

Implementation of EU anti-discrimination law in the Member States: a comparative approach

Ten years have passed since the adoption of the EU Anti-Discrimination Directives, landmarks in the EU for the promotion and protection of equality and non-discrimination in the EU.

The degree of implementation varies greatly between countries.

Purpose of the presentation is to give a general overview and highlight some specific issues of concerns/good practices relating to the state of implementation in the EU.

EU Anti-Discrimination Directives

- Directives 2000/43/EC Racial Equality Directive (Racial and ethnic origin for employment, education, social protection and social advantages, goods and services including housing)
- Directive 2000/78/EC Employment Equality Directive (Age, disability, sexual orientation, religion or belief in employment)

Transposition process

- 2003 date of transposition
- 1 January 2004 for EU 10
- 1 January 2007 for Bulgaria and Romania
- 2011 transposition in all countries but still some gaps (incorrect/insufficient transposition)
- Requirement to align with the EU *Acquis* for candidate countries (Croatia, FYROM, Iceland, Montenegro, Turkey)

Main EU requirements

- Implementation of the equal treatment principle

Foreword:

All EU Member States have included the general principle of equal treatment or specific grounds of discrimination either in their Constitution (except the UK which lacks a written constitution) and/or in their national anti-discrimination legislation.

A number of Member States such as Belgium, Bulgaria, Cyprus, Hungary, Poland, Romania, Spain, and Sweden chose not to restrict new anti-discrimination laws to the grounds found within the two Directives and have opted for a broader list of prohibited grounds (such as nationality which is explicitly not included in the scope of the Directives, health condition, color, language, marital status).

Concerning the candidate countries, age and sexual orientation are not explicitly mentioned in the legislation in Turkey and while the new Anti-Discrimination Act in FYROM covers extra grounds not provided for in the Directives, it does not include sexual orientation.

The Racial Equality Directive and the Employment Equality Directive require Member States to prohibit discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation. The Directives do not contain any definition of these grounds.

I. Grounds

1. Racial or ethnic origin

Definition: some countries have taken the view that including the terms ‘race’ or ‘racial origin’ in anti-discrimination legislation reinforces the perception that humans can be distinguished according to ‘race’.

Austria rejects the idea of separate races and therefore the notion of ‘race’ has been removed from legal texts to be replaced with ‘ethnic affiliation’. Similarly, Hungary refers to ‘racial affiliation’ and ‘belonging to an ethnic minority’. In Germany, vivid criticisms and opposition have arisen for the same reasons. In France, various legal provisions refer to ‘real or assumed’ (*vraie ou supposée*) race.

An important area of ambiguity in the Racial Equality Directive is the extent to which characteristics such as colour, national origin, membership of a national minority, language or social origin fall within the scope of ‘racial or ethnic origin’. Also, the boundary between ethnic origin and religion is also unclear (important with regard the scope of application of the two directives which differs).

Give examples: NL – possibility to challenge discrimination against Jews and Muslims perceived as racial discrimination. In the UK, discrimination against Jews and Sikhs considered to be ethnic discrimination. For obvious historical reasons, in DE anti-semitism constitutes racial discrimination.

Problem of implementation of the Racial Equality Directive in all fields covered by the Directive: In Latvia and Poland, not implemented outside the workplace (although a new comprehensive anti-discrimination legislation is foreseen to be adopted this year in Poland to resolve the breach of EU law). The new law however takes a very minimalistic approach and only implements the minimum required standards.

Equality body: All states, except Poland and Turkey, have set up such an equality body competent for racial/ethnic discrimination. The Czech Republic and Spain have both put their equality bodies in place during the course of 2009 (but a new equality body, the Authority for the equal treatment and non-discrimination, more efficient and with more powers, is foreseen in the new law). In FYR of Macedonia, the new Anti-Discrimination Law envisages the establishment of a Commission for Protection from Discrimination in 2011.

2. Religion or belief

Definition: no Member state has a definition fixed in the law with regard to religion or belief. NL includes “philosophy of life” into the definition, giving a broad interpretation of the concept. In Austria, the explanatory notes for the Federal Equal Treatment Act state that the ‘Framework Directive’ states that the terms religion and belief must be interpreted broadly. Matter of interpretation by national courts or some countries provide further guidance in accompanying explanatory notes to legislation, such as in Belgium, France and Germany.

Implementation of the provisions of the Employment Equality Directive, controversies relate to the exceptions provided for organised religions (e.g. churches) and organisations with an ethos based on religion or belief (e.g. religious schools). The Directive provides a rather complex exception in Article 4(2) which allows employment requirements on the basis of religion or belief acceptable. Some states have provided exceptions that go beyond the strict terms of the Directive (e.g. Hungary and Croatia) or which remain ambiguous (e.g. Greece, Ireland, Italy, Romania and the UK). France, Portugal and Sweden did not adopt any exception clause for employers with an ethos based on religion or belief. An infringement procedure has been initiated against the Netherlands for incorrect implementation of that

provision, as the Dutch implementing provision does not correspond to the wording of the Directive.

Case law: gradual increase in case law arising since the adoption of the Directives stemming from controversy over requirements on dress codes and religious symbols (Belgium, Denmark, France, Germany, Greece, Italy, the Netherlands, Sweden and the United Kingdom).

3. Disability

Definition: provided by the European Court of Justice in *Chacon Navas*.

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

The majority of national legislation contains many examples of definitions of disability (e.g. Austria, Belgium, Cyprus, the Czech Republic, Estonia, Germany, Luxembourg, Portugal, Slovakia, Spain Sweden, and FYR of Macedonia) but stem from the context of social security legislation rather than anti-discrimination law.

Conformity of all these definitions with the *Navas* definition is yet to be checked by national courts, when appropriate. Lithuania does not limit material scope to professional life as reference is made to public life. Countries including Estonia, Hungary and Malta go beyond the employment field by referring to everyday activities or all aspects of social life and, likewise, Sweden does not seem to restrict the scope of relevant impairment to professional activities only. Danish law does not contain a definition of ‘disability’ and the term used in the Prohibition of Discrimination in the Labour Market Act is ‘handicap’ which seems to be narrower than that established in *Chacón Navas*.

Implementation: Key concept in the area of disability discrimination is ‘reasonable accommodation’ and duty imposed on employers to provide for reasonable accommodation. Outside the field of employment, this duty is not absolute.

The following states have legal provisions that approximate to the reasonable accommodation duty found within the Directive: Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Spain, Sweden, the United Kingdom. These vary considerably from states which provide a basic duty with little elaboration on how this should be implemented (e.g. Lithuania) or how the disproportionate burden must be assessed (e.g. Latvia, Sweden), to states with more extensive guidance on its practical application (e.g. the United Kingdom).

The concept of reasonable accommodation duty has not been included in national legislation in Italy, Poland, and Turkey. In Hungary, the duty of reasonable accommodation has not entirely been implemented. In France, the scope of the duty of reasonable accommodation remains incomplete as the obligation is limited to those who are already officially recognised as disabled workers.

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

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

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

4. Sexual orientation

Definition: very few states have defined sexual orientation within anti-discrimination legislation. Generally defined as 'heterosexual, homosexual or bisexual orientation' (e.g. Bulgaria, Germany, Ireland and Sweden). The 2006 German General Law on Equal Treatment adopts the term 'sexual identity' while the Federal German Constitutional Court refers to both sexual identity and sexual orientation, going beyond sexual orientation and encompassing protection against discrimination for transsexual people. Similarly, the new legislation to be adopted in Spain will include "sexual identity".

In France and the Netherlands, the concept of sexual orientation has not been interpreted in a way that covers transsexuality and transvestism, in contrast with Denmark. Discrimination on these grounds is regarded as sex discrimination. Anti-discrimination provisions in FYR of Macedonia and Turkey do not cover sexual orientation as a protected ground.

Equality Body: 18 single Equality Body competent to deal with all discrimination grounds (Belgium, Bulgaria, Denmark, Germany, Greece, France, Ireland, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, the Netherlands, Austria, Romania, Slovenia, Slovakia and the United Kingdom). Estonia, Italy

Only Sweden has had a body specifically tasked to deal with discrimination on grounds of sexual orientation, namely *HomO*, one of four Equality Ombudspersons. But since 1 January 2009 the Ombudsman against Discrimination on grounds of Sexual Orientation and the other Ombudsmen against discrimination have been merged into the Swedish Equality Ombudsman. The new Ombudsman will base its activities on the new Discrimination Act that will replace the existing seven pieces of legislation on discrimination.

Implementation: sexual orientation is a very sensitive issue, in particular regarding the exceptions provided for with the ethos organisations (employers may be reluctant to hire a homosexual for religious reasons). Provokes problems in terms of family-related benefits.

5. Age

Definition: age is generally assumed to be an objective characteristic with a natural meaning and hence it is not defined in national legislation.

Implementation: ECJ's decisions with *Mangold* and *Küçükdeveci* will greatly affect national implementation, particularly as the ECJ ruled that prohibition of discrimination on the grounds of age must be considered as a general principle of EU law to which the Directive merely gives expression.

Case law: Preliminary rulings referred to the ECJ by national courts concern mainly age cases (9 judgements out of 13 in total since the adoption of the Directive).

Implementation: Many countries have used the exception clause set out in Article 6(1) which states: *'Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.'*

Examples of differences which could be allowed, including the fixing of minimum conditions of age, professional experience or seniority for access to employment are provided in the Directive.

Austria, Cyprus, Greece, Malta, Portugal and Slovakia. Meanwhile, Finland, France, Germany, Ireland, Italy, Luxembourg, Romania, Slovenia and the United Kingdom have provisions that resemble all or part of Article 6.

6. Multiple discrimination

Multiple discrimination is a relatively new phenomenon in European equal treatment and anti-discrimination debates. In Europe, the tendency is to endorse a “one-ground” approach. The preamble of the Council proposal for a framework directive makes a first explicit reference to multiple discrimination, as an important issue to be addressed by all Member states.

The Equal Treatment Commission (**the Netherlands**), the Equality Authority (**Ireland**), the National Council for Combating Discrimination (**Romania**) and the **Danish** Institute for Human Rights prioritise multiplication discrimination in their work. In **Romanian** legislation it is considered an aggravating circumstance if a person is discriminated against on more than one ground.

II. Fields

Scopes of the two directives are not aligned with each other. Proposal for a framework directive covering age, sexual orientation, disability, religion or belief outside the workplace, blocked at the Council level due to reticence of some Member states (mainly DE).

A number of states provide the same protection also for other grounds of discrimination, if not all grounds, and thus go beyond the requirements of the Directives, for example:

- **Austrian:** for federal legislation the distinction between the scopes of the two Directives is maintained, but in some provincial legislation it is levelled up.
- **Denmark** extends the prohibition of discrimination outside employment to religion or belief and sexual orientation.
- **Hungarian** law has practically unlimited material scope, treating all grounds of discrimination equally.
- In **Slovenia**, protection is enjoyed with regard to all of the Directives’ grounds and other grounds against discrimination in the fields of social protection, social advantages, education and goods and services.
- **Romanian** anti-discrimination legislation applies to a large number of criteria going beyond those provided by the Directives, and the scope of the Anti-Discrimination Law is applicable to areas beyond those spelled out in the Directives.

III. Concepts of discrimination

Considerable progress in this area. In most cases, the definitions provided in national legislation are very similar to the definitions found in the Directives (or interpretation given by national courts).

1. Direct discrimination

Definition: all countries, except Turkey, have adopted legislation that reflects closely the definition of direct discrimination found within the Directives. There are several common elements:

- the need to demonstrate less favourable treatment;
- a requirement for a comparison with another person in a similar situation but with different characteristics (e.g. ethnic origin, religion, sexual orientation);

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

These elements can be generally found in legislation in Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, France (although hypothetical comparison is not foreseen, which is in breach of the Directives), Finland, Germany, Greece, Italy, Ireland, Latvia, Lithuania, Luxembourg, Malta, Poland (although the erroneous definition of the comparator limits the scope of protection), Portugal, Slovakia, Slovenia, Sweden, the United Kingdom, Croatia and FYROM.

2. Indirect discrimination

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

3. Harassment

Definition: Harassment is defined in the Directives as “*unwanted conduct related to racial or ethnic origin, religion or belief, disability, age, or sexual orientation with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment*”.

Implementation: majority of states have adopted definitions of harassment that appear similar to that contained in the Directives: Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovenia, the United Kingdom, Croatia and FYROM. In Turkey, only harassment that constitutes defamation is punishable under Criminal Law.

The Directives do not provide specific rules on how to determine which conducts constitute harassment. Several states have sought to clarify this in national legislation such as under Slovakia’s Anti-Discrimination Act harassment means conduct which results in or may result in creating an intimidating, unfriendly, shameful, humiliating, degrading or offensive environment and which has or may have the purpose or effect to violate a freedom or human dignity. In the Equal Treatment of Persons Order in Malta, harassment refers to any unwelcome act, request or conduct, including spoken words, gestures or the production, display or circulation of written words, pictures or other material that any person can be subjected to. Finland provides a wider definition as it covers the violation of physical integrity in addition to the violation of dignity and includes not only individuals but also groups.

Another area left open by the Directives is the responsibility of the employer for acts of harassment by other workers or by third parties such as customers. In many states, employers can be held liable for the actions of their workers to varying degrees. Some Member States have chosen to place a specific duty on employers to take action to prevent and redress harassment in the workplace. For example, the 2006 German General Act on Equal Treatment places employers under a legal duty to prevent discrimination occurring in the workplace. This includes a duty to protect employees from discrimination by third parties. Ireland also prohibits harassment by an employer, a colleague, a client, customer or other business contact of the employer.

4. Instructions to discriminate

Definition: the Directives contain a provision stating that ‘an instruction to discriminate (...) shall be deemed to be discrimination’. A similar provision has been included in the national legislation of the great majority of EU Member states. Under Bulgarian and Croatian law, only intentional instruction to discriminate is regarded as discrimination.

IV Shift in burden of proof

Definition: Imposes a shift to the respondent who must prove that there has been no breach of the principle of equal treatment.

Implementation: Poland does not transpose the shift beyond employment cases. In Latvia the shift of the burden of proof applies to employment, natural persons who are economic operators and access to goods and services

V. Protection against victimisation

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

Implementation: there is still a major inconsistency with this principle of protection against victimisation in a number of states where there is no protection in the areas outside employment protected by the Racial Equality Directive (Latvia, Luxembourg, Poland and Spain). New legislation to be adopted this year in Poland and Spain will however fill the gap bringing these countries to comply with EU law.

VI. Legal standing

Article 7(2) of Directive 2000/43 and Article 9(2) of Directive 2000/78 provide that *‘Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of [these Directives] are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under [these Directives].’*

Member States have some discretion as to how this clause is implemented.

- In UK, associations with sufficient interest may bring judicial review actions under administrative law against public authorities, even if they have not themselves been the victims of a wrongful act.
- In Bulgaria, public interest NGOs and trade unions may join proceedings brought by a victim in their support, and do not formally need the complainant’s consent for this, or else they may represent complainants, for which consent is necessary. Greek procedural law also requires the person’s written consent.
- In Germany and in Luxembourg anti-discrimination associations are entitled to support claimants in court proceedings, provided that they fulfil certain criteria (regarding number of years of existence, membership, etc.).

Few states allow associations to engage in proceedings ‘on behalf of’ victims of discrimination (e.g. ES, LV, LT, Romania).

VII. Access to justice and sanctions

Infringements of anti-discrimination laws must be met with effective, proportionate and dissuasive sanctions, which may include compensation being paid to the victim (Article 15 Racial Equality Directive, Article 17 Employment Equality Directive).

In practice, a wide range of possible remedies exist:

- civil, criminal, or administrative remedies)
- punitive or non-punitive character
- backward-looking or forward-looking (the latter meaning remedies seeking to adjust future behaviour)
- individual/micro or group/macro level

They can be available through various, possibly complementary, enforcement processes (administrative, industrial relations and judicial processes).

There is no single national enforcement system appears to be truly all-encompassing. Essentially, they are all mostly based on an individualistic and remedial – rather than a preventative – approach.

In some Member States the specialised body is empowered to issue sanctions in cases where they have found discrimination (e.g. CY, BG).

VIII. Establishment of a national specialised body to promote equal treatment

Definition: Equality bodies aim at promoting equal treatment on grounds of racial or ethnic origin (Article 13 Racial Equality Directive):

Implementation: There is a general convergence towards the model of a single Equality Body competent to deal with all discrimination grounds. Such model is already in place in 18 Member States (Belgium, Bulgaria, Denmark, Germany, Greece, France, Ireland, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, the Netherlands, Austria, Romania, Slovenia, Slovakia and the United Kingdom).

PL has no equality body (but new law to be passed to resolve the situation). Spain's equality body entered into function in September 2009 only and the new law is going to set up a new Authority for discrimination and equality that is meant to be one of the strongest in Europe (this is according to Lorenzo).

Functions:

- a) provide independent assistance to victims of discrimination in pursuing their complaints about discrimination,

Some specialised bodies provide assistance in the form of support in taking legal action – the Belgian, Finnish, Hungarian, Irish, Italian, Slovak, Swedish, British, Northern Irish and Croatian bodies can do this.

Others give their – usually non-binding – opinion on complaints submitted to them, e.g. the Austrian and Dutch Equal Treatment Commissions, the Danish Board of Equal Treatment, the Hungarian Equal Treatment Authority, the Latvian Ombudsman's Office, the Greek Ombudsman and Equal Treatment Committee, and the Slovenian Advocate of the Principle of Equality. Such proceedings do not preclude the victim from subsequently taking legal action before the courts with a view to obtaining a binding remedy.

- b) conduct independent surveys concerning discrimination, and

- c) publish independent reports and recommendations on any issue relating to such discrimination.

A number of specialised bodies – e.g. those in Austria, Bulgaria, Cyprus, France, Hungary, Ireland, Lithuania, Romania and Sweden – can investigate complaints of discrimination.

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

- The **Belgian** Centre for Equal Opportunities and Opposition to Racism has the power to take legal action in the public interest.
- The **French** High Authority has the right to seek permission to submit its observations on civil, administrative and criminal matters.
- The **Dutch** Equal Treatment Commission has the power to advise organisations (including governmental bodies) whether their employment practices contravene non-discrimination law.
- The **Hungarian** Equal Treatment Authority may initiate an *actio popularis* with a view to protecting the rights of persons and groups whose rights have been violated.

Main concerns relate to the absence of independence (Italy, Spain), lack of visibility (Austria) and cuts in funding due to the recession, affecting the equality bodies' effective work (e.g. Ireland, Latvia and Romania).

IX. Positive action

22 countries have introduced positive action measures Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, Finland, France, Germany Greece, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the United Kingdom.

Disability is the ground for which there are probably most positive action measures already in place. These can be found in the great majority of countries. There is a quota system for the employment of disabled persons in Austria, Belgium (mostly public sector only), Bulgaria, Cyprus (only in the public sector), the Czech Republic, France, Germany, Greece, Italy, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovenia, Spain.

With regard to the promotion of equality, a number of states have introduced legal duties to promote equality. In some cases, there are broad obligations to advance equality in national constitutions (Greece, Spain). In the United Kingdom for example, national legislation includes detailed obligations for public authorities to pay 'due regard' to the need to promote equality on the grounds of race, disability and gender. There is however a gap between the law and reality as the Government has announced that no executing measure to the principle of 'due regard' will be adopted in the new 2010 Equality Act.

X. Dissemination of information and awareness-raising

Dissemination of information: due to vagueness of the Directives' provisions, very little has been done for implementation. Impression prevails that there is an insufficient implementation in at least Bulgaria, Cyprus, Estonia, Greece, Latvia, Luxembourg, Poland, Slovenia, Spain, Italy and Portugal. More generally, it seems that the duty to disseminate information and establish dialogue mechanisms is not a high priority at the national level.

XI. A step further to implementation: effective enforcement and access to justice

Implementation of the Directives has significantly enhanced protection from discrimination in the EU but problems of effective enforcement and access to justice remain the most pressing issues.

Important role of the national courts for effective implementation and interpretation of national legislation but, gaps to be filled:

- Understanding of judges and legal advisers of concepts, identification of cases, collection of evidence, etc.
- All grounds should be equally tackled (trends show that racial or ethnic discrimination or religion or belief discrimination are more subject to publicity/ likely to be brought to courts)
- Multiple discrimination rather than current “one-ground” approach, which requires the victim to prioritise grounds of discrimination
- Legal framework remain complex and procedures are unclear to the victims (lengthy procedures, high costs, absence of legal aid or support – see the UK where the system of free legal aid is going to drastically suffer from the budgetary cuts announced by the Government)
- Cuts in funding affect effective support (lack of interpreters, absence of legal support/aid, absence of investigation/legal action by the Equality Body on its own motion) Ex: Romania, Ireland.
- no harmonisation of enforcement mechanisms with regard to legal standing, class action, effective dissuasive sanctions
- Situation testing