



National protection beyond the two EU Anti-discrimination Directives

The grounds of religion and belief, disability,
age and sexual orientation beyond
employment

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sexual orientation beyond employment

European Network of Legal Experts in the non-discrimination field

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European Commission
Directorate-General for Justice

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Sheila | 1990

Executive Summary

On 2 July 2008 the Commission put forward a Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation outside the labour market. That Proposal has yet to become law, and a number of draft amendments have been made in relation to it. The purpose of this report is to provide a context within which legislative change in this area might be discussed. Specifically, the purpose of this report is to update the 2006 mapping study¹ of the regulation of discrimination outside the employment context on grounds of age, disability, religion or belief, sex and sexual orientation, sex being largely excluded by reason of the adoption of Council Directive 2004/113/EC of 13 December 2004. This analysis is based on information provided by the Legal Network, through the national reports provided by the experts and through complementary information provided by the experts.

There is a great deal of regulation across the countries surveyed² of discrimination on grounds of age, disability, religion / belief and sexual orientation (referred to as “the relevant grounds”) beyond the scope of Council Directive 2000/78. Many of the countries surveyed have specific legislative provisions regulating discrimination across some or all of the relevant grounds across all or much of the material scope of Council Directive 2000/43. Other countries achieve broad coverage by virtue of a combination of Constitutional provisions (some with horizontal effect) with field-specific legislation (that is, legislation which, for example, provides rights, including non-discrimination rights, in relation to social protection, education, access to goods and services), and/or ground-specific statutory prohibitions on discrimination (most commonly on grounds of disability).

Approaches differ, but it is noteworthy that, of the 33 countries here considered, 14 have in place what might broadly be termed comprehensive (or almost comprehensive) regulation of discrimination across much or all of the material scope of Council Directive 2000/43 in relation to all of the relevant grounds; with a further four states coming very close behind in terms of coverage (two of these having relatively minor gaps in coverage which result from a combination of federal and regional measures); a further four having significant protection across all of the relevant grounds beyond the scope of Council Directive 2000/78;³ an additional five having significant protection of some but not all relevant grounds beyond the scope of Council Directive 2000/78 with the remaining six countries having more limited (but in five of the six some) additional protections.

As far as the detail of the prohibitions on discrimination is concerned, the requirement for reasonable accommodation of disability-specific needs is commonplace across the 33 states (with only four restricting such duties to employment alone), though the material scope of such duties varies. Most cover education though many are much broader in scope, sometimes as a result of judicial interpretation rather than legislative decision-making. There is a wide variation in the level of detail of such duties, particularly as regards the question what is “reasonable” accommodation, with **Austria** and **Cyprus** being among those countries which provide most legislative guidance on this matter. Over and above the obvious cases of (for example) wheelchair access, duties of reasonable accommodation have been applied to require the broadcast of programmes accessible to those with hearing impairments (**Romania**) and to overrule limitations imposed on the degree of assistance provided to schoolchildren with hearing impairments and other disabilities (**Belgium** and **Italy**). Participation in civic life in the form of voting has also featured in both **Iceland** and **Norway**, with courts ruling that failures to provide for simultaneous translation of election broadcasts and inadequacies in online election campaigning materials breached individuals’ rights. So too, **Iceland’s** Supreme Court recently ruled, did a requirement that those unable physically to cast their own vote did so through officials rather than their personal

¹ Mapping study on existing national legislative measures – and their impact in – tackling discrimination outside the field of employment and occupation on the grounds of sex, religion or belief, disability, age and sexual orientation, VT/2005/062.

² i.e., EU Member States, candidate countries (Iceland, The Former Yugoslav Republic of Macedonia and Turkey) and EEA countries.

³ The difference between these states and those in the immediately preceding category is a question of degree.

assistants. Accessibility standards are common especially with regard to buildings (also transport), but problems of enforcement are regularly reported.

All of the 33 states considered permit at least some scope for positive action rather than enforcing an entirely symmetrical approach. There are wide variations, however, between those which regard positive action as a necessary element of equal treatment/ non-discrimination, and those which permit such action only as an exception to the general rule. The greatest scope generally applies for positive action in favour of those with disabilities (reasonable accommodation being an example of this).

Turning to consider the material scope of the regulation of discrimination, all 33 states prohibit discrimination by legal as well as natural persons, and most provide for vicarious liability on the part of employers. There is wider variation, however, as regards the question whether legal persons are protected from discrimination. Relevant to the prohibition across many states of disability discrimination in education, most favour the integration of disabled pupils into mainstream schools at least in principle, though practice varies. Issues which arise in relation to education also include the ability of religious schools to discriminate, in relation to access, on grounds of religion/ belief and, in some cases, sexual orientation. The headscarf has featured in a significant number of cases in recent years with differing results between, and even within, countries. Other questions which have arisen concern the accommodation of children of minority faith (or none) in states in which religious instruction/ practice generally takes place in schools, and in cases in which the individual requires positive accommodation of his or her religious practice. In both cases the practice differs between states.

A number of states which regulate discrimination in access to goods and services, including housing, do so regardless of whether the goods and services are provided to the public generally or more narrowly, though of these some provide exceptions to the general prohibition on discrimination covering family and similarly private supply. Relatively few countries which regulate discrimination on the relevant grounds as regards housing make any specific exceptions to cover private situations (such as where an individual rents or sells one or more apartments in a building in which he or she, and/or their family continues to reside). Another question of broad application which arises concerns the exceptions provided in the context of financial services, also in relation to social protection/ advantages and/or healthcare, to prohibitions on discrimination on grounds of age and/or disability. A number of states which regulate discrimination in relation to financial services, social protection/ advantages and/or healthcare do not do so on grounds of age/ disability, or provide justification defences applicable to these grounds or more generally, or make specific provision for actuarial discrimination. There are examples, however, of judicial decisions prohibiting age-related discrimination in access to medical procedures and fertility treatment.

More generally, a number of the countries which have broad statutory prohibitions on discrimination on the relevant grounds provide for general justification defences at least in relation to discrimination falling outside the scope of EU law (see, for example, **Belgium** and the **Czech Republic**). Other general defences includes that which applies in **Hungary** where the anti-discrimination statute allows discrimination which is necessary for the enforcement of other fundamental rights, and also allows discrimination other than in connection with fundamental rights which is objectively reasonable. Others including the **UK** and **Sweden** provide general justification defences only in relation to age, these and other countries providing specific exceptions applicable to particular grounds in particular contexts. A number of states specifically provide for exceptions designed to safeguard religious autonomy. And even where explicit exceptions to prohibitions on discrimination do not exist, courts have on occasion been ready to create them.

Finally as regards enforcement, there is a difference between regulating discrimination in principle and providing effective rights upon which individuals can rely. Costs are a particular concern across many of the countries surveyed, time limits also being mentioned as are specific problems of access to rights for people with disabilities. Alternatives to individual litigation include access to Ombudspersons or other specific enforcement bodies but the powers of such bodies regularly do not extend to monetary compensation.

Hasy | 1972

Introduction

EU Proposal

The Proposal for a Council Directive of 2 July 2008 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation originated from the priorities of the EU's Renewed Social Agenda and the framework strategy for non-discrimination and equal opportunities for all. If enacted as proposed by the Commission, the draft Directive would prohibit discrimination on these four grounds in the context of social protection, including social security and healthcare; social advantages; education; and access to goods and services, including housing. Since the publication of that Proposal, the entry into force of the Lisbon Treaty on 1 December 2009 has had the effect that the proposal now falls under Article 19 of the Treaty on the Functioning of the European Union, requiring for its adoption unanimity in the Council following the consent of the European Parliament.⁴

In December 2011 the Employment, Social Policy, Health and Consumer Affairs Council was informed by the Polish Presidency of the results of its analysis of the age-related provisions and the Working Party on Social Questions has subsequently continued its examination of the proposal under the Danish Presidency, again focusing in particular on age discrimination. Among the possible amendments to the draft Directive proposed in that Working Party have been the exclusion of protection from age and disability discrimination in respect of social protection and of age protection in the context of education, with some members proposing the complete removal of social protection, and others the removal of education, from the scope of the Directive. The approach taken by Article 2(7) to financial services has also proved controversial with a number of states taking the view that this area should be excluded from the scope of the Directive. As of May 2012, all Member States had in place general scrutiny observations on the proposal with the **Czech Republic, Denmark, France, Malta** and the **UK** having parliamentary scrutiny reservations to it.⁵ The Commission had affirmed its original proposal and maintained a scrutiny reservation on any changes to it.

International Context

Developments at EU level take place against an international context in which the regulation of discrimination on grounds such as disability, sexual orientation and religion/ belief has become increasingly common not just at constitutional level but also by way of detailed statutory provisions. As Sandra Fredman's recent study pointed out,⁶ **Canada's** broad and progressive equality clause is augmented by federal and Provincial Human Rights statutes which regulate discrimination in access to goods and services as well as employment on grounds including race, national or ethnic origin, colour, religion, age, sex (including pregnancy and childbirth), sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted. **South Africa** benefits not only, at constitutional level, from a general equality guarantee, a specific anti-discrimination provision, and express authorisation for affirmative action provisions, but also from two comprehensive anti-discrimination statutes, one of which (the Promotion of Equality and Prevention of Discrimination Act) is concerned with non-employment issues and regulates discrimination on grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, with the further possibility

⁴ According to the Council of the EU Interinstitutional File: 2008/0140 (CNS), Brussels, 10 May 2012 – Progress report of the Presidency, doc.ref.8724/12.

⁵ *Ibid*, p.2.

⁶ EC, Justice (2012) *Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India*, available at <http://www.non-discrimination.net/home/anti-discrimination-legislation-us-canada-south-africa-and-india-comparative-analysis>.

of extension to include HIV/AIDS status, socio-economic status, nationality, family responsibility and family status.⁷ And **New Zealand's** Bill of Rights Act 1990 prohibits discrimination on grounds of sex, including pregnancy and childbirth; marital status; religious belief; ethical belief; colour; race; ethnic or national origins, including nationality or citizenship; disability; age; political opinion, or the lack of such; employment status and family status and sexual orientation.⁸ In addition, New Zealand's Human Rights Act 1993, as amended, prohibits discrimination on all of these grounds across a broad material scope including employment, education, and access to goods and services including housing.

That is not to suggest that relatively comprehensive anti-discrimination regimes are commonplace. It should not be forgotten, in particular, that sexual activity between consenting adults remains criminal in more than 80 countries across the globe where the adults are of the same sex as each other.⁹ Even where states do not pursue such practices, there is often ample space for public and private sector actors to discriminate. **Australia's** Constitution, for example, contains no express "equal protection" or "anti-discrimination" provisions and, while the High Court did accept in *Leeth v Commonwealth*¹⁰ that the Constitution contained an implied constitutional right to equality, there is no developed jurisprudence of the kind seen in **Canada** or in **South Africa**. Further, while Australian federal legislation regulates discrimination across a broad material scope on grounds of sex, race, age and disability, no equivalent protections apply at federal level in respect of sexual orientation or religion/belief.

In the **US**, whose Equal Protection Clause has proven influential in the development of equality law across the world, the highest level of constitutional protection ("strict scrutiny") is reserved for race, national origin and alienage while gender receives intermediate scrutiny and all other grounds of discrimination only "rational review". At federal level, Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sex, race, colour, religion or national origin by employers of 15 or more employees, and discrimination based on race, colour, religion or national origin (but not sex) by private and public entities in access to public accommodations (e.g. hotels, restaurants and theatres); Title IX prohibits discrimination on grounds of race, colour, national origin or sex by publicly funded educational institutions and public entities which receive funds from federal government and Title VI prohibits discrimination based on race, colour or national origin in any "program or activity" receiving "federal financial assistance".¹¹ Age discrimination is regulated in the employment context and disability in employment, access to public accommodations and schooling but protection is far from comprehensive and, in the case of sexual orientation, is all but entirely absent.¹²

Closer to home, the jurisprudence of the **European Court of Human Rights** on discrimination has become increasingly robust with the recognition in *Thlimmenos v Greece* (2001) 31 EHRR 411 that the avoidance of discrimination may require differentiated, rather than identical, treatment; and in *DH v Czech Republic* (2008) 47 EHRR 3 that Article 14 applied to indirect as well as to direct discrimination. As becomes clear from this report, many EU Member States have moved significantly closer in recent years to establishing very broad ranging legal prohibitions on discrimination on the grounds here considered (sexual orientation, age, religion/ belief and disability). As will also become clear from what follows, however, there are very significant differences between the states here considered as regards depth and scope of coverage, and many gaps remain between the protection envisaged by the 2008 Proposal and the practice across those states. Further, and importantly, there are difficulties as regards enforcement and the practical effect of provisions which are in place which might require redress at EU level.

⁷ See generally Fredman, *ibid.*

⁸ Also discrimination by perception and association.

⁹ See generally <http://www.humandignitytrust.org/>.

¹⁰ (1992) 174 CLR 455.

¹¹ See generally Fredman, fn 6 above.

¹² *Ibid.*

Structure of the Report

Part I will consider in outline the legal framework in each state in turn: in particular, whether discrimination is regulated by the Constitution and/or by legislation; which grounds of discrimination are covered by each type of legal regulation and the material scope of such regulation and, where relevant, the federal or other level of legislation. Whereas the 2006 mapping study¹³ considered coverage outside the employment context of discrimination on grounds of age, disability, religion or belief, sex and sexual orientation, this report is not significantly concerned with sex, Council Directive 2004/113/EC of 13 December 2004 having filled some of the gaps identified in the 2006 report in relation to sex. Having said this, the domestic regulation of sex discrimination will be mentioned where, as in the context of education, there remain gaps in legal regulation at EU level.

Part II discusses the approach taken to definitions of “discrimination” across various regimes and, in particular, the extent to which (1) duties of reasonable adjustment/ accommodation are imposed and (2) “positive action” permitted and/or required. No attempt is made to list the approaches state-by-state. The aim of this part of the report is, rather, to draw attention to trends and possibilities, and to highlight possibilities and difficulties to which attention is drawn by national experiences.

Part III is concerned with the personal and material scope of national legislation. Again the purpose here is not to provide a “tick box” of which state does what, rather to highlight trends and particular issues which arise. Questions considered will include the extent to which legal as distinct from natural persons are protected from and liable for discrimination, and questions of vicarious liability for discrimination, including liability for discrimination by third parties. I also consider a number of issues arising in connection with the material scope of the regulation of discrimination across the states surveyed, in particular, the extent to which religion-specific education is permitted and the approach to education for pupils with disabilities (i.e., whether the tendency is to integrate or segregate such students, and how the legal regimes accommodate such practices); the extent to which particular areas of goods and services such as insurance and housing are regulated, and whether exceptions related to private life are permitted in relation to housing; the scope of any justification defence in relation to social protection and the exceptions to any prohibitions on discrimination in this context, in particular in respect of age and disability. Finally, I will consider particular issues which arise in relation to health care including exceptions to prohibitions on discrimination in relation, in particular, to age and disability.

Part IV considers exceptions of general application which are found in the national legislation and Part V deals with issues of enforcement including, in particular, approaches taken to remedies, and the role of national equality bodies in this area. Finally in Part VI I endeavour to draw some general conclusions as regards extent and nature of coverage of existing national provisions by reference to ground of discrimination and material scope. A central purpose of this part of the report is to draw attention to any obvious gaps which remain at the national levels as regards the regulation of discrimination on grounds of age, disability, religion and belief, and sexual orientation outside employment and occupation.

¹³ McColgan A., Niessen J. and Palmer F., *Mapping study on existing national legislative measures*, VT/2005/062.

Sanny | 1980

Part I

Domestic regulation of discrimination

1.1 Introduction

This part of the report does no more than to provide an outline of national approaches to equality/ discrimination law, constraints of space preventing a more detailed analysis at this stage. It can be said at the outset, however, that there have been some significant developments since the publication of the 2006 Mapping Report. While there are still a number of states which regulate discrimination only or mainly as required by EU law (in the case of EU Members) or more narrowly (in the case of non-members here considered), much broader regulation covering much or all of the material scope of Council Directive 2000/43 across multiple grounds including, or even exceeding, those protected by Directive 2000/78, is relatively commonplace.

Complexities including coverage in some states by regional as well as national legislative measures, and the broad horizontal application of Constitutional equality provisions in others, make it difficult to draw up a definitive hierarchy of states ranked according to the nature and degree of protection from discrimination they afford. Nevertheless, below I attempt to cluster the countries considered in this report broadly according to the level of protection they afford. Even where countries are ranked as more rather than less protective, or are said to have more or less comprehensive protection in respect of the relevant grounds across the material scope of Council Directive 2000/43, that is not to say that their legislation is compatible with applicable EU measures, much less that the provisions which extend beyond current EU requirements would be compatible with any directive which might regulate discrimination on the relevant grounds across the material scope of Directive 2000/43. In the case of **Croatia**, for example, which is listed first below, the exceptions provided to the prohibition on employment-related discrimination are broad and unclear.

1.2 States providing protection across the material scope of Council Directive 2000/43 in respect of all relevant grounds

States offering more or less comprehensive protection in respect of all the relevant grounds (age, disability, religion/belief and sexual orientation) across most or all of the material scope of Directive 2000/43 include **Croatia** whose Anti-discrimination Act 2009 covers all the relevant grounds with others including property, genetic heritage, education, trade union membership, social status and gender identity and expression. It prohibits discrimination on all of the regulated grounds across the material scope of Directive 2000/43. The Same-sex Relationships Act also prohibits discrimination based on 'same-sex relationship' and 'homosexual orientation' and the Constitution guarantees rights and freedoms to everyone in Croatia regardless of race, colour, gender, language, religion, political or other belief, national or social origin, property, birth, education, social status or other characteristics.

The **Czech Republic** has a comprehensive Anti-discrimination Law 2009 in addition to constitutional prohibitions on discrimination on an open-ended list of grounds including, *inter alia*, religion or belief, political or other conviction, property and birth or other status (but not sexual orientation, age or disability). The 2009 Act applies to all of the grounds considered in this report in relation to health care and education, social security and social protection, social advantages and access to goods, services, consumer protection and housing. It also guarantees access to special enforcement measures against discrimination and imposes duties on the state with respect to the mainstreaming of equality principles, public dialogue on equality, and information about the rights of members of the public.

Hungary has detailed statutory provisions prohibiting discrimination on the relevant grounds, amongst many others,¹⁴ which apply to public sector actors and, so far as is relevant, to private actors (i) who publicly offer to contract (e.g.

¹⁴ Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities also regulates discrimination on grounds of sex, racial affiliation, colour of skin, nationality, belonging to a national minority, mother tongue, health condition, political or other opinion, family status, maternity (pregnancy) or paternity, sexual identity, social origin, financial status, part-time nature of employment legal relation or other legal relation aimed at labour, or determined period thereof, belonging to an interest representation, or other situation, attribution or condition (hereinafter together: characteristic), of a person or group.

by advertising the availability for rent of an apartment) or call for an open tender; (ii) who provide services or sell goods at premises open to customers; or (iii) who (as self-employed persons, legal entities or organisations without a legal identity) receive state funding in respect of their legal relations established in relation to the usage of the funding. The Act covers access to social security and health care and education and is thought to cover access to social advantages. In addition, Hungary's constitution contains a general anti-discrimination clause which, as well as providing for special measures, in particular in the case of children, the elderly and disabled and women, provides for the enjoyment of fundamental rights by all "without any discrimination" on all the grounds considered in this report, and others (though sexual orientation is covered as "another ground" rather than being enumerated).

In **Slovenia** the Act implementing the Principle of Equal Treatment 2004 regulates direct and indirect discrimination on 14 grounds including the relevant grounds¹⁵ in all areas of social life. In addition, the 2010 Act on Equal Opportunities for People with Disabilities imposes duties of "appropriate accommodation" and the Penal Code prohibits some forms of discrimination. In 2009 the Constitutional Court ruled that a legislative distinction drawn, in the context of inheritance, between registered same-sex and married partners, breached Slovenia's Constitution, a decision which involved the reading-in of sexual orientation to the list of grounds protected by the Constitutional prohibition on discrimination.¹⁶

The **UK** also has detailed statutory provisions which govern discrimination on all the relevant grounds across all or much of the material scope of Directive 2000/43. In Great Britain (which excludes Northern Ireland) discrimination on grounds of disability, sexual orientation, religion or belief and age are regulated by the Equality Act 2010 in relation to education, the supply of goods and services¹⁷ and housing and the performance of public functions. The provision of social advantages other than by public authorities is regulated only if they comprise "goods and services" but this is likely to be the case. No distinction is drawn as regards the material scope of the prohibitions on discrimination between the relevant grounds, though the justifications available for age discrimination are broader than is the case for the other grounds and age discrimination is not prohibited by schools in the delivery of their education function. The prohibition on age discrimination does not protect those aged under 18. Nor does the prohibition on harassment apply, outside the broad scope of employment, in respect of sexual orientation or religion/ belief.

In Northern Ireland the regulation of discrimination on grounds of sexual orientation, religion or belief and disability is very similar to that in Great Britain but discrimination on grounds of age is unregulated outside the broad scope of employment. Differences also arise in relation to religion and belief, Northern Ireland's provisions having no application to primary or secondary education (which remain for the most part segregated along religious lines). Further, where public bodies in Northern Ireland are performing functions which are different in kind from those carried out by private sector actors, the prohibitions on sex and religion/ belief discrimination apply only to direct discrimination.

Sweden's Discrimination Act 2008 regulates discrimination on all relevant grounds in relation to (so far as relevant here) education, membership of certain organisations, goods, services and housing, meetings and public events, health and medical care and social services and social security and financial aid for studies.¹⁸ Social advantages which do not fall within the preceding list will be covered if they amount to goods and services (this will be the case for discounts, for example). Disability is asymmetrically protected so discounts for people with disabilities do not have to be justified. Penal provisions also prohibit discrimination on grounds, *inter alia*, of sexual orientation and religion by private businesses against customers and public employees against members of the public.

¹⁵ The Act regulates discrimination on grounds of "personal circumstances such as nationality, racial or ethnic origin, sex, health state, disability, language, religious or other conviction, age, sexual orientation, education, financial state, social status or other personal circumstances".

¹⁶ 2 July 2009 U-I-425/06.

¹⁷ Widely defined to include services to prisoners such as access to prison work (*Alexander v Home Office* [1988] ICR 685).

¹⁸ In the case of age this regulation has only been effective from 1.1.12.

Romania has statutory provisions regulating discrimination on the relevant grounds, amongst others, in relation to a wide variety of rights including economic, social and cultural rights, in particular, the right to housing, the right to health, medical assistance, social security and social services; the right to education; the right to take part in cultural activities and sport in conditions of equality and the right of access to all public places and services (§1). Disability is not expressly listed in the anti-discrimination legislation but is read into the open-ended list of grounds.

Luxembourg's Bill 5518 of 28 November 2006 provides protection against discrimination on the relevant grounds across much of the material scope of Directive 2000/43, though payments made by state schemes or similar are excluded from the prohibition on discrimination on the relevant grounds. In addition, there are a range of penal prohibitions regulating discrimination in economic activities and the provision of goods and services including advertising on a wide range of grounds including the relevant grounds with the exception of age. "Belief" is not covered in terms by the penal provisions but "religion" and "philosophical opinions" are. In addition, Luxembourg's Constitution contains a general equality provision to the effect that all Luxembourgers are equal before the Law which has been interpreted to prohibit unjustified discrimination.¹⁹

Bulgaria's detailed statutory provisions (the Protection Against Discrimination Act 2004) regulate discrimination on all grounds considered in this report as well as many others²⁰ in employment and occupation, also in the exercise of any other right or freedom provided for under the Constitution and domestic laws (primary and secondary legislation and ratified international law which is an integral part of domestic law under the Constitution). There is, however, a significant amount of older contradictory legislation and it is not clear whether and to what extent the 2004 Act prevails. The Act makes detailed provision in relation to employment and access to goods and services and otherwise states that "The prohibition of discrimination shall be binding on all in the exercise and protection of the rights and freedoms provided for under the Constitution and laws of the Republic of Bulgaria".

Ireland has detailed statutory provisions regulating discrimination on all the relevant grounds, among others,²¹ in relation to access to goods and services, accommodation, transfer of property and education. It is uncertain whether the Equal Status Acts apply to discrimination in social security, healthcare or social advantages. The Act also prohibits clubs from discriminating (s8). The Act supplements constitutional equality guarantees which have been found in the past to permit the criminalisation of sex between men (but not women) and not to require the state to enable physically disabled persons to vote.²² (Ireland's first attempt to impose duties of reasonable accommodation on employers in relation to disabled workers was also declared unconstitutional.²³)

Slovakia's Anti-discrimination Act 2004 regulates discrimination on all the relevant grounds, amongst many others,²⁴ in relation to social protection, education and access to goods and services including housing. The Act probably also applies in respect of social advantages,²⁵ and imposes positive duties on the state to "adopt[] measures for protection against discrimination" (s.2(3)). There is some uncertainty as to the scope of the prohibition on discrimination where (as in the case of harassment by pupils of teachers) the discriminated-against person is not the bearer of legal rights against the discriminator, also in the context of housing. In addition, the Constitution prohibits discrimination on the

¹⁹ Constitutional Court Judgment 2/1998 of 13.11.98, Mémorial (Official Gazette) A - no. 102 of 8.12.98, page 2499.

²⁰ Nationality, origin, education, convictions, political allegiance, personal or public status, family status and property status and "any other grounds established by law, or international treaty the Republic of Bulgaria is party to".

²¹ The Equal Status Acts 2000-2011 also regulate discrimination on grounds of marital status, family status, race and membership of the Traveller community.

²² *Draper v. Attorney General* [1984] IR 277, *Norris v. AG* [1984] IR 36.

²³ *Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321.

²⁴ Sex, race, affiliation with nationality or an ethnic group, marital status and family status, colour of skin, language, political or other opinion, national or social origin, property, lineage/gender or other status.

²⁵ Subject to a possible lacuna where the advantage is provided for other than by legislation (for example, by governmental decrees, ministerial ordinances, generally binding ordinances of self-governing bodies or municipalities etc.).

relevant grounds, amongst others, in relation to fundamental rights. Such fundamental rights do not include access to goods and services or to housing, but do include the right to education, to adequate material security in old age as well as in cases of incapability for work and death of the breadwinner of a family, and the right of a person suffering material need to assistance that is necessary to secure a basic standard of life.

Estonia's Constitution prohibits discrimination on the relevant grounds, amongst others, in "all spheres of life".²⁶ It is directly applicable against state and private actors and applies to social protection, including social security, social assistance and healthcare, social advantages and education. There is little case-law on the subject. General Estonian Constitutional and criminal anti-discrimination provisions regulate access to goods and services including housing and further field-specific legislation applies to public transport and to taxi-drivers who are prohibited from refusing a fare without good reason.

Finland has various detailed statutory provisions as well as Constitutional provisions, administrative law, civil law and criminal law provisions which regulate discrimination either generally or in particular spheres. The Non-Discrimination Act 2004 prohibits discrimination in relation to education in relation to a non-exhaustive list of grounds including those considered in this report. In addition, penal provisions regulate discrimination on the relevant grounds, among others, in the discharge of public duties, the provision of goods and services and the arrangement of public events and meetings. Public bodies are also under a Constitutional duty to provide their services on a non-discriminatory basis. Field-specific legislation also prohibits discrimination in relation to healthcare, social services and social protection. Discrimination in access to social advantages is also covered by the Constitution and, to the extent that it involves the exercise of a "trade or profession, service of the general public ... official authority or other public function or ... the arrangement of a public amusement or meeting", by the Penal Code. The Constitutional prohibition of discrimination, as well as the Non Discrimination Act, applies to education and discrimination while unjustified discrimination in access to goods and services (including housing) on the relevant grounds, amongst others, is regulated by the Penal Code.

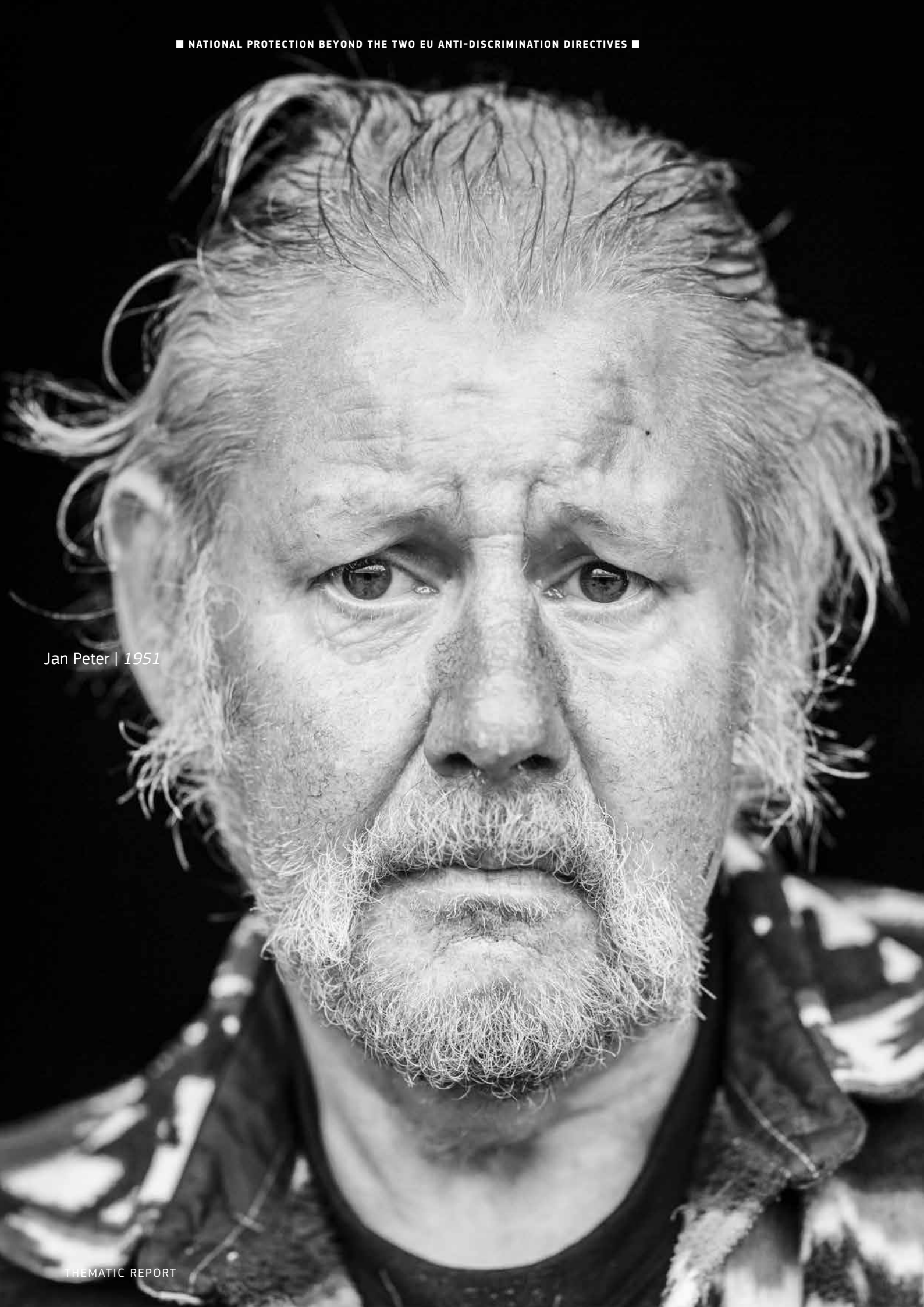
Portugal has a variety of statutory provisions dealing with discrimination on the relevant grounds as well as Constitutional provisions and field-specific legislation which prohibit unjustified differential treatment in social security, social protection, social assistance, education, healthcare, social advantages, and goods and services available to the public. Disability discrimination is subject to more detailed statutory protection.

1.3 States providing broad (but not comprehensive) protection from discrimination in relation to all the relevant grounds

Among these states are two (Belgium and Austria) which apply a patchwork of national and regional/ provincial protections. **Belgium's** federal legislation prohibits discrimination in the provision of goods or services offered to the public; reference in an official document; access to and participation in, as well as exercise of, an economic, social, cultural or political activity normally accessible to the public on all the relevant grounds.²⁷ Federal prohibitions on discrimination do not apply to discrimination in legislative provisions, as distinct from administrative practices, or to education or housing, but the regions also have in place extensive prohibitions on discrimination within the areas of their competence across a very broad range of grounds and most or all of the material scope of Directive 2000/43.

²⁶ Constitution §12 covers ethnic origin, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or other grounds including (implicitly) age, disability and sexual orientation. See also Decision of the Constitutional Review Chamber of the National Court of 6 March 2002; published RT III 2002, 8, 74.

²⁷ The Protection Against Discrimination Act 2003 includes age, sexual orientation, civil status, birth, property, religious or philosophical belief, actual or future state of health, disability, physical characteristic, political opinion, trade union opinion, language, social origin and social origin as protected characteristics.



Jan Peter | 1951

Similar, but providing less comprehensive protection, is **Austria**, whose federal Disability Equality Act includes protection in relation to the supply of goods and services including housing but not, it is thought, in relation to social protection or social advantages. Regional legislation provides significant protection against discrimination by private bodies and by provincial governments which are very significant providers of social protection, social advantages and education (the provincial acts typically reflect Council Directive 2000/43/EC but apply to all relevant grounds²⁸). The gap which exists in respect of discrimination falling outside regional competence is filled to some extent by the Constitutional non-discrimination clause whose open ended list of grounds includes [sex] and religion, as well as disability, by the European Convention on Human Rights (ECHR) which forms part of Austria's Constitution and may be relied upon against public authorities by administrative penal law which protects social groups characterised by religion, as well as disability, against unjustifiable "disadvantage".

Cyprus is interesting in that it has very little statutory protection but it incorporates Protocol No. 12 of the European Convention on Human Rights and Convention rights are actionable in the civil courts against public authorities and private bodies.²⁹ Constitutional equality litigation is relatively scarce but the Equality Body (Ombudsman) is empowered to tackle "discrimination forbidden by law", which is defined to include discrimination in the private or public sector on all grounds regulated under Protocol 12 (hence all relevant grounds), and covers social protection, social security, medical care and education and social advantages at least where they are state provided. The Ombudsman's mandate also covers discrimination in "access to and provision of goods and services" and housing in the public and private sector. In addition, the Law on Persons with Disabilities 2000 regulates discrimination on grounds of disability across "services and facilities", public transport and access to telecommunications and information. Religious discrimination is prohibited by criminal law in access to goods and services.

In the **Former Yugoslav Republic of Macedonia** the Anti-discrimination law regulates discrimination in relation to social protection, education and housing as well as in "other fields provided for by law". The Law provides protection in respect of an open list of grounds including age, disability and religion and belief. Although sexual orientation is not expressly included it is treated as a protected ground by the Equality Body. In addition, there is a constitutional prohibition on discrimination which applies only, however, to citizens of the country and has a closed list of grounds which do not include disability, age and sexual orientation or belief other than political and religious belief.

1.4 States providing significant protection in relation to all or most of the relevant grounds beyond the material scope of Council Directive 2000/78

A number of other countries provide legal protection from discrimination which is less comprehensive in material scope, but still extends significantly beyond the requirements of current EU law. Among these are **Germany** whose 2006 Anti Discrimination Act prohibits discrimination on all the relevant grounds in relation to social protection and advantages, broadly understood, and on all relevant grounds except belief (religion is covered) in relation to standard form contractual relationships and the provision of private law insurance. Discrimination in education is covered by the Act only if it falls within the prohibition on contractual discrimination but such discrimination is regulated under the Constitution (Basic Law) which provides an equality guarantee. The Constitutional equality provision also applies in respect of social protection and social advantages, and to health care whether publicly or privately provided. Where goods and services are provided by public authorities, other than on the basis of private contracts, the Constitution, rather than the Act, will govern. It does not regulate harassment or instructions to discriminate in terms. Special provisions require the provision of service without discrimination in transport and, in the case of dominant service providers, telecommunication and postal services. The Licensing Law makes authorisation to establish a

²⁸ The exception is the Province of Lower Austria which provides extensive regulation only in respect of race.

²⁹ *Yiallourou v Evgenios Nicolaou* 2002.

restaurant dependent on the provision of rooms that reasonably accommodate the needs of disabled persons and licenses can be denied in cases of discriminatory behaviour.

In **Spain**, field of application specific provisions are favoured on the principle of mainstreaming (education, social security etc., and healthcare). These do not tend to include definitions of discrimination but all the relevant grounds are regulated as regards social protection and education, but not as regards access to goods and services or housing. There are, in addition, detailed statutory provisions dealing with disability and the government is required to equality impact assess all proposed legislation. Constitutional provisions, which are directly applicable both vertically and horizontally, prohibit differential treatment between Spaniards without objective and reasonable justification “on the grounds of birth, race, religion, opinion or any other condition or personal or social circumstance” in all areas, public and private, even in the absence of specific statutory provisions.

Lithuania has a Constitutional prohibition on discrimination which applies to religion or belief alone of the relevant grounds, and which is binding against the state and private actors. In addition, discrimination on all relevant grounds is regulated by the 2003 Law on Equal Treatment which covers discrimination by the state, educational institutions, providers of goods and services, advertisers and employers in relation to (so far as relevant here) 1/ state and municipal institutions’ and offices’ activity in adopting legislature, preparing various programs and means for guaranteeing equal opportunities; 2/ education; and 3/ access to goods and services. There is little case-law on the Law on Equal Treatment, the first finding of direct discrimination in a Lithuanian court happening in June 2008.

French penal law prohibits direct discrimination on all relevant grounds and others³⁰ in relation to, *inter alia*, 1) refusal to supply goods or services; 2) obstructing the normal exercise of any given economic activity; and 3) subjecting the supply of goods or services to a condition based on one of the regulated factors. In addition to these penal provisions, French civil law regulates discrimination in access to tenancies on the same grounds through field-specific legislation (covering both direct and indirect discrimination). There is no express prohibition of discrimination in education other than in the case of disability (discrimination on this ground also being subject to express regulation in relation to access to goods and services) but education, in common with social protection and social advantages, is subject to the general principles of equality contained in the Constitution and other laws.

1.5 States providing uneven protection in relation to the relevant grounds

Other states provide very different levels of protection in respect of various of the grounds considered in this report. In the **Netherlands**, for example, the Equal Treatment Act regulates discrimination on grounds of sexual orientation and religion or belief in “offering or permitting access to goods or services (including housing, social services, health care, cultural affairs and education, but not otherwise including social protection, social advantages or social security) in concluding, implementing or terminating agreements on the subject, and in providing career orientation and advice or information regarding the choice of educational establishment or career”. The prohibition on discrimination applies to all offers which are made publicly, whether in a newspaper, on a billboard or on a website, and specifically includes public authorities where they offer goods or services. In addition, the Act on Equal Treatment on the Ground of Disability regulates discrimination in education and housing. Penal provisions prohibit discrimination in the course of professional activities and the Constitution prohibits discrimination on open-ended grounds, while internationally agreed provisions such as the International Covenant on Civil and Political Rights (ICCPR) form part of domestic law. Constitutional provisions are enforceable only against the state, however, and do not trump formal legislative provisions (§120).

³⁰ The Penal Code regulates discrimination on grounds of origin, sex, family situation, physical appearance or family name, health, genetic characteristics, morals, political opinions, union activities, and actual or perceived ethnicity, nationality, or race.

Norway's Anti-discrimination Act regulates discrimination, so far as is relevant here, on grounds of religion or belief in all areas of society including access to goods and services. Discrimination on grounds of age and sexual orientation are only regulated in the context of employment. Discrimination on grounds of religion or belief in social protection including social security and health care is covered as are social advantages and education. The Anti-discrimination and Accessibility Act 2009 regulates disability discrimination across all areas of society. The Equality and Anti-Discrimination Tribunal has found that HIV positive status amounts to disability for the purposes of the Anti-discrimination and Accessibility Act,³¹ and has ruled that a prohibition against full-body bathing suits in a hospital physiotherapy pool amounted to unlawful discrimination on grounds of religion.³² A proposal for a comprehensive anti-discriminatory legal framework was presented on 1 July 2009, by a Commission set up by government, but legislation has still to be adopted.

Italy's Constitution recognises equal dignity and equality under the law without distinctions on grounds including religion, political opinions, and personal conditions, and calls upon the State to remove the social and economic obstacles which limit the freedom and equality of the citizens and prevent full human development. Detailed statutory provisions go beyond the requirements of EU law in the case of disability and religion/ belief which are regulated along the lines of Council Directive 2000/43. It is also generally assumed that the Italian rules relating to access to primary and secondary schools and to public housing would prevent at least direct discrimination on any ground in these contexts. Shopkeepers and those who offer services to the public for commercial purposes are prohibited from denying their services to the public, as are public authorities. A number of Italian regional assemblies have introduced laws prohibiting discrimination.

Denmark has complex penal provisions regulating discrimination outside employment which cover the grounds of sexual orientation and belief in the provision of goods and services, including housing, and access to public places. Much discrimination in relation to social protection is regulated by the general principle of equality which binds public authorities.

In **Latvia** the Constitutional equality clause, which refers to “discrimination of any kind”, can be directly relied on as against state actors (§91). In addition, field-specific measures prohibit direct and indirect discrimination in relation to social services, defined as measures ensured by state or municipality in the form of monetary or material support or other “services to promote the full realisation of person’s social rights”. This guarantee is also thought to apply in relation to healthcare, and to the whole field of social protection and social advantages within the public sphere (though this has not been established by litigation). The Latvian Law on Education applies to both the public and private sphere and prohibits discrimination on the basis of a closed list not including age, sexual orientation or disability (except by way of “health condition”). The 2008 Law on Consumer Rights Protection prohibits discrimination on grounds of disability (alone of the relevant grounds) in relation to access to and supply of goods and services and the Constitutional prohibition on “discrimination of any kind” would appear to apply to goods and services including housing in the public sphere.³³ Some protection from discrimination is also provided in the private sphere by penal law which prohibits intentional discrimination on the basis of race, religion or belief in any sphere, and civil law.

1.6 States providing limited protection in relation to the relevant grounds

Among the states which provide more limited legal protection from discrimination on the grounds considered in this report is **Iceland**. That country’s constitutional equality provision provides that “Everyone shall be equal before the law and enjoy human rights irrespective of sex, religion, opinion, national origin, race, colour, financial status,

³¹ Equality and Anti-Discrimination Tribunal 31.1.12, Case no. 40/2011.

³² 15.2.07: Case no 06/1529.

³³ Though it is not considered likely to extend to requiring accessible housing, for example, for wheelchair users.

parentage or other status. Men and women shall have equal rights in every respect". This provision is interpreted to impose obligations on the state to take positive measures, in particular as regards disabled persons. But as yet there is no comprehensive anti-discrimination legislation.³⁴ Specific statutory prohibitions on discrimination apply to administrative decision makers, providers of health care, postal and other services, and in respect of disabled and elderly persons. In particular the Act on the Affairs of Persons with Disabilities No. 59/1992 aims to guarantee equality for people with disabilities and living conditions comparable with those of other citizens as regards education and housing.

Turkey's Constitution provides, *inter alia*, that "All individuals are equal without any discrimination before the law, irrespective of language, race, colour, gender, political opinion, philosophical belief, religion and sect, or any such considerations" and that "Men and women have equal rights" (§10). Neither age nor sexual orientation is included in the Constitutional prohibition on discrimination but they are capable of inclusion within "other considerations". There is specific legislation on disability discrimination which applies to education as well as employment and some regulation of religious discrimination in relation to social protection, social advantages and education. Finally, the penal law provides some protection in relation to all relevant grounds as regards access to goods and services, excluding housing.

Poland regulates discrimination outside the employment sphere mainly by means of general Constitutional provisions some of which are applicable only to Polish citizens, and field-specific provisions providing rights (for example) to social security, healthcare, etc. Poland's Constitution contains an equal treatment clause concerning access to health care services and provides the right to education without discrimination. In theory these provisions are directly enforceable against the state but in practice Constitutional provisions are rarely invoked directly and there are no definitions of discrimination outside the employment context. The Constitution imposes upon public authorities an obligation to create policies enabling them to meet the housing needs of citizens, but Polish domestic legislation does not specifically regulate discrimination in housing. Discrimination on grounds of sex, marital status, and family status is regulated in relation to social security while the Act on Social Assistance prohibits discrimination without reference to any particular grounds. In addition, international treaties including the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of all forms of Race Discrimination (CERD), the Convention on the elimination of all forms of Discrimination against Women (CEDAW) and the ECHR are directly applicable in Polish law.

In **Malta** detailed statutory provisions go beyond EU requirements in relation to disability, the Equal Opportunities (Persons with a Disability) Act, 2000 regulating discrimination in education. Malta also has a variety of Constitutional provisions which are directly enforceable against the state and which cover, so far as relevant here, political opinions and creed (§§32 & 45).

Liechtenstein has not yet adopted legislation on the lines of Directives 2000/43 or 2000/78. It does have legislation on disability equality which is not restricted to employment but applies more generally, and the recognition of same-sex couples but no significant regulation on discrimination on grounds of age, sexual orientation or religion/ belief.

Greece provides very limited regulation relevant to the current discussion despite a variety of Constitutional provisions including a general equality clause governing all grounds of discrimination and all areas ("All Greeks are equal before the law") together with an express prohibition on sex discrimination and a provision favouring positive action. Constitutional provisions are effective horizontally as well as vertically. Discrimination on the relevant grounds in relation to social protection and advantages and education, goods and/or services and housing would be unconstitutional insofar as the discrimination was between Greek citizens, though there is little relevant case-law.

³⁴ Developments are anticipated in 2013.

Greek legislation provides that protection against discrimination on the relevant grounds can be extended to other fields by Presidential Decree but no such extension is imminent.

1.7 Conclusion

It is clear from the above, and from a comparison with the 2006 mapping report, that most EU and other states surveyed have domestic equality laws which extend very significantly beyond that required by EU law. There is a significant variety in approach and in the scope and nature of domestic regulation, but the countries which have enacted domestic laws extending beyond the provisions required by EU law heavily outweigh those which have not.

Prisca | 1977

Part II

Approaches to “discrimination”

2.1 Introduction

This chapter is concerned with the various approaches taken by the states surveyed to definitions of “discrimination” and, in particular, the extent to which (1) duties of reasonable adjustment/ accommodation are imposed and (2) “positive action” permitted and/or required.

2.2 Definitions of discrimination

It is not possible to say much of a general nature as regards the definitions of discrimination applied across the various states surveyed. Where discrimination is regulated only by constitutional, penal and/or sector specific legislation it appears that discrimination is often not defined, and it is by no means certain that it would be interpreted in line with EU approaches. One example of this is seen in **Poland** where there are no definitions of discrimination as regards regulation of the relevant grounds outside the context of employment, which consists at most of general Constitutional prohibitions on discrimination and some field-specific legislation providing an entitlement to education without discrimination.

Of those states in respect of which information is available, **Denmark’s** penal provisions regulating discrimination outside employment on grounds of sexual orientation and belief utilise the concept of discrimination found in the Convention on the Elimination of all Forms of Racial Discrimination which does not specifically distinguish direct and indirect discrimination, harassment or reasonable accommodation. Elsewhere, such as in **Ireland**, the **UK**, the **Czech Republic**, **Slovakia**, **Bulgaria**, **Norway**, **Austria**, **Germany** and **Hungary**, the definitions applicable to discrimination on the relevant grounds in relation to social protection, goods and services etc. are in line with EC definitions (though the UK does not explicitly regulate harassment related to sexual orientation or religion except in the broad employment context, and Ireland does not regulate harassment on any of the relevant grounds outside the employment context). Until 2011, **Dutch** Equal Treatment Laws contained a variety of definitions of direct and indirect discrimination but these were amended on 1 November 2011 to bring them into line with those in the EU Directives, this because of the European Commission’s view that the variety of definitions in Dutch legislation reduced the protection afforded to victims of discrimination below the standards required by EU law.³⁵ Dutch legislation continues, however, to use the term “distinction” rather than “discrimination”.

2.3 Harassment and freedom of expression

A number of interesting cases have been litigated concerning the scope of “harassment”. This is one of the trickier areas in which to achieve a balance between competing rights. It was the recognition of the fact that one person’s religious freedom might entail another person’s harassment related to religion or belief, or to sexual harassment, that resulted in the decision taken in the **UK** to restrict prohibitions on sexual orientation and religion/ belief harassment to the context of employment and occupation (albeit broadly defined).

By way of example of some of the case-law which has arisen in this context, **Bulgaria’s** Supreme Administrative Court confirmed in 2011 that a council’s public order decree banning “public demonstration and expression of sexual and other orientation in public places” amounted to unlawful harassment related to sexual orientation,³⁶ because it created a hostile, offensive and threatening environment for persons with non-heterosexual orientation, impinging

³⁵ Letter dated 31.1.08 (no. 2006-2444), with reference to the infringement procedure of 18.12.06, infringement No. 2006/2444.

³⁶ *Pazardjik Municipal Council v. PADC*, case N 9292/2010, final, 1.7.11.

on their dignity.³⁷ And in 2012 **Croatia's** Supreme Court ordered the president of the Croatian Football Association to apologise in respect of a public statement that gay people would not play in the national football team as long as he was president of the CFA, and that only “healthy” people played football. Zagreb County Court had found that the statement did not amount to discrimination because he was not in a position to determine who would play in the national team, and that it did not constitute harassment absent evidence of any negative consequences. The Supreme Court allowed an appeal, ruling that the statement did amount to discrimination given the maker’s position and that the burden of proof fell on him to establish that the statement did not create an intimidating, hostile, degrading or offensive environment.³⁸

The line between freedom of expression and harassment on grounds of religion/ belief and sexual orientation, in particular, can be a difficult one to draw, however. In 2012 **Bulgaria's** Supreme Administrative Court ruled that homophobic statements made by a TV presenter who referred, *inter alia*, to “perversions”, did not amount to harassment or incitement to discriminate on grounds of sexual orientation.³⁹ The Court considered the fact that the statements did not “target a specific individual” and that they expressed “the presenter’s opinion”, further that they expressed “disapproval” but not “hatred or aggression”, and that they were aimed at “the manifestation of the acts concerned, and not against their essence”. The same Court ruled, also in 2012, that a nationalist, anti-minority political party, the *VMRO*, had harassed Jehovah’s Witnesses on grounds of religion or belief by referring to them as a sect and as “Satanists”, and by campaigning on an “Out, sects, out!” platform.⁴⁰ The Supreme Court took the view that what was at issue was a “theological dispute” which concerned “political expression”, that there was “public antagonism between representatives of two organisations, that is clearly a consequence of their differing views on the ways and means for conducting religious activities in Bulgaria”. On a similar note, in 2011 **Slovenia's** Equality Advocate concluded that an artist’s statement that “There are things one has to hate. In my opinion the Catholic Church in Slovenia is something you have to hate. I feel that as my civic duty”, did not amount to discrimination or harassment.⁴¹ The Advocate accepted that the statement had an intimidating and hostile effect on the personal level and that it was based on a negative attitude towards Catholicism, but did not accept that the statement created an intimidating and hostile environment for members of the Catholic Church in general.

2.4 Reasonable accommodation

2.4.1 Material scope of the duty

Another major issue which arises in relation to the definition of “discrimination” concerns the extent to which duties of reasonable accommodation are imposed outside the employment field in relation, in particular, to disability (the imposition of such duties in connection with other protected characteristics being highly unusual). The imposition of duties of reasonable accommodation is commonplace at least in the field of education (as in **Hungary** or **Bulgaria** or, in the case of **Sweden** and **Finland**, higher education and/or vocational training) and, more usually, across a

³⁷ See also *K.P.D. and Kroz AD v. PADC* 8.7.11 Decision N 10294, in which the same Court ruled that homophobic publications by a newspaper amounted to harassment related to sexual orientation. Cf *Apostolic Reformed Church and 'Prelom' Christian Centre v. PADC* 13.9.11 Decision N 11359 in which the publication of statements made by an activist of the Bulgarian Orthodox Church against protestant communities did not amount to harassment related to religious belief where the interviewee generally targeted all protestants and there was no aim to create a hostile environment.

³⁸ *LORI Lesbian Organization Rijeka & Ors v ZM*, 18.4.12, Gž.12/11 (SC), where similar comments were made by the executive manager of the most popular football club in Croatia and vice president of the Croatian Football Association.

³⁹ *Radoslav Stoyanov and Dobromir Dobrev v Yulian Vouchkov* 27.12.2012 Decision N 16558.

⁴⁰ “*Jehovah's Witnesses*” v *VMRO – Bulgarian National Movement party* 01.08.2012 Decision N 10926.

⁴¹ 13.2.11, Opinion no. 0921-2/2012-UEM.

broader material scope.⁴² Thus the **Dutch** Act on Equal Treatment on the Ground of Disability imposes duties of reasonable accommodation in education and (to a limited extent) housing. In the **Czech Republic** the duty to make reasonable accommodation applies in relation to public services. And **Iceland's** Act on the Affairs of Persons with Disabilities 1992 also imposes obligations on public authorities to provide disabled persons with conditions that enable them to lead a normal life, as regards education, health and social services and the Supreme Court has interpreted the general equality provisions of the Constitution, the ECHR and the 1992 Act to impose duties of reasonable accommodation as discussed below.

France imposes rights of reasonable accommodation for disabled pupils in education and specific accessibility requirements for disabled people in relation to goods and services which, for example, provide a right to be accompanied by a guide animal and priority of access for the persons and accompanying persons in public transport, public places, waiting areas and queues. **Spain's** duty of reasonable adjustment applies more broadly in relation to telecommunications, built-up public spaces and buildings, transport, goods and services available to the public (including social security and healthcare), and relations with public administration. **Croatia's** Anti-discrimination Act requires reasonable accommodation of disability including in the context of participation in public and social life and the use of publicly available resources (§4(2)). And **Slovakia's** Anti-discrimination Act imposes duties of reasonable accommodation in relation to social security, health care, education and the provision of goods and services including housing.

Slovenia's 2010 Act on Equal Opportunities of People with Disabilities imposes duties of reasonable adjustment in relation to goods and services, education, housing and public cultural events. In addition, state funding is made available for technical equipment to facilitate participation by disabled people. In **Cyprus** the Law on Persons with Disabilities 2000 requires the adoption of "reasonable measures", to the extent that the local economic and other circumstances allow, in relation to (a) basic rights (right to independent living, diagnosis and prevention of disability, personal support with assistive equipment, services etc., accessibility to housing, buildings, streets, the environment, public means of transport, education, information and communication through special means, services for social and economic integration, vocational training, employment in the open market, and (b) supply of goods and services, including the facilitation of accessibility for safe and comfortable use of such services, etc.; transport; and telecommunications. **Belgian** provisions generally impose duties of reasonable adjustment across the (varied) material scope of their application. And **Norway's** Anti-Discrimination and Accessibility Act imposes duties of reasonable accommodation on educational institutions, municipal social services and health care while public undertakings and private undertakings that offer goods or services to the general public are required to make active, targeted efforts to promote universal design within the undertaking and to ensure the universal design of the undertaking's normal function.

Germany's Anti-discrimination Act does not, by contrast, provide a duty of reasonable accommodation as such outside the employment sphere, but there are legislative provisions which deal specifically with the needs of disabled persons, providing rights to assistance in communicating with public authorities and in court, and to free and/or escorted travel. Higher education institutions are also required to take account of the needs of the disabled persons. In **Portugal** no duty of reasonable accommodation as such applies outside employment but there is a right not to be discriminated against on grounds of disability and a right to positive measures which goes some way towards establishing such a duty, and children's right to integration in education carries some obligations of adjustment. And in **Romania**, although (again) the duty of reasonable adjustment as such does not apply beyond employment, there are specific legal duties, backed by fines, to provide adequate technical support in the area of education, in access to public buildings and in access to transportation services (see further below). The **FYR of Macedonia's** Anti-discrimination Law provides that infrastructure and space must be adjusted, and obstacles to the use by disabled

⁴² No duty of adjustment applies outside employment in **Denmark, Malta, Greece** or **Estonia**.

people of publicly available resources and their participation in public life removed. Failures in this context amount to discrimination.

In **Finland**, although the duty of adjustment applies as such only to providers of vocational training and university education, the Basic Education Act provides for that every disabled pupil is entitled to receive the interpretation services and assistance necessary for participating to basic education free of charge. Further, the Penal Code's prohibition of differential treatment "without a justified reason" by "a person who in his/her trade or profession, service of the general public, exercises of official authority or other public function or in the arrangement of a public amusement or meeting" has been successfully relied upon by a guide dog user denied entrance to a restaurant.⁴³ In **Turkey**, similarly, the disability law does not impose a duty of accommodation as such but does require the provision of education to disabled persons on equal terms with the others and imposes on the authorities the obligation, *inter alia*, to provide disabled students with the tools and special course materials they need to further their education.

2.4.2 The limits of duties to accommodate

By its nature, a duty of reasonable accommodation is subject to limitations. These vary across the countries surveyed. The requirements imposed by **Norway's** disability legislation apply to the threshold of "undue burden". "When considering whether the accommodation leads to an undue burden, particular importance is to be attached to the effect of the accommodation on the dismantling of disabling barriers, the necessary costs of the accommodation, the undertaking's resources. Any breach of the obligation to ensure individual accommodation ... is to be regarded as discrimination." **Ireland's** duties of reasonable accommodation, by contrast, apply only where such do not give rise to more than a nominal cost.⁴⁴ Thus in one case the refusal of access to premises to a person accompanied by a guide dog was found to amount to discrimination for a failure to provide reasonable accommodation.⁴⁵ In another, however, the failure of a bus operator to provide a functioning accessible bus on the complainant's route did not amount to discrimination because each wheelchair accessible bus cost in the region of €150,000.⁴⁶

As stated above, **Cyprus's** Law on Persons with Disabilities 2000 requires the adoption of "reasonable measures" to the extent that the local economic and other circumstances allow across a broad material scope. The model is interesting for the detail it provides as to what is "reasonable". In the case of access to goods and services, telecommunications and information, factors which must generally be taken into account in determining whether a measure is reasonable or not are (§9(2)):

- (1) the nature and required cost for the adoption of the measures;
- (2) the financial resources of the person who has the obligation to adopt the measures;
- (3) the financial situation and other obligations of the state in those cases where the obligation for the adoption of measures refers to the state;
- (4) the provision of donations by the state or other sources as a contribution towards the total cost of the said measures; and
- (5) the socio-economic situation of the person with the disability concerned.⁴⁷

⁴³ District Court of Vaasa, 27.9.2005.

⁴⁴ This because of the decision of the Irish Supreme Court in 1996 that the more onerous duty to accommodate initially imposed by the Bill, which applied an "undue hardship" threshold, amounted to an unconstitutional interference with property rights: Article 26 and the Employment Equality Bill 1996 [1997] 2 IR 321.

⁴⁵ *Roche v Alabaster Associates Ltd* DEC-S2002-086.

⁴⁶ *Hennessy v. Dublin Bus* DEC-S2003 – 046.

⁴⁷ Specific provision is also made in the Cypriot model for additional time and other facilities for disabled students and pupils in examinations.

In 2012 Cyprus' Equality Body published a report on the (in)accessibility of football grounds, this in response to a complaint by a paraplegic sports journalist against the Cyprus Sports Organisation.⁴⁸ The Equality Body found that, while some football grounds were accessible to wheelchair users, others were not so. It concluded that this inaccessibility demonstrated deficiencies in the monitoring and certification system for accessibility, which created a hostile environment for people with disabilities and forced them into social exclusion. Interestingly, the report pointed out, that in the spirit of the U.N. Convention on the Rights of Persons with Disabilities (CRPD), the concepts of "accessibility" and "reasonable accommodation" were complementary and the obligation to provide "reasonable accommodation" did not replace the obligation to take measures to ensure accessibility, especially in cases of services offered to the general public.

Austria, which applies duties of reasonable accommodation across a very wide material scope, also provides a good deal of guidance as to the scope of the duty to make adjustments. The Federal Disability Law operates by defining the maintenance of barriers as indirect discrimination, rather than a failure to make reasonable adjustment,⁴⁹ and provides that such indirect discrimination will be unjustified unless the removal of the barrier would impose a "disproportionate burden" on the discriminator. Then (§6):

- (1) When testing whether a burden is disproportionate, the following has to be taken into account in particular:
 - the necessary effort to eliminate the conditions constituting the disadvantage;
 - the economic capacity of the person denying the discrimination;
 - public financial assistance available for the necessary improvements;
 - the time span between the coming into force of this Act and the alleged discrimination;
 - the effect of the disadvantage in regard to the general interests of the persons protected by this act;
 - concerning access to housing: the need of the person for the particular accommodation. This need has to be demonstrated by the person claiming access.
- (2) In case the removal of conditions which constitute the disadvantage turns out to be a disproportionate burden in this sense it shall still be deemed discrimination if the provider failed to improve the situation of the affected person at least in a considerable way in order to reach the best possible approximation to equal treatment.
- (3) When assessing whether certain circumstances constitute indirect discrimination it has to be taken into account whether relevant legislation exists in regard to accessibility and to what extent it has been complied with.
- (4) Premises or other facilities, means of transport, technical equipment, information systems or other dedicated spheres of life shall be deemed accessible if they can be accessed and used by people with disabilities in a customary way, unassisted and without extra difficulty."

The duties of reasonable accommodation imposed by Austria's Federal Disability Equality Act are becoming gradually more onerous as to the levels of spend which can be required by service providers, subject to a disproportionate burden defence. The Viennese Anti-Discrimination Act includes the concept of "disproportionate burden" for all grounds (§3a), thus introducing a duty of reasonable accommodation across all relevant grounds as follows:

"Indirect discrimination shall be deemed to occur when the complete removal of conditions which led to the disadvantage qualifies as disproportionate burden ... but there is a failure to implement reasonable measures in order to achieve at least significant improvement of the situation of the respective person in the sense of a maximally possible approximation to equal treatment."

⁴⁸ 29.5.12, Ref. A.K.I 30/2010 & A.I.T 1/2012.

⁴⁹ Regional provisions generally apply a duty of reasonable adjustment across the material scope of Directive 2000/43.

In the **UK**, where the duty to make reasonable adjustments applies across the material scope of Directive 2000/43, guidance is provided as to the reasonableness of adjustments (note that, if the adjustment is reasonable, there is no “undue burden” or other defence to a failure to provide it). In **Bulgaria** the duty of reasonable adjustment does not apply where “the costs are unreasonably big and would seriously hinder” the educator.⁵⁰ There is no provision for taking existing opportunities for public financial help into account when determining what cost is excessive.

2.4.3 Case law on reasonable accommodation

Iceland’s Supreme Court ruled in 1999 that a university had had an obligation to accept the complainant, who was blind, as a student (which it had done) and to take general measures necessary to accommodate her to ensure that she could avail herself of the same services as other students, at the department of her choosing (which it had not).⁵¹ Also in 1999 the Supreme Court ruled that the failure of the National Broadcasting Service to provide simultaneous interpretation into sign language of speeches by political candidates to be broadcast on the night before elections breached the equality rights of deaf persons.⁵² The Court ruled that access to information was an integral part of the right to vote and that the broadcaster should ensure equality when carrying out its legally prescribed role in relation to elections by arranging the broadcast of candidates’ speeches in a manner accessible to deaf people.

Disability discrimination claims have been brought successfully in **France** against travel companies, cinemas and landlords in respect of failure to make reasonable adjustment (by failing to provide an electric respiratory device user with a seat adjacent to an electrical socket) and direct discrimination (refusal to admit a wheelchair user for safety reasons and refusal to let an apartment on an upper floor because the elevator was unreliable).⁵³ All of these cases were decided in 2005. In the case of the cinema the Court ruled that, absent proof that the premises could not be made safe and accessible without disproportionate cost, the owners could not rely on the state of the premises to defend the discrimination. They were fined €2000. A similarly robust approach was adopted by the Administrative Tribunal of Lyon in 2005 to the failure to provide access to school to a child with disability because of a lack of specialised facilities. The Court ruled that the state was liable in damages regardless of fault.⁵⁴ In the same year, in **Latvia**, where no duty of reasonable adjustment as such applies outside employment, a Civil Law provision on protection of honour and reputation was successfully relied upon by a wheelchair user to claim moral damages when he was twice refused entry into a nightclub. The court ruled that he had been discriminated against on the basis of his disability, thus offending his honour and reputation (the wording of the applicable anti-defamation provision of the Civil Law).⁵⁵

In 2008, **Romania’s** National Council on Combating Discrimination found that the persons with hearing or speaking impairments were denied their rights to information, education and culture because Romanian public television provided a limited number of shows accessible for such groups (that is, only TV shows targeting persons with disabilities, which did not include news).⁵⁶ In 2009, in *Marie Gerday & Ors v Sint-Bavohumaniora and the Flemish*

⁵⁰ The duty applies (see above) only in the context of education (apart from that of employment).

⁵¹ *Ragna Kristín Guðmundsdóttir v University of Iceland* 177/1998.

⁵² *Berglind Stefánsdóttir and Félag heymalausra v State Broadcasting Service* 151/1999.

⁵³ Respectively *SNCF c. Thetier* Court of Appeal of Paris 14.3.05 no 200108355 (train company); *Association des paralysés de France c. Société Hellucha*, Court of Appeal of Poitiers 1 September 2005 no 419/05 (cinema) and *Poncelet c. Lassailly* High Judicial Court of Paris, 17th Chamber 28.6.05 no 0402608235 (landlord).

⁵⁴ *M. & Mme Hebri* 29.9.05 AJDA 2005, no 0403829. See also Administrative Supreme Court decision of 15.10.10 n° 344729 in which a school was ordered to replace an assistant who had assisted the claimant’s access to education, also the decision of the Administrative Supreme Court of 20/04/2011 (n° 345434 et 345442) which confirmed that assistance extended to out-of-school assistance if this was necessary to ensure effective access to education of disabled children.

⁵⁵ Riga regional court 11.07.05, case No. C04386004 *Raimonds Smagars v SIA “Vemīsāžas centrs”*.

⁵⁶ *Societatea Română de Televiziune* Decision no. 535/2008.

*Community & Ors*⁵⁷ the First Instance Court of Ghent (**Belgium**) ruled that three deaf children had been denied reasonable accommodation by being provided with only 5-9 hours per week of deaf interpretation at school. The Judge noted that greater hours had been provided in the past, that deaf children studying in integrated schools in the Netherlands are, in principle, entitled to full-time interpretation and that the Flemish Government accepted that more support for deaf children was desirable. The fact that the three children concerned were successful at school did not prove that the accommodation provided was reasonable. The Flemish Community was ordered to make provision for interpretation during 70% of the school week within five months of the judgment, and the claimants were awarded €650 of fixed-rate moral damages. An appeal against the decision was rejected by the Court of Appeal of Ghent.⁵⁸ And in 2011 the Court of Appeal of Ghent rejected a challenge to a ruling by Ghent's Commercial Court that a deaf man who was refused the services of a travel agency to travel to Jordan because it (the agency) was concerned that he would be unable to communicate while in Jordan, and would therefore be at risk, had failed to provide the claimant with reasonable accommodation.⁵⁹ The agency had been required to pay a lump sum of €650 and a fine of €1000 for every possible new offence noticed and per diem if the offence continued. The Court of Appeal increased the compensation payable to €1300.

In 2010 **Norway's** Equality and Anti-Discrimination Tribunal ruled that arrangements at an airport the effect of which was to require wheelchair using passengers to be escorted by security personnel on a circuitous route, or to be carried down ten steps, violated the duty of universal accessibility.⁶⁰ The airport was ordered to make suitable alternative arrangements as soon as possible and in any event within six months of the Tribunal's decision.

Also in 2010, and notwithstanding very limited legislative provision on reasonable accommodation, the **Italian** Constitutional Court ruled that legislative provisions which set limits on the number of teachers employed to support disabled students and which removed the previous option of hiring new specialist teachers for students with particularly severe disabilities on fixed-term contracts were illegal.⁶¹ A Sicilian school authority had reduced from 25 to 12 the weekly hours of teaching support provided to a severely disabled child. The Constitutional Court declared that it was constitutionally illegal to set limits to the provision of specialist support that failed to take into account the situation of the individual, so the removal of the possibility to hire extra *ad hoc* support teachers for severe cases was "unreasonable". Disabled people had a "fundamental right" to education and, although it recognised that the State had a "discretionary power to identify measures for the protection of disabled persons", it reaffirmed that "such discretion is not absolute and is limited by the respect of a minimum core of guarantees". An individualised approach to the needs of disabled people was, according to the Court, constitutionally imposed by Article 24(2)(c) of the UN Convention on the Rights of Persons with Disabilities, and by the fact that the legislation on educational support to disabled children aims at pursuing an 'evident national interest' implementing the Constitutional right of disabled people to education. And in 2012 a Tribunal ruled that a person affected by Amyotrophic lateral sclerosis could make a will through a special attorney, even though the act was strictly personal and could not generally be delegated.⁶² The Tribunal accepted that the denial of this faculty would amount to discrimination on grounds of disability contrary to the UN Convention on disability, which was ratified in Italy, given that the claimant was competent to act. The Tribunal allowed for a special attorney to write his will on the basis of instructions imparted by the patient through an Eye Tracking system.

In **Poland**, and in the absence of any legislation on disability outside the context of employment, there have been a number of cases in which claimants have successfully challenged such discrimination. In September 2011 Warsaw's

⁵⁷ 15.7.09.

⁵⁸ A diametrically opposed decision was reached on 27.7.09 by the President of the First Instance Court of Leuven in a case brought by a fourth deaf student, Vasco Van Landuyt.

⁵⁹ *Centre for Equal Opportunities and Opposition to Racism v. BVBA Kuoni Travel Belgium*, 20.1.11.

⁶⁰ Equality and Anti-Discrimination Tribunal 22.11.10, Case no. 29/2010.

⁶¹ Decision no. 80 of the Constitutional Court of 22.2.10.

⁶² Tribunal of Varese, 12.03.12.

Court of Appeal overturned the decision of a lower court that the refusal of a restaurant of admission to the assisting dog of the complainant, a wheelchair user, did not violate his personal goods (because the claimant was an active person who enjoyed sport and was psychologically strong and self-confident). The Court of Appeal found that the refusal of admission to the claimant's guide dog amounted to an unlawful restriction of the Claimant's liberty and to discrimination which it accepted occurred when an apparently neutral provision, criterion or practice is applied equally to all, but specifically affected a certain social group.⁶³

In 2012, **Norway's** Equality Ombud found that a political party had failed to apply universal design, and had therefore breached the Equality Act, by launching an online election campaign in 2011 utilising a flash solution which created difficulties for many visually impaired people. No alternative delivery mechanism for the information was provided.⁶⁴ The Ombud has also found that the Act was breached by refusals to admit a guide dog to a restaurant,⁶⁵ also by failures of accessibility in terms of wheelchair access to bathrooms and other areas of restaurants.⁶⁶ Finally, the Ombud recently found that a primary school breached the duty of accommodation when it moved a pupil's classroom from the ground to an upper floor, thus impeding her access to a disabled toilet (the pupil had cerebral palsy) and to the outdoors.⁶⁷ The Ombud concluded that the school had not made an individual assessment of the pupil's needs, or of the impact on her of the classroom move, further that the school had not established that keeping her classroom where it was would be "disproportionately burdensome".

Also in 2012, **Slovenia's** Equality Advocate found that a hotel had failed to comply with the duty of reasonable accommodation when it adapted only standard, but not superior, rooms for wheelchair users, charged a supplement for all dogs including guide dogs, and refused to permit a guide dog access to certain areas including the swimming pool and parts of the dining room.⁶⁸ And **Iceland's** Supreme Court rejected a claim by three disabled voters that Iceland's Presidential elections of 2012 should be invalidated because they (the claimants), being unable to vote "by their own hands", had been refused permission to be assisted in the exercise of their voting rights by their personal assistants, rather than by polling booth staff.⁶⁹ The claimants claimed that the restriction violated the constitutional provisions on free, fair and secret elections, the right to privacy and the right to equality, and that it was in violation of the CRPD, the ECHR and other human rights obligations of Iceland. The Court found that the law on elections did not permit others than designated polling station staff to assist voters at the polling booths, since others were not bound by confidentiality and that this arrangement was not unconstitutional. It dismissed the claim but the law has subsequently been amended to permit designated personal assistants to help persons with disabilities to vote.

In the **Netherlands** the Equal Treatment Commission⁷⁰ recently ruled that the refusal of a school to allow a pupil with dyscalculia to use a formula chart during the final national written exams (this on the basis that any adjustments should relate only to the way in which the examination was taken, rather than to its contents, and that knowledge of the math formulae was part of the learning the examination was intended to test) was unsustainable in view of the fact that pupils were permitted to use the chart during all other tests and examinations.⁷¹ The ETC concluded that the use of the charts during the final examination was a reasonable accommodation and did not

⁶³ *Dominik Rymer v. XY* 28.9.11.

⁶⁴ Case no 11/1784 of 12.12.12.

⁶⁵ 3.12.09 Case no 09/1352.

⁶⁶ 30.11.10: Cases 09/357, 09/358, 09/359, 09/360, 09/361 and 09/363. In 2/6 cases the failures were justified because full accessibility would have imposed undue costs on the restaurants at the particular time.

⁶⁷ Case no 11/1491, 28.9.12.

⁶⁸ 27.9.2012, Opinion no. 0700-49/2012/2.

⁶⁹ 25.7.12, *Ásdís Jenna Ástráðsdóttir, Guðmundur Magnússonar and Rúnar Björn Herrera Þorkelsson*.

⁷⁰ On 2 October 2012 the Equal Treatment Commission (ETC) was incorporated by the new Netherlands Institute for Human Rights, which took over its mandate. This report however refers to the ETC.

⁷¹ 7.5.12, ETC Opinion 2012-85.

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impose any undue burden on the school, notwithstanding the fact that secondary legislation was inconsistent with that accommodation.

2.4.4 Accessibility standards

Leaving aside duties of accommodation expressed as such, many countries impose accessibility standards in relation to buildings, among them **Croatia**, the **FYR of Macedonia**, **Hungary**, **Italy**, **Lithuania**, **Liechtenstein**, **Luxembourg**, **Slovakia**. The dividing line between duties of reasonable accommodation and accessibility requirements might in practice be thin. In **Hungary**, for example, whose 1998 Act on Disability Equality, as amended, imposes duties of accommodation only in relation to education, the failure to make buildings and public services (very broadly defined) accessible to persons with disabilities is regarded as direct discrimination. In December 2010 the Metropolitan Regional Appeals Court upheld a decision that a refusal to allow a visually impaired person access with his guide-dog to a supermarket violated his right to equal treatment and confirmed an award of non-pecuniary damages in the amount sought by the Claimant: €1,725.⁷² No proof was required of non-pecuniary damage since the refusal of access to the claimant was self-evidently humiliating.

One difference in approach between reasonable accommodation, on the one hand, and accessibility requirements, on the other, is suggested by the rejection by **Austria**'s Viennese Civil Provincial Court in December 2012 of a claim by a wheelchair user that he had been unable to access a recently established public service which was housed in part of the medieval complex of the former emperors' castle.⁷³ The front door of the service centre had three steps and in order to access the premises he had to send another person inside to announce his presence (the doorbell being unreachable by him). He was then accompanied by a member of staff over a cobbled courtyard and through a "staff only" door only opened to staff-members who therefore held a magnetic card. The claimant's claim of disability discrimination failed because the duty of accessibility applied (as regards buildings) only to those built or renovated after 1 January 2006.

Accessibility legislation varies as to whether it applies to private accommodation and, if so, of what size (in **Liechtenstein**, for example, it applies only if there are at least six apartments in a residential block, in **Slovenia** ten, whereas in **Croatia** there appears to be no lower limit). In **Ireland** building regulations require all new buildings including private houses to be accessible but all public buildings, public spaces and state services to be accessible only by year 2015 and only "where possible/ practicable". Accessibility requirements typically only apply to buildings built or extensively renovated after the implementation date.

Of those countries whose accessibility requirements apply beyond buildings, they are imposed in **Spain** to transport and Information Technology and in **Norway** in relation to all areas of society, the concept of "universal design" being employed. All services available to the public, buildings and infrastructure are required to be designed and built in a disability-accessible way and a breach of the obligation of "universal design" amounts to discrimination. In **Slovenia** and **Liechtenstein** accessibility requirements are imposed in relation to transport as well as buildings, in **Cyprus** to transport, footpaths, telephony and broadcasting and in **Portugal** and the **Czech Republic** in relation to public spaces other than buildings, in the former also to packaging of goods in larger shops and in the latter also to media and communications, and in the **Netherlands** (over time) to public transport vehicles. **Lithuania**'s Law on the Social Integration of the Disabled⁷⁴ imposes broad duties on public authorities to promote accessibility in a wide range of fields (goods and services, transport, housing, education, etc.), though it does not spell out in detail how the duties

⁷² *Sz. Sz. v. Csemege-Match Zrt.* 7.12.10.

⁷³ *S.12.12, M.L. vs. Austria*, Ref no.36 R96/12b.

⁷⁴ *Lithuania/Lietuvos Respublikos Neįgalųjų socialinės integracijos įstatymas*, *Official Gazette/Valstybės žinios*, 2004, Nr. 83-2983.

ought to be implemented, and also lacks a monitoring mechanism. **Belgium** is planning legislation to require access for guide dogs to public places. In **Sweden** public authorities are under a general duty to assess accessibility in all their activities and to develop accessibility plans to this end.⁷⁵

France's Law on the rights of disabled persons requires complete accessibility of public transport by 15 February 2015 with exceptions for a number of railways systems and in cases of manifest technical impossibility or manifestly disproportionate cost, such impossibility or excessive cost to be determined on a case-by-case. The Community of Voironnais adopted a general implementation scheme that provided for only 40% of the public transportation network to be accessible to disabled persons, this on the basis that full accessibility would be too costly. No specific technical difficulties or obstacles entailing a disproportionate cost were identified. In June 2012 the Conseil d'Etat quashed the implementation scheme.⁷⁶ And in **Bulgaria**, where accessibility requirements apply in relation to transport and buildings, the Supreme Administrative Court has in recent years upheld complaints regarding failures to comply with these accessibility standards against banks,⁷⁷ a state agency, the Health Security Fund, the Sofia city transportation company and the Ministry of Justice (for the state of a pre-trial detention facility).⁷⁸ The Court has found that efforts made by respondents resulting in partial accessibility were inadequate where they did not result in absolute independence of persons with mobility difficulties.⁷⁹

2.4.5 Concluding remarks on reasonable accommodation

What is perhaps most striking about the material here considered is the extent to which the countries surveyed impose obligations of reasonable adjustment across a fairly broad material scope whether formally (by means of express legislative provisions) or by other means. So, for example, in **Iceland**, in which the formal duties apply only in relation to education, health and social services, the Supreme Court has interpreted substantive rights such as the right to vote to apply equally between voters, this in turn requiring that the relevant information be made accessible to the deaf. Similarly in **Romania**, where the duty of reasonable adjustment does not as such apply beyond employment, rights to information, education and culture have been utilised to require accessible broadcasting. In **Poland** general rights to liberty and against discrimination have required adjustments to be made for the disabled, and in **Italy** the UN Convention on Disability has proven very significant in the case-law. Finally, accessibility standards have in a number of countries been interpreted to provide individual rights enforceable through law.

2.5 Positive action

The next area of general interest which arises in connection with definitions of discrimination relates to the scope for lawful positive action on the relevant grounds outside the context of employment and occupation. The approach of the states surveyed to positive action vary considerably according to whether they adopt a "formal" or "substantive" approach to equality. The focus of this section is on the legal status of positive action rather than on the extent to which it is adopted in practice as most of the material in the national reports (and possibly most of the positive action measures in place) concerns race/ ethnicity and/or employment, both of which are beyond the scope of this report.

⁷⁵ Ordinance (2001:526).

⁷⁶ Conseil d'Etat, 22.6.12, *Communauté d'agglomération du pays de Voironnais*, ref no. 343364.

⁷⁷ Decisions N° 5622 in administrative case N° 8693/2010; N° 10373 in administrative case N° 12883/2010; N° 14450 in administrative case N° 9458/2011 and N° 14886 in administrative case N° 11188/2011.

⁷⁸ Respectively, Decisions N° 14212 in administrative case N° 11153/2011; N° 14212 in administrative case N° 11153/2011; N° 9727 in administrative case N° 6878/2010 and N° 4624 in administrative case N° 314/2011.

⁷⁹ Decisions N° 9727 of in administrative case N° 6878/2010 and N° 4624 in administrative case N° 314/2011.

2.5.1 Positive action as a species of equal treatment

At one end of the scale is **Spain** whose Constitution requires public authorities to promote “the conditions to ensure that the freedom and equality of individuals and of the groups that they form are real and effective”. Such positive action is not regarded as an exception to the principle of equal treatment, but as a guarantee of its effectiveness and the Constitutional Court has repeatedly held that affirmative action is not to be seen as discriminatory. Positive action has been a feature of educational, as well as other public service, provision since the passing of the Spanish constitution in 1978 and the Organic Law on Education 2006 provides that “In order to render effective the principle of equality in the exercise of the right to education, the authorities shall develop compensatory actions aimed at persons, groups and territorial regions with unfavourable situations, and provide the necessary economic resources”.

The **Greek** Constitution also obliges the state to take positive measures to promote equality and Law 3304/2005 provides that adopting or maintaining special measures to prevent or compensate for disadvantages linked, *inter alia*, to religious or other beliefs, disability, age or sexual orientation, will not be considered to be discrimination. Even prior to the Constitutional embrace of positive measures the Greek Council of State explicitly recognised that there may be cases which show that in practice a certain category of individuals has been discriminated against “due to social prejudice”, leading to only nominal equality and accepted that the Constitutional recognition of equal rights for men and women in principle allowed the state to take temporary, appropriate and necessary “affirmative action”.⁸⁰

Luxembourg's laws allow the adoption and maintenance of specific measures to prevent or compensate for disadvantages linked to any of the relevant grounds. **Poland**'s Act on Equal Treatment provides generally that adopting specific measures that are aimed to prevent or compensate unequal treatment linked with inequality does not breach the requirement for equal treatment. The Polish Constitution also contains an equal treatment clause concerning access to health care services which specifically provides for special health care in the case of children, pregnant women, disabled people, mentally ill people and persons of advanced age. In **Norway** positive action is permitted in relation to all relevant grounds, being defined as “specific measures that contribute to promote the purpose of the Act [and which] shall not to be regarded as discrimination... Such measures shall cease when the purpose of it has been achieved”. And **Austria**'s legal provisions generally permit positive action, and positive measures have been taken in respect of disabled persons and women.

British law allows any proportionate positive action on all relevant grounds to address disadvantage, particular needs or under-participation of people defined by reference to any of the protected characteristics across the material scope of Council Directive 2000/43 (that is, to the extent that discrimination on those grounds is regulated). No such provision is needed in respect of disability whose protection is asymmetrical and it should be noted that all age discrimination is capable of justification. The Equality Act also makes provision for positive action across all the protected grounds in the selection of candidates for election. Those provisions are intended to enable British political parties to take a wider range of positive action measures in relation to matters regarding their constitution, organisation and administration, though all-minority shortlists along the lines of the all-women shortlists currently permitted remain unlawful. The scope for positive action in Northern Ireland is narrower though the prohibition on disability discrimination is asymmetrical there also. Age is not regulated outside employment so no restrictions on age-related positive action apply. No specific provisions apply in respect of positive action on grounds of sexual orientation or race outside the broad employment context. In addition **Britain** and to a lesser extent **Northern Ireland** imposes positive obligations on all public authorities to take into account the need to eradicate discrimination and further equality in all their functions. The fulfilment of this duty may require the taking of positive action.

In **Finland** the Constitution and Penal Code permit, but do not require, positive action (with restrictions in the case of recruitment of civil servants). The Constitutional duty to guarantee the observance of basic and human

⁸⁰ Judgment 1917/1998.

rights and liberties obliges public authorities to take active measures to secure the *de facto* realisation of rights, which may necessitate the taking into account of the specific situation of vulnerable groups and principles of good administration have evolved which, e.g., oblige public authorities to take positive steps to ensure that all people have the same opportunity to successfully present their cases, irrespective of e.g. disability. The Non-Discrimination Act, which imposes specific obligations on public authorities to draw up race equality plans, provides that it “does not prevent specific measures aimed at the achievement of genuine equality in order to prevent or reduce the disadvantages caused by ... discrimination” where such action is proportionate to the aim pursued. The Act also obliges all authorities to take steps to foster equality. In addition to the requirements concerning race equality plans, authorities are required “In all they do [to] ... seek purposefully and methodically to foster equality and consolidate administrative and operational practices that will ensure the fostering of equality in preparatory work and decision-making. In particular, the authorities shall alter any circumstances that prevent the realization of equality”. The traditional interpretation regarding the Finnish legal system is that the legislator has a wide margin of appreciation in determining what kind of measures are necessary in a given situation, especially if the legislation intends to improve the situation of socially disadvantaged groups or individuals. Generally speaking, actions taken to improve the position of disabled people are not characterised as positive action measures.

Ireland's Equal Status Act provides that nothing in the Act shall prohibit preferential treatment or the taking of positive measures which are *bona fide* intended to promote equality of opportunity for persons who are, in relation to other persons, disadvantaged or who have been or are likely to be unable to avail themselves of the same opportunities as those other persons; to cater for the special needs of persons, or category of persons, who, because of their circumstances, may require facilities, arrangements, services or assistance not required by persons who do not have those special needs. The Equal Status Act also permits different treatment by housing authorities and voluntary housing associations in the provision of accommodation on the basis of ‘family size, family status, marital status, disability, age or membership of the Traveller community’, and preferential fee charges in respect of goods and services in respect of persons with a disability or in specific age groups.

2.5.2 States having a more restrictive approach to positive action

The **Czech Republic's** Anti-discrimination Law permits positive action across the material and personal scope of the Act but forbids rules of automatic preference. Similarly, **Estonia's** Law on Equal Treatment does not prevent the adoption or maintenance of specific measures to prevent or compensate for disadvantages linked to the relevant grounds which is proportionate to the objective being sought. **Belgium's** anti-discrimination laws generally permit positive action, though within parameters. Under federal law, for example, such action should be a response to situations of manifest inequality; the removal of this inequality should be identified as a public goal by an Executive; the “corrective measures” must be of a temporary nature; and they should not restrain uselessly the rights of others. Similar provisos apply at regional/ community level. Similarly, **Hungary's** Act on Equal Treatment allows any “measure aimed at the elimination of inequality of opportunities based on an objective assessment of an expressly identified social group” which is based on an Act, on a government decree based on an Act or on a collective contract, and which is effective for a definite term or until a specific condition is met. National law also makes express provision, so far as relevant here, for positive action in relation to disabled people.

Romania's Anti-discrimination Law provides (§2) that “Measures taken by public authorities or by legal entities under private law in favour of a person, a group of persons or a community, aiming to ensure their natural development and the effective achievement of their right to equal opportunities as opposed to other persons, groups of persons or communities, as well as positive measures aiming to protect disadvantaged groups, shall not be regarded as discrimination under the ordinance herein.” It covers all protected grounds. Romania's equality body has ruled that

positive action measures can be taken only while the disadvantage remains.⁸¹ Persons with disabilities are entitled to additional social advantages including free or subsidised meals and accommodation in schools, allowances, priority in public housing, exemption from road taxes and free transport for severely disabled persons and their escorts.

Croatia's Anti-discrimination Act permits positive action “based on provisions of laws, subordinate regulations, programmes, measures or decisions with the aim of improving the status of ethnic, religious, language or other minorities or other groups of citizens or persons facing discrimination on the prohibited grounds of discrimination”. The provision regarding positive action, which applies in respect of all the grounds covered by the Act, is regarded as an exception to the prohibition on discrimination and lawful positive action must be temporary and proportionate to the aim and purpose for which it is provided.⁸² Similarly **Lithuania's** Law on Equal Treatment allows, also by way of exceptions to the prohibitions on discrimination, (1) special measures applied in healthcare when striving to create and implement conditions and opportunities guaranteeing and promoting the integration of the disabled into the work environment; and (2) special temporary measures applied in an attempt to ensure equality on the basis of age, sexual orientation, disability, religion, beliefs or convictions. A specific system of additional educational support has been adopted in respect of disabled students.

Liechtenstein's Act on Equality of People with Disabilities provides that specific measures to achieve equal participation of people with a disability in daily life within society are not considered to be discriminatory, further that appropriate measures taken to implement practical equality do not amount to discrimination. There are no similar provisions dealing with the other relevant grounds, which are not regulated by law. The **FYR of Macedonia's** Anti-discrimination Law (which applies only to disability) allows measures in favour of: (1) a person, group of persons or community, in order to eliminate or diminish factual inequality; and (2) marginalised groups with the same aim. And **France's** Law on Disability affirms the right of disabled persons to the support of all members of the nation and the right to compensation in respect of disability. Positive action measures taken to promote equality for disabled people are not to be construed as discriminations. In addition, differential treatment on grounds of age is permitted if it is objectively and reasonably justified by a legitimate aim, in order to maintain health, support professional insertion, maintain employment of workers, and if the means to pursue these objectives are reasonable and necessary. Leaving aside employment, special measures have been taken to improve access to education of disabled children.

Sweden's Discrimination Act does not regulate positive action in favour of disabled persons since the protection from disability discrimination is asymmetric. All age discrimination is capable of justification so positive action in this context is potentially permissible. Universities are required to do goal-orientated work with regard to all grounds except age, which include the annual adoption of equality plans but, except in the case of age and disability, positive action is not permitted if it amounts to direct discrimination. Positive action is in principle legitimate under **Italy's** Constitution but there are no applicable legislative provisions and little such action except in relation to disability. **Malta** has no specific legal measures concerned with positive action. The same is true in **Denmark** and in **Latvia**, which has no history of such action on any of the relevant grounds.

Turkey's Constitution was amended in 2010 to state that positive action “for children, elderly, persons with disabilities, widows and orphans of martyrs, ex-soldiers disabled in the war and veterans cannot be considered to be against the principle of equality” but the Turkish state has yet to be convinced that discrimination and inequalities exist in Turkey or that some groups are more disadvantaged than others. By way of example, in its initial reports to the UN committees responsible for the ICESCR and CERD, Turkey claimed that “there exists no distinction, exclusion, restriction or preference, be it in law or in administrative practices or in practical relationships, between persons or groups of persons, made on the basis of race, colour, gender, religion, political opinion, nationality or social origin, which would have the effect of nullifying or impairing the recognition, enjoyment or exercise of equality of

⁸¹ A.M. v. Direcția Generală a Finanțelor Publice a județului Harghita, decision no. 43 of 9.1.08, ref 353/2007.

⁸² Constitutional Court decision no. U-I-2767/2007, 31.3.09.

opportunity or treatment in employment or occupation”. Consequently, specific programmes targeting specific groups are very rare.

2.5.3 States with a cautious approach towards positive action

There is tension in **Bulgaria** between the Protection Against Discrimination Act, which requires positive action *inter alia* aimed at equalising the opportunities of disabled persons in training or education, or protecting the identity and cultural rights of persons belonging to ethnic, religious and linguistic minorities, and the approach of the Constitutional Court which has held that preferential treatment on constitutionally protected grounds is unconstitutional.⁸³ (The Constitution prohibits discrimination on grounds of race, national origin, ethnicity, sex, origin, religion, education, conviction, political affiliation, personal or public status, and property status, but not disability, sexual orientation or age).

Germany’s Anti-discrimination Act permits positive action consisting in appropriate measures to prevent or compensate existing disadvantages but positive action by public authorities including legislation must be consistent with the constitutional guarantee of equality and there is debate as to whether, absent explicit regulations such as apply in the case of women and disabled people, positive action is permissible under the Constitution. In **Cyprus** the Supreme Court and Appeal Court have struck down various employment-related positive action measures (among them quotas for the employment of disabled people) as inconsistent with the Constitutional equality guarantee.⁸⁴ As a result of the Supreme Court decision the Constitution was amended in 2006 to give priority to EU regulations and Directives over all domestic legislation. Various social security measures target those with disabilities for support.

Dutch law allows only limited positive action measures with regard (so far as relevant here) to disability, this on the basis that persons defined by reference to other relevant grounds do not suffer from structural disadvantages in society. It does not allow measures aimed at the prevention of disadvantage as distinct from its reduction or removal⁸⁵ and permits only those measures which have a clearly defined, legitimate aim and which are appropriate and necessary to reach this aim. In addition, general supportive measures are permitted for disabled persons (as per §7(2) rather than 7(1) of the Directive). Such measures are not time restricted. In 2005 there was some discussion on whether the possibility of positive action schemes should be extended to all other grounds that are covered in the Equal Treatment Act and to age discrimination. The Government published a draft report which included comments from the ETC. The report recognised that there was very limited structural disadvantage in Dutch society in relation to age, religion or sexual orientation but took the view that the positive action measures should in principle be possible for all groups. The Government concluded, however, that no change was necessary.

Slovakia’s Constitution contains provisions which explicitly derogate from the rules of rigid formal equality, permitting measures of positive action for (inter alia) juveniles and persons with disabilities. These categories of persons enjoy more extensive health protection. The Anti-discrimination Act 2004 as it was implemented provided (§8) that “With a view to ensuring full equality in practice and compliance with the principle of equal treatment, specific equalising measures to prevent disadvantages linked to racial or ethnic origin may be adopted”. The Constitutional Court ruled (5 of the 11 judges dissenting) that this provision was unconstitutional,⁸⁶ in part because of non-compliance with the principle of equality. In the majority’s view only positive measures having their roots in the Constitution itself were lawful. A new provision (§8a) provided for the adoption of “temporary equalising measures” aimed at “removing forms of social and economic disadvantage and disadvantage following from the ground of age and disability” from

⁸³ Ruling N 14 of 1992.

⁸⁴ Decision of the Supreme Court of 26.09.2002; *Charalambos Kittis et al v. The Republic of Cyprus* (2006), Appeal case No. 56/06.

⁸⁵ See Explanatory Memorandum to the EC Implementation Act.

⁸⁶ 18.10.05.

1 April 2008. Such measures may only be adopted by state bodies with the aim of “securing equal opportunities in practice” and consist mainly (so far as relevant here) of:

- measures consisting in supporting the interest of representatives of the disadvantaged groups in, education, culture, health-care and services;
- measures aimed at generating equality in access to education mainly through targeted preparatory programmes for representatives of the disadvantaged groups or through spreading information about these programmes or through possibilities to apply places in the system of education.

The temporary special measures can only be adopted if there is “provable inequality”, if their aim is reducing or removing this inequality and if they are appropriate and necessary to achieve the set aim. The temporary special measures can only be adopted in the fields falling under the material scope of the Anti-discrimination Act. They can only be in force while the inequality which led to their adoption exists. Bodies which adopt such measures must monitor and evaluate them continuously and publish information about them with the view of reappraising their further duration, and must inform the Slovak National Centre for Human Rights about these matters.

2.5.4 Concluding remarks on positive action

It is evident from the above that there is a fairly wide range in approaches across the states surveyed to positive action as an instrument of equality. Some states go as far as requiring the taking of positive steps by public authorities, which steps will or may involve asymmetrical treatment according to relative (dis)advantage. Others regard asymmetrical treatment with suspicion, though in some of these cases the model of disability discrimination adopted permits such treatment in the case of that protected ground. Having said all this, it is noteworthy that no state under discussion imposes a blanket ban on positive action, whether or not they conceptualise such action as part of, or as a derogation to, equality.

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Part III

Material and personal scope

3.1 Personal Scope

3.1.1. Liability for Discrimination

All the states surveyed prohibited legal as well as natural persons from discriminating, in some cases (e.g. **Belgium, Slovenia**) where the prohibition was in penal form. **Spanish** and **Turkish** criminal prohibitions, by contrast, apply only to natural persons. Penalties in **Cyprus** vary with fines on natural persons (and on the controlling mind of a legal person) being subject to a maximum of 6,835€ and/or six months imprisonment or both while legal persons can be fined up to 11,962€. Different levels of fine are also applicable in the **FYR of Macedonia** and **Slovenia** to natural and legal persons.

3.1.2 Protection from Discrimination

In **Bulgaria** the Protection Against Discrimination Act protects legal persons and unincorporated associations as well as individuals, where the former suffer discrimination on grounds of characteristics of their employees or members. The same is true in **Cyprus**. **Croatia's** Anti-discrimination Act protects legal as well as natural persons as do **Hungarian, French, Norwegian, Italian, Macedonian, Portuguese, Latvian, Turkish** and **Slovenian** laws and **Luxembourg's** penal provisions and general discrimination law. **Romania's** Anti-discrimination Law protects both natural and legal persons, with higher fines in the case of discrimination perpetrated against groups or communities. **Latvia's** Law on Equal Treatment is thought to protect legal as well as natural persons and **Slovakia's** Anti-discrimination Act expressly prohibits discrimination against legal persons, which is defined as "a failure to comply with the principle of equal treatment in relation to this person on the grounds of discrimination listed in [the Act] with respect to its members, associates, shareholders, members of its bodies, employees, persons acting on its behalf or persons on behalf of which such legal entity is acting" .

At the other end of the scale, the Anti-discrimination Law of the **Czech Republic** provides that only natural persons have a right to equal treatment and protection against discrimination. The same is true in **Denmark, Lithuania** and in **Sweden** despite criticism from the former four Ombudsmen against discrimination and a 2006 proposal from the Discrimination Inquiry Commission that legal persons should be protected in some areas covered by non-discrimination legislation.⁸⁷ This also appears to be the case in the **Netherlands**, though it is clear there that a group of individuals who have been discriminated against (as, for example, an association of professionals, a political association / party or a religious church) may sue through their organisation⁸⁸ and in one case, the ETC allowed a company to submit a complaint against a customer.⁸⁹ In **Poland** legal persons are protected against race discrimination, other prohibitions applicable outside the employment sphere protecting only natural persons.

There is uncertainty as to whether legal persons are protected from discrimination in **Austria, Belgium, Iceland** and **Finland**, though in Austria the (regional) Viennese Anti-Discrimination Act expressly provides such protection when the discrimination is directed against the members, partners or organs of a legal person in connection with their activities for the legal person (2(5)). Further, as regards **Finland**, the equality legislation in the Åland Islands protects both natural and legal persons. **Malta's** statutory protections from discrimination protect legal as well as natural persons but its Constitutional protections apply only to natural persons.

⁸⁷ SOU 2006:22 from p. 332.

⁸⁸ See e.g. ETC Opinions 96-110, 98-31 and 98-45.

⁸⁹ ETC Opinion 2003-142.

In the **UK** protection against discrimination is generally regarded as a right given to natural persons and in the case of disability discrimination only disabled (natural) persons can claim but in principle a legal person could be the victim of discrimination in relation to the provision of goods facilities and services, or the exercise of public functions (where, for example, a corporate body was perceived as having, or being associated with, a particular ethnicity, sexual orientation or religion). It is also thought that **Greek** and **Portuguese** law could protect legal persons from discrimination in appropriate cases. There is some uncertainty as to whether **Estonia's** Law on Equal Treatment protects legal persons though it is thought not to, although political parties, political and religious associations can at least in theory be recognised as victims of discrimination on grounds of religious, political or other belief. Constitutional protections apply to legal as well as natural persons “in so far as this is in accordance with the general aims of legal persons and with the nature of such rights, freedoms and duties”.⁹⁰ Penal protections from discrimination apply only to natural persons both as perpetrators and victims.

In **Ireland**, notwithstanding a general interpretive statute which provides that “‘Person’ shall be read as incorporating a body corporate ... and an unincorporated body of persons, as well as an individual...”, the Equality Tribunal has taken the view that the Equal Status Act did not protect legal “persons” from discrimination.⁹¹ Section 2 of that Act states expressly that “‘person’, as that term is used in or in relation to any provision of this Act that prohibits that person from discriminating or from committing any other act or that requires a person to comply with a provision of this Act or regulations made under it, includes an organisation, public body or other entity”, but the Act is silent as to the definition of the persons protected from discrimination. The Equality Tribunal concluded that, because “the general legal definition of ‘person’ includes corporate and unincorporated bodies, the definition in the Equal Status Acts would be unnecessary, unless the legislature intended that the term ‘person’ was to some extent only to mean individuals... I am therefore of the view that the legislative intent in this regard was to protect individuals and not bodies from discrimination”. Legal persons are not protected from discrimination in **Germany**.

3.1.3 Vicarious/ third party liability

Generally speaking employers can be held liable under civil law for the actions of their staff (and other agents) but examples of third party liability are rare. Specific provision is made in **Belgium** for teachers’ liability for the actions of pupils under their surveillance. Third party liability does not otherwise exist outside the field of employment in Belgium. Similarly in **Slovenia** schools are liable for the actions of pupils under their supervision, unless the school proves that the supervision was carried out in accordance with due diligence or that the damage would have occurred even with due diligence.

Exceptions to the principle of vicarious liability arise in **Spain** where employers and service-providers, landlords, schools and hospitals etc. are not vicariously liable for the actions of employees and, more narrowly, in **Denmark** in relation to harassment (because it is not seen as part of anyone’s job), as long as the employer has complied with its duty to instruct or correct staff to avoid harassment among employees. In **Ireland**, as in the **UK**, statutory defences are available where the employer took such steps as were reasonably practicable to prevent the employee from doing the act of discrimination. Generally speaking individual harassers/ discriminators as well as their employers may be the target of legal claims.

⁹⁰ §9(2) and see Decision of the Constitutional Review Chamber of the Supreme Court of 6 March 2002; published in RT III 2002, 8, 74 (s13).

⁹¹ *Gloria (Ireland’s Lesbian and Gay Choir) v Cork International Choral Festival Ltd* DEC-2008 -S078.

3.2 Material Scope

There is much that could be said about the material scope across which discrimination on the relevant grounds is regulated in the countries under study. Part I of this report outlined that scope in very broad terms. Here the focus is on a number of particular issues relating, broadly, to education (specifically, in relation to religious segregation/ classes and the degree of integration of disabled students), and to exceptions to the prohibition on age and disability discrimination in the regulation of discrimination in access to social protection, social advantages, goods and services. Also considered is the extent to which prohibitions on discrimination in access to goods and services apply exclusively to goods and services supplied to the public, and to housing. It is worth pointing out here that one of the most pressing issues as regards education and segregation appears to be the *de facto* segregation of Roma children in many of the states here considered. That segregation is outside the scope of this report, though it sometimes overlaps with the segregation of children categorised as having special educational needs.

3.2.1 Education

3.2.1.1 Schooling of disabled children

Most states, at least in theory, favour the integration of disabled students where possible into mainstream education but the practice differs significantly. There is an emphasis in **Austria** on the integration of disabled children at school with positive measures taken to this end, for example, and the general trend in **Belgium** is to promote integration of children with disabilities in mainstream education. **France's** Law no 2005-102 on Disability imposes a duty to integrate disabled children in the mainstream school system. It was adopted after the Committee of Ministers of the Council of Europe condemned France for violating the rights of disabled children contrary to Article 9 of the additional protocol to the European Social Charter,⁹² and completely reforms assistance and education of disabled children. The Act confirms rights of disabled children to education, to reasonable accommodation, to access to local mainstream schools and to a personalised educational plan.⁹³ It also creates a commission to assess disabled children and propose a personalised program of education. Children may be placed in special schools only with the consent of their parents and if provided for in their personalised plan and if access to the local mainstream school is not possible because of the physical condition of the premises, any additional cost of transportation to another school must be met by the municipal authorities.

In the **UK** the parents of disabled children have a strong right to their inclusion in mainstream schools with appropriate provision being made to accommodate any special educational needs. A system of "statementing" provides for expert assessment of such needs and for the identification of appropriate provision therefor, schools and local authorities then being obliged to comply with the provision set out in the Statement.

Denmark favours integrated education in the case of children with disabilities though special schools are also available when it is judged that children cannot adequately be served by differentiated teaching within mainstream schools. The relevant factor when selecting the type of education is not the child's diagnosis but an estimation of how the child will profit most from education. If a child is able to retain a connection to normal teaching and classes while receiving special educational assistance, this will be preferred. If the child cannot profit from participating in ordinary education, he or she may be given the opportunity to attend a special class at a state school or at a special teaching facility.

⁹² Resolution ResChS(2004)1, collective complaint n° 13/2002.

⁹³ Ministerial instruction (*Circulaire*) no 2006-126 of 1.8.06.

Children with disabilities are generally integrated into mainstream schools in **Iceland** and in **Ireland** the Education for Persons with Special Educational Needs Act 2004 favours inclusive education where it is in the best interests of the child and does not impair the effective provision of education of those children with whom the child is to be educated. Students with special needs are educated in mainstream schools (9732 in 2011) and also in a variety of special schools and in special classes attached to mainstream primary and post-primary schools (7178 in 2011). It is also permissible to discriminate where the provision of education to a student with a disability would have a seriously detrimental effect on the provision of education to other students.

In **Malta** inclusive education for disabled children has been preferred since the mid-1990s and is becoming more commonplace, almost 88% of students who in 2007 were stated as having special educational needs being educated in mainstream schools. Children with disabilities are integrated in **Norway** into mainstream schools where appropriate and there is a system for assessment and the provision of support in cases of special educational need. In **Portugal** the preference is for the integration of disabled children into mainstream schools, with appropriate assistance. There is a quota at higher level education for 2% of students to be selected from those with disabilities and there is a prohibition on disability discrimination in education. And in **Sweden** children have a right to be educated at the school of their (parents') choice to a threshold of substantial financial burden, but in practice local authorities determine whether children with special educational needs will be educated in mainstream or (which is significantly more expensive to the authority) special schools.⁹⁴

The general approach in **Finland** is to integrate disabled children as much as possible into mainstream schooling, the Basic Education Act providing that a student who has moderate learning or adjustment difficulties is entitled to special-needs education alongside other teaching, students with more severe impairments being admitted or transferred to special-needs education. In **Spain** the Organic Law on Education 2005 seeks to establish a more even distribution of pupils with special needs between state schools and state-subsidised private schools by the imposition of targets, with obligations on public authorities to provide adequate staffing and funding levels. The Law on the social integration of disabled people expresses a preference for integrated education "receiving, ... the support and resource programmes that the Law recognises" and the Organic Law on Education requires that schooling "shall guarantee non-discrimination and effective equality in access to and continuance in the [mainstream] education system" with special schooling "only when [pupils'] needs cannot be met in the framework of measures catering for diversity in ordinary centres".

In **Cyprus** children with disabilities are educated in a variety of schools including mainstream and special schools, with a preference for mainstream schooling where possible. There is a system of assessment in place to determine appropriate place of schooling taking into account *inter alia* parental wishes. **Hungary's** 1998 Act on Disability Equality, as amended, imposes duties of accommodation in relation to disabled pupils who should be integrated into mainstream schools where that is regarded as beneficial to them.

In **Estonia** the general preference is for integrated schooling if possible. In 2005 the equality body suggested that this was insufficiently pursued in practice as a result of which matters have improved and a (bare) majority of children with special educational needs are educated in mainstream classes in mainstream schools (54% with a further 14% in segregated special classes in mainstream schools).⁹⁵ And in **Luxembourg**, although duties of reasonable accommodation apply to schools, many children with disabilities (physical as well as mental) are often educated in special schools, although wheelchair users can generally be accommodated in mainstream schools. In **Slovenia**, children with disabilities are primarily educated in special schools unless they are able to follow the curriculum in mainstream schools and such schools are willing to accept them, no special equipment being provided

⁹⁴ School Act (2010:800) ch.9 s15.

⁹⁵ Data published by the European Agency for Development in Special Needs Education at <http://www.european-agency.org/country-information/estonia> (08.04.2012).

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by the state to mainstream schools with disabled pupils. **Greek** law provides for the education of disabled children in mainstream or special schools, in hospitals or institutions or at home. Mainstream education is the preference but depends on a positive evaluation by a group of specialists (elementary school teacher, secondary school teacher, psychologist, medical doctor). Special schools exist for deaf children, blind children and those with cerebral palsy.

The thrust of **Bulgaria's** legislation is to integrate disabled children into mainstream schools, though the practice often falls short. The Integration of Persons with Disabilities Act imposes on the relevant Minister a duty to provide children with disabilities with a supportive environment for their integrated education which is absolute and without any justification defence on grounds of disproportionate burden. The courts have held that this duty will only be satisfied when there is supportive environment for integrated education in every kindergarten and school in the nation. The Minister is also under an absolute duty to create educational opportunities for children with disabilities who are not integrated in a common educational environment, and higher education institutions are under absolute duties to accommodate those with disabilities. The practice falls very short of the rule however and, while the theory is that children may be sent to special schools only after all possibilities for inclusive education are exhausted, there is no legal definition of what it is to exhaust all possibilities for inclusive education and a lack of adequate planning by the authorities, and/or of financial resources, may make it impossible to adapt the environment or the teaching to accommodate disabled children in mainstream schools.

Liechtenstein favours the integration of children with disabilities into the regular schools but also supports special schools with special training for teachers and many disabled children are not integrated into mainstream schools. In the **Czech Republic** special schools, which catered in practice largely for Roma (as distinct from disabled) children were formally abolished in 2005 and a National Action Plan for Inclusive Education developed in 2010 but the segregation of Roma children into schools with reduced curricula remains in practice. Disabled children are not generally integrated into mainstream schools.

In **Germany** the general aim is towards integrated education for children with disabilities and the Constitutional Court has ruled that a decision to put a child in a special school against the wishes of the parents breached the Basic Law if it was possible for the child to attend an ordinary school without special pedagogical help, if his or her special needs could be fulfilled using existing means, and if other interests worthy of protection, especially of third parties, did not weigh against integrated schooling. It does not appear that any duty of accommodation applied.

Disabled children in **Slovakia** are generally educated in special schools or classes despite a notional preference for integrated schooling. Assessment of children is generally undertaken by persons attached to special schools. Roma children are disproportionately likely to be regarded as having special educational needs and segregation of Roma children remains commonplace. In **Latvia** disabled children are likely to be taught at home by reason of inaccessible school buildings and a preference (in the case of those with special educational needs) for home instruction. In 2011/12, 3.5% of children with special educational needs were at special schools.

In **Turkey**, overt discrimination by the authorities towards disabled students occurs despite the legislative prohibition on disability discrimination. In 2009, an announcement by the “Executive Board of the Foreign Secondary Schools Entrance Exam” on the web-site of the Ministry of National Education stated that: “We cannot provide education to students in need of special education and to students who have physical disabilities. As those students will not be able to register to our schools, they will not be allowed to take the ‘Private Foreign Secondary Schools Entrance Exam’”. Also in 2009 the University Entrance Exam Guidelines included a statement from one university that “students with disabilities should not choose our University.”

3.2.1.2 Education, sex and religion

There is not a great deal of information available as regards sex-segregated education (which is unregulated by EU law). In **Ireland** and the **UK** the prohibitions on sex discrimination in education in domestic law contain exceptions covering such education. In **Spain**, where public schools are integrated, the Supreme Court ruled in 2006 that such education was not discriminatory.⁹⁶ An action was brought against three state subsidised private schools linked to Opus Dei which educated boys and girls in separate classrooms. It was argued that this breached the prohibition on sex discrimination in the Organic Law on Education. The Supreme Court ruled that sex-segregated education in the private sphere was lawful, and that there was no “express provision barring public support for schools offering such education”, referring to the statement in the International Convention against Discrimination in Education⁹⁷ that “separate education systems ... shall not be deemed to constitute discrimination”, and that “mixed education is one means, but not the only one, of promoting the elimination of sexual inequality.” The Court also made reference to the Constitutional right of parents to choose their children’s form of education.

Hungary’s explicit prohibition on segregation in education is not breached by voluntary participation in education based on religious or other ideological conviction, or education for national minorities, which is organised in such a way that the goal or curriculum of the education justifies the creation of separate classes or groups, provided that this does not result in any disadvantage for those participating in such an education. The same is true for sex-segregated education. In **Germany** private schools may select pupils freely on the basis of faith and in **Belgium** religious educational institutions are free to choose the curriculum and values on which their teaching is based.

In **Ireland**, primary and post-primary schools with a religious ethos may accept pupils of a particular religious denomination in preference to others, or refuse to admit pupils who are not of that denomination, where it is proved that the refusal is essential to maintain the ethos of the school (S 7(3)(c)). **Lithuania’s** prohibition on discrimination in education is subject to a broad exception covering religious schools which, Conservative politicians stated during Parliamentary Debates on the Law, could be used to “protect” schools from homosexuals.

In 2005, in the *Károli* case, **Hungary’s** Supreme Court rejected a complaint concerning the declaration by a Calvinist university’s theology faculty that “the church may not approve of [...] the education, recruitment and employment of pastors and teachers of religion who conduct or promote a homosexual way of life.”⁹⁸ The Court found that the university was exempted from the obligation to abide by the requirement of equal treatment by the general exception permitted by §7(2) of the Act. According to the Court, it was reasonable for a denominational university to exclude homosexuals from theological education which might lead to their becoming pastors. Section 7 has since been amended and the *Károli* case might generate a different result today.

A number of the issues reported as having arisen in the context of education have involved religious dress. In **Turkey**, where religious discrimination is prohibited in education, there are on-going disputes concerning the ban on the wearing of headscarves in Turkish universities though in October 2010, the then new Director of the High Board of Education issued a written statement prohibiting university administrations from dismissing students from classrooms because of violations of disciplinary rules. The statement did not explicitly mention the headscarf but the goal was to bring a *de facto* end to the headscarf ban. The reaction of universities is reported to have been mixed with some still preventing access to women in headscarves.

The headscarf has also caused difficulties in **Belgium** where in 2009 the Conseil d’Etat refused to suspend the exclusion by a school of three primary schoolgirls who had refused to comply with a newly imposed prohibition on

⁹⁶ reference no. 3356/2000.

⁹⁷ http://www.unhchr.ch/html/menu3/b/d_c_educ.htm.

⁹⁸ Supreme Court 8.6.05.

the wearing of conspicuous religious signs at school.⁹⁹ The Court did not accept that the girls had been subjected to any “serious harm” by the prohibition because the parents knew of the school’s rule when they had enrolled their daughters. And in 2011 the Constitutional Court upheld a prohibition imposed by the Flemish Education Council (the administrative authority for 700 public primary and secondary schools) on the wearing of any religious or philosophical symbol at school by students and staff.¹⁰⁰

In 2010 a **French** training centre for apprentices was fined 3 275€, and its Director €1250, and damages of 10 500€ awarded against them by the Paris Appeals Court to a young woman refused access to a training course because she was wearing a headscarf, the legal prohibition on “ostentatious” religious signs or clothes not being applicable to such centres.¹⁰¹ In 2011, however, the Montreuil Administrative Court ruled that a school was entitled to prevent headscarf wearing women from accompanying their children on school trips, applying to such volunteers the rules applicable to teachers and students.¹⁰²

In **Sweden**, prior to November 2010, schools had quite extensive rights to ban *niqab* or *burqas* in the classroom. In November 2010 the **Swedish** National Board of Education issued guidelines requiring that decisions must be made by schools on a case-by-case basis and following dialogue with the women involved on common values for instance, equality between gender and other democratic values upon which the Swedish educational system relies. On 30 November 2010, the Equality Ombudsman¹⁰³ considered the case of a 24 year old ethnic Swede who had converted to Islam and wore a *niqab* for religious reasons, who had been denied access to a training programme. The case was settled but new guidelines were issued in 2012 which permit the prohibition of *niqab* or *burqas* for health and safety reasons in particular cases but stress that obstacles to communication and identification posed by such religious wear can generally be overcome by other means.

A different difficulty has arisen in the education context in **Cyprus** where the Ombudsperson has dealt with a complaint concerning the conduct of religious confession at schools during the school day. The Ombudsperson accepted that the practice could put students under pressure to participate and rejected the Ministry of Education’s defence of the practice (that some students would otherwise struggle to attend confession) but did no more than to recommend that the Ministry investigate the possibility of having confessions conducted outside schools.¹⁰⁴ More recently, something of a crisis has developed between the Equality Body and the Ministry of Education over the latter’s refusal to revoke a circular requiring that children exempted from religious instruction be required to remain in the classroom in which such instruction is being provided.¹⁰⁵

In **Turkey**, non-Muslim students are exempt from Constitutionally required religious education at primary and secondary level pursuant to a 1990 decision of the Ministry of Education.¹⁰⁶ In practice, however, the exception is applied only to three non-Muslim groups that Turkey officially recognizes as minorities, and many school administrators are unaware of the 1990 decision. The Alevis challenged Turkish practice before the European Court of Human Rights (ECtHR) which ruled that the content of religious education classes was incompatible with Article

⁹⁹ *Kheir v. Commune de Dison; Dakir v. Commune de Dison*. Judgment nos. 196.625 & 196.626 of 2.10.09 of the administrative section of the Council of State.

¹⁰⁰ *X v. the Flemish Education Council*. Judgment of 15.3.11.

¹⁰¹ 86.10 *Mme Boutaina Benkirane v Centre universitaire de formation par l’apprentissage* Sup 2000 no 08/08286. See, similarly, *Said v Greta of Paris* 5.11.10 no 0905232, Administrative Tribunal of Paris.

¹⁰² 22.11.11 *Recteur de l’Académie de Créteil* n° 1012015.

¹⁰³ Case 2009/103.

¹⁰⁴ 29.07.11, Report of the Anti-discrimination Authority regarding complaint 42/2010.

¹⁰⁵ Difficulties as regards freedom of religion have also been experienced by prisoners in Cyprus who are other than Greek Orthodox.

¹⁰⁶ Ministry of Education, Religious Education General Directorate for Higher Education and Training Committee decision, 9.7.90.

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9 ECHR, but the Court did not find the classes to be in violation of the ECHR as such¹⁰⁷ and the government has continued to reject the Alevis' demands for these classes to be abolished or made non-mandatory. A Commission was established to consider the content of religious education material and new textbooks have been issued but these have not satisfied the concerns of the Alevi community. A number of Turkish courts have relied on the 2007 ECtHR judgment in ruling that Alevi students should be exempted from mandatory religious classes¹⁰⁸ but the issue has yet to be resolved more generally and the inclusion of material about non-Muslim faiths in the new textbooks has resulted in a 2012 decision by the Council of State overturning an exemption awarded by a lower court.¹⁰⁹

Other issues arising in this context include the positive accommodation of minority faiths. In April 1995 **France's** Administrative Supreme Court ruled that the requirement for school attendance could not override the right of pupils to worship or celebrate religious festivals, "at least in so far as their absence is compatible with performance of the tasks entailed by their studies and with the maintenance of public order in the school".¹¹⁰ In 2011 the **German** Federal Administrative Court ruled that the prohibition of public prayer by a Muslim pupil during breaks to protect the peace in the school did not violate the pupil's freedom of religion in the particular circumstances of the case, religious conflicts having occurred at the school in consequence of the pupil's prayers.¹¹¹

3.2.1.3 Conclusions on education

It is evident from the foregoing that, even leaving aside widespread practices of segregating Roma schoolchildren, a number of significant issues arise in the context of education. Approaches to the schooling of disabled children vary widely but it is worth bearing in mind that the meaningful inclusion of disabled children into mainstream schools requires heavy commitment of financial and educational resources if it is not to leave many such children equally or more disadvantaged than they would remain in "special" education. For the most disabled children, special schools might afford better education and the cost of such schools, properly resourced, might tempt authorities to favour mainstream schooling. Difficult issues which arise in connection with religion include the extent to which minority dress codes are accommodated and, on the other hand, the degree to which majority religious views are imposed on schoolchildren in potential breach of ECtHR rights. In addition, in some countries the freedom of religious schools to select pupils on religious grounds may create educational and cultural ghettos. Consideration will need to be given to what steps will most facilitate integration while avoiding the forced assimilation of minority students to majority cultural practices.

3.2.2 Goods and services

3.2.2.1 Introduction

It is evident from Part I above that most states surveyed provide a significant degree of protection from discrimination on the relevant grounds as regards access to goods and services. The exceptions are **Spain**, the **FYR of Macedonia**, **Iceland**, **Poland**, **Greece** and **Turkey**, the **Netherlands** (except as regards sexual orientation and religion/ belief), **Norway** (except as regards religion/ belief and disability), **Denmark** (except as regards sexual orientation and belief) and **Latvia**, **Liechtenstein** and **Malta** (except as regards disability). The interesting questions which tend

¹⁰⁷ *Hasan & Eylem Zengin v Turkey* Appl no 1448/04, 9.10.07.

¹⁰⁸ See in particular the decision of the 8th Circuit of the Council of State, 28.12.07, E. 2006/4107, K. 2007/7481.

¹⁰⁹ 7th Chamber of the Court of Cassation, refs E: 2012/262, K. 2012/3351, 27.7.12.

¹¹⁰ 14.4.95 Consistoire central des israélites de France, Mr Koen Recueil Lebon page 169, Dalloz 1995, jur. page 481, note Koubi G.

¹¹¹ 6 C 20.10, 30.11.2011.

to arise in connection with goods and services (as, below, with social protection and social advantages) concern the limitations imposed and the exceptions provided by national law.

3.2.2.2 Public and “private” goods and services

Much of the legislation which regulates discrimination in access to goods and services draws no distinction between those available to the public or otherwise (this is the case in **Bulgaria, Cyprus, Croatia, Malta, Luxembourg, Romania, Slovenia, France, Estonia, Lithuania** and **the Netherlands**). In **Norway**, exceptions apply to family life and other relationships of a personal nature and in the **Czech Republic** exceptions also apply to the prohibition on discrimination in access to goods and services in areas of private and family life (there is also a general justification defence where discrimination is regulated beyond the requirements of EU law). And **Swedish** legislation prohibits discrimination in access to goods and services where “persons who outside private or family sphere are offering goods services or housing to the public”. **Danish** penal prohibitions on discrimination on grounds of sexual orientation and belief in the provision of goods and services, including housing, and access to public places, do not cover strictly private affairs.

Slovakia’s Anti-discrimination Act applies only in relation to goods and provision of services carried out in public and targeted to the public, and not to goods and services offered or provided on the private basis (e.g. to the members of a private association, or a family, etc.). In **Portugal**, goods and services available through private associations are excluded from the prohibition on discrimination under the principle of freedom of association, but access to membership itself cannot be based on discriminatory criteria.

In **Belgium**, the civil prohibitions on discrimination in access to goods and services do not apply where they are reserved to a closed group as distinct from being offered on the market. And **Finland’s** Penal Code, which prohibits differential treatment “without a justified reason” by “a person who in his/her trade or profession, service of the general public, exercises of official authority or other public function or in the arrangement of a public amusement or meeting”, distinguishes between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association), although it is not entirely clear where exactly is the line between “public” and “private”.

The **UK’s** Equality Act prohibits only discrimination in relation to goods, services and facilities by persons “concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public”. Special provision is made, however, in respect of discrimination by membership associations in relation to their members. The limits of such provisions are suggested by the **Belgian** decision in the *Lejeune* case in which the Court of Appeal at Mons refused to injunct the Congregation of Jehovah’s Witnesses from issuing instructions to its members to shun the claimant, a former member,¹¹² in part because the State’s obligations of neutrality and impartiality prevented the Court from assessing the legitimacy of religious beliefs or the way in which such beliefs manifested themselves as part of the principle of personal autonomy of believers. It is likely that a similar decision would be reached in many of the states surveyed as a result of institutional competence, whatever the detail of the applicable laws.

In **Austria**, goods and/or services are “available to the public” (and discrimination in access to them regulated) whenever an offer is directed to an undefined group of potential customers, as distinct from a close circle of family and friends. The **German** prohibition on contractual discrimination applies only in respect of transactions that are typically concluded in a multitude of cases under comparable conditions without regard to the person and to legal transactions where the characteristics of the person have only subordinate importance. **French** law, by contrast,

¹¹² 10.1.12.

makes a distinction only as to the level of penalty between discrimination in relation to goods and service available to the public and those only available privately.

3.2.2.3 Housing

Housing is covered by the prohibition on discrimination in access to goods and services at least in **Austria** and **Portugal** (as regards disability), the **Netherlands, Germany, Denmark, Italy, Bulgaria, Belgium, Luxembourg, Romania, Sweden, Slovakia**, the **Czech Republic, Ireland, Hungary**, the **UK**, and **Slovenia** though the latter's housing laws allow the imposition of many conditions on tenancy agreements which can lead to discrimination on the basis of some personal circumstances. **Hungary's** Act of Equal Treatment covers access to housing where it is publicly provided or advertised. The Act on Equal Treatment, however, contains a general exception which allows the enforcement of other fundamental rights. Discrimination which is not regarded as concerning fundamental rights (as where it concerns access to services) may be justified where it is objectively reasonable. In **Romania** a general justification defence is applicable in respect of access to goods and services, including housing. **Germany's** Anti-discrimination Act covers housing subject to the normal provisos about personal contracts (it is supposed not to apply in principle - though exceptions are possible - if a landlord does not let more than 50 flats).¹¹³ An exception is provided which (§19.3) permits unequal treatment in the letting of premises in order to create and maintain socially stable structures of inhabitants and balanced structures of settlement and balanced economic, social and cultural relations.

Ireland's Equal Status Act applies to housing but not to accommodation that is being provided in the discriminator's own home, "or where the provision of accommodation affects the person's private or family life or that of any other person residing in the home". The **UK** provides similar "private sphere" exceptions. Another exception provided in Ireland relates to accommodation that is reserved for a particular category of people, and this may relate to one of the relevant grounds, such as a residential centre for people with disabilities, or a nursing home for the elderly. And the Irish Equal Status Act further provides that nothing in it can be construed as prohibiting housing authorities from providing, in respect of housing accommodation, different treatment to persons based, *inter alia*, on family size, family status, marital status, disability or age (s6(6)). There is no clarification as to the nature of such permissible distinctions in treatment, however; in 2007 the High Court clarified that s6(6) could not be relied on to allow local authorities to afford less favourable treatment in the provision of housing.¹¹⁴

Lithuania's Law on Equal Treatment does not state in terms what aspects of housing fall under its scope. It appears that the provision requiring equal treatment in consumer rights protection could apply to housing generally, but there is no authority on this. **Belgium's** goods and services provisions apply to the private housing market¹¹⁵ but public or social housing (housing policy) is a regional competence subject only to the Constitutional prohibition on discrimination. Further, except in the case of discrimination regulated by EU law, Belgian federal legislation operates an open justification defence which permits differences in treatment which are appropriate and necessary to realise a legitimate objective.

Norway's Anti-discrimination Act does not, but the Anti-discrimination and Accessibility Act does, cover discrimination in housing (except, in the case of the Anti-discrimination Act, as regards the sale of dwellings), but separate legislation prohibits discrimination in housing on grounds, *inter alia*, of religion or life orientation, homosexual orientation and disability. Again the Anti-discrimination Act does not apply to discrimination in the context of family life and other relationships of a personal nature. Field-specific provisions prohibit discrimination on all relevant grounds in relation

¹¹³ Public authorities providing housing will be regulated by the constitutional provisions on equality.

¹¹⁴ *Doherty & Anor v. South Dublin County Council & Ors* [2007] IEHC 4.

¹¹⁵ Judgment of 19.4.05 of the President of the First Instance Court of Nivelles.

to housing in **France** without exceptions. In **Austria** no specific exceptions are provided by regional legislation which regulates discrimination in housing across the relevant grounds. The same is true of **Bulgaria's** Protection Against Discrimination Act 2003.

With the exception of the various provisos regarding private/ family life discussed above, none of the country reports mention particular exceptions applicable to their prohibitions on discrimination in the context of housing. One particularly interesting decision reported in this context is that of **France's** Court of Cassation in *X c. Société d'investissement* case in which it rejected a claim that the installation of an electrical door code on the outer door of a residential building violated the freedom of religion of people who, for religious reasons, could not use electricity on Saturday and religious holidays.¹¹⁶ According to the Court, religion did not create underlying contractual obligations unless the contract contained an express clause providing for the accommodation of the lessee's demands. In March 2007 the Administrative Supreme Court ruled that the refusal of a mayor to rent a municipal room to the local association of Jehovah's Witnesses, this on the basis that the relatively low price of municipal rooms could amount to a subsidy to a cult, was discriminatory and a serious violation of freedom of association.¹¹⁷

3.2.2.4 Financial services

Another area of interest concerns the extent of exceptions provided in any prohibition on discrimination in access to financial services in relation to age and/or disability. There is somewhat limited information as to the extent of coverage by countries of discrimination in access to such services and to the exceptions thereto so any conclusions to be drawn from what follows would necessarily be tentative. In the **Netherlands** the prohibitions on age and disability discrimination do not apply to goods and services generally, or financial services in particular. The same is true in **Denmark**, and in **Norway, Latvia, Liechtenstein** and **Malta** in relation to age; and in **Spain**, the **FYR of Macedonia, Iceland, Poland, Greece** and **Turkey** in relation to all relevant grounds. In **Belgium** prohibitions on age and disability discrimination do apply in this context but are subject to the broad justification defence provided by federal law (see above). The same is true in **Cyprus**, and in the **Czech Republic** where the general justification defence provided by s7(1) of the Antidiscrimination Law applies to all discrimination falling outside EU law. In **Romania** a general justification defence applies in relation to goods and services, including financial services.

Swedish and **UK** law apply a general justification defence in respect of age discrimination. No proportionality assessment is required in relation to age discrimination in insurance by the Swedish provisions (in contrast to the usual position regarding the general justification defence). No exceptions are applied by **Sweden** in relation to disability discrimination in this context though insurance companies in fact frequently use medical conditions for risk assessments. This is generally regarded as lawful and in 2011 Stockholm's District Court ruled that:¹¹⁸

“Discrimination is when a person has had a [un]favourable treatment compared to other persons in the same risk group. The equal treatment requirement shall thus not be interpreted as meaning that persons with different risks of for instance developing a medical problem shall be granted insurance on the same terms”.

In the **UK** the definition of direct disability discrimination (which alone is incapable of justification) is sufficiently narrow such that discrimination on the basis of probable life expectancy or morbidity connected with a specific disability would not amount to direct disability discrimination (though refusing to provide travel insurance to any wheelchair users, for example, probably would).

¹¹⁶ Third Civil Chamber 18.12.02 no 01-00519.

¹¹⁷ 30.3.07 no 304053.

¹¹⁸ Stockholm District Court, case T20377-09, *Equality Ombudsman v Trygg Hansa*.

Croatia provides a justification defence in respect of age discrimination including (so far as relevant here) where insurance premia etc. are in line with relevant and accurate statistical data and rules of actuarial calculations. In **Austria** federal legislation (under which financial services fall) does not regulate age discrimination so no exceptions are necessary, and none are provided as regards disability discrimination with the effect that direct discrimination (i.e., discrimination by reason of the bare fact of disability) would be unlawful in this context. **Ireland's** Equal Status Act provides (s5(2)) that the prohibition on difference in treatment does not apply in the case of differences in the treatment of persons in relation to annuities, pensions, insurance policies or any other matters related to the assessment of risk, which must be effected by reference to actuarial or statistical data obtained from a source on which it is reasonable to rely, or "other relevant underwriting or commercial Factors", and must be reasonable having regard to the data or other relevant factors. In 2007, following negotiations with the Equality Authority, the underwriters AIG Insurance undertook no longer to underwrite travel insurance which contains an absolute age limit. And **Lithuania's** Law on Insurances allows differential treatment on the grounds of age and state of health in the calculation of insurance risks.

Similarly to Sweden, while **Icelandic** law does not explicitly allow for differences in treatment on the grounds of age and disability in the provision of financial services, assessment of risk may take age or disability into account but no explicit legislative provisions are to be found to this end. Furthermore, life insurance premiums may take the age of the insured into account, although this is not explicitly set out in the law. **Norway's** anti-discrimination provisions regulate discrimination in financial services in relation to disability but not to the other relevant grounds. No special exceptions are provided. In 2011 the Equality Ombud rejected a complaint to the exclusion by an Insurance of the risks in respect of which it was prepared to insure a child with ADD in respect of expenses related to sickness and accidents, and possible loss of income due to illness or accident in adulthood, of "ADHD, ADD, Autism, Asperger's and Tourette's syndrome and the consequences of such".¹¹⁹ The exclusion was part of the insurance company's general terms and was not specific to the particular child.

In addition, Norway's Act relating to Insurance Contracts allows the denial of insurance, or the imposition of special conditions thereon, only for "just cause". Particular conditions will be regarded as providing "just cause" for discrimination where there is a specific and reasonable correlation between the particular risk posed by the condition and the discrimination, and where that discrimination is not unreasonable to the individual. The Insurance Complaints Board has guidelines and a panel of medical experts who assess whether the requirement for "just cause" has been satisfied in cases of complaint.

Latvia's legislation does not regulate age discrimination in the context of goods and services and provides no relevant exception in relation to disability. In **Italy** age and disability discrimination in the provision of financial services are regulated only by general rules on equality and not by anti-discrimination laws, so the question of exceptions does not arise. **Slovakia's** Anti-discrimination Act makes specific provision for differential treatment on grounds of age or disability in the provision of insurance services which results from an assessment of risk verifiable by statistical or similar data and is proportionate to such risk (s8(6)). Despite the need for the proportionality test, it appears that some insurance companies simply refuse to provide people aged 70+ with travel and health insurance.

Germany's Anti-discrimination Act covers financial services but provides that such discrimination can be justified, in the case of religion, disability, age or sexual orientation, if it is based on acknowledged principles of calculations adequate to the risks, especially on actuarial evaluation of risks based on statistical surveys. **Liechtenstein's** Act on Health Insurance requires that insurance companies have to offer obligatory benefits without consideration of age or health but allows them to impose age limits and exclude from coverage conditions from which insured persons have previously suffered. And in **Luxembourg**, insurance contracts may subject persons to differential treatment because of age or disability reasons if this exception is objectively and reasonably justified. The law does not provide for any

¹¹⁹ Decision of 23.6.11, case no 2009/2.

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detail on what the assessment of risk has to be based, whether on relevant and accurate actuarial or statistical data or not.

In **France** the only relevant exception to the prohibition of discrimination in access to goods and services allows life and health insurance policy providers to take into account the insured person's health. In 2009 the Court of Cassation, Criminal Chamber ruled that the denial of car insurance on the ground of age was prohibited as discriminatory. **Bulgaria's** Protection Against Discrimination Act 2003 does not provide any exceptions to the prohibitions, on all relevant grounds, of discrimination in this context. In 2008 **Cyprus's** Ombudsman extended the non-discrimination principle to prohibit the refusal of car insurance to persons over 70 to drive cars even though age discrimination in the field of services is not yet expressly covered by legislation, as distinct by under the Constitution's general equality clause.¹²⁰ And **Hungary's** Equal Treatment Authority has ruled that the refusal, on grounds of age, of a credit card to a person of 68 violated the principle of equal treatment, imposing a fine of €6,900.¹²¹ The Act on Equal Treatment contains no explicit exceptions for age or disability discrimination in access to goods or services but the general exception (see above) will apply in individual cases.

3.2.3 Social protection, social advantages and healthcare

Among the interesting questions which arise here are those which concern the scope of any exceptions from prohibitions on age and disability discrimination in this context. Again there is relatively limited information available on this. Leaving aside those states in which age (and/or, less commonly, disability) discrimination in this context is unregulated, or is subject only to Constitutional or field-specific regulation containing broad equality/ non-discrimination provisions, **Austrian** regional legislation prohibits age discrimination with exceptions which relate only to employment, there being no exceptions permitting minimum and/or maximum age requirements in relation to access to healthcare, social advantages or other matters outside the fields of employment and occupation.

The scope of **Ireland's** prohibitions on discrimination in this area is uncertain¹²² but it is likely that most state services are covered by the Act. The Equal Status Act provides that treating a person differently does not constitute discrimination where the person "is so treated solely in the exercise of a clinical judgment in connection with the diagnosis of illness or his or her medical treatment..." **Luxembourg's** legislation permits differences of treatment on grounds of health, where this consists of operations intended to prevent or ensure against risk of death, risk of threat of bodily harm to the person, or risk of incapacity for work or invalidity. It also provides an exception in relation to payments of any kind made by state schemes or similar, including state social security or social protection schemes, and allows a general justification in respect of age if objectively and reasonably justified. As above, the **UK** provides a general justification to age discrimination in this and other contexts and applies a narrow concept of direct disability discrimination such that distinctions related to life expectancy or likely outcome of treatment etc. would not amount to direct discrimination.

In **Belgium** all age discrimination is subject to potential justification as is the case in **Sweden**. In **Cyprus** disability and age discrimination are capable of justification. In 2008 the Ombudsperson ruled that a state scheme granting a severe disability benefit to persons aged between 12 and 65 was unlawfully discriminatory, this despite the fact

¹²⁰ Ref. 125/2007, 21.10.08.

¹²¹ 588/2008 www.egyenlobanasmod.hu/zanza/588-2008.pdf.

¹²² *Cf O'Neill v. Garda Síochána Ombudsman Commission* 30.7.10 DEC-S2010- 037 in which the Equality Tribunal ruled that the body responsible for investigating complaints against the police was exercising a quasi-judicial decision-making function rather than providing a "service" for the purposes of the prohibition on discrimination, and *Two Complainants v. Department of Education and Science* DEC-S2003-042/043, in which an Equality Officer accepted that the payment of maintenance grants by the state to adults on further education courses was a "facility" within the Equal Status acts.

that the law prohibiting age discrimination does not extend to state benefits.¹²³ In 2010 the Ombudsperson ruled (on the basis of ECHR Protocol 12) that the fixing of the age limit of 65 for funding radical prostatectomy and the fixing of the age limit of 40 as a condition of eligibility for financial support for artificial insemination were unlawfully discriminatory.¹²⁴ Another complaint to **Cyprus's** Ombudsperson concerned the refusal of the Ministry of Finance to grant public assistance to persons with intellectual disabilities in respect of travel and related costs (such assistance being available to those with other disabilities).¹²⁵ The Ombudsperson recommended that transport assistance be extended to the excluded group.

Bulgarian law prohibits age and disability discrimination in this context without exception. Bulgaria's Supreme Administrative Court confirmed in 2011 that the exclusion of women over 43 from various methods of assisted reproduction amounted to unlawful age discrimination in the absence of a concrete assessment of each individual woman's reproductive health status.¹²⁶ In 2008 **Romania's** National Council on Combating Discrimination ruled that the restriction of anti-viral treatment and therapeutic packages for patients suffering from various types of hepatitis to patients aged under 65 involved unlawful age discrimination.¹²⁷ **Bulgaria's** Supreme Administrative Court also ruled in 2011 that the exclusion of patients with Idiopathic pulmonary hypertension/ Chronic cardiopulmonary disease from entitlement to medication at the state's expense breached the state's positive duty to secure such funding.¹²⁸

In November 2009 a **Swedish** Court of Appeal ruled that there was no obligation to provide IVF treatment to a woman in a same sex couple whose partner had reached 40 (and therefore become ineligible for such treatment) having had only three of the maximum six free cycles. The District Court¹²⁹ found this rule discriminatory and awarded damages. The upper Court disagreed ruling that, because only one person in a heterosexual couple could have a fertilized egg implanted in her womb, the principle of equal treatment could not result in a requirement on the County Council to provide IVF treatment to both women in a same sex couple.¹³⁰ In a subsequent case the same Court awarded €3300 to a woman who was denied IVF treatment because she was in a same-sex relationship.¹³¹ The award would have been higher if the medical centre involved had not immediately apologised for and offered to put right the discrimination. The Equality Ombud has appealed the level of damages, arguing that it should have been in the region of €11,100, and the Supreme Court has agreed to hear the appeal.

Other interesting cases which have arisen in this context include, in the **Netherlands**, the rejection of homosexual blood donors, the policy being found to be justified by the higher incidence of HIV among gay men and the lack of any 100% accurate screening mechanisms for HIV in blood products.¹³²

¹²³ Ref. 114/2007, 10.11.08.

¹²⁴ Equality Body Decision 24.11.10, Ref. AKR 164/2008, AKR 63/2010 and AKR 126/2009 respectively.

¹²⁵ 24.06.11 Report of the anti-discrimination authority regarding the discriminatory treatment of persons with mental deprivation AKR 95/2009.

¹²⁶ *Minister of Healthcare v. PADC* 6 .6.11 Decision N 7924. See also Decision N 15601of 25.11.11.

¹²⁷ *Ministerul Sănătății Publice v Casa Națională de Asigurări de Sănătate* 13.11.08 Decision no. 605/2008.

¹²⁸ *Minister of Healthcare v. PADC* 18.1.11 Decision N 831 in administrative case N 5186/2010, final. See also 16.12.11 N 13532/2011, final; 5 .12.11 N 12812/2011, final; 18.7.11 N 6131/2011, final.

¹²⁹ Uppsala District Court case T 499-08.

¹³⁰ *Uppsala CC v. Equality Ombudsman* 5.11.09 case T 9187-08.

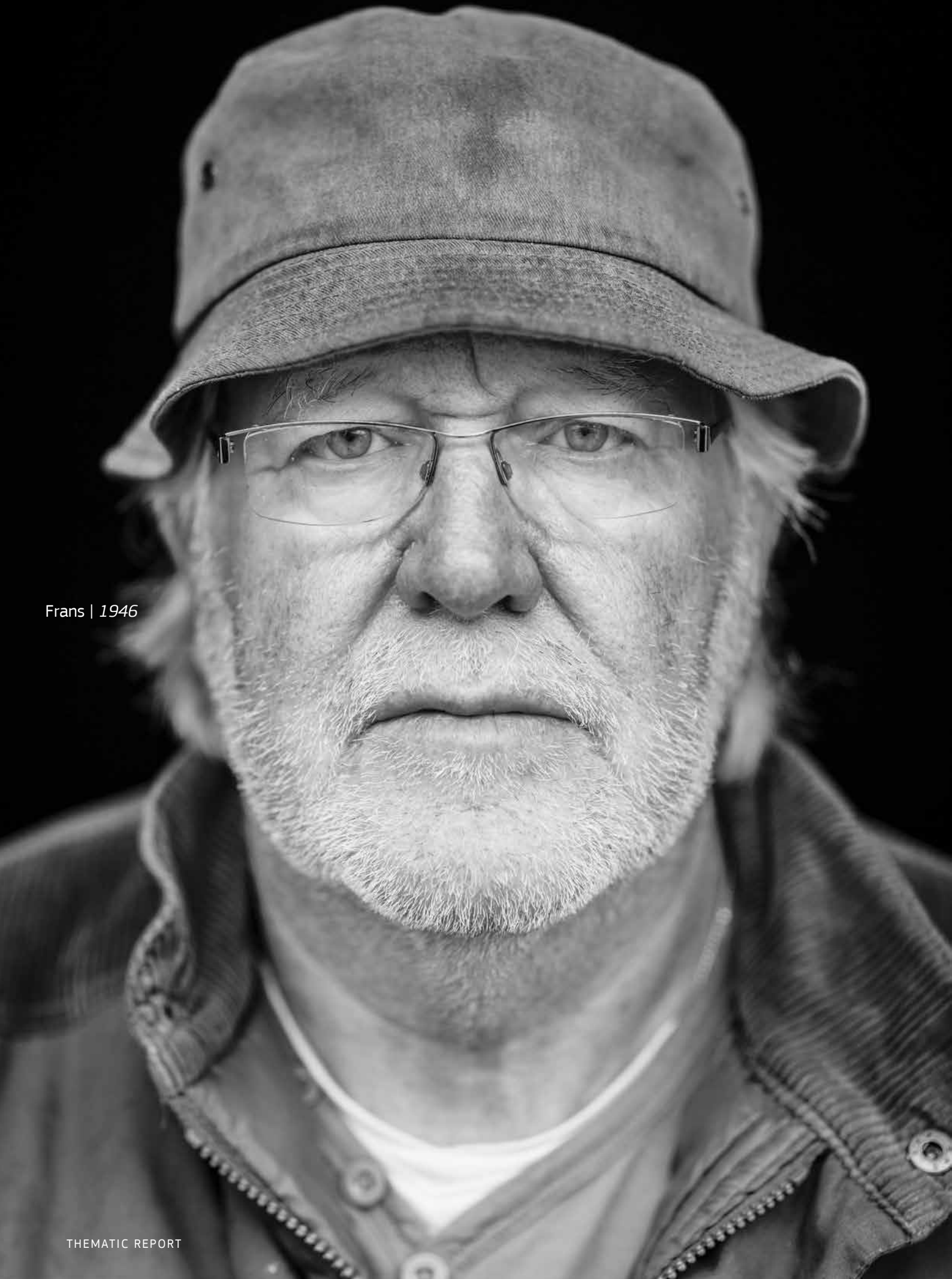
¹³¹ 12.11.12, *Stockholm CC v Equality Ombudsman* ref no. T 9222-11.

¹³² 2.8.07 Opinion 2007-85 of the Equal Treatment Committee. Interestingly the relevant law did not contain an explicit applicable justification defence.

3.2.4 Concluding remarks on material scope

It is evident from the foregoing that there is quite a wide variation across the states surveyed as regards the material scope of anti-discrimination law and the issues which arise in connection with that material scope. It is common for those states which regulate discrimination in access to goods and services to provide some exceptions, if not for non-commercial transactions, then at least for those which pertain to the truly “private” sphere of family transactions. The regulation of discrimination in access to housing is commonplace, and there are few examples of exceptions being provided in this context over and above those available in relation to goods and services other than housing.

Most states which regulate discrimination in access to financial services provide exceptions or justifications which would permit discrimination related to age and, often, differential treatment relating to disability. The same is true in relation to social protection/ social advantages. This is by no means invariably the case, however, and there have been a number of judicial/ quasi-judicial determinations that age/ disability discrimination in these contexts is unlawful.



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Part IV

General exceptions

4.1 Introduction

There is relatively little information on the subject of general exceptions. Questions concerning such exceptions do not tend to arise where the regulation of discrimination takes the form of Constitutional provisions¹³³ and/or field-specific legislation¹³⁴ which provides for access to the relevant goods, services etc without discrimination. In such cases (as, for example, in **Luxembourg, Estonia** and **Germany**), “discrimination” tends to be understood as incorporating an absence of justification. Where protections take the form of legislation concerned specifically with discrimination (whether on single or multiple grounds), that legislation typically defines direct discrimination (at least broadly in line with the EU Directives) and prohibits such discrimination, subject either to specific exceptions or, less commonly, a general justification defence. Such a defence may apply across multiple regulated grounds or may be restricted to one or more (typically age).

4.2 General justification defences

One example of a general justification defence is provided by **Hungary’s** Act on Equal Treatment, which contains a general provision allowing the enforcement of other fundamental rights. Where the discrimination itself concerns fundamental rights, it may be justified only where it is absolutely necessary, suitable for achieving the aim and proportionate with the aim. Where the discrimination is not in connection with fundamental rights (as where it concerns access to services) it may be justified where it is objectively reasonable. There are no explicit exceptions for age or disability discrimination in access to goods or services and the Equal Treatment Authority has made a number of findings of discrimination in cases where financial services have been refused on grounds of age.¹³⁵ The general exception will, however, apply in individual cases. The Equal Treatment Act also provides exceptions to the prohibition on discrimination in access to goods and services where access to premises is restricted to a group defined by reference to protected characteristics in order to preserve traditions or maintain cultural and individual identity, where such restriction is overt and does not involve humiliation to those whose entry is restricted.

Most of **Finland’s** patchwork of Constitutional and statutory provisions allow general justification defences in respect of much direct discrimination (the Penal Code, which applies to goods and services, prohibits discrimination on a wide variety of grounds “without a justified reason”, while the Constitution prohibits direct and indirect discrimination on grounds of “sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person.”) **Portugal’s** Constitution provides that the law may only restrict rights, freedoms and guarantees in cases expressly provided for in the Constitution and that such restrictions shall be limited to those needed to safeguard other Constitutionally protected rights and interests, while the Civil Code states that, in case of conflict of rights, that which is considered to be of higher value must prevail. Except in the case of discrimination regulated by EU law the **Belgian** federal legislation operates an open justification defence which permits differences in treatment which are appropriate and necessary to realise a legitimate objective. A similar approach is adopted in the **Czech Republic**.

In **Romania** a general justification defence was applicable until December 2012 in respect of access to goods and services only. That defence has been removed but it is thought that a fresh justification defence may be implemented.

Ireland’s Equal Status Act contains broad general exemptions which apply to all grounds. Art 14(1) for example provides a sweeping general exception stipulating that no act is discriminatory where it is mandated by any other legislation. Art 14(2) permits positive action, and Article 15 provides a defence where a *bona fide* belief exists of the

¹³³ **Greece, FYR of Macedonia** and (except in relation to disability) **Cyprus, Iceland**, and **Liechtenstein**.

¹³⁴ **Estonia, Latvia, Poland, Portugal, Spain**, and **Turkey**.

¹³⁵ See, for example, case no. EBH 14/2007. See <http://www.egyenlobanasmod.hu/jogesetek/hu/14-2007.pdf>.

likelihood of criminal conduct ensuing or breach of licensing laws. **Luxembourg's** Constitution contains a general equality provision to the effect that all Luxembourgers are equal before the Law, which has been interpreted to prohibit only unjustified discrimination.¹³⁶ **Estonia's** Constitutional prohibitions on discrimination permit differential treatment which is suitable, necessary and proportionate to the achievement of a legitimate aim¹³⁷ and **Germany's** constitutional prohibitions on discrimination are thought to be subject to a broad justification defence. And in **Cyprus**, where disability alone of the relevant grounds is regulated by statute outside the employment sphere, no general justification defence is set out but a number of Supreme Court decisions have adopted a narrow, comparator-based approach to direct discrimination and have accepted "reasonable discrimination which must be done because of the special nature of things".¹³⁸

Swedish and **UK** law apply general justification defences in respect of age discrimination but not otherwise. **Dutch** law also provides a general justification in relation to age.

4.3 An alternative approach: detailed statutory exceptions

In **Lithuania** the Law on Equal Treatment does not permit justification of direct discrimination generally, but provides an exhaustive list of exceptions including (so far as relevant here) the following:

1. Objectively justified age-related restrictions;
2. Legal restrictions on participation in political activities;
3. Special healthcare measures intended to promote workplace integration;
4. Special temporary measures to promote equality in respect of the basis of age, sexual orientation, disability, religion, beliefs or convictions;
5. Special sports competitions for persons with disabilities;
6. Discrimination in admission to religious schools and other (broadly) educational institutions where such discrimination is necessary to maintain the ethos of the said organisations;
7. Discrimination in the provision of religious goods or services by religious bodies.

Differential treatment falling within categories 1-5 above must also be objectively justified by a legitimate aim, and be appropriate and necessary to meet that aim in order to qualify for the exception. **Croatia's** Anti-discrimination Act of 2009 does not contain any general justification defence but allows less favourable treatment where such is appropriate and necessary for the purposes of preserving health or preventing criminal acts, and provides an exception where the treatment concerns family relations and is intended to protect the rights and interests of children (e.g. an age limit for adoptive parents).

Bulgaria's broad legislative prohibition on discrimination does not contain any general justification defence but contains a provision allowing the setting of maximum ages for the award of degrees. And in addition to the general justification defence which applies to age discrimination, **Dutch** law also allows differential treatment (so far as relevant here):

1. whose aim is to place disabled persons in a privileged position in order to eliminate or reduce existing inequalities connected with disability and the discrimination is in reasonable proportion to that aim; or
2. which is based on generally binding regulations or on written or unwritten rules of international law.

¹³⁶ Constitutional Court Judgment 2/1998 of 13.11.98, Mémorial (Official Gazette) A - no. 102 of 8.12.98, p.2499.

¹³⁷ Supreme Court 7.6.11.

¹³⁸ *Cyprus Athletics Organisation v. Andreas Potamitis* (Supreme Court Case No. 111/2007, dated 18.06.2010) and *Antonios Aresti v. Cyprus Athletics Organisation* (Supreme Court Case No. 1406/2008 10.02.10). See also *Tassos Tratonikola v Cyprus*, Ref. 135/07, 13.04.11; and in *Costakis Charalambous v. Cyprus* Ref. no. 1334/2008, 19.09.11.

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The Dutch Equal Treatment Commission has, on a number of occasions, accepted that direct discrimination may be objectively justified when its prohibition would be absolutely unacceptable or completely irrational, even when it does not fall within a specific exception. In one case, for example, it permitted a measure which rejected gay male blood donors because of public health risks (Opinion 2007-85). In another case the Commission found that freedom of expression, as guaranteed in Article 10 ECHR, prevailed over the prohibition on discrimination on grounds of political convictions (Opinion 2011-69).

4.4 Exceptions concerned with religious autonomy

In addition to the **Lithuanian** provisions considered above, **Norway's** Anti-discrimination Act (which applies only in respect of religion and belief), provides an exception applicable other than in relation to employment to “actions and activities carried out under the auspices of religious and belief communities and enterprises with a religious or belief-related purpose, if the actions or activities are significant for the accomplishment of the community’s or the enterprise’s religious or belief-related purpose”. **Britain's** Equality Act provides exceptions applicable to religious schools as regards admission and curriculum and to the performance by organised religions of certain services provided for the purposes of the organised religion.

The **Dutch** General Equal Treatment Act provides, in addition to the exceptions listed above, an exception to the prohibition on discrimination which applies in respect of “legal relations within religious communities, independent sections or associations thereof and within other associations of a spiritual nature”. In 2010 the Cantonal Court of Arnhem/ Wageningen ruled that a building contractor had breached the penal provisions prohibiting discrimination in the course of professional activities by refusing to provide building services to a gay potential client.¹³⁹ It rejected the builder’s argument that the refusal was based on his religious beliefs, ruling that the legislator had balanced the competing rights in imposing the criminal prohibition on discrimination in this context. In May 2012 the Dutch Equal Treatment Commission ruled that a preference given to Baptists by a Baptist Church in relation to housing owned by the Church did not fall within the “religious communities” exception¹⁴⁰ which applied only when essentially religious affairs are at stake, as distinct from where (as here) a Church organisation took part in social and economic life (in particular, commercial activities). By contrast, the refusal of a company to produce goods of which it disapproved (the claimants wanted to have towels printed with “Gay Sports Nijmegen PINK Tournament 2009” by a company which refused on the basis that the work was inconsistent with its moral views) was found by the **Dutch** Equal Treatment Commission not to entail direct sexual orientation discrimination because the company was not obliged to offer goods which were equally useful to all.¹⁴¹

4.5 Implied exceptions to prohibitions on discrimination

Other justifications/ exceptions appear to be read into legislation in cases regardless of the absence of any relevant legislative provision. In 2005, for example, **France's** Administrative Supreme Court rejected a complaint by a woman denied access to the Consulate in Marrakech because she refused to remove her veil during a security check.¹⁴² Emphasis was placed by the Court on the competing interest of public order and the fleeting nature of the removal required.¹⁴³ By contrast, also in 2005 the-then national equality body HALDE considered complaints from turban wearing Sikhs who had been denied access to the Bank of France on security grounds.¹⁴⁴ The Security Directive on

¹³⁹ 9.9.10 LJN BN8113.

¹⁴⁰ 4.5.12 ETC Opinion 2012-84.

¹⁴¹ 9.3.10 Opinion 2010-32.

¹⁴² 7.12.05 no 264464.

¹⁴³ The European Court of Human Rights dismissed her subsequent application. ECtHR no 15585/06 8.3.08, EL MORSLI.

¹⁴⁴ 19.9.05 Deliberation no 2005-26.

which the bank relied provided that in case of “suspicion related to a person’s garments, the guard can ask a person to remove any head covering garment or accessory covering totally or partially a person’s face”. HALDE upheld the complaints, ruling that the security directive failed to distinguish between religious and non-religious garments and, in the absence of a law, disproportionately interfered with freedom of religion. The following year HALDE ruled that a Sikh man had been subject to unlawful discrimination when he was expelled from court because he was wearing a turban.¹⁴⁵ The Minister of Justice subsequently issued instructions to judiciary stressing the right to freedom of conscience and to appear before the court wearing religious garments, as long as they complied with the requirements of decency and public order.¹⁴⁶

The Administrative Supreme Court confirmed in 2010 that a headscarf-wearing woman was entitled to stand as a candidate for election, her appearance having no impact on the freedom of choice of electors,¹⁴⁷ but the same Court ruled in 2008 that the denial of French citizenship by marriage, on the ground of her radical religious practice, to a *burqa* wearing woman did not breach her freedom of religion.¹⁴⁸ The Court held that the *burqa* was incompatible with essential values of the French community, such as the principle of gender equality, and that the claimant did not meet the requirement of assimilation provided for by the Civil Code. And in October 2010 the Constitutional Council ruled that the Law forbidding covering of the face in the public space was reasonable and proportionate in pursuit of legitimate objectives including public safety and gender equality, though the restrictions could not be interpreted to regulate appearance in places of worship.¹⁴⁹

The *niqab* has featured in recent **Belgian** case-law, the legislative prohibition on the wearing of full-face coverings in the public space having been challenged, *inter alia*, as inconsistent with freedom of religion. In September 2012 the Police Tribunal at Verviers ruled that the imposition of fines of €25 on each of five women who had worn the *niqab* in public did not breach their religious freedom or right to non-discrimination under the Constitution or the ECHR because “sartorial freedom”, when it relies on a philosophic choice, is not absolute.¹⁵⁰ The conclusion rested on the finding that the wearing of the *niqab* by these particular women was the result of a personal approach, and not of a religious requirement, such that the provisions on freedom of religion were not regarded as applicable. The judge went on to rule, however, that the security argument invoked by the authorities to justify the banning of any face covering met the “necessity requirement” (proportionality test) imposed by the Constitution and the ECHR. The Judge expressed the view that the wearing of the *niqab* is not a practice compatible with gender equality and the principles of tolerance, respect for others and equality and non-discrimination in a democracy. In December 2012 the Constitutional Court rejected a challenge to the constitutionality of the legislative ban (the federal Anti-*burqa* Act),¹⁵¹ ruling that the aim of the legislation (public security, equality between women and men, and a certain conception of the “living together” in society) justified any impact it had on freedom of expression and religion, on private life and any disparate impact it had on Muslims. The Court did, as the French Constitutional Council had done, rule that the ban should not be interpreted to cover places of worship.

Public safety defences are not without their limits. In **France**, Paris’ Court of Appeal recently ruled that Easyjet’s refusal to allow mobility-impaired passengers to travel alone amounted to disability discrimination notwithstanding the entitlement provided by §4 of Regulation (EC) No 1107/2006 of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, which allows an Air carrier to refuse boarding “in

¹⁴⁵ 5.6.06 Deliberation no 2006-132.

¹⁴⁶ Note however that all head coverings must be removed for driving licence photographs by Ministerial order of the Minister of transport no 2005-80 of 6.12.00, a challenge to this being rejected by the ECtHR in *Singh v France* 13,11.08. See also *Singh v France* ECHR n° 25463/08, in which the ECtHR rejected a challenge to the prohibition on turban wearing in schools.

¹⁴⁷ 23.12.10 no 337899.

¹⁴⁸ 27 June 2008 *Mme Faiza A.* Decision No. 286798.

¹⁴⁹ 7.10.10, 2010-613.

¹⁵⁰ Police Tribunal of Verviers, 10.9.12, *X, X1, X2, X3 and X4 v. the municipality of Dison*, judgment no. 78 (09A113).

¹⁵¹ Judgment no. 145/2012 of 6 December 2012 of the Constitutional Court: *Belkacemi & Oussar & Ors v. The Federal State*.

order to meet applicable safety requirements established by international, Community or national law or in order to meet safety requirements established by the authority that issued the air operator's certificate to the air carrier concerned".¹⁵² The Court upheld the ruling of a lower court that Easyjet was not entitled to adopt a blanket policy, but was required to determine in each individual case whether a mobility impaired passenger could travel alone. Easyjet was fined 70 000€ and required to publish the decision in the newspaper *Le Monde*, a further fine of 25 000€ being imposed on a sub-contractor and each of three complainants being awarded 2000€ in damages.

4.6 Concluding remarks on exceptions

As elsewhere, the survey of the law in this section of the report illustrates a broad variety of approaches. What it does suggest, however, particularly when read in conjunction with the preceding section, is that many European states have managed to implement very broad prohibitions on discrimination on the relevant grounds while deploying general or targeted justification defences, or specific statutory exemptions, the purpose of which is to strike a balance between the competing interests at stake.

¹⁵² Paris Court of Appeal 12/01781, 5.2.13, *Gianmartini et al vs. Easyjet*.



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Part V Enforcement

5.1 Introduction

The discussion here, as in the previous part of the report, is necessarily limited because of the information on which this report is based. There is little or no evidence, for example, as to the burden of proof applicable to or the remedies available in respect of discrimination on the relevant grounds beyond the scope of employment, or the role of the national equality bodies in relation to such discrimination.

5.2 Effectiveness

Accessibility standards are particularly susceptible to problems of enforcement. In **Lithuania**, for example, building standards have no monitoring mechanisms or sanctions and are said to be largely ineffective except in the case of new builds. **Luxembourg's** accessibility requirements apply to schools and kindergartens, tourist sites, hospitals, religious buildings, prisons, train/bus stations, public administration buildings, banks, including parking places, toilets and telephone facilities but no sanctions are provided for in case of non compliance. Progress in **Portugal** and **Cyprus** is reported to be slow. In **Hungary**, where building accessibility requirements have been in place since the late 1990s under which all public buildings were required to be fully accessible by 2005, only an estimated 20% of such buildings were accessible by that date. And in **Turkey**, whose legislation requires that public buildings, public infrastructure and public places, and public and private transportation vehicles regulated by the municipalities are accessible to disabled persons by 7 July 2012, no sanctions are provided for failure to comply and progress has been very slow with even new builds failing to comply with the minimum standards for accessibility.

The effectiveness of duties of reasonable accommodation is sometimes also questionable. Remark was made in section 3.2.1.1 about educational practices in **Slovenia** and **Luxembourg** concerning disabled children. In **Lithuania**, although about 90% of disabled children are in mainstream schools, under-financing is a significant issue with only just over 20% of funds initially being allocated to a 2005-2008 government education programme for disabled people actually being provided. A lack of financial resources, lack of specialists in mainstream education institutions and lack of accessibility for physically disabled persons were identified as the main obstacles to successful integration by the Children's Rights Ombudsman in a 2006 report¹⁵³ and in 2008-2011 almost no funding was made available to any major social inclusion or anti-discrimination governmental programmes. Disabled students account for only 0.5 % of the total number and only a small number of higher education institutions are fully accessible.¹⁵⁴ A lack of available sanctions is mentioned in relation to discrimination by universities (other than as regards access) in **Austria** and in education and housing in **France**.

The **Slovakian** report states that "The most important barrier [to enforcement] is scepticism towards judicial proceedings and their outcomes, resulting from low trust in the judiciary in general but also from the lack of expertise of judges in the field of anti-discrimination, which also adds on another risk and barrier connected to the potential risk of losing – in particular fear that the person initiating the judicial proceedings would have to, in case of losing, pay the proceeding costs of the defendant. The delays in judicial proceedings also make the proceedings for persons injured by discrimination ineffective".

Further, while there are NGOs that can fill part of the gap left by the unavailability of legal aid, since 2011 such bodies have been unable (if the claim succeeds) to recover costs in respect of work done by them for the claimant which has not actually been paid for (possibly even if this has involved expenditure of funds by the NGO). This is by contrast with the normally applicable rules and "generates absurd situations of NGOs either being pushed into doing the expert

¹⁵³ *Neįgaliųjų vaikų situacija ir problemos Lietuvoje, Vaiko teisių apsaugos kontrolieriaus informacinis biuletenis* Nr. 8, 2006.

¹⁵⁴ The Equal Opportunities Ombudsperson annual report 2010.

work comprising legal representation for free, or having to refuse persons affected by discrimination just because lack of capacities and resources and no chance of having the costs of legal representation reimbursed later”.

5.3 Judicial enforcement: the problem of costs

What is also apparent from the national reports is the reference made in a great many (including those of **Luxembourg, Malta, Slovakia, Norway, Poland**, the **UK, Portugal**, the **Czech Republic, Ireland, Greece, France, Croatia, Cyprus, Sweden**) to the dissuasive effect of legal expenses, complex law and procedure, delays and rules of procedure which impose liability on an unsuccessful claimant for the legal expenses of the other party. In the **Czech Republic** this is particularly problematic as costs are based on the value of the dispute regardless of the actual sums expended.

In **Luxembourg**, as in **Malta, Portugal** and the **Netherlands** state funding may be available but court fees are set to increase in the Netherlands which is likely further to deter prospective litigants. Elsewhere, as in **Poland, Cyprus**, the **Czech Republic, Croatia** and **Slovakia**, legal aid is inadequate or unavailable. The **Polish** national report, as well as those of **Slovakia** and **Cyprus**, mentions practical difficulties of access to court for disabled potential litigants. In **Ireland** short time limits for the filing of claims are regarded as problematic particularly where claims involve harassment, or where claimants have language difficulties. And, whereas costs are not awardable by or legal representation necessary before the Equality Tribunal, some complaints (specifically in relation to licensed premises) must be brought before the civil courts to which appeals from the Tribunal also proceed. Further, the Irish national report suggests that the open nature of hearings in the civil courts (as distinct from before the Equality Tribunal) can operate as a barrier to claimants in disability and sexual orientation cases in particular.

It appears that relatively few claims get to court. In **Norway**, for example, a 2008 study reported that only 51 cases had been brought in the 30 years to 2008 during which discrimination had been regulated by law.¹⁵⁵ A significant increase in discrimination cases is reported since 2008 in the lower instance courts with a significant expansion of relevant legislation but numbers remain very low by comparison with the large numbers of cases brought before the Equality Ombud, a fact attributed in part to the risks and costs involved in litigation, and the difficulties in obtaining free legal aid in discrimination cases. In **Sweden**, similarly, relatively few cases get to court but many more are settled prior to that point.

5.4 Alternative means of enforcement

A number of states provide alternative methods of enforcement. **Norway's** Equality Ombud and the Equality Tribunal (to which appeal from the Ombud may be brought) report that more than 95% of all cases on discrimination are handled by them. The position in **Sweden** is similar. In both countries the Ombudsman has a duty to investigate complaints of discrimination, to provide advice and – at the Ombudsman's discretion – to represent the alleged victim of discrimination in settlement proceedings or, ultimately, in a court of law.

In **Lithuania**, where lawyers are expensive and legal aid relatively limited, there is an Equal Opportunities Ombudsperson to whom there is a right to complain about discrimination according to a simple and relatively inexpensive procedure. In the **Netherlands**, too, claimants may reduce some of the difficulties associated with litigation by bringing their complaint to the Equal Treatment Commission, a semi-judicial body which does not charge fees, at which legal representation is unnecessary, and which renders non-binding Opinions. The importance of such

¹⁵⁵ McClimans, E. *Rettspraksis om diskrimineringslovgivning* (Court cases concerning discrimination legislation), Diskriminerings-slovutvalget, 2008.

Opinions is that, if they favour the claimant, they increase the prospects of success in any subsequent litigation, and therefore of settlement on favourable terms. The ETC may also bring legal action with a view to obtaining injunctive relief against on-going discrimination, but has yet to make use of this power.

Romania's National Council for Combatting Discrimination (NCCD) has the power to issue fines and also makes recommendations and warnings where discrimination is found. It dealt with 465 complaints in 2011, down from a high point of 836 and 837 in 2007 and 2008 respectively. In **Slovenia**, the Advocate of the Principle of Equality provides a free and informal procedure which results in the issue of an opinion with recommendations which, if not followed, may be referred to the relevant inspectorate. Complaints concerning public bodies may also be brought to the Human Rights Ombudsman, petitioning the latter to bring proceedings on the alleged victim's behalf. The Ombudsman has the authority to obtain, from the state and other bodies, all information without regard to its confidentiality, to perform investigations and in this capacity to call witnesses for questioning. In **Cyprus** the Equality Body (Ombudsperson) can investigate complaints and issue decisions, and may impose fines, but in practice does not do so and has yet to issue a binding decision (as distinct from attempting to settle matters through "diplomacy" and mediation). The Ombudsperson may not award compensation.

A significant shortcoming of the Ombud/equality body approach tends to be their inability to award compensation. In **Norway**, for example, neither the Equality Ombud nor the Equality Tribunal has the power to require the payment of compensation though the Tribunal's decisions are legally binding on private bodies. In **Lithuania** the decisions of the Ombudsman are binding subject to their being overturned by a court, but do not involve the award of compensation. In the **Netherlands**, too, the Equal Treatment Commission cannot award compensation.

5.5 Remedies

Even when cases get to court the available remedies may be low. In the **Netherlands** it is reported that, even when claimants succeed in litigation before the courts, monetary compensation is rare. **Latvia** reports low levels of cases and low levels of compensation (average compensation for injury to feelings standing at less than 1500€). In the **Czech Republic** compensation is rarely awarded and is generally small in amount while in **Denmark** fines are also typically low. The low level of compensation available in cases where discriminated-against persons must themselves bring legal action is likely to be a particular deterrent against such action where that action carries significant risks of costs. The absence of discussion of other countries should not be taken to indicate that more generous levels of compensation pertain. It is rather indicative of a general lack of information available.

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Conclusion

It is clear from the foregoing that there is extensive regulation of discrimination on the relevant grounds beyond the context of employment both across the EU and in the other countries surveyed. That regulation frequently, though not invariably, consists in anti-discrimination legislation covering the relevant grounds (and sometimes others) across a wide material scope. In other cases regulation is achieved by some combination of detailed legislation and/or Constitutional provisions and/or field specific legislation. Of the relevant grounds disability is probably the most comprehensively covered at this time, with the prohibitions on such discrimination regularly including a duty of accommodation extending beyond the employment sphere.¹⁵⁶ The least regulated ground is probably age but there is not a huge disparity between this and the grounds of religion/ belief and sexual orientation.

It is not easy to generalise as to where the gaps exist but it can be said that, in those states which lack relatively comprehensive anti-discrimination legislation, the patchwork of Constitutional provisions and field specific legislation, with or without specific statutory prohibitions on (for example) disability discrimination, tend to lack clarity as regards definitions of discrimination, precise material scope, applicable exceptions and enforcement mechanisms which are more characteristic of detailed anti-discrimination legislation. The very nature of the legal provisions has implications for ease of use and, accordingly, for enforcement and effectiveness.

General themes which emerge from this report include the particular difficulties of enforcement which seem to arise outside the sphere of employment. Perhaps because of the absence of enforcement mechanisms such as Labour Inspectorates which might play a role within the sphere of employment, perhaps because the central focus of trade unions in terms of the enforcement of rights is likely to be on employment-related matters, and/or perhaps because the likely measure of damages is likely to be significantly less where the discrimination relates to other fields than employment, the gap between legal and effective rights appears particularly acute outside the scope of employment.

Other themes which emerge and which are within the scope of this report include the role of the judiciary: in a number of cases national judges appear to have taken concepts such as reasonable accommodation which have been developed in the employment sphere, and applied them outside that sphere even absent any clear legislative basis for so doing. This suggests that concepts such as “discrimination” (utilised, for example, as a general Constitutional term) can be imbued with understandings set out in legislation implementing EU law and developed in the application of such law. In other cases the judiciary have been inclined to carve out exceptions to prohibitions on discrimination even where the legislation at issue did not appear to provide them. The nature of such exceptions is likely to vary over time. At present, and in a number of EU states, the question of the headscarf and the relationship between religious equality, on the one hand, and countervailing concerns about public security, community cohesion and the perceived requirements of gender equality, on the other, loom large. While the approach in **France** and **Belgium** has been to impose bans on full-face coverings being worn in the public sphere, **Sweden** has moved in the opposite direction by restricting even the power of schools to ban such religious dress. This is one example which brings home the very real differences of legal and cultural approaches which prevail across the 33 states.

¹⁵⁶ Sex is not considered in any detail because of the implementation of Council Directive 2004/113/EEC except in relation to education which is beyond the material scope of that Directive.

ANNEX

The state of play across the 33 states

Note that “A” refers to age, “D” to disability, “R/B” to religion/ belief and “SO” to sexual orientation
“GJD” refers to a general justification defence

	Social Protection	Social Advantages	Education	Goods & Services	Housing	Exceptions	Reasonable accommodation of disability beyond employment
Austria	A, D, R/B, SO ¹	A, D, R/B, SO ¹	A, D, R/B, SO ¹	A, D, R/B, SO ¹	A, D, R/B, SO ¹		Yes
Belgium	A, D, R/B, SO ²	A, D, R/B, SO ²	A, D, R/B, SO ²	A, D, R/B, SO ²	A, D, R/B, SO ²	GJD	Yes
Bulgaria	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	Specific defences	Yes ³
Croatia	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	Specific defences	Yes
Cyprus	A, D, R/B, SO ⁴	A, D, R/B, SO ⁴	A, D, R/B, SO ⁴	A, D, R/B, SO ⁴	A, D, R/B, SO ⁴	GJD ⁵	Yes
Czech Republic	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	GJD	Yes ⁶
Denmark	No	No	R/B, SO	R/B, SO	R/B, SO		No
Estonia	A, D, R/B, SO ⁷	A, D, R/B, SO ⁷	A, D, R/B, SO ⁷	A, D, R/B, SO ⁷	A, D, R/B, SO ⁷	GJD	No
Finland	A, D, R/B, SO ⁸	A, D, R/B, SO ⁸	A, D, R/B, SO ⁸	A, D, R/B, SO ⁸	A, D, R/B, SO ⁸	GJD	Yes ⁹
France	Uncertain	A, D, R/B, SO ¹⁰	Uncertain	A, D, R/B, SO	A, D, R/B, SO		Yes
FYR of Macedonia	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO		Yes
Germany	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO ¹¹	A, D, R/B, SO ¹²	A, D, R/B, SO ¹³		No ¹⁴
Greece							No
Hungary	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	GJD	Yes ³

¹ This by reason of the combination of federal and regional provisions though there are some gaps as regards social protection and advantages at regional level.

² This by reason of the combination of federal and regional/ provincial provisions.

³ Education only.

⁴ This by reason of Protocol 12 ECHR which is generally applicable.

⁵ This a question of judicial interpretation.

⁶ Public services only.

⁷ Note that this is the result of horizontally effective Constitutional provisions.

⁸ This the result of a combination of field-specific provisions, specific disability provisions and Constitutional provisions.

⁹ Higher Education only though some specific duties apply also to schools.

¹⁰ As regards contributory benefits only. Uncertain as regards non-contributory benefits.

¹¹ Only education whose provision is covered by the Constitution (because it is provided by the state) or which is subject to standard contractual terms is covered. In the latter case discrimination on grounds of belief as distinct from religion is not regulated.

¹² Only goods and services whose provision is covered by the Constitution (because they are provided by the state) or which are subject to standard contractual terms are covered. In the latter case discrimination on grounds of belief as distinct from religion is not regulated.

¹³ Only housing whose provision is covered by the Constitution (because it is provided by the state) or which is subject to standard contractual terms are covered. In the latter case discrimination on grounds of belief as distinct from religion is not regulated.

¹⁴ But specific duties of accommodation apply.

¹⁵ Coverage uncertain.

¹⁶ Education, health and social services but the courts have interpreted constitutional provisions to broader effect.

¹⁷ Uncertain as regards social security and healthcare.

	Social Protection	Social Advantages	Education	Goods & Services	Housing	Exceptions	Reasonable accommodation of disability beyond employment
Iceland			A, D, R/B, SO	R/B, SO ¹⁵			Yes ¹⁶
Ireland	A, D, R/B, SO ¹⁷	Uncertain	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	Broad defences	Yes
Italy	R/B, D	R/B, D	R/B, D ¹⁸	R/B, D ¹⁸	R/B, D ¹⁸		Yes ¹⁹
Latvia	A, R/B ²⁰ , D	A, R/B ²⁰ , D	R/B, D ²¹	D	D		Yes ¹⁹
Liechtenstein							Yes
Lithuania	Uncertain	Uncertain	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	Specific defences	Yes
Luxembourg	A, D, R/B, SO ²²	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO		Yes ²³
Malta			D				No
The Netherlands	R/B, SO ²⁴	R/B, SO ²⁵	R/B, SO, D ²⁶	R/B, SO ²⁷	R/B, SO, D ²⁶	GJD (age) and specific defences	Yes ²⁸
Norway	R/B, D	R/B, D	R/B, D	R/B, D	R/B, D	Specific defences	Yes
Poland							Yes ¹⁹
Portugal	A, D, R/B, SO ²⁹	A, D, R/B, SO ²⁹	A, D, R/B, SO ²⁹	A, D, R/B, SO ²⁹	A, D, R/B, SO ²⁹	GJD	No ³⁰
Romania	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO		Yes ¹⁹
Slovakia	A, D, R/B, SO	A, D, R/B, SO ³¹	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO		Yes
Slovenia	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO		Yes
Spain	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO				Yes
Sweden	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	A, D, R/B, SO	GJD (age)	Yes ³²
Turkey	R/B	R/B	D, R/B	D, R/B ³³			No ³⁴
UK	A ³⁵ , D, R/B, SO	A ³⁵ , D, R/B, SO	A ³⁵ , D, R/B, SO	A ³⁵ , D, R/B, SO	A ³⁵ , D, R/B, SO	GJD (age) and specific defences	Yes

¹⁸ Age and sexual orientation possibly also covered by general rules.

¹⁹ As a result of judicial decisions.

²⁰ Age and religion/ belief where the service is publicly provided. Disability is covered and there is uncertainty as regards sexual orientation.

²¹ There is some uncertainty as regards disability.

²² This does not extend to payments under state schemes.

²³ Schools only.

²⁴ Social services and healthcare only except insofar as covered by the Constitution. Age and disability covered only by the general Constitutional prohibition on discrimination on open-ended grounds.

²⁵ Cultural affairs only except insofar as covered by the Constitution. Age and disability covered only by the general Constitutional prohibition on discrimination on open-ended grounds.

²⁶ Age covered only by the general Constitutional prohibition on discrimination on open-ended grounds.

²⁷ Age and disability covered only by the general Constitutional prohibition on discrimination on open-ended grounds.

²⁸ Education and housing.

²⁹ This the result of a combination of field-specific provisions, specific disability provisions and Constitutional provisions which may have horizontal effect.

³⁰ But there is a right to some positive measures.

³¹ Slovakia's prohibitions on discrimination on all these grounds are thought to apply in relation to social advantages though this is not certain.

³² Higher Education only.

³³ Possibly also age and sexual orientation.

³⁴ But there is a right to some positive measures in education.

³⁵ Not Northern Ireland.

European Commission

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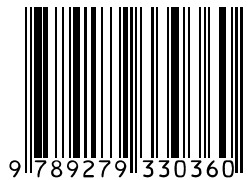
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