applicants of Moroccan origin, etc.? Responses to these questions are not easily or not at all to be had, which swiftly leads to the conclusion that collective enforcement may be the only form that successfully addresses these outstanding issues.

Interestingly, the Advocate General’s opinion made the most convincing argument about the interconnect- edness of substantive and procedural matters: the type of discrimination on the one hand and the enforce- ment mechanism and remedies on the other. Indeed, if discrimination committed against individuals who remain unidentified is also covered by the RED – and by analogy, under EU non-discrimination law – are Member States whose national law does not provide for mechanisms facilitating legal challenges against such acts in breach of EU law? Moreover, would such a situation breach substantive provisions – such as the definition of discrimination under Article 1 – or procedural ones, such as NGO standing contained in Article 7 and remedies contained in Article 15?

In *Asociația ACCEPT*, a situation rather similar to that encountered in *Feryn* was challenged by a private entity, an association whose aim is to promote and protect lesbian, gay and transsexual rights in Roma- nia.¹⁰⁷ Curiously, following the heated discussion concerning the standing of a public body – the specialised equality body – in *Feryn*, similar contentions were not made in *Asociația ACCEPT*. It appears therefore, that Member States are in fact more relaxed about (supplementary) private enforcement of collective claims. One may only guess the causes behind their approach, which may range from concerns about the budgetary implications of a public enforcement model to varying levels of commitment to fighting discrimination on different grounds.

In *Asociația ACCEPT*, the ‘patron’, who presented himself and was perceived by the public as playing a leading role – and who at the time of his homophobic statements in relation to the recruitment policy pertaining to football players still owned shares – in the Football Club Steaua București SA was found by the CJEU to fall within the personal scope of the EED. The Court also clarified that the appearance of dis- crimination on ground of sexual orientation may be refuted with a body of consistent evidence. However, evidence that is impossible to adduce without interfering with the right to privacy – namely to prove that LGBT players had been recruited in the past – is not required under the EED. Last, the CJEU established that the EED precluded national rules by virtue of which it was only possible to give a ‘warning’ after the expiry of six months from the date of which the facts leading to a finding of discrimination occurred.

As demonstrated above, the transposition of the Anti-discrimination Directives has opened up the possibil- ity for collective standing in various Member States. Such standing has by and large been utilised by NGOs which have successfully pursued challenges up to the CJEU, a forum otherwise familiar with collective actions in fields other than anti-discrimination law. This familiarity may in turn have paved the way for the burgeoning jurisprudence that seems to consolidate standing while slowly venturing into the issue of remedies – including that of damages due to representative plaintiffs. It is now time to take another look at the enforcement mechanisms.

¹⁰⁷ *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării*, Case C-81/12.

5 - Enforcement models revisited

McCrudden distinguishes three concepts of equality and therefore three distinct models of enforcing anti-discrimination law. Protection provided in law is available in practice in the framework of the individual justice model, the group justice model and the equality of participation model.¹⁰⁸ The first typically provides justice to victims who challenge discriminatory treatment in judicial or administrative proceedings. The individual justice model is based on merit and achievement and is 'markedly individualistic'. This model proceeds from a twin focus on the intention of the wrongdoer and on the sense of grievance of the person harmed. Judgment does not rely on complex socio-economic facts. Under the individual justice model, three main elements can be identified: a criminal justice model, a civil justice model, and an enforcement agency model. In the first, complaints of discrimination are treated under criminal law, while the second perceives them as matters of civil law. The enforcement agency model – present in Article 13 RED and Article 20 of the Recast Gender Directive – seeks to ensure that individual grievances are remedied with the assistance of a specialised body that in ideal circumstances has investigatory powers in assisting victims of discrimination. The latter approach has been followed in a few Member States – especially in those that have established equality bodies with public administrative powers – such as Bulgaria, Hungary and Romania.

As Fredman points out, (civil as well as criminal) remedies in this system are retrospective, individual and based on proof of breach or fault.¹⁰⁹ Moreover, in this system perpetrators take a defensive approach and are not encouraged or required to correct the institutional structure, while claims are ad hoc, which makes enforcement patchy and random.

The group justice model concentrates on the outcomes of the decision-making process from a re-distributive angle. Thus, it seeks to demonstrate discrimination suffered by groups or classes through class, collective or representative action. This model's main preoccupation is with the 'relative position of groups and classes'. Under this model, group-based remedies are sought, including positive action measures. This approach signals a shift to positive duties: from non-discrimination to equal opportunities. The focus on groups has, in some countries, led to standing being provided to public and/or private entities without the need for an identified individual victim (*actio popularis*). Significantly, an agency's investigatory powers may also serve the group justice model.

The third model – equality as participation – requires that, by 'involving the affected groups themselves', policies of non-discrimination be woven 'into the fabric of decision making' at governmental, company and local levels. In a few Member States equal opportunities planning – whether a statutory duty or optional – has been introduced and can ensure the participation of protected groups in the planning and decision-making processes.¹¹⁰

These enforcement models are rarely implemented in their pure form. The Directives have not been spared from criticism, which has ranged from pointing to the varying scope and levels of protection under EU non-discrimination law to the general lack of positive obligations, the focus on individual discrimination and the failure to properly address mass harm. Agency enforcement at the domestic level is envisaged – to a greater or lesser extent – on the ground of sex and race only, whereas despite the establishment of the Fundamental Rights Agency it is broadly lacking at the EU level. Bell underlines that the kinds of remedies

¹⁰⁸ Christopher McCrudden, 'National Legal Remedies for Racial Inequality' in Fredman, S. and Alston, P. (eds) *Discrimination and Human Rights: The Case of Racism*. Oxford University Press, 2001, pp. 253-259.

¹⁰⁹ Sandra Fredman, *The Public Sector Equality Duty*, *Ind Law J* (2011) 40 (4): pp. 405-427.

¹¹⁰ Sandra Fredman, *Making Equality Effective: Proactive Measures and Substantive Equality for Men and Women in the EU*, *European Gender Equality Law Review*, 2/2010, p. 10.

and response mechanisms set forth under the RED are primarily individually focused.¹¹¹ Provisions pertaining to social dialogue and dialogue with non-governmental organisations are limited in scope and do not flesh out robust participatory rights.

Clearly, the collective enforcement tools discussed above can facilitate access to group justice. Through the participation of protected groups in the decision-making pertaining to strategic litigation, the monitoring of trials and implementation of judgments, they may also accommodate justice as participation.

De Búrca notes that the fight against discrimination at the EU level is shaped by a hybrid model that combines multiple techniques of governance in order to achieve equal treatment. Complementing judicial approaches which flow from a classical human rights approach that the RED, as a legislative model, reflects, other schemes and institutional arrangements have also been put in place. These include the EU action programmes, the networks – including the European Network of Legal Experts in the Non-discrimination Field – that report to the European Commission and the Fundamental Rights Agency. She contends that this hybrid approach prioritises ‘revisability’ and ‘open-endedness’, is more radically bottom up and that judicial enforcement in this model plays a residual role ‘to monitor the adequacy of the processes established and to allow for their disruption where they are malfunctioning.’¹¹²

However, social change may not be in such close reach as to leave a residual role to courts just as yet. Indeed, some argue that strategic litigation both at the EU and the national levels should more frequently be undertaken and that for it to succeed, collective enforcement tools need to be put to use.¹¹³

6 - Conclusions

In 2000, the Anti-discrimination Directives emerged from concerted NGO efforts that sought to fight against discrimination based on race and religion. Regrettably, the strong procedural right facilitating access to justice as contained in the NGO proposals was not finally taken up by Member States and EU institutions. Member States have arguably not done enough to match procedural tools with the gravity and frequency of discrimination. Most national enforcement systems cater for individual justice, thus providing the least effective protection both in terms of access to justice and remedies. In countries where remedies are primarily provided under criminal law, enforcement is further limited by the lack of reversal of the burden of proof, the victim’s independent standing, as well as the role NGOs and trade unions can play in assisting the victim in proceedings.

The ideal model would focus on public enforcement through national and possibly EU level agencies, i.e. the specialised equality bodies and the Fundamental Rights Agency, with strong powers to investigate and support victims in securing a remedy, as well as the standing to launch group actions that by definition seek systemic changes. Such actions would minimise the risk that individuals who have suffered discrimination would be victimised again in court, in often rather hostile proceedings.

Enforcement systems available against discrimination need to accommodate group justice needs in Member States and EU level on a par with standing and accompanying structural remedies in the fields of

¹¹¹ Mark Bell, ‘Walking in the Same Direction?: The Contribution of the European Social Charter and the European Union to Combating Discrimination’, in G de Búrca, B de Witte and L Ogertschnig (eds), *Social Rights in Europe*, Oxford University Press, 2005.

¹¹² Gráinne de Búrca, ‘EU Race Discrimination Law: A Hybrid Model?’ in *Law and Governance in the EU and the US*, Gráinne de Búrca and Joanne Scott (eds), Hart Publishing, 2006, p. 98.

¹¹³ Mark Dawson and Elise Muir, ‘Individual, Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons from the Roma’, in *Common Market Law Review* 48, 2011, and M Dawson, Elise Muir and M Claes, ‘Enforcing the EU’s Rights Revolution: the case of equality’, in *European Human Rights Law Review* 2012, p. 3.

consumer protection, competition law and environmental rights. Enforcement needs to be unified across the grounds/areas protected under EU law.

Representative standing is already provided in many Member States to public as well as private entities in the field of consumer, competition and environmental law. Academic analysis has been conducted on the rules of standing and redress in these fields, and the European Commission's consultation leading up to the adoption of the Recommendation also canvassed stakeholder opinions pertaining to these fields.¹¹⁴ The same exercise is yet to be conducted in the non-discrimination field, and a comparative analysis between fields expressly selected for further regulation and the field of non-discrimination may also prove beneficial.

Persuasive economic arguments pertaining to the cost of discrimination at the societal, as well as the individual, level have been made.¹¹⁵ An eminent public interest which is served by equal treatment in Europe's ageing societies is economic competitiveness. Consumers who are also members of protected groups are often denied access to goods and services because of their protected ground. Is there any reason why mass violations resulting from discrimination should not be worthy of collective redress in the single market context?

It appears that standing rules in the areas already addressed at the EU level facilitate the access to justice of all individuals subject to illegal practices or suffering mass harm. It is therefore disheartening to see that in the non-discrimination context certain Member States fail to provide *actio popularis* standing to all groups protected under EU law. The playing field may be levelled out through future EU law arising in the wake of the recent Commission Recommendation pertaining to the procedural aspect of collective enforcement as the enthusiasm for further attempts to regulate discrimination by legislating has ebbed in a changing political climate.¹¹⁶ However, in this context the general lack of public enforcement is a notable shortcoming for which private enforcement may not be a sufficient substitute – in view particularly of the scarcity of funds available for such private actions. Clearly, public enforcement through field-specific agencies or through equality bodies would provide a more robust access to the right to equal treatment and ensure the effective implementation of European anti-discrimination law.

¹¹⁴ See, most recently, Micklitz, Hans-W., and Astrid Stadler, 'The development of collective legal actions in Europe, especially in German civil procedure' in *European Business Law Review* 17.5 (2006); Van den Bergh, Roger, and Louis Visscher, 'The Preventive Function of Collective Actions for Damages in Consumer Law' in *Erasmus L. Rev.* 1 (2007); Buccrossi, Paolo, and Michele Carpagano, 'Is it Time for the European Union to Legislate in the Field of Collective Redress in Antitrust (and how)?' in *Journal of European Competition Law & Practice* (2012).

¹¹⁵ There is vast literature on this topic in the US. See, for example, Crosby Burns, *The Costly Business of Discrimination. The Economic Costs of Discrimination and the Financial Benefits of Gay and Transgender Equality in the Workplace*, March 2012 and Brimmer, Andrew Felton, 'The Economic Cost of Discrimination against Black Americans' in *A Different Vision: Race and Public Policy, Volume 2*, edited by Thomas D Boston, 2002, Routledge, pp. 1-17. In Europe, recently the societal cost of the segregation of Romani children in schools has also been calculated. See, Gábor Kertesi and Gábor Kézdi, *Expected Long-term Budgetary Benefits to Roma Education in Hungary*, Working Papers No 1, Roma Education Fund, Budapest, 2006.

¹¹⁶ Gráinne de Búrca, EU Race Discrimination Law: A Hybrid Model? in *Law and Governance in the EU and the US*, Gráinne de Búrca and Joanne Scott (eds), Hart Publishing, 2006, p. 103.

European Legal Policy Update¹¹⁷

Adoption of Directive 2014/54/EU

On 16 April 2014, Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers was adopted, reinforcing the prohibition of discrimination on the ground of nationality between EU citizens, and in particular providing for the establishment of bodies exercising similar powers to those of the existing national equality bodies required by Article 13 of the Racial Equality Directive, with regard to the ground of nationality for EU citizens.

Internet source:

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.128.01.0008.01.ENG

European Commission's first report on EU level implementation of UNCRPD

On 5 June 2014, the European Commission published its first report on the implementation at EU level of the UN Convention on the Rights of Persons with Disabilities, ratified by the European Union in 2011. On this occasion, the Commission reconfirmed its commitment to the protection and promotion of the rights of persons with disabilities, and noted that the issue of accessibility lies at the centre of its legislative and policy action in this field.

On the same date, the Commission also launched the 5th Access City Award competition, looking to recognise the measures and procedures put in place by European cities to facilitate the access of disabled and older people to areas such as housing, public transport or communication technologies.

Internet source:

http://europa.eu/rapid/press-release_MEMO-14-396_en.htm

ECRI publishes its annual report for 2013

The European Commission against Racism and Intolerance (ECRI) of the Council of Europe published its annual report, calling for timely action against extremist organisations that promote racism to avoid an escalation of violence and related criminal activities. In its report, ECRI outlined the main trends in the fields of racism, racial discrimination, xenophobia, anti-Semitism and intolerance in Europe in 2013.

Internet source:

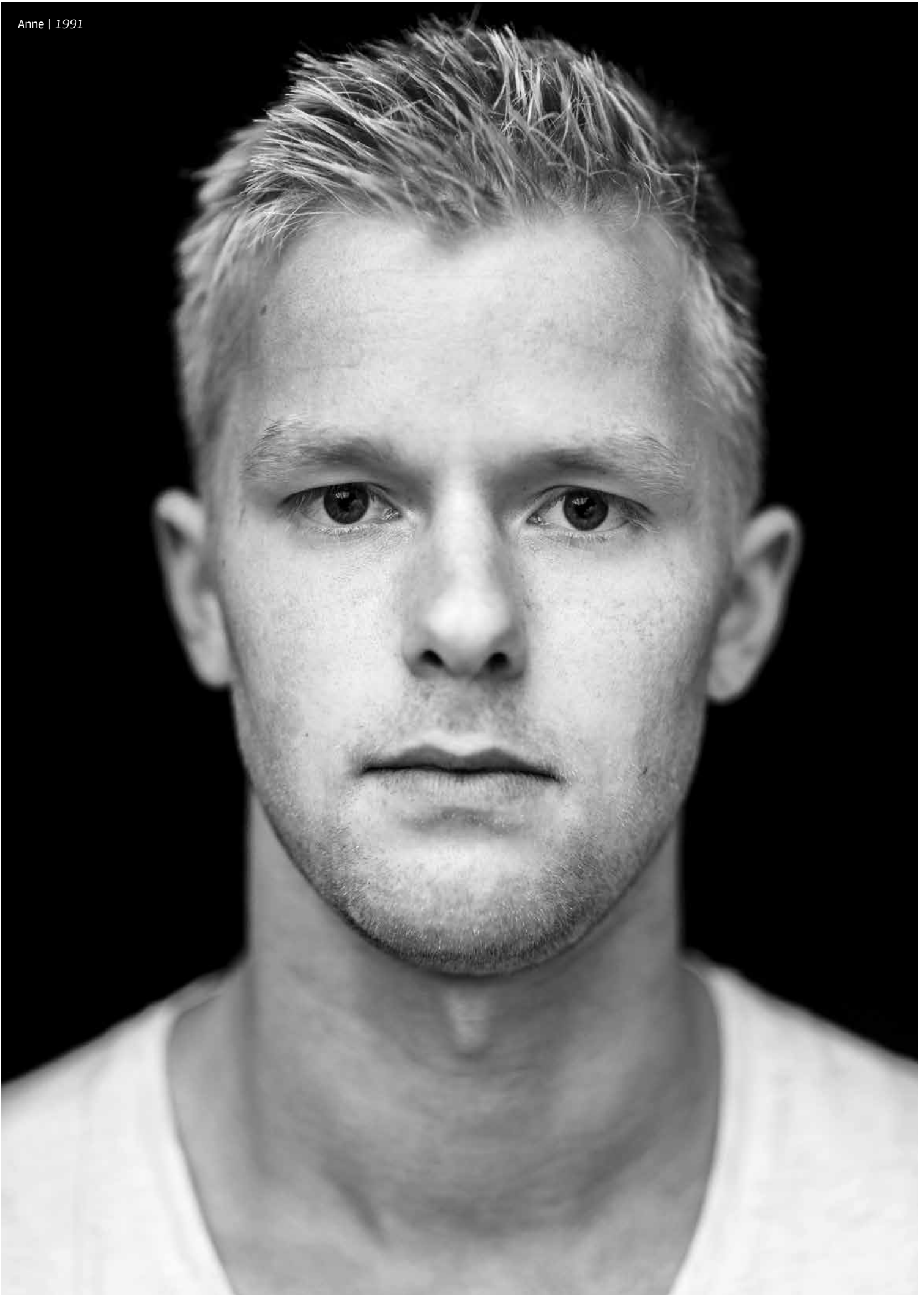
<http://goo.gl/hYSIWv>.

European Commission infringement proceedings

Romania: *Letter of formal notice regarding failure to correctly transpose provisions on sanctions*

The decision was taken on 23 January 2014 to send a letter of formal notice to Romania regarding the country's failure to correctly transpose Article 17 of the Employment Equality Directive requiring effective, dissuasive and proportionate sanctions (*Infringement number 2012/2145*).

¹¹⁷ This section provides as far as possible an overview of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 15 January to 15 June 2014.



Greece: Complementary letter of formal notice regarding insufficient protection from age discrimination

A complementary letter of formal notice was sent to Greece on 16 April 2014 regarding non-conformity with the Employment Equality Directive due to the fixing of an upper age limit (35 years) for candidates wishing to become civil servants at the Ministry of Foreign Affairs (*Infringement number 2007/4558*).

Greece: Age discrimination in the Ministry of Foreign Affairs

The European Commission sent a reasoned opinion to Greece on 16 April 2014 regarding non-conformity with the Employment Equality Directive due to age discrimination against diplomats who, in contrast to other officials in the Foreign Service, cannot extend their activity beyond the age of 65 years in order to complete 35 years of pensionable service (*Infringement number 2011/4082*).

Court of Justice of the European Union Case Law Update¹¹⁸

References for preliminary rulings - Application

Case C-83/14 CHEZ Razpredelenie Bulgaria, action brought on 17 February 2014

Sofia City Administrative Court (SCAC) has referred a case for a preliminary ruling to the CJEU, concerning inaccessible electric meters in a Roma neighbourhood. The case before the Court was brought by an electricity company, CHEZ Razpredelenie Bulgaria AD, against a ruling by the Commission for Protection Against Discrimination (the race equality body) in favour of the original complainant, Anelia Nikolova. The Commission had found that placing electric meters at an inaccessible height in a Roma neighbourhood, while placing them at an accessible height in other neighbourhoods, was indirect discrimination based on ethnic origin.

The national court referred a number of questions on the interpretation of concepts such as 'comparable situation', 'less favourable treatment', 'apparently neutral practice' and regarding the justification of indirect discrimination.

References for preliminary rulings – Judgment

Grand Chamber Judgment in Z. v A Government department and the Board of management of a community school, C-363/12, ECLI:EU:C:2014:159

The Irish Equality Tribunal referred a series of questions regarding the interpretation and the validity of the Employment Equality Directive 2000/78/EC¹¹⁹ and of the Recast Directive 2006/54/EC¹²⁰ to the CJEU for a preliminary ruling. The case concerned an action for alleged discrimination on the grounds of gender, disability and family status brought by a woman against her employer. The applicant had had a child through a surrogacy arrangement as the commissioning mother, since she was unable to bear children herself due to a condition which constituted a disability in accordance with national anti-discrimination law. The action concerned the employer's refusal to grant her paid leave equivalent to adoption and/or maternity leave following the birth of the child.

The questions referred thus concerned whether the relevant Directives should be interpreted as precluding such difference of treatment and, if not, whether these Directives are in fact compatible with primary law of the EU and with the UN Convention on the Rights of Persons with Disabilities (UNCRPD).

Firstly, the Court found that a refusal to provide paid leave equivalent to maternity leave in such circumstances does not constitute discrimination on the ground of sex and that a refusal to provide leave equivalent to adoption leave does not fall within the scope of Directive 2006/54. Secondly, regarding the allegation of discrimination on the ground of disability, the Court reiterated the necessity to interpret the Employment Equality Directive in a manner that is consistent with the UNCRPD, referring in particular to

¹¹⁸ This section provides as far as possible an overview of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 15 January to 15 June 2014.

¹¹⁹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

¹²⁰ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

its jurisprudence in *HK Danmark*.¹²¹ However, applying the definition of the concept of 'disability' adopted in that same ruling, the Court found that the inability to have a child by conventional means does not constitute a 'disability' within the meaning of the Framework Equality Directive. Such a condition does not in itself constitute a limitation which, in interaction with various barriers, may hinder the person's full and effective participation in *professional life* on an equal basis with other workers.

Finally, the Court examined the validity of the relevant provisions of the Employment Equality Directive in the light of the UNCRPD. Underlining that it is for the contracting parties to adopt the legislative and other measures for the implementation of the rights recognised in the Convention, the Court concluded that it was 'programmatic' in nature. Thus, the Court found that its provisions are not unconditional and not sufficiently precise within the meaning of the Court's case law to have direct effect in EU law. Following this reasoning, the validity of the Employment Equality Directive cannot be assessed in the light of the UNCRPD.

¹²¹ Joined cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, Judgment of 11 April 2013. See also Lisa Waddington's analysis in *European Anti-Discrimination Law Review*, Issue 17 (2013), p.11.

European Committee of Social Rights Update¹²²

Decision on the merits of Complaint No 81/2012, Action Européenne des Handicapées (AEH) v France

The complaint (registered on 3 April 2012) alleges that France does not ensure access to education for autistic children and teenagers and that it does not take all necessary steps to provide access to initial and continued vocational training, in violation of Articles 15§1 (right of persons with disabilities to independence, social integration and participation in the life of the community) and 10§1 (right to vocational training), taken alone or in combination with Article E (non-discrimination) of the Charter.

In its decision on the merits, the Committee found several violations of the Charter, including three separate violations of Article 15§1, with regard to (1) the right of children with autism to be educated primarily in mainstream schools; (2) the right of young persons with autism to vocational training; and (3) the lack of sufficient measures to ensure that the work done by institutions caring for children and adolescents with autism and the working methods they use are predominantly educational in nature.

In addition, France has failed to take into account the specific learning and communication needs of children and adolescents with autism in school, which has the consequence of forcing families to go abroad in order to educate their children with autism in specialised schools.¹²³ The Committee found that this failure constitutes direct discrimination, in violation of Article E taken in combination with Article 15§1. The Committee also held that budget restrictions in social policy matters, and particularly with regard to funding for the education of children and adolescents with autism, are more likely to disadvantage these persons with disabilities. The limited funding provided by the State therefore results in indirect discrimination, which also constitutes a violation of the same provisions.

¹²² This section provides as far as possible an overview of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 15 January to 15 June 2014.

¹²³ France finances the education of children with autism in Belgium, where the specialised classes lacking in France are provided.

European Court of Human Rights Case Law Update¹²⁴

Fernández Martínez v Spain (Application No 5603/07), Grand Chamber Judgment of 12 June 2014

The applicant was a Catholic priest who was civilly married, employed as a teacher of Catholic religion in a State-run secondary school, under a renewable one-year contract.¹²⁵ In accordance with the provisions of a 1979 agreement between Spain and the Holy See, the bishop of the diocese was to confirm, every year, that the applicant's employment was to be renewed, and the Ministry of Education was bound by the bishop's decision. In 1996 a newspaper article quoted the applicant urging the ecclesiastical authorities to introduce optional celibacy for priests. The following year, the bishop decided not to renew the applicant's contract for the new school year.

In his application to the European Court of Human Rights, the applicant alleged that the non-renewal of his contract constituted an unjustified interference with his right to respect for his private life; and that the public manifestation of his beliefs concerning the celibacy of priests was the reason for the non-renewal of his contract – rather than the belief itself – in violation with his rights to freedom of thought and expression. On 15 May 2012 a Chamber of the ECtHR found no violation of the Convention. This decision was submitted on appeal to the Grand Chamber.

In its judgment of 12 June 2014, the Grand Chamber held that the applicant could have reasonably foreseen, on the basis of the clear wording of the agreement between Spain and the Holy See, that in the absence of a certificate of suitability from the Church his contract would not be renewed. Thus, the non-renewal of the contract was in accordance with Spanish law.

The Court held that the State should accept the autonomous right of religious communities recognised by the State to react to any internal dissident movements that might pose a threat to their cohesion, image or unity. The national authorities should therefore not act as the arbiter between the religious community and one of its dissident factions. Apart from in very exceptional cases, the right to freedom of religion prohibits the State from exercising any discretion to determine whether religious beliefs or their means of expression are legitimate. Moreover, the principle of religious autonomy prevented the State from obliging a religious community to admit or exclude an individual or to entrust someone with a particular religious duty.

The Court held that the applicant had knowingly and voluntarily accepted a special duty of loyalty towards the Catholic Church, which limited the scope of his right to respect for his private and family life to a certain degree. In choosing to accept a publication about his family circumstances and his association with a protest-oriented meeting, the applicant had severed the bond of trust required for the fulfilment of his professional duties.

The Court concluded, by nine votes to eight, that there had been no violation of Article 8, because the interference with the applicant's right to respect for his private life had been legitimate and proportionate. The eight judges who did not vote for the judgment (among them, the Spanish judge) issued a joint dissenting opinion.

¹²⁴ This section provides as far as possible an overview of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 15 January to 15 June 2014.

¹²⁵ The applicant was ordained as a priest in 1961. He applied to the Vatican for dispensation from the obligation of celibacy in 1984 but did not receive an answer. He was married in a civil ceremony in 1985. He was employed as a teacher of religion from 1991 onwards.



News from the
EU Member States,
the Former Yugoslav Republic
of Macedonia, Iceland,
Liechtenstein, Norway and
Turkey¹²⁶

More information can be found at <http://www.non-discrimination.net>

¹²⁶ This section provides as far as possible a selection of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 15 January to 15 June 2014.

*Case law***First Austrian complaint brought to CRPD Committee**

A complaint (under the Optional Protocol to the UN Convention on the Rights of Persons with Disabilities (CRPD)) was brought before the Committee by a blind man from Linz, Upper Austria, and the Litigation Association of NGOs Against Discrimination. The complainant had exhausted all available domestic remedies, arguing that he is facing discrimination on the basis of his disability.

The defendant company is owned by the City of Linz, where it runs the entire public transport system. Between 2004 and 2009, the defendant equipped its tram stops with digital audio information systems, to enable persons with visual impairments to use the trams independently and on an equal basis with others, by receiving all the information that is available optically. However, in 2011 the defendant extended tramline No 3 without providing any of the new stops with the digital audio system although the budget allotted to building the new line was not fully utilised (€10 million was left).

The complainant is visually impaired and needs to use some of the new stops on the extended tramline No 3 on a daily basis both for private and business purposes. Passenger information is not available or accessible to him in contrast to passengers without any visual impairment.

The complaint claims:

- The failure to provide an accessible passenger information system constitutes a breach of Art. 9 CRPD because the recently extended tramline No 3 in Linz is not accessible to the plaintiff in the same way as it is to people who can use the visible information. There are no national binding laws stipulating that transport networks have to be equipped with information accessible to at least two senses. Non-binding soft law is vague and was not considered in the process of the extension of the tramway network. Therefore, the complainant faces a barrier and he cannot access the new stations on the extended tram network.
- This barrier constitutes discrimination under Art. 5 CRPD.
- The barriers to use of tramline No 3 also deprive the complainant of his rights to live independently (Art. 19 CRPD) and to personal mobility (Art. 20 CRPD).
- The Republic of Austria has failed to provide technical standards that guarantee accessibility to public transport (Art. 9 and 20 CRPD).
- The Federal Disability Equality Act (FDEA) does not provide adequate protection from discrimination because there is no obligation to remove barriers. Moreover, the courts have interpreted the FDEA so restrictively that the barriers were not identified as discrimination. Therefore, the complainant is violated in his right to equal and effective legal action (Art. 5, para. 2 CRPD).
- Finally, the Austrian FDEA only declares unlawful discrimination that is caused on purpose or by fault. Any behaviour that has the effect, but not the purpose, of creating barriers and discrimination is not considered unlawful by this act, which results in a violation of Art. 2 CRPD.

Political developments

New independent Inter-federal Centre for Equal Opportunities and Opposition to Racism and Discrimination operational

On 12 June 2013, the Federal State, the Regions and the Communities signed a cooperation agreement to turn the Centre for Equal Opportunities and Opposition to Racism into an inter-federal centre. Under this agreement, the new independent Inter-federal Centre for Equal Opportunities and Opposition to Racism and Discrimination (*Centre interfédéral pour l'égalité des chances et la lutte contre le racisme et les discriminations*) is competent to promote equal opportunities and fight any kind of distinction, exclusion or restriction based on the prohibited grounds contained in various anti-discrimination instruments adopted at both regional and federal levels. Previously, the Centre was merely competent to deal with issues at the federal level even though some protocols of collaboration had already enlarged its scope of competence.

In late 2013 and early 2014, each of the eight parliaments of the federal and federated entities adopted an act approving the cooperation agreement of 12 June 2013.¹²⁷ On 15 March 2014, the cooperation agreement entered into force and the new independent inter-federal Centre is now fully operational. Henceforth, potential infringements of any federal or regional anti-discrimination legislation can be reported to the Centre through its main office in Brussels or its contact points in Flanders (*meldpunten*) or Wallonia (*Espaces Wallonie*).

Internet source:

<http://www.diversite.be/interfédéral-un-nouvel-adjectif-pour-un-nouveau-statut>

The Diversity Barometer in housing: first Belgian comprehensive report on discrimination in housing

On 20 February 2014, the Centre for Equal Opportunities and Opposition to Racism and Discrimination in collaboration with the Federal Minister for Equal Opportunities, the three regional Housing Ministers and the Gender Institute presented the Housing Diversity Barometer. It consists of a research programme set up by Belgian universities to evaluate the scale and forms of discrimination in the area of public and private housing. It is the first Belgian comprehensive report on discrimination in this field.

The report was commissioned because of the difficulties in the field of housing in Belgium: discrimination, high cost of private housing, lack of housing for those with special needs, insufficient public supply of social housing, deplorable sanitary conditions of some housing, etc.

Regarding public housing, the report notes that efforts should be made to increase, facilitate and rationalise the supply of public (social) housing, which is unequally distributed throughout Belgium. Regarding private housing, discrimination is found to occur against people of foreign origin and those who receive social allowances or do not have a very high income. More specifically, the report shows that property owners and real estate agencies adopt subtle strategies for not renting to these groups, including to people with disabilities. Thus, fighting discrimination in housing is increasingly challenging.

¹²⁷ Decree of the French Community of 5 December 2013, Decree of the Walloon Region of 11 December 2013, Decree of the Commission Communautaire Française of 19 December 2013, Decree of the Flemish Community of 20 December 2013, Federal Act of 19 January 2014, Decree of the German-speaking Community of 20 January 2014, Ordinance of the Region of Brussels-Capital of 27 February 2014, Ordinance of the Commission communautaire commune of 3 April 2014.

The report underlines the role of real estate agencies in this discrimination. At the request of property owners, 42% of agencies agree to reject candidates of foreign origin and 61% agree to reject unemployed people. Very few of them expressly refuse to reject applicants of foreign origin (14%) or are unemployed (7%). In this regard, action undertaken by the Professional Institute of Real Estate Agents remains too limited.

Internet link source:

<http://www.diversite.be/barometre-de-la-diversite-logement>

Case law

Confirmation of Council of State case law on the right of teachers of religion to wear religious symbols outside the classroom within public Flemish schools



On 5 February 2014 the Council of State (the supreme administrative court) decided two separate actions for suspension filed by two teachers of religion against the refusal to renew their temporary employment contracts for the school year 2013/2014. In both cases, this refusal was based on the teachers wearing the headscarf in school premises, outside the classroom before or after teaching their classes. The schools in both cases justified their decisions by claiming that the wearing by teachers of political, ideological or religious symbols was in breach of the principle of neutrality of public education as enshrined in Article 24 of the Belgian Constitution. They considered that the exception provided for teachers of religious or moral education only applied during those classes and within that classroom.

In its decisions, the Council of State agreed with the applicants' argument that the religious beliefs – and thus related religious symbols – of a teacher of religion are inherent to his/her function. On this ground, the Council of State recalled that the Constitution requires public schools to provide Islamic religion courses, as one of the legally recognised religions in Belgium, and concluded that, *prima facie*, by refusing to appoint an Islamic religion teacher only because she wears a headscarf as a religious symbol and refuses to remove it outside the classroom, after class, the schools had breached Article 24 of the Constitution.

However, the applicants did not manage to prove the risk of serious irrevocable prejudice since the decisions only involved an appointment for a temporary period and were not related to any dismissals. Thus their actions for suspension were rejected.

The Council of State referred to its previous ruling adopted in 2013, following which the right of teachers of religion or moral education to wear political, ideological or religious symbols is not limited to the premises where the philosophical course is taught.¹²⁸ The case law of the Council of State regarding the authorisation for teachers of moral and religion courses to wear political, ideological or religious symbols, after and outside of class, seems therefore to have been confirmed for all public schools of the Wallonia-Brussels Federation and for those of the Flemish Community. The Council of State has yet to rule on the teachers' actions for annulment to further consolidate its case law on this matter.

Internet sources:

<http://www.raadvst-consetat.be/arr.php?nr=226345dep>

<http://www.raadvst-consetat.be/arr.php?nr=226346dep>

¹²⁸ See *European Anti-Discrimination Law Review*, Issue 18, pp 46-47.

Members of a right-wing extremist group convicted of Holocaust denial and incitement to discrimination and to hatred, violence and segregation against the Jewish community

The Flemish right-wing extremist group Bloed, Bodem, Eer en Trouw (BBET; 'Blood, Soil, Honour and Loyalty') was created in 2004 with the aim of harming people of foreign origin and especially members of the Jewish community. The content of their website and periodic journals appeared clearly in breach of the Racial Equality Federal Act and the Federal Act of 23 March 1995, which aims to suppress denial, minimisation, justification and approbation of the genocide committed by the German National Socialist regime during the Second World War. The group was also engaged in arms dealing.

racial
or ethnic
origin

In September 2006, the group was dismantled after 17 of its members were arrested and criminal proceedings were initiated. On 7 February 2014, the Criminal Court (*Tribunal correctionnel*) of Dendermonde convicted 14 of the group's former members of Holocaust denial and incitement to discrimination and to hatred, violence or segregation against a person or against a group, a community or its members and especially the Jewish community. Some of them were also convicted of terrorism, conspiracy and possession of arms. The main defendant was sentenced to five years' imprisonment and a fine of €8,250, while the sanctions imposed on the remaining defendants ranged between 6 months' and three years' imprisonment and fines of up to €5,550.

Internet source:

http://www.diversite.be/sites/default/files/documents/verdict/2014-02-07_corr_dendermonde_1.pdf

First murder conviction with homophobic intent as aggravating circumstance

In July 2012, the perpetrator of a violent murder confessed his crime and explained to the police that his specific intention had been to kill homosexual men, to somehow take revenge on the man who allegedly raped him when he was young.

sexual
orientation

On 27 March 2014, the perpetrator was sentenced to 25 years' imprisonment for murder with homophobic intent as an aggravating circumstance. The Belgian Criminal Code provides that an 'abject motive' (i.e. based on any of the grounds of discrimination prohibited by the Anti-Discrimination Act) of a crime is to be considered as an aggravating circumstance, but this was the first time that a court recognised homophobic intent.

Internet source:

www.diversite.be

Bulgaria

BG

Legislative development

Parliament adopts amendments to anti-discrimination law at first reading

On 16 January 2014, Parliament adopted at first reading a draft bill tabled by the Government in November 2013, to amend two provisions of the Protection Against Discrimination Act. The relevant amendments aimed to bring national law closer to the intention of the Directives regarding the shift of the burden of proof (Article 9 of the anti-discrimination law) and to insert a new provision which expands the definition of 'gender' so as to include gender reassignment, in order to broaden the prohibition of gender discrimination (proposed subsection 17 of §1 of the Additional Provisions). Article 9 currently provides for a shift of the burden of proof when the claimant establishes facts which may lead to the *conclusion* that discrimination

has occurred, and the proposed amendment changes the wording of the provision to 'inference' instead of *conclusion*. In addition, the proposal would also amend the wording of Article 9 by replacing the terms 'proves facts' with 'establishes facts' in the aim of further aligning the wording with the relevant EU provisions on the shift of the burden of proof in discrimination cases.

At second reading on 28 February, a motion for the bill not to be discussed was adopted, and the amendments were therefore dropped.

CY

Cyprus

Legislative development

Extension beyond employment of duty to provide reasonable accommodation for persons with disabilities



On 23 May 2014, an amendment to the Law on Persons with Disabilities was published, extending the duty to provide reasonable accommodation for persons with disabilities beyond the field of employment.¹²⁹ Previously, Article 9 of the law provided for 'measures to be taken (...) where local economic conditions allow', in a number of areas beyond employment such as provision of goods and services and housing. The amended provision does not make the adoption of such measures conditional on favourable local economic conditions, but requires that certain rights¹³⁰ of persons with disabilities 'must be implemented through suitable measures ensuring reasonable accommodation to the maximum of available resources'. The provision defines reasonable accommodation as 'necessary and suitable amendments and adjustments which do not impose a disproportionate or unjustified burden, where necessary in order to ensure the exercise and enjoyment of human rights and fundamental freedoms', and specifies that a 'burden is not disproportionate where it is sufficiently balanced by measures taken in the framework of state policy in favour of persons with disability.'

In addition, the right to lodge a complaint to the equality body is now extended and no longer refers specifically to the field of employment. The right to apply to the equality body for discrimination beyond employment is also foreseen in the law setting out the equality body's mandate.¹³¹

Internet source:

http://www.cylaw.org/nomoi/arith/2014_1_63.pdf

¹²⁹ Law amending the Law on Persons with Disabilities No 63(I)/2014, published in the Official Gazette on 23.05.2014.

¹³⁰ The rights covered are: The right to independent living, diagnosis and prevention of disability, personal support with assistive equipment, services etc., access to housing, buildings, streets, the environment, public means of transport, etc., education, information and communication through special means, services for social and economic integration, vocational training, employment in the open market, etc. (Article 4); Equality in employment including access to, working conditions, training etc., in line with Directive 2000/78 (Article 5); Equality in the provision of goods services and facilities where this is 'justified' (Article 6); Telephone services especially adapted for persons with disability and television programs accessible to deaf persons (Article 8). In addition, the provision in Article 9C of the old law, which provided for the right to lodge a complaint to the equality body in cases of discrimination in employment, has now been amended by removing the reference to employment. The new wording thus provides for the right to apply to the equality body without restricting this to the employment field.

¹³¹ Law on Combating Racial and Other Forms of Discrimination (Commissioner) No 42(I)/2004, Art. 6.

Political development

New Ombudswoman elected by Czech Senate

On 14 February 2014, the Czech Senate elected Anna Šabatová, former Deputy Ombudsman, as the new Ombudswoman, also exercising the mandate of equality body (Public Defender of Rights).

The newly elected Ombudswoman intends to demand that the new government extends her competences, including by adding the competence to lodge a discrimination claim before the courts and the competence to challenge the constitutionality of legal provisions before the Constitutional Court.

Internet source:

<http://www.ochrance.cz/tiskove-zpravy/tiskove-zpravy-2014/novou-verejnou-ochrankyni-prav-byla-dnes-zvolena-anna-sabatova/>

Case law

Dismissal on the ground of disability from the armed forces of the State

A former policeman submitted a complaint to the Czech equality body (the Public Defender of Rights), following his dismissal from the police force. When the employer received information that the complainant was infected by HIV, the latter was ordered to go through a medical examination of fitness for service. According to the complainant, the doctor only verified the diagnosis and concluded that the complainant had lost his fitness for service on a long term basis. The complainant was therefore dismissed. The equality body found that HIV infection, even in its symptomatic phase, can be regarded as a disability, and concluded that the complainant was dismissed solely on the ground of his disability. However, this dismissal was in accordance with the applicable law, which does not provide for protection against discrimination on the ground of disability regarding service in the armed forces of the state.¹³²



The fitness for service of servicemen/women is assessed according to the Regulation on Health Fitness, which provides a classification of illnesses that represent unfitness for service.¹³³ When a health condition falls into a given category representing unfitness for service according to the Regulation, diagnosis is automatically followed by dismissal.

The Public Defender of Rights therefore found that the dismissal was in accordance with national law, but held that it would be necessary to determine whether in this respect national law complies with the Directive 2000/78/EC (EU Employment Equality Directive), the EU Charter of Fundamental Rights, and the European Convention on Human Rights.

The equality body provided legal assistance to the victim, and recommended him to challenge the possible discrimination in court, as it does not have a mandate to act in court itself.

The equality body has the mandate to challenge the compatibility of a regulation with the law before the Constitutional Court, but not to challenge a law which potentially violates the Czech constitutional order.

¹³² Law No 361/2003 Coll. on Service by Members of the Security Services and Law No 221/1999 Coll. on Service by Members of the Armed Forces.

¹³³ Ministry of Interior Regulation No 393/2006 Coll. on Assessment of Health Fitness.



Internet source:

http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Kauzy/prace/157-2012-DIS-JSK-ZZ.pdf

Senator disciplined for verbal racial attack

A Czech Senator was penalised by the Mandate and Immunity Committee of the Czech Senate for an incident that took place in a local private hospital in June 2013, where the Senator is appointed as a director. The Senator started an argument with a medical doctor of Yemen origin, telling him that he had no business to be there and that he should go back to where he came from. The doctor found it to be offensive and related to his ethnic origin, and reported the incident to the police. The local municipality misdemeanour commission initiated proceedings; however, the Senator exercised his right to apply for disciplinary proceedings to be opened by the Mandate and Immunity Committee of the Senate instead of misdemeanour proceedings. His request was granted by the Mandate and Immunity Committee.



The Committee found that the defendant was guilty of committing a verbal attack with racist intent and imposed a fine of CZK 20,000 (€740), which corresponds to the maximum amount imposable under the law on misdemeanours for such an act (one month's average salary in 2013 in the Czech Republic). The defendant expressed his intention to lodge an appeal against the decision with the Senate.

Internet source:

http://www.senat.cz/xqw/xervlet/pssenat/webNahled?id_doc=71682&id_var=60241

Denmark

DK

Case law

Dismissal because of disability-related sickness absence, following CJEU preliminary ruling in *Ring and Skouboe Werge*

A trade union claimed compensation because of discrimination on the ground of disability on behalf of two workers who had both been dismissed from their respective employment with a shortened notice period (one month). Section 5(2) of the Salaried Employees Act allows such a shortened notice period when the employee has been sick for 120 days within a period of 12 consecutive months. The case was referred for a preliminary ruling and the Court of Justice of the European Union delivered its judgment on 11 April 2013 in the joined cases C-335/11 and C-337/11 (*Ring and Skouboe Werge*).¹³⁴



Based on the judgment of the Court of Justice, the Danish Maritime and Commercial Court delivered its judgment in the two cases on 31 January 2014.¹³⁵

1. The Court referred to the CJEU judgment and stated that the concept of 'disability' must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable, if that illness entails 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 employees, and the limitation is a long term one. The Court concluded that both women had a disability encompassed by the Act on Prohibition of Discrimination in the Labour Market etc. and the Employment Equality Directive.

¹³⁴ See *European Anti-Discrimination Law Review*, Issue 17, pp. 11-21.

¹³⁵ Maritime and Commercial Court, F-13-06 and F-19-06, Judgments delivered on 31 January 2014.

2. The Court observed that the employer in one of the cases could have adapted the workplace by means of a height-adjustable desk and part-time employment, and that the employer had not established that such accommodation would have been unreasonable. With regard to the question of a part-time position, the Court observed that the employer advertised a vacant part-time position immediately after the complainant's dismissal. In the other case, the employer had not initiated any adaptations to accommodate the complainant's disability. Thus, in both cases the Court stated that the disability-related sickness absence was caused by the employer's failure to provide reasonable accommodation.
3. The Court concluded in both cases that the dismissals with a shortened notice period for sick employees constituted direct discrimination on the ground of disability. Both workers were awarded compensation corresponding to 12 months of salary in accordance with the Act on Prohibition of Discrimination in the Labour Market etc., in addition to two months and five months of salary respectively corresponding to the remainder of their entitled notice period.

Internet source:

<http://domstol.fe1.tangora.com/brDomsoversigt.16692/F-0013-06.1414.aspx> <http://domstol.fe1.tangora.com/brDomsoversigt.16692/F-0019-06.1415.aspx>

Definition of disability and reasonable accommodation



In July 2011 and October 2012, a worker suffered two distinct work-related accidents, following which he had several periods of part-time work and sick leave. In January 2013 he was dismissed because of long illness (19 months). The worker initiated an action before the Board of Equal Treatment, claiming that the dismissal was discriminatory on the ground of disability.

In its reasoning, the Board of Equal Treatment referred to CJEU C-335/2011 (*Ring*) and C-377/2011 (*Skouboe Werge*) and decided that the damage to the complainant's left foot and the resulting functional limitations constituted a disability falling within the scope of the Act on Prohibition of Discrimination in the Labour Market etc.¹³⁶ Considering that the employer had referred to a long sickness absence when justifying the dismissal, the Board found that the complainant had established facts that gave rise to suspect that he had been discriminated against because of his disability.

The Board found that after the first accident, the employer had offered the complainant a part-time position, which he accepted and performed until the second accident. The Board also noted that the employer had offered the complainant both a full-time and a part-time office position in another city and that the complainant had rejected this offer, claiming not to be able to drive to the suggested workplace.¹³⁷

On that basis the Board concluded that the employer had established facts that it had taken steps to provide reasonable and appropriate accommodation with regard to the complainant's specific needs before deciding on the dismissal. Thus, the Board concluded that no discrimination because of disability had occurred.

Internet source:

<http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=1359&type=Afgoerelse>

Forced dismissal of priests at 70 years of age



Section 43(a) of the Civil Servants Act imposes mandatory retirement for priests when they reach the age of 70.

¹³⁶ Board of Equal Treatment Decision No 19/2014 of 29 January 2014.

¹³⁷ It is not clear from the case why the complainant would not have been able to drive.

The complainant is a priest who argued that this provision constitutes discrimination on the ground of age, considering that there is no mandatory retirement age for the other employees at his workplace (the organist, the verger, the parish clerk, etc.).

The Board of Equal Treatment noted that the Danish Parliament maintained this provision when the Civil Servants Act and other rules on forced retirement were amended in 2008.¹³⁸ According to the Board, Parliament at that time must have taken the view that Section 43(a) of the Civil Servants Act was not a violation of the prohibition of age discrimination.

The Board referred to the 2008 preparatory work for the Civil Servants Act, which stated that the purpose of maintaining the forced retirement age for priests was to ensure that the specificities of priests' employment were taken into account. Although it is not stated explicitly, the Board's reasoning was probably that without a mandatory retirement age it would be too difficult for the local ward councils to dismiss elderly priests, a situation which would cause conflict between priests and local ward councils.

The Board argued that the forced retirement age is an appropriate and necessary means to obtain these objectives, and concluded that it did not find reason to set aside the Danish Parliament's assessment that these objectives were sufficiently compelling and legitimate to justify an exception from the prohibition of age discrimination.

Internet source:

<http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=1382&type=Afgoerelse>

Rejection from access to public meeting based on Middle Eastern name

The complainant had bought a ticket to a seminar on 'Freedom of speech after the attack on Hedegaard',¹³⁹ arranged by a nonpartisan association and held in one of the halls of the Danish Parliament. Before the seminar, the complainant was informed that he was not allowed to participate in the seminar, as his name 'Jihad' in combination with his Palestinian/Egyptian background were considered to raise concern due to the topic and the timing of the seminar.



The Board of Equal Treatment found that the complainant had established a prima facie case of indirect discrimination due to ethnic origin, thus shifting the burden of proof to the defendant.¹⁴⁰ The Board emphasised the fact that the actual presence of journalist Lars Hedegaard in the seminar shortly after the assassination attempt meant that the association had to take security surrounding the meeting very seriously, considering in particular that the Danish Security and Intelligence Service had declared that it would not conduct any security assessments of participants.

Against that background the Board concluded that the association had proved that the complainant's rejection was not based on his ethnic origin, thus discrimination had not taken place.

Internet source:

<http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=1353&type=Afgoerelse>

¹³⁸ Board of Equal Treatment Decision No 41/2014 of 5 March 2014.

¹³⁹ Lars Hedegaard is a journalist and historian who is known to be a critic of Islam and who co-founded the Free Press Society (Trykkefrihedsselskabet) in 2004, working for the freedom of speech. On 5 February 2013, an unknown person attempted to kill Hedegaard in his home.

¹⁴⁰ Board of Equal Treatment Decision No 13/2014 of 22 January 2014.

*Political development***Study on disabled workers in Estonian ministries**

In December 2013, the Estonian equality body published the report *Creation of Employment Opportunities for Disabled People in Ministries*,¹⁴¹ including an overview of the results of a questionnaire conducted in Estonian ministries as well as recommendations for employers in the public and private sectors.

Estonian legislation permits benefits to be granted to disabled persons, including measures aimed at creating facilities for safeguarding or promoting their integration into the working environment. In addition, employers must provide reasonable accommodation where needed in a particular case.¹⁴²

According to the study, Estonian ministries did not duly consider the interests of disabled persons in the creation of working conditions. There were only two disabled employees in 11 ministries, and many ministries are not accessible to people with physical impairments. However, there were also several examples of positive practices (e.g. provision of special equipment for a worker with a hearing impairment, reorganisation of work, etc.).

The equality body makes several recommendations (with relevant explanations) to public and private sector employers: (1) to draft action plans to recruit workers with disabilities; (2) to state clearly in recruitment advertisements that disabled persons may also apply; (3) to ensure that people with disabilities have unimpeded access to and accessible paths inside a building; (4) web pages of public authorities should be readable by and comprehensible to disabled people; (5) the organisation of work should meet the specific needs of people with disabilities (including opportunities to work half-time); (6) the principles of universal design should be promoted in the workplace.

This is one of the equality body's first attempts to produce an analytical report.

Internet source:

http://www.svv.ee/failid/Puuetega%20inimeste%20t%C3%B6%20v%C3%B5imalused%20ministeeriumides_k%C3%BCsitlus%20ja%20soovitused.pdf.

Estonian ministries as promoters of the principle of equal treatment

According to the Equal Treatment Act (Article 14), each ministry must, within their area of government, monitor compliance with the requirements of the Equal Treatment Act and cooperate with other persons and agencies to promote the principle of equal treatment. These obligations correspond to the duties provided in Directives 2000/43/EC (Article 10) and 2000/78/EC (Article 12) that

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

As part of the research and awareness-raising project *Diversity Enriches*, an impact assessment report was published in February 2014, evaluating Estonian officials' awareness and implementation of the

¹⁴¹ *Puuetega inimestele töötamise võimaluste loomine ministeeriumides. Ministeeriumide küsitluse tulemused ja soovitused tööandjatele. Soolise võrdõiguslikkuse ja võrdse kohtlemise voliniku kantselei*, Tallinn, 2013.

¹⁴² Article 11(2)-(3) of the Equal Treatment Act.

obligation to promote the principles of equality and equal treatment.¹⁴³ The analysis was conducted by the Estonian Research Centre and covered the situation in Estonian ministries. The analysis evaluated whether ministries are aware of the obligation provided for in Article 14 of the Equal Treatment Act; how this obligation is reflected in action plans and law making; whether ministries have information about various (vulnerable) groups and their needs; and what ministries do or are planning to do to avoid direct and indirect discrimination within their areas of government. Desk research was combined with 19 semi-structured interviews in the ministries.

The results showed that most ministries were influenced by the Equal Treatment Act to a rather modest degree, and the authors advocated for more active awareness-raising activities among public officials.

Internet source:

http://issuu.com/erinevusrikastab/docs/v__rdse_kohtlemise_edendamise_kohus

Finland

FI

Legislative development

Ratification of the Convention on the Rights of Persons with Disabilities proceeding in Finland

The Committee preparing for the ratification of the Convention on the Rights of Persons with Disabilities has finished its work and the legislative proposal is being circulated to authorities and NGOs for comments during the spring of 2014. The legislative proposal suggests structures required for the ratification of the Convention (Article 33). The structures are:

- The Ministry of Foreign Affairs and Ministry of Social Affairs and Health are to work as the focal points within government (for matters relating to the implementation of the Convention);
- A new coordination mechanism to be established within the Ministry of Social Affairs and Health (to facilitate harmonised action across different sectors);
- A framework (to promote, protect and monitor implementation of the Convention) is to be created within the Human Rights Centre and the Ombudsman for Minorities which form the National Human Rights Institution.



The ratification of the Convention requires that legal provisions be revised with regard to the self-determination of people with disabilities. The Ministry of Social Affairs and Health has set up a working group, which includes representatives from disability NGOs and is expected to give its legislative proposal on strengthening the self-determination of people with disabilities before the end of 2014.

Internet source:

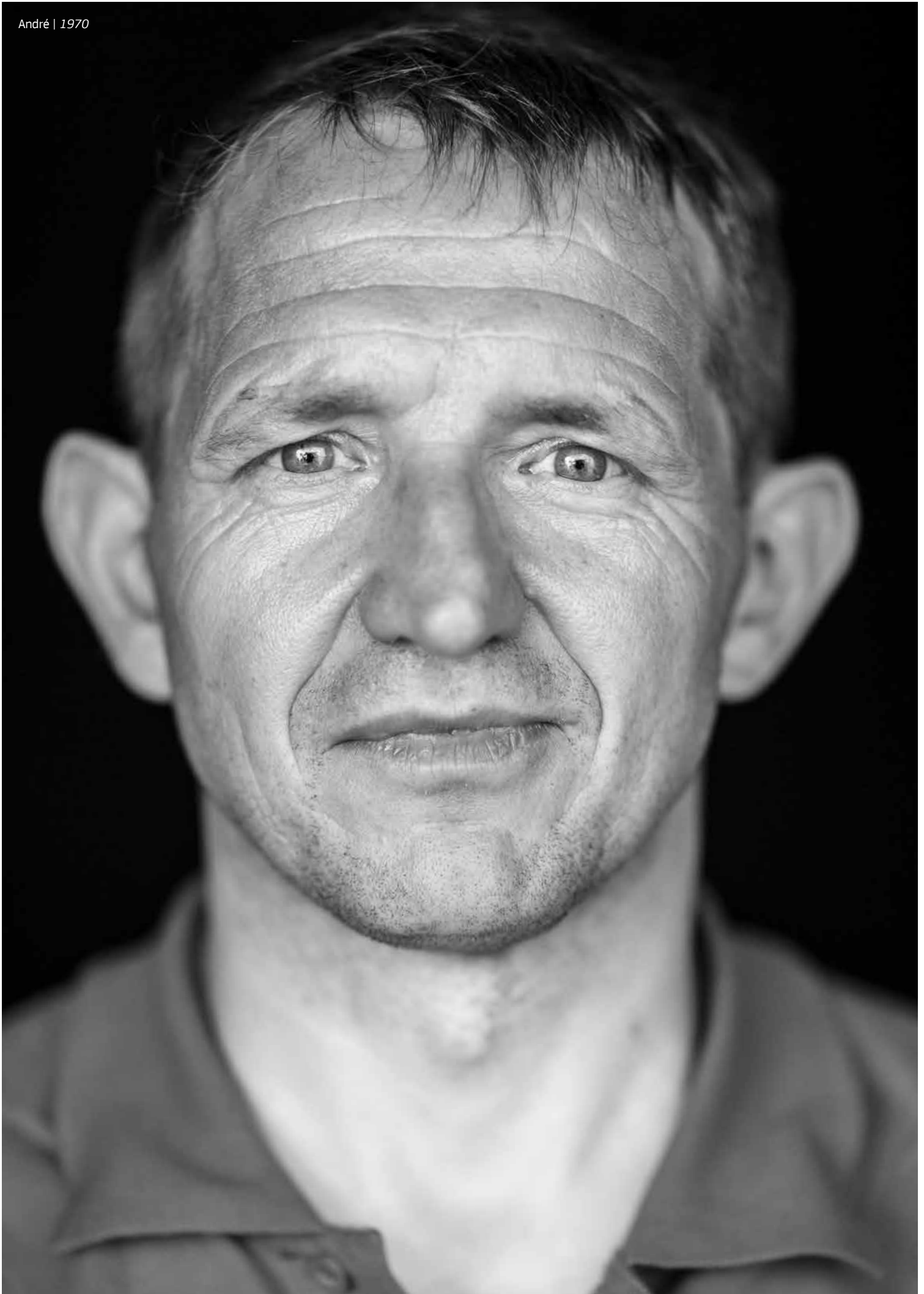
<http://www.formin.fi/public/download.aspx?ID=126000&GUID={3FC74604-9C7E-4872-9EAB-BB69DDC-CAB9B}>

Political development

Anti-discrimination reform presented to the parliament

In April 2014 the government presented a proposal for anti-discrimination law reform to Parliament. This proposal suggests that all discrimination based on age, origin, nationality, language, belief, opinion, politi-

¹⁴³ Liin Eik, Jon Ender, Pille Hillep, Kalli Kulla, Riin Pärnamets, *Awareness and implementation of the obligation to promote equal treatment in ministries (Võrdse kohtlemise edendamise kohustuse teadlikkus ja rakendamine ministeeriumides)*, Tellija: TTÜ Õiguse Instituut, 2014.



cal activity, industrial activity, family ties, state of health, disability, sexual orientation or other reasons related to a person would be prohibited in all public and private activity except in legal acts falling within the scope of private affairs and family life or the practice of religion. Similarly, it would broaden the scope of activity of the Ombudsman for Minorities and the Discrimination Tribunal from ethnicity to all these grounds, but their competences in the field of employment would continue to be limited as they would still not be able to publish opinions in this field. The Ombudsman for Equality would continue to work separately on issues related to gender and gender minorities.

While in all cases of discrimination the victim would be entitled to financial compensation, the concept of direct discrimination would differ between different grounds and situations. Generally direct discrimination would be allowed if it was based on legislation or had an acceptable aim and the means used were appropriate and necessary for achieving this aim.

In situations where Directives 2000/43/EC and 2000/78/EC are applicable, the protection would remain almost the same and the concepts of discrimination would comply with the Directives. The only change would be that all direct or indirect differential treatment would be allowed if it was permitted by law. The draft amendment proposes reducing protection which currently goes beyond the requirements of the EU Directives. In working life (as defined in Directive 2000/78), only genuine and determining occupational requirements may be reason for differential treatment based on ethnicity, religion, belief, disability or sexual orientation. However, this limitation is not stipulated for the additional grounds that are not covered by the Directives. Similarly, in education or provision of services (as defined in Directive 2000/43), the current legislation prohibits differential treatment on the grounds of ethnicity as well as nationality, language, religion, belief, opinion, health, disability, sexual orientation or other personal characteristics. The proposal aims to reduce this protection to the minimum which is imposed by the Directives, i.e. the ground of ethnicity.

The proposal requires public authorities as well as employers with more than 30 employees to analyse the equality situation in their field of activity and to draw up a plan for fostering equality for all discrimination grounds.

The proposal significantly expands the scope of legislation and protected grounds of discrimination. The introduction of a new concept of direct discrimination in situations outside the scope of Anti-discrimination Directives at the same time weakens current protection against discrimination in legislation e.g. when discrimination based on sexual orientation or disability occurs in education.

Internet source:

<http://www.eduskunta.fi/triphome/bin/vex3000.sh?TUNNISTE=HE+19/2014>

Case law

Denial of access to a store with wheelchair was a criminal offence

The Helsinki Court of Appeal found it to be discrimination prohibited in the Criminal Code when a shop owner denied entry to a customer using a wheelchair.¹⁴⁴ The shop owner was sentenced to pay €420 as a fine and €600 as compensation to the victim. The Helsinki District Court had previously acquitted the defendant.

The shop owner argued that the shop aisles were too narrow to enter with a wheelchair, and that the fire inspector had advised him to prohibit entry to wheelchairs and strollers. Considering the shop's shape and



¹⁴⁴ Helsinki Court of Appeal (R13/1508).

size, the Court of Appeal held that the owner could have rearranged the shelves to accommodate safe entry by wheelchairs. It also held that other arrangements to provide service to people using wheelchairs would have been acceptable instead of a sign announcing a blanket entry ban for wheelchair users.

First finding of discrimination in housing between private individuals



The Ombudsman for Minorities requested the National Discrimination Tribunal to examine whether the prohibition of discrimination in the Non-discrimination Act had been breached when a person had refused to rent out an apartment to a person belonging to the Roma minority.

An apartment was offered for rent to the general public by the owner, who was a private person. Based on the negative attitude of the housing company's board of directors and manager towards renting out the apartment to a person of Roma origin, the owner refused to rent the apartment to the applicant. The Tribunal considered, however, that the apartment's owner was solely liable and she was therefore prohibited from continuing and repeating ethnic discrimination in breach of Section 6 of the Non-discrimination Act. The National Discrimination Tribunal does not have a mandate to award compensation for discrimination.

This is the first time the National Discrimination Tribunal has examined a case in the field of housing between two private individuals, rather than between a Roma applicant and a public housing provider such as a municipality.

Internet source:

www.syrjintalautakunta.fi/en/front_page

FR

France

Legislative development

Creation of a ground of discrimination based on place of residence

On 21 February 2014 Parliament amended the Programme Law for the City and Urban Cohesion by creating a new ground of discrimination based on place of residence.¹⁴⁵ The new ground has been added to the lists of protected grounds contained in labour law, criminal law and in the general anti-discrimination Law 2008-496 of 28 May 2008.

Internet source:

http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=7C63CD8A73D21DF3FDBEF8F13534A673.tpdjo11v_2?cidTexte=JORFTEXT000028636804&dateTexte=&oldAction=rechJO&categorieLien=id&idJO=JORFCONT000028636780

Protection against discrimination in access to housing extended to all grounds

On 24 March 2014, Parliament amended the Law on the Rights of Landlords and Tenants, extending protection against discrimination in access to housing to all prohibited grounds of discrimination enumerated at Article 225-1 of the Penal Code.

¹⁴⁵ Programme Law for the City and Urban Cohesion No 2014-173 of 21 February 2014. See also *European Anti-Discrimination Law Review*, Issue 18, p. 58.

The formulation of the amended provision allows the protection against discrimination in access to housing to evolve to cover all new grounds potentially to be added to the list in the Penal Code, such as place of residence which was adopted as a new ground by the Law of 21 February 2014.

In 2012, the Defender of Rights had alerted the Minister of Housing that existing legislation did not cover the ground of age in protection against discrimination in access to housing.

Internet source:

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028772256&categorieLien=id>

Political developments

Annual survey of the Defender of Rights and ILO for 2013

The Defender of Rights in collaboration with the International Labour Organisation has published its annual survey on general perceptions and experiences of discrimination in the workplace for 2013, with a particular focus on young persons.

Some 501 employees from the private sector and 500 employees from the public sector participated in a telephone survey. The results show that three out of 10 workers, whether in the private or public sector, state that they have been a victim of discrimination in the past.

Eighty per cent of respondents believe that being aged over 55 is a major obstacle to being hired in today's market. Other commonly reported grounds of discrimination are ethnic origin and nationality in the private sector (27% and 19%) and physical appearance in the public sector (22%).

Approximately four in 10 victims state that they have not undertaken any action about the discriminatory situation, but when they do act, their first action is to address a claim to their superiors.

The employees surveyed do not consider that being young is a disadvantage in itself, but a non-conventional physical appearance or a disability are held to have a negative impact on a young person's recruitment and career progression. Moreover, all members of the workforce agree that young people are being hired for positions that are inferior to their level of qualifications (40% of private employees and 43% of public employees), or hired as interns to carry out tasks which should be given to employees (40% in the private sector and 35% in the public sector). Finally, one in ten people have witnessed young people being victims of moral or sexual harassment, or being denied a promotion by reason of their age.

Measures to make hiring processes more objective, such as situational judgment tests, are held to be the most effective measure to prevent discrimination (a view held by 74% of private employees and 79% of public employees).

Internet source:

http://www.defenseurdesdroits.fr/sites/default/files/upload/nlunifree/img/111711_barometre_discriminations_dans_le_travail_-_principaux_enseignements_4_pages.pdf

Former Yugoslav Republic of Macedonia

Legislative development

Amendments to appointment procedure for equality body members

Amendments to the Law on Prevention and Protection against Discrimination (the anti-discrimination law) were adopted in March 2014, to align the criteria and procedure for the selection of members of the national equality body, the Commission for Protection against Discrimination (CPAD), with the newly adopted Law on Administrative Servants, which has replaced the former laws on public servants and on civil servants.¹⁴⁶

The previous selection criteria required that the candidate (1) be a citizen of the country and have permanent residence in the country, and (2) have a high level of education and experience in the area of human rights or social sciences. The procedure required the call for appointment of CPAD members to be published by Parliament in the Official Gazette and daily print media.

Following the recent amendments, the general selection criteria for civil servants also apply to members of the CPAD. The amended Article 18 of the Anti-discrimination Law requires members of the CPAD to be citizens of the Former Yugoslav Republic of Macedonia; to have been subject to no criminal convictions or sanctions prohibiting the exercise of a profession, service or duty; to have 240 ECTS¹⁴⁷ higher education credits in the area of human rights or social sciences; to have a minimum of five years of working experience; to have an internationally recognised certificate attesting active knowledge of English; and to pass a psychological test and a test of integrity.

Given that the CPAD is an autonomous and independent body, it is not clear why the criteria for civil servants are applied to its members, who are not de facto civil servants.

Moreover, the amended criteria could have the effect of excluding persons with a disadvantaged social or economic status, given the cost of the English language certificates and of the psychological and integrity tests.

Political development

LGBTQ study on protection against discrimination, access to justice and access to services

In May 2014 a research study was published on the interplay and impacts of politics and society on discrimination against LGBTQ persons and access to services, healthcare and the police in particular. The study sheds some light on the perceptions, experiences and attitudes of LGBTQ persons in the Former Yugoslav Republic of Macedonia.

The research identified a number of problematic issues such as the negative and hostile LGBTQ discourse, including in the media; social exclusion, discrimination and harassment by the general population; social and economic conditions with a negative impact on LGBTQ people's lives; violence; under-reporting of violence and discrimination due to the perceived hostility and negativity of the police; and a strong distrust of government institutions, particularly the health sector.

¹⁴⁶ Law Amending the Law on Prevention and Protection against Discrimination, Official Gazette No 44/2014.

¹⁴⁷ The European Credit Transfer and Accumulation System (ECTS) grading scale is a common European grading system for tertiary education.



According to the research, out of respondents reporting that they have been attacked or have suffered a form of violence, 38% have not reported the attack to the police. Sixty-two per cent of cases have been reported with or without the victim's agreement.

Based on the issues raised, the study makes a number of recommendations targeting state bodies and institutions, national human rights institutions and NGOs respectively.

Internet source:

<http://studiorum.org.mk/?p=1862>

Case law

Discrimination in relation to free movement of Roma by border officers

Since 2010, holders of a Macedonian passport have been able to travel to Schengen countries without a visa, if certain conditions are fulfilled. In 2011 and 2012, instances of alleged abuse of visa-free travel were reported, as the numbers of asylum seekers coming from the Former Yugoslav Republic of Macedonia to EU countries kept rising. These reports mainly cited the Roma population as most frequently 'abusing' the visa-free regime.



Reacting to the concerns raised by representatives of several EU countries, the Government proposed amendments to the Criminal Code that were adopted by Parliament on 3 October 2011, making it a criminal offence to abuse the visa-free travel regime. Since this amendment entered into force, civil society has been reported instances of Roma being sent back from the border, although they fulfilled all necessary additional conditions (i.e. travel insurance, a valid passport, a place to stay, funds for the days of planned travel, etc.).

An NGO which provides legal aid to victims of discrimination, the Macedonian Young Lawyers Association (MYLA), brought an action to court against the Ministry of Interior for the decision not to authorise a Roma family to travel despite all the necessary conditions being fulfilled. In this case, the border officer had refused to let the family cross the border but also stamped their passports with a symbol signifying that they were potential abusers of the visa-free travel regime. The NGO claimed that an act of direct discrimination was committed by the Ministry of Interior on grounds of (1) nationality (under the Constitution) and (2) ethnicity (under the Anti-discrimination Law).

The court found that although it is not disputed that, because of the danger of abuse and violations of the visa-free regime, the State has the right to undertake actions to prevent citizens with such intentions from crossing the border, this must be done in a way that does not breach the principle of equality. The court clearly stated that, should the border officer have considered the proof of travel provided by the Roma family, and not concluded only on the ground of their Roma ethnicity that they were potential asylum seekers, this situation and the violation of their right to free movement would not have happened. The Ministry of Interior was ordered to pay the applicant non-pecuniary damages of MKD 30,000 (approx. €500) as well as MKD 13,256 (approx. €220) in costs and expenses. The other remedies sought by the applicants, such as the publication of the judgment by the Ministry, were found by the court to be unreasonable.

This is the first case in the country where a court has found discrimination under the Anti-discrimination Law.

Internet source:

<http://www.akademik.mk/padna-prvata-presuda-vo-rm-so-koja-se-utvrduva-diskriminatsija-granichni-sluzhbi-iskluchivo-vrz-osnova-na-natsionalnata-pripadnost-zakluchile-zloupotreba-na-vizniot-rezhim>



Case law

Federal Labour Court on discriminatory dismissals, disability and reasonable accommodation

The plaintiff filed a complaint to nullify a dismissal based on his HIV infection that is as of yet asymptomatic. He worked in a pharmaceutical facility in a 'clean room' where medication is produced under strict hygienic conditions. The employer argued that he had to dismiss the plaintiff due to his infection given the hygienic standards to be preserved in this sensitive environment.



The Federal Labour Court (Bundesarbeitsgericht)¹⁴⁸ reversed the decisions of the lower instances and held that the prohibition of discrimination was applicable (despite the provision of Section 2.4 of the Anti-discrimination Law excluding the rules on dismissal from its scope) to all cases where special rules on dismissal do not exist, e.g. – as in the case under consideration – during a probation period.

The Court also reconceptualised the definition of disability, following the CJEU's definition in *HK Danmark*.¹⁴⁹ In this respect, the Court held that the definition in German law is wider than that provided by the CJEU, in that it regards a physical impairment that lasts longer than six months as sufficient to constitute disability and refers not only to inclusion in the workforce but also to inclusion in social life in general. The Court underlined that the disability lies in the barrier which is created by other people's treatment of the HIV-infected person (even if the person does not suffer from any impairing symptoms). The disadvantageous treatment of persons with HIV infection without symptoms is regarded as a case in point. Finally, the Court clarified that a lack of reasonable accommodation can preclude the possibility of a justification of unequal treatment. If an employer has not taken sufficient measures of reasonable accommodation, this can lead to discrimination. As the lower courts had not sufficiently considered these matters, the Court remanded the case to the lower instance for reconsideration.

Internet source:

www.juris.bundesarbeitsgericht.de

Greece

Political developments

Ombudsman publishes diversity guide explaining anti-discrimination legislation

On 21 March 2014, on the occasion of the International Day against Racism, the Greek Ombudsman published a diversity guide addressed to public employees, to enable them to serve members of vulnerable groups in a better and more efficient way.

The guide covers all grounds of discrimination and all fields, and aims at creating a common understanding of the forms of discrimination existing in practice, taking into account and explaining the specificities of different groups subject to discrimination. For instance, it explains that Roma and migrants are generally not well aware of the Greek language, and emphasises that sometimes disabled persons have special needs for specific reasons etc. The information is based mainly on cases dealt with by the Ombudsman

¹⁴⁸ Federal Labour Court (Bundesarbeitsgericht), 19.12.2013, 6 AZR 190/12.

¹⁴⁹ Joined cases C-335/11 and C-337/11, *Ring and Skouboe Werge*, Judgment of 11 April 2013.

as well as information provided by civil society organisations. The guide recommends solutions and approaches based on the Greek legislative framework and on the reality of the Greek social context.

Internet source:

<http://www.synigoros.gr/?i=kdet.el.news.166072>

Ombudsman's special annual report on discrimination

In its 2013 special annual report on discrimination published on 27 March 2014, the Greek Ombudsman, as the equality body for cases concerning the public sector, expressed serious concern about Greek society's apparent regression in terms of the alertness required in the essential fight against discrimination.

In 2013, the Ombudsman investigated 175 cases of allegedly discriminatory conduct, out of which 54 cases were fully investigated. In 10 of those cases no finding of discrimination was made but in 44 cases the Ombudsman found that the relevant public body had discriminated. In 20 of those cases the responsible administration complied with the Ombudsman's recommendations, while in the remaining 24 cases it refused to comply. It is noteworthy that when the administration refuses to comply, the case is considered to be dismissed and the Ombudsman does not have authority to continue its investigation or to impose its recommendations through sanctions. However, in this case the victim has the right to bring an action to court and may include the Ombudsman's recommendations in their submissions.

The Ombudsman's report raises a number of specific concerns, in particular in relation to Roma and their very difficult living conditions, which undermine any effort to design and implement solutions for their integration in social, economic and political life. The report also underlines how 'sweeping' police operations against Roma and media coverage of these operations shift the focus from the necessity of tackling social exclusion to the issue of suppressing crime. Another concern raised by the report is the prevalence of unjustified or poorly reasoned age limits in employment.

Internet source:

<http://www.synigoros.gr/resources/docs/10-diakriseis.pdf>

Review of tertiary education admission procedures for people with disabilities



On 11 February 2014, the Ministry of Education ordered a review of tertiary education admission procedures for people with disabilities. The decision was triggered by a university physics department's refusal to enrol an applicant with top marks, as his visual impairment would allegedly keep him from conducting the laboratory work which students were required to conduct themselves, and which constituted 30% of the course.

There are no uniform rules governing admission procedures for people with disabilities. Article 35 of Law 3794/2009 provides that students with disabilities who are among the top 5% of all students on national level may apply for university courses without sitting examinations. The decision on whether to enrol them, however, rests with each university. There are other university physics departments in the country where no restrictions apply to people with visual impairments.

Case law

Public bus driver convicted of discriminatory refusal to allow access to a bus



On 24 February 2014, the Thessaloniki Court of First Instance found that a bus driver employed by the OASTH (Organisation of Public Transport of Thessaloniki) had discriminated on grounds of racial or ethnic origin

against two passengers when he refused to allow them to board the bus.¹⁵⁰ The defendant argued that the passengers concerned did not have tickets, although no other passengers were asked to present their tickets, as was confirmed by witnesses from the bus. The witnesses also noted that the defendant verbally attacked other passengers who reacted to his treatment of the two passengers concerned. The Public Prosecutor at the Court of Misdemeanours had opened the preliminary investigation on the basis of a report submitted by a number of lawyers who are members of the NGO Nazi-free Thessaloniki Assembly (NAFTHA).

The defendant was sentenced to 10 months' suspended imprisonment and a fine of €1,000 for breaching Law 3304/2005, incorporating into national law the Racial Equality Directive. Without mentioning specifically the term 'harassment', the Court found that the refusal to provide a public service to two persons solely on the ground of their racial or ethnic origin amounted to an offence against their dignity and the creation of an intimidating, humiliating or offensive environment.

Internet source:

<http://www.hlhr.gr/?MDL=pages&SiteID=1027>

Medical doctor convicted for discriminatory sign outside his office

On 7 March 2014 the Misdemeanour Court of Thessaloniki convicted a medical doctor who had placed a sign saying 'Jews not welcome' (in German) outside his office.¹⁵¹ In the absence of an identified victim, the defendant was prosecuted on the basis of the antiracism law and not the anti-discrimination law. The Court imposed a suspended prison term of 16 months and a fine of €2,500 for incitement of racial discrimination, in violation of Article 1 of the antiracism Law 927/1979. The defendant is a member of the ultranationalist party Golden Dawn, and was also convicted of illegal possession of weapons.



Iceland

IS

Legislative development

Hate speech and anti-discrimination legal provisions in access to goods and services extended to transgender persons

The General Penal Code has been amended, and its Article 233a now prohibits 'hate speech' targeting transgender people. The amended provision criminalises public attacks of a person or group of persons on the grounds of their nationality, colour, race, religion, sexual orientation or gender identity, whether by mockery, slander, insult, threat or other means of comment or expression, such as through images or symbols.¹⁵²

Article 180 of the General Penal Code has also been amended to criminalise the denial of a service, or access to any public area or place intended for general public use, to a person on account of his/her nationality, colour, race, religion, sexual orientation or gender identity.

Although the term 'gender identity' is not defined, the explanatory notes that accompanied the bill demonstrate that the aim is to protect transgender people.

Internet source:

www.althingi.is/alttext/143/s/0569.html

¹⁵⁰ Fourth One-member Misdemeanour Court of Thessaloniki, Decision No 4232/2014 of 24 February 2014.

¹⁵¹ One-member Misdemeanour Court of Thessaloniki, 7 March 2014 (decision number not available).

¹⁵² Act No 13/2014 of 10 February 2014 amending Articles 233a and 180 of the General Penal Code No 19/1940.

*Political development***UN Human Rights Committee Concluding observations on the third periodic report of Latvia**

On 11 April 2014 the UN Human Rights Committee (HRC) reviewed Latvia's third periodic report and issued recommendations concerning Latvia's compliance with the UN International Covenant on Civil and Political Rights.

The HRC voiced concern regarding the discriminatory effects of the language proficiency requirement for the employment and work of minority groups. It urged Latvia to review the State Language Law and its application, in order to ensure that any restriction on the rights of non-Latvian speakers is reasonable, proportionate and non-discriminatory, and take measures to ensure access by non-Latvian speakers to public institutions and facilitate their communication with public authorities.

The HRC also expressed concern at reports of racist speech, acts of violence and discrimination against vulnerable groups, including Roma and LGBT persons as well as allegations of insufficient hate crime recording, monitoring, investigation and prosecution. It urged Latvia to strengthen its strategies to fight against racially motivated crimes and counter the use of racist discourse in politics and in the media; implement criminal law provisions aimed at combating racially motivated crimes, punish perpetrators with appropriate penalties and facilitate the reporting procedure for hate crimes; and to establish incitement to violence on grounds of sexual orientation or gender identity as a criminal offence.

In addition, the HRC noted that Roma continue to suffer from discrimination and social exclusion, especially in the areas of employment, housing, health and education. It highlighted that certain municipalities exclude Roma children by placing them in separate classes from other children, which prevents them from receiving an equal quality of education and limits their professional opportunities.

The HRC urged Latvia to intensify its measures to ensure effective enjoyment by Roma of all the rights under the Covenant, without any discrimination, and take immediate steps to eradicate the segregation of Roma children in its education system by ensuring that placement in schools is carried out on an individual basis, after due assessment of the child's circumstances and capacities, and is not adversely influenced by the child's ethnic origin or socially disadvantaged condition.

Internet source:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/LVA/CO/3&Lang=En

Case law

Religious discrimination against children regarding swimming classes

A family with four school-aged children claimed that their right to freedom of religion had been violated by the law (Art. 37 of the Constitution of the Principality of Liechtenstein Act¹⁵³ and Art. 9 ECHR¹⁵⁴), when their application for the children to be excused from swimming classes for religious reasons was declined by the Ministry of Education.¹⁵⁵ The Ministry held that the attendance of the swimming classes based on the official school education plan is reasonable if children are allowed to wear full length bathing clothing and use separate changing rooms, and therefore it creates no conflict with the family's religious rules.



The applicant family challenged the Ministry of Education's decision. Following lengthy court proceedings, the Administrative Court found on 21 February 2014 that two statutory rights (right of school education and right of religious liberty) were in conflict, but that the mental distress experienced by the children when forced to participate in school swimming classes must objectively be of higher importance than the school education plan's goal. The Court also noted that, based on the absoluteness of the applicant's religious beliefs, it could be assumed that these beliefs would not change in the future. An annual application for dispensation was therefore of no relevance. Finally, the Court amended the Government's previous decisions to allow the applicants full dispensation from school swimming classes.

Internet source:

<http://www.gerichtsentscheide.li/default.aspx?mode=gerichte&prim=3&value=2014&id=4042&backurl=?mode=gerichte%26prim=3%26value=2014>

Malta

Legislative developments

Constitutional amendment introducing the ground of sexual orientation and gender identity

On 17 April 2014, Parliament adopted amendments to the Maltese Constitution so as to extend constitutional protection against discrimination to the grounds of sexual orientation and gender identity.¹⁵⁶



The Act also introduces the principle that any law imposing requirements as to sexual orientation or gender identity in calls for service as a public officer or service in a local government authority or body established for public purposes, will be found to constitute discrimination.

¹⁵³ *Verfassung des Fürstentums Liechtenstein vom 5. Oktober 1921* (LV), LGBl. 192, no. 15.

¹⁵⁴ *Konvention vom 4. November 1950 zum Schutze der Menschenrechte und Grundfreiheiten*, 8 September 1982, LGBl. 1982, no. 60/1.

¹⁵⁵ Ministry of Education, 17 December 2009, RA 2011/2986-4292.

¹⁵⁶ Act No X of 2014, adopted on 17 April 2014.

Emma | 1993



Chris | 1992



Helena | 1994



Nienke | 1996





Act on civil unions for same-sex couples, recognition of same-sex marriages celebrated abroad

On 14 April 2014, Parliament adopted the Civil Unions Act, introducing the possibility to register, as a 'civil union', a partnership between two persons of the same or opposite sex.¹⁵⁷ The Act also provides for the recognition and registration of unions of equivalent status celebrated outside of Malta. A registered civil union will have the same effects in law as a civil marriage.

The Act also inserts Article 100B into the Civil Code, providing that children adopted jointly by partners in a civil union contracted between persons of the same sex will be recognised as having parents of the same sex and all rights conferred to parents and children towards each other will apply to them. While it was already possible for same-sex couples to apply to adopt as single parents, the law now recognises the right of a same-sex couple in a civil union to apply as a couple to adopt.

The Civil Unions Act also provides that in case of doubt in the interpretation of any provision of law, every effort must be made to equate the rights of same-sex couples in a civil union with those enjoyed by spouses.

Political development

Consultation launched on strengthening of human rights and equality legislation

On 24 February 2014, the Ministry for Social Dialogue, Consumer Affairs and Civil Liberties launched a consultation process with the aim of strengthening human rights and equality legislation.

The Government expressed its belief that both the legislative and infrastructural frameworks require reinforcement so as to provide Malta with adequate human rights and equality mechanisms. The aim of this initial consultation phase was to gather feedback from the general public, civil society organisations, trade unions, business organisations, political parties, governmental institutions and other stakeholders. The further aim is to strengthen human rights and equality legislation, as well as the institutions that enforce such legislation, so that they conform both with the United Nations' model of a national human rights institution (NHRI) laid out in the Paris Principles, and with the provisions of the EU equality and non-discrimination directives regarding the establishment of specialised equality bodies.

This initial consultation phase is closed and the submissions received are currently being reviewed.

Internet source:

http://msdc.gov.mt/en/Public_Consultations/MSDC/Documents/Scoping%20Consultation%20HREC%20Final%20EN.pdf

Case law

Conviction for false declaration of accessibility of premises in tender proposal

The defendant company had submitted a tender proposal for a call for tender issued by the Department of Contracts for the provision of tuition in the field of information technologies. The selection criteria of the call for tender specified that the premises had to be accessible to persons with disabilities, and in their proposal the defendant company declared that their premises were indeed accessible. However, an



¹⁵⁷ Act No IX of 2014, adopted on 14 April 2014.

investigation of the premises revealed that this was a false declaration as the premises were in fact not accessible.

Criminal charges were brought against the defendant company, on the basis of Article 188 of the Maltese Criminal Code, prohibiting false declarations, statements and information intended for any public authority

The defendant argued that their premises were accessible to some, but not all, persons with disabilities, and that they had failed to declare that the premises were not accessible to wheelchair users since no wheelchair-using students had ever attended their courses since they had established the business in the year 2000. They also invoked the tender document's failure to specify accessibility standards for persons with disabilities.

The Court of Criminal Appeal held that the directors of the company had knowingly and falsely declared that the premises were accessible to persons with disabilities in order to gain an advantage or a benefit, and thus sentenced them to 18 months' imprisonment, suspended for two years.¹⁵⁸

NL

The Netherlands

Political developments

Mandatory 5% quota of disabled people may be imposed in 2017



The 2012 Coalition Agreement of the current Government had included a proposal to impose a 5% legal quota reserving jobs for people with disabilities. In April 2013, the proposition was repealed in response to a Social Accord between trade unions and employers' organisations. The employers' organisations agreed that employers were to hire more people with disabilities on a voluntary basis, and if they failed to meet a certain number of newly created jobs, a legal obligation could be imposed in 2017.

The State Secretary for Social Affairs and Employment has therefore drafted and presented a first draft of a bill requiring employers to create 23,000 additional jobs for people with disabilities by 2017. If they fail to meet this number, fines may be levied. Under certain conditions, a legal quota of 5% may enter into force and replace the voluntary promises made by the employers.

Internet source:

<http://www.internetconsultatie.nl/quotumwet>

Action plan against labour market discrimination

In November 2013, the Government requested the Social and Economic Council of the Netherlands (SER, Sociaal-Economische Raad) to propose measures against discrimination in the area of social and economic policies. The SER's advice included proposals to simplify the reporting of discrimination, but the advisory body did not suggest any far-reaching measures.

The Government has now published its reaction to the SER's advice, incorporated into a comprehensive action plan against labour market discrimination, targeting discrimination on the grounds of age, disability, race/ethnic origin, sex and sexual orientation.¹⁵⁹ The plan includes a number of measures, ranging from pre-existing government policies and already proposed legislative changes to new policy proposals. A

¹⁵⁸ Court of Criminal Appeal, Decision No 152/2013 of 6 March 2014.

¹⁵⁹ *Kamerstukken II* 2013/14, 29544, 523.

follow-up will take place in 2015, when the Government will report on the progress made in implementing the measures set out by the action plan. Interestingly, the action plan seems to be more ambitious than the SER's recommendations.

One important proposal is to include a non-discrimination clause in all government contracts with private companies. Such a clause would enable the government body to terminate contracts in the event of discrimination within the private company and to exclude these companies from public tenders. The action plan, moreover, proposes an active policy of naming and shaming companies found guilty of discrimination. In order to enable the publication of inspection results, the Act on Working Conditions (*Arbeidsomstandighedenwet*) will also be amended.

Other measures include the police designing a tool to (centrally) register discrimination-related crime and an awareness-building campaign in the area of discrimination on the ground of age (foreseen for autumn 2014). Also, a mobile phone application Report Discrimination Now (*'Meld discriminatie nu'*) – has been launched to simplify the reporting of discrimination.

Internet source:

<http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2014/05/16/kamerbrief-actieplan-arbeidsmarktdiscriminatie-en-kabinetsreactie-ser-advies.html><http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2014/05/16/kamerbrief-actieplan-arbeidsmarktdiscriminatie-en-kabinetsreactie-ser-advies.html>

Report published on perceived discrimination

In January 2014, a large-scale research report on perceived discrimination was published by the Netherlands Institute for Social Research.¹⁶⁰ Considering the lack in the Netherlands of a systematic structure for tracking data on discrimination, this report is rare in that it aims to offer a broad insight into the extent to which people perceive that they are victims of discrimination, on the basis of large-scale research (i.e. a questionnaire completed by more than 11,000 residents of the Netherlands).

The research shows that discriminatory practices, views and ideas are still widespread in all fields of Dutch society. A quarter of the respondents had experienced discrimination on the ground of one or several of the EU discrimination grounds over the last year, most often on the ground of age (10%) and ethnicity/race (8%). Discrimination on the ground of race/ethnic origin is particularly prevalent in access to employment, where it remains 'hidden' as discriminatory job advertisements for instance are very rare. Discrimination on the ground of sexual orientation is most prevalent in public spaces, but is rarely reported, in particular in access to employment.

In a television interview, the Minister of Social Affairs and Employment stated that it is up to society itself to combat and eradicate discrimination, implying that no additional measures will be taken by the Government in response to the report's conclusions. The Minister also sent a letter to Parliament in response to the report, without indicating any concrete measures.

Internet source:

http://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Ervaren_discriminatie_in_Nederland

Temporary measure allowing age requirements in job advertisements

As part of a series of measures to fight the rise in unemployment among those who are hit hardest, namely the age categories 16-27 and 50-plus, the Coalition Government has adopted a decision to temporarily



¹⁶⁰ *Perceived discrimination in the Netherlands ('Ervaren discriminatie in Nederland')*.

authorise (until 31 December 2015) certain age requirements in job advertisements. Employers may thus (temporarily) include in advertisement that they will only hire people between 16 and 27 years old, but only if the vacancy specifically targets youth unemployment, which should also be mentioned explicitly in the job advertisement. Similar provisions apply to job advertisements specifically addressing older job seekers.

Advertisements need to clearly specify the reasons for making a distinction on the ground of age, and the reason given needs to be credible and necessary. It can be argued that this temporary measure falls within the scope of legitimate policy measures to justify difference of treatment on the ground of age, but it may still be controversial from an equal treatment standpoint.

A recent comparative report commissioned by the International Labour Organisation on discrimination in job advertisements showed that in the Netherlands such advertisements frequently include age requirements that are not objectively justified. The report also concluded that the Netherlands is still lacking effective sanctions and that awareness of (especially indirect) discrimination in job advertisements is low.¹⁶¹

Internet source:

https://www.werk.nl/portal/page/portal/werk_nl/werkgever/meerweten/werving/spelregels/leeftijdsdiscriminatie (last accessed 18 March 2014)

Case law

Court upholds decision to grant lower insurance pay-out to Turkish woman



A Turkish woman, who as a 10-year-old had become disabled as a result of a traffic accident, challenged the amount of her insurance pay-out, which was partly based on the ground of her sex and ethnicity.

The claimant had made a claim of €430,000 based on an estimate made by an independent centre for assessing bodily injury, the NRL (Nederlands Rekencentrum Letselschade), taking into account expectations concerning the girl's potential future level of education and the yearly wage of her potential future employment. However, the insurance company invoked actuarial statistics showing that the majority of Turkish women stop working after they have their first child, which is around the age of 26. They then, after about ten years, re-enter employment but only to work half-time. On the basis of these data, the insurance company estimated that the harm caused by the accident amounted only to €70,000.

The District Court of The Hague accepted the insurance company's line of reasoning and found that using actuarial statistics with regard to the victim's cultural background and gender does not breach the principle of equality (as enshrined in the Article 1 of the Dutch Constitution), as it remains possible for a judge to deviate from these statistics, where personal circumstances give cause to do so.¹⁶² In this particular case, however, the judge found that no reason existed to deviate from the statistics, and decided to apply the pay-out as requested by the defendant company. The claimant lodged an appeal which is still pending.

This judgment has been strongly criticised in the Dutch media as well as by certain Members of Parliament and civil society organisations. In addition, a member of the Dutch equality body Netherlands Institute for Human Rights (NIHR) has called the judgment gender-related discrimination in the Dutch media.¹⁶³

¹⁶¹ The report (working title: 'Wanted': Effective Legal Measures to Eliminate Discrimination in Job Advertisements) is expected to be published in the course of 2014. Countries included were Moldova, the Netherlands, Portugal, Romania, Ukraine and the United Kingdom.

¹⁶² Judgment of 23 July 2013; ECLI:NL:RBDHA:2013:9276.

¹⁶³ Shortly after the cut-off date for this Review, on 19 August 2014, the NIHR rendered an Opinion in this case (No 2014-97), finding that the insurance company had discriminated but only on the ground of gender. Its opinion is not binding.

Discrimination on the grounds of sex and race/ethnicity in the area of goods and services is prohibited under Dutch law. The NIHR and its predecessor have reported on the use of statistics in estimating insurance pay-outs,¹⁶⁴ and have established discrimination in three such cases.¹⁶⁵ The equality body agrees with the Government's interpretation of gender equality legislation in finding that the use of statistics to determine insurance premiums and pay-outs is allowed, as long as the data are reliable and accurate. The element which differentiates this case from previous ones is that statistics are used not only regarding gender but also racial/ethnic origin.

Internet source:

<http://uitspraken.rechtspraak.nl/>

Indirectly discriminatory dismissal justified by health and safety requirements

The claimant was an education worker in a hospital, but was dismissed due to her refusal to comply with her employer's newly imposed clothing requirements. The clothing requirements (in particular, wearing short sleeves) were adopted based on the recommendation of a commission of experts following an outbreak of a bacterial infection.



The claimant refused to work wearing short sleeves on the ground of her religious beliefs, as this is prohibited by the Islamic dress code that she adheres to. She argued that the clothing requirements should not apply to her function which did not involve much direct physical contact with patients, as she mostly supported patients' parents. As a compromise, she proposed to change her position to such an extent that she would not have any direct physical contact. The employer deemed this impossible and ultimately decided to ask for her dismissal.

The District Court of Rotterdam held that the clothing requirements, although indirectly discriminatory on the ground of religion, could be justified by the legitimate aim of preventing the risk of infection.¹⁶⁶ The employee's refusal to comply with the hospital's clothing requirements was therefore found to constitute sufficient ground for dismissal.

Internet source:

<http://uitspraken.rechtspraak.nl/>

Norway

NO

Political development

Government announces new comprehensive equality and anti-discrimination legislation

On 20 March 2014, the current conservative/right-wing government announced that it will prepare one comprehensive piece of anti-discrimination legislation. The Minister for Children, Equality and Social Inclusion invited a number of key NGOs working on discrimination issues to a consultation meeting to hear their views on the planned revision of discrimination legislation.

¹⁶⁴ Report of the Equal Treatment Commission *Verkennd onderzoek letselschade*, available at <https://mensenrechten.nl/publicaties/detail/17392>.

¹⁶⁵ Decisions of the Equal Treatment Commission Nos 1996-90, 2004-37 and 2009-117, available at www.mensenrechten.nl/publicaties/oordelen.

¹⁶⁶ District Court of Rotterdam, 21 January 2014, ECLI:NL:RBROT:2014:2368.



Unofficial information from the meeting suggests that the Government plans to use the Government White Paper on Comprehensive Protection against Discrimination¹⁶⁷ as a starting point for their new legal revision. Given that a full revision of anti-discrimination legislation was finalised only in June 2013 and in force only as of 1 January 2014, the proposed legal revision has been met with a degree of apprehension. Before the last elections, when the Government was in opposition, it strongly challenged the proactive equality duties enshrined in the current anti-discrimination legislation. Consequently, many organisations now fear that the protection against discrimination will be minimised rather than strengthened.

Internet source:

<http://www.regjeringen.no/nb/dep/bld/aktuelt/nyheter/2014/Starter-arbeidet-med-ny-lov.html?id=753398>

Case law

Equality Tribunal orders remedies to comply with requirements regarding universal design/ universal accommodation

On 5 February 2014, the Equality Tribunal ordered Oslo's local public transport company to properly mark all stairways and steps in contrasting colours to assist the sight-impaired, by 31 December 2014.¹⁶⁸ This decision followed the company's failure to remedy the situation following a previous decision of the Equality Tribunal which found that the lack of properly marked steps and stairways was in violation of Section 9 of the Anti-discrimination and Accessibility Act regarding universal design and universal accommodation, but no order to remedy the situation was issued.

The Tribunal furthermore warned the company that continued failure to remedy the situation might cause the Tribunal to issue a coercive fine to ensure implementation of its order.

Internet source:

<http://www.diskrimineringsnemnda.no/sites/d/diskrimineringsnemnda.no/files/7aa321b609ef01f6a4fc4c537580e3bf.pdf>



Poland

PL

Case law

Incapacitated persons deprived of possibility to become mayors

The Polish Ombudsman has challenged before the Constitutional Tribunal the constitutionality of Article 492(1)(6) of the Polish Electoral Code, which stipulates that a person's term of office as the mayor of a village, town or city expires automatically if a medical statement on total incapacity for work or incapacity for self-care is issued with regard to that person. The Ombudsman argued that the provision was inconsistent with Article 60 of the Constitution, which ensures equal access to public office, in conjunction with Article 32 of the Constitution which ensures equality before the law, equal treatment by public authorities and non-discrimination in political, social and economic life. The Ombudsman also invoked Article 29(a) of the Convention on the Rights of Persons with Disabilities.

On 23 January 2014, the Constitutional Tribunal ruled that Article 492(1)(6) of the Polish Electoral Code is consistent with Article 60 in conjunction with Article 31(3) of the Constitution (which reads: 'Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when



¹⁶⁷ Government White Paper NOU 2009:14 *Et helhetlig diskrimineringsvern*.

¹⁶⁸ National equality body decision of 5 February 2014 in case number 47/2013.

necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.’).¹⁶⁹

The Tribunal found that there was no need to examine the constitutionality of the challenged provision with regard to the other two provisions invoked by the Ombudsman, including Article 29(a) of the UNCRPD, as the Ombudsman had not proved that the normative content of those two provisions exceeded that of Article 60. The Constitutional Tribunal clarified that the provision applies to mayors already in office, but not to candidates standing for election.

Finally, the Tribunal held that the challenged provision did have certain legislative defects, although it was found to be consistent with the Constitution. Therefore, the Constitutional Tribunal stated that it would inform the Polish Parliament, in a separate decision, about the need to eliminate legal gaps so as to preserve the coherence of the legal system.

Internet source:

<http://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/6622-pozbawienie-osob-niepelno-sprawnych-mozliwosci-sprawowania-funkcji-wojta-burmistrza-prezydenta/>

RO

Romania

Legislative development

Entry into force of new Criminal Code

On 1 February 2014 the new Criminal Code entered into force, including some amendments of relevance to protection against discrimination.¹⁷⁰ The new Article 77(h) establishes discriminatory intent as an aggravating circumstance and lists in this regard all the grounds covered by Romanian law, including *inter alia* the grounds covered by the EU anti-discrimination directives. The new Criminal Code criminalises sexual harassment in work-related relations (Article 223), torture by a civil servant on grounds of discrimination (Article 282) and abuse in the exercise of authority on the basis of a protected ground (Article 297). The new Article 369 defines incitement to hatred and discrimination as ‘incitement of the public, by any means, to hatred or discrimination against a category of persons’ and Article 381 punishes the infringement of the free exercise of religion. However, this last provision is limited to the protection of religious denominations which are ‘organised and functioning according to the law’, excluding those religious denominations which do not meet the legal requirements for recognition and registration by the State.

Internet source:

http://www.just.ro/Sectiuni/PrimaPagina_MeniuDreapta/noulcodpenal/noulcodpenalmentiuniprecizari/tabid/2392/Default.aspx

Political developments

Annual report of national equality body for 2013

The 2013 annual report of the National Council for Combating Discrimination (NCCD) prepared for Parliament presents the institution’s most active year since its establishment in 2002. The report mentions

¹⁶⁹ Constitutional Tribunal (CT) Judgment of 23 January 2014. Case: K 51/12.

¹⁷⁰ Law 286/2009 on the New Criminal Code.

as highlights three consecutive amendments of the legislative framework¹⁷¹ and the highest number of complaints received (858 as opposed to 548 in 2012, 465 in 2011 and 478 in 2010) as well as the highest number of decisions issued (824) and the highest number of decisions where discrimination was found (135). In addition, in 2013 the NCCD issued 110 fines, amounting to a total of RON 267,800 (approx. €60,400) compared to the 35 fines issued in 2012 amounting to RON 114,000 (approx. €26,000).

Out of the 858 complaints, the most common grounds were belonging to a social category (414),¹⁷² ethnicity (66) and nationality (61), while the least common grounds invoked were race (3), HIV/AIDS status (4) and sexual orientation (13). The most common field was employment and education (459).¹⁷³

In 2013, the NCCD issued 824 decisions, finding 341 complaints to be non-admissible. In 348 cases the NCCD found that no discrimination had occurred, and in 135 cases the NCCD issued a decision sanctioning discrimination (compared to 113 in 2012). Out of the cases where a finding of discrimination was made, the NCCD issued recommendations carrying no financial penalty in 48 cases, 34 administrative warnings without a fine and 110 administrative fines. Due to changes in the legislation¹⁷⁴ the level of fines ranged between RON 400 and RON 20,000 (approx. €90-€4,510) and the report mentions that most fines were of RON 1,000 (approx. €225). Most of the fines were issued in cases of access to employment (59) while most recommendations were issued in relation to access to public services (16) or administrative services (16).

Internet source:

www.cncd.org.ro.

Fourth ECRI report on Romania

On 3 June 2014, the European Commission against Racism and Intolerance (ECRI) released its fourth report on Romania highlighting both progress achieved and remaining concerns, particularly in relation to religious minorities and the Roma.



Among other concerns the report highlights the limited resources provided to the national equality body and its difficulties in carrying out its work, as well as the hurdles in implementing strategies for Roma integration. ECRI also highlighted the worrying trend of stigmatising statements against Roma in political discourse and the absence of an effective mechanism to sanction politicians and political parties which promote racism and discrimination. It therefore recommended that the Criminal Code should be amended in order to ensure that public insults and defamation against a person or a group of persons on grounds of their race, colour, language, religion, citizenship or national/ethnic origin be prohibited. It also suggested that legal provisions be adopted to prevent the public financing of organisations, including political parties, which promote racism and discrimination.

Internet source:

<http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Romania/ROM-CbC-IV-2014-019-ENG.pdf>

Case law

Fine issued against Romanian President for discriminatory statements

In November 2010, while on an official visit to Slovenia, the President of Romania made public statements regarding the Roma, alleging that 'very few of them want to work' and that 'many of them, traditionally,



¹⁷¹ See *European Anti-Discrimination Law Review*, Issue 17, pp. 77-78.

¹⁷² 'Belonging to a social category' is a protected ground under Romanian law which has been liberally interpreted by the NCCD and the courts as covering, for instance, social or socio-professional status.

¹⁷³ Employment and education are considered as one field in the NCCD's data on complaints.

¹⁷⁴ See *European Anti-Discrimination Law Review*, Issue 17, pp. 77-78.

live off of what they steal.¹⁷⁵ Romani CRISS, a Roma NGO, filed a complaint with the National Council for Combating Discrimination (NCCD), which, however, declined competence due to lack of territorial jurisdiction as the statements were made on Slovenian territory.¹⁷⁶

Following an appeal by Romani CRISS, the Bucharest Court of Appeal held that the NCCD should have considered the fact that the results of the statements were produced on the Romanian territory, and should not have declined competence. The Court of Appeal decision was challenged by the NCCD before the High Court of Cassation and Justice, which on 21 January 2014 rejected the appeal, thus maintaining the Court of Appeal decision.

The NCCD announced in a press release on 10 February 2014 that it has reviewed Romani CRISS's petition again as requested by the courts and that it issued a fine of RON 600 (approx. €134) against the Romanian President. It is the first time a fine has been imposed on a President of Romania.

Internet source:

<http://www.cncd.org.ro/noutati/Comunicate-de-presa/Comunicat-de-presa-referitor-la-hotararea-adoptata-de-Colegiul-director-al-C-N-C-D-in-sedinta-din-data-de-10-02-2014-193/>

Administrative fines levied against 39 mayors failing to ensure accessibility



The National Council for Combating Discrimination (NCCD) launched an *ex officio* investigation into the accessibility of public transportation in all county capital cities in Romania as well as into the National Agency for Payments and Social Inspection. Invoking anti-discrimination legislation, the UN Convention on the Rights of Persons with Disabilities, the specific legislation regarding the rights of persons with disabilities and EU directives, the NCCD found that failure to ensure access to public transportation for persons with disabilities in 39 main cities amounted to direct discrimination by limiting access to services, infringing the right to dignity.¹⁷⁷

Only two counties' capital cities complied with the 2006 legislation regarding accessibility of public transportation.

The NCCD issued sanctions against the mayors of the 39 cities concerned, including the mayor of Bucharest. The fines ranged between RON 1,000 (approx. €227) and RON 2,000 (approx. €454). The sanctions were issued against the mayors personally as Law 448/2006 creates a personal obligation for mayors to ensure the accessibility of local transportation. In addition, the National Agency for Payments and Social Inspection was issued a fine of RON 5,000 (approx. €1,135) as this agency bears a legal obligation to enforce observance of legal provisions ensuring that local transport is accessible to persons with disabilities. The NCCD made a recommendation for all mayors to review their public transportation contracts and continue only those contracts where accessibility for persons with physical disabilities is ensured and to publish a brief account of the case in local newspapers. The equality body also stated its intention to monitor implementation of the recommendations over the next six months. The decision was unanimous and has been challenged before the Court of Appeal by several mayors and the National Agency for Payments and Social Inspection.

¹⁷⁵ The full statements are available at: <http://www.thediplomat.ro/articol.php?id=1617>.

¹⁷⁶ NCCD Decision No 175 of 4 May 2011 in case No 101/2011.

¹⁷⁷ National Council for Combating Discrimination, Decision No 251 of 30 April 2014.

*Case law***Constitutional Court applies a shift of the burden of proof**

A Roma woman brought an action to the Constitutional Court, alleging that the general courts of first and second instance had violated several of her rights as recognised by the Slovak Constitution and by international conventions, by failing to find that she had been discriminated against in access to employment. The complainant had brought a complaint against a school where she had applied for a position but had been rejected, and the position had been filled by someone with lower qualifications than her. She also alleged that the director of the school had ridiculed her based on her ethnic origin.

In its decision of 27 November 2012, the Banská Bystrica Regional Court had argued that the fact that the applicant was of Roma origin cannot *per se* mean that discrimination had taken place if the selection was made from among numerous applicants (of non-Roma origin) who had, as the Court evaluated it, the same or even better qualifications for the position in question, and if the Roma applicant's non-selection was justified by 'various logical and reasonable grounds' (such as the potentially lower pay grade of the applicant eventually selected).¹⁷⁸ An opposite stance, according to the Court, would constitute positive discrimination. The Regional Court also said that 'the defendant has proved that it is more likely that discrimination did not take place than it is likely that discrimination did take place, and so [the director of the school] had discharged his burden of proof.'

The Constitutional Court found the applicant's complaint manifestly ill-founded, arguing that the general courts in the previous proceedings gave a clear and easy-to-understand answer to all legally and factually relevant questions. The Constitutional Court did not find any other reasons or circumstances in the previous proceedings that would lead to the conclusion that the complainant's constitutional or other rights had been violated.¹⁷⁹ It explicitly stated that the general courts had correctly assessed the burden of proof of both parties

The Constitutional Court seems to have interpreted the concept of burden of proof in a manner more favourable to the defendant than required by the EU Anti-discrimination Directives and the relevant CJEU case law. The Constitutional Court is indicating that once the burden of proof is shifted to the respondent (upon the applicant establishing facts from which it may be presumed that there has been discrimination), the respondent is not obliged to prove *beyond any doubt* that there has been no breach of the principle of equal treatment (as the directives presumably require) but only to provide evidence establishing some *probability* of non-discrimination, provided that the probability of non-discrimination is higher than the probability of discrimination.

Internet source:

<http://portal.concourt.sk/pages/viewpage.action?pagelId=1277961>

¹⁷⁸ Judgement of Banská Bystrica Regional Court No 13 Co 263/2012-208 of 27 November 2012.

¹⁷⁹ Decision of the Slovak Constitutional Court No II. ÚS 383/2013-16 of 10 July 2013.

Spain

Case law

Court conviction for refusal to allow transsexual persons access to a nightclub

A security guard at a nightclub was convicted by the Criminal Court of Barcelona of a crime against fundamental rights and civil liberties in the form of denial of provision of a service.¹⁸⁰ The case related to two transsexual persons who were refused entry by the defendant to the nightclub where he was working. The defendant was disqualified from the exercise of the profession of nightclub security guard for a duration of one year for discriminatory denial of service, and to pay compensation of €300 to each of the victims.

Article 512 of the Criminal Code stipulates disqualification from the exercise of a profession, trade, industry or business, for a period of one to four years, for ‘those who, in the exercise of their professional or business activity, deny the provision of a service to a person entitled thereto on the grounds of his ideology, religion or beliefs, membership of an ethnic group, race or nation, his gender, sexual orientation or family situation or any illness or disability from which he suffers.’

It is the first time that this provision has been applied and a person has been convicted in Spain for discrimination on the basis of sexual orientation in the field of access to services. The Special Prosecutor against Discrimination and Hate Crimes of Barcelona played a particularly important role in this case.

Sweden

Political development

Lack of accessibility as a form of discrimination



On 27 February 2014 the Government presented a proposal for changes to the Discrimination Act to the Legal Council. If the Legal Council finds no technical legal objections, a bill will be presented to Parliament.

Currently there are five forms of discrimination: direct discrimination, indirect discrimination, harassment, instructions to discriminate and victimisation. The proposal creates a sixth form of discrimination – lack of accessibility. The proposed day of entry into force is 1 January 2015.

Lack of accessibility is to be defined as:

the disfavouring of an individual through lack of action to make reasonable adaptation to improve access for persons with disabilities so that they are placed in a similar situation to a person without a disability and which is reasonable with regard to accessibility requirements established by laws and other regulations where such requirements are applicable, and taking into consideration economic and practical considerations, the durability and extent of the contact between the provider of the activity and the individual concerned and other relevant circumstances.

The key elements are: disfavour, lack of action, and comparable situation.

¹⁸⁰ Court Decision 111/14 (Criminal Court No. 6 of Barcelona).

This new form of discrimination is proposed to apply in the labour market and education, and the current special rules for these sectors in the Discrimination Act will be removed. Some important exceptions are that the proposed new form of discrimination is not applicable in the fields of access to employment and housing. In the area of goods and services it will not apply to companies with fewer than 10 employees.

There is no case law on the Discrimination Act regarding lack of reasonable adaptation outside the two specially regulated areas – employment and education. Currently, lack of accessibility has to be understood within the concept of indirect discrimination. The proposed legislation makes the prohibition clearer, especially with regard to the fact that lack of accessibility may constitute discrimination even when the provider has not violated any other legislation.

Internet source:

<http://www.regeringen.se/sb/d/18379/a/235277>

Government ‘white book’ on Roma discrimination

On 25 March 2014 the Government held a ceremony presenting a ‘white book’ on Roma discrimination called *The Dark and Unknown History – a white book on abuse and discrimination of Roma people during the 20th century*.¹⁸¹

racial
or ethnic
origin

The purposes of the white book include recognition of discrimination suffered in the past; increased awareness and understanding of the Roma situation; and the description of what state and local authorities actually did to Roma people at different times. It is based on research and on interviews with Roma people and took three years to complete.

The white book stops at the year 2000, which means that none of the violations described can lead to court cases due to time limits. Its principal importance is that it shows that segregation was not chosen by the Roma people but was forced upon them by a hostile society. The report has been generally welcomed and has, in connection with the scandal of the police registration of Roma people¹⁸² which broke out in 2013, made Roma discrimination more visible to the general public.

Internet source:

<http://www.regeringen.se/content/1/c6/23/70/61/b8446bac.pdf>

Turkey

TR

Legislative developments

Comprehensive amendments to laws concerning persons with disabilities

On 6 February 2014, the Turkish Parliament adopted a ‘package law’ containing more than 100 amendments to a number of laws and introducing new rights for persons with disabilities and to a lesser extent the elderly.¹⁸³

disability

¹⁸¹ Official Inquiry DS2014:8.

¹⁸² It was revealed in September 2013 that the police in southern Sweden has been keeping a register of Roma people, including children and deceased persons, in breach of data protection legislation. See *European Anti-Discrimination Law Review*, Issue 18, p. 83.

¹⁸³ Law on Amendments to the Decree with the Force of Law concerning the Organisation and Duties of the Ministry of Family and Social Policy and to some Laws and Decrees with the Force of Law (no. 6518), 6 February 2014, Official Gazette, No 28918, 19 February 2014.

The purpose of the Law on Persons with Disabilities is redefined as: ‘to ensure that the requisite regulations are made to take measures which will prevent disability and will ensure the full and effective participation of persons with disabilities in societal life on equal terms with other individuals through encouraging and securing their exercise of fundamental rights and liberties and strengthening the dignity that they have by virtue of birth.’

New definitions have been inserted into the Law on Persons with Disabilities, such as the definitions of direct and indirect discrimination, person with a disability and reasonable accommodation. The new definition of ‘person with a disability’ refers to a person who is ‘influenced by attitudes and environmental factors which hinder his/her full and effective participation in social life on an equal basis with others due to loss of physical, mental, psychological or sensory capabilities at various levels’. Reasonable accommodation is defined as ‘necessary and appropriate changes and precautions which do not impose a disproportionate and excessive burden and which are needed in a certain situation in order to ensure that the disabled exercise or benefit from their human rights and fundamental freedoms fully and on an equal footing with others.’

The Law on Persons with Disabilities now prohibits all kinds of discrimination against the disabled, including direct and indirect, requires the State to bring an end to discrimination and allows affirmative measures to ensure equality. It prohibits the exclusion of persons with disabilities and introduces new accessibility standards in public transportation. Habilitation and rehabilitation services are required to start at the earliest possible stage of disability. Discrimination on the basis of disability is prohibited not only in job applications, hiring processes, working hours and conditions but also in all issues relating to employment including the continuity of employment, career development and healthy and safe working conditions. The Government undertakes to make plans to ensure that persons with disabilities have access to integrated/mainstream schools at every level of their education.

Disability has been added among the enumerated grounds of non-discrimination under the Law on National Education and the Labour Law. In the field of employment, sheltered workplaces will be given tax incentives and financial support, and the transfer requests of civil servants who have a first-degree relative with disability in their care will be accommodated. To improve the access of persons with disabilities and the elderly to social services, state financial assistance is introduced (both for those receiving home care and those receiving care at public and private institutions).

Internet source:

<http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2014/02/20140220.htm&main=http://www.resmigazete.gov.tr/eskiler/2014/02/20140220.htm>

Parliament implements the Government’s ‘democratisation package’

On 2 March 2014, the Turkish Parliament adopted Law No 6529¹⁸⁴ to implement the reforms that the Government had announced through a ‘democratisation package’ on 30 September 2013.¹⁸⁵

The changes include for example the amendment of Article 122 of the Penal Code. Its title has been changed from ‘discrimination’ to ‘hatred and discrimination’, and the word ‘discrimination’ has disappeared from the text of the provision. The offence of discrimination has practically been replaced by the offence of hate crime, which requires heightened scrutiny. The grounds covered by Article 122 have also been limited: although nationality has been added as a protected ground, the provision is no longer open-ended as the words ‘and similar reasons’ have been removed. Thus, there is no longer any room for interpretation to include the excluded grounds of ethnicity, age or sexual orientation.

¹⁸⁴ Law on the Advancement of Fundamental Rights and Liberties, No 6529, 2 March 2014, Official Gazette, no. 28940, 13 March 2014.

¹⁸⁵ See *European Anti-Discrimination Law Review*, Issue 18, p. 85.

The new law also opens the way to private education in minority languages. An amendment made to the Law on the Teaching of and Education in Foreign Languages and the Learning of Different Languages and Dialects by Turkish Citizens allows the opening of private secondary schools to give education in unofficial languages. While the Government has not yet identified the minority languages eligible for mother tongue education, Kurdish is expected to be among them.

Internet source:

<http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2014/03/20140313.htm&main=http://www.resmigazete.gov.tr/eskiler/2014/03/20140313.htm>

Case law

No conviction of newspaper and editor accused of homophobic hate speech

A local court in Istanbul issued its ruling in the first criminal case brought by a public prosecutor concerning hate speech in the media directed against the LGBT community.

The case was brought by KaosGL, a national LGBT organisation, against an article published on 23 October 2012 by *Yeni Akit*, a national newspaper with an Islamist orientation and known for its discriminatory content against minorities. The article referred to LGBT individuals as 'deviants'. The case was brought by the public prosecutor under Article 216(2) of the Turkish Penal Code which criminalises open denigration of a section of the population on grounds, *inter alia*, of gender. KaosGL asked the court to interpret the term 'gender' liberally so as to include sexual orientation and sexual identity and claimed that the defendant denigrated the organisation's members and volunteers through homophobic news content. The court, however, found that the defendant had been exercising its freedom of expression, and that legal persons such as the NGO bringing the case cannot be the victim of hate speech. KaosGL has expressed its intention to appeal the decision.



High Council of Radio and Television issues sanction against public broadcaster for discriminatory content

The High Council of Radio and Television (Radyo ve Televizyon Üst Kurulu, RTÜK) has issued sanctions against a Turkish public broadcaster (Türkiye Radyo ve Televizyon Kurumu, TRT) for broadcasting discriminatory content on the ground of religion/belief. The decision concerned a 'joke' told by a famous singer during a music programme broadcast by TRT. The Council concluded that the Alevi faith, which is a non-Sunni denomination within Islam, was presented as falling outside of the Muslim religion, that the sacred beliefs of the Alevis were made fun of and that the Alevi faith was misrepresented by narrating factually inaccurate information. The Council found these elements to constitute discrimination against the Alevis on the basis of the differences in their faith. The body noted that the programme's host laughed at the joke and did not warn the singer, which showed that the host and the broadcaster indirectly approved the discrimination.



In a majority decision (nine against one), the Council found the broadcaster to have violated the prohibition of discrimination within broadcasting contained in Article 8(f) of the Law on the Establishment of Radio and Television Enterprises and their Broadcasting Services and issued a warning sanction.¹⁸⁶

Internet source:

<http://www.rtuk.gov.tr/#¹⁸⁷>

¹⁸⁶ High Council of Radio and Television, Decision No 29, 22 January 2014.

¹⁸⁷ Please click on "Üst Kurul Kararları" on the left hand side, then go to "2014 Yılı Tüm Kararları", then click on "22.01.2014 tarih ve 2014/05 sayılı Üst Kurul Toplantısı Kararları".

