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# The Employment Equality Directive

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## European Implementation Assessment

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EPRS | European Parliamentary Research Service

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**Ex-Post Impact Assessment Unit**

PE 536.346 - February 2016



# **The Employment Equality Directive - - European Implementation Assessment**

*On 18 March 2015, the Committee on Employment and Social Affairs (EMPL) requested an implementation report on the Application of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive'), which triggered an automatic implementation assessment from DG EPRS.*

*This analysis has been drawn up by the Ex-Post Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, within the European Parliament's Directorate-General for Parliamentary Research Services. It looks at the implementation of the act in question (the Employment Equality Directive) on the basis of the existing documents, with special attention given to Parliament's input and the Commission's reports.*

*In order to complement the available information, an external study has been requested with regard to the principle of non-discrimination on the basis of religion and belief, which is published in a separate document, and referred to within this analysis.*

## ***Abstract***

The adoption of the Employment Equality Directive in 2000, in addition to the Racial Equality Directive, extended the protection against discrimination provided under EU law, which had previously been developed on gender matters. By explicitly obliging the Member States to prohibit discrimination in employment on the grounds of religion or belief, age, disability and sexual orientation, the general principles set out in the Treaties - as well as international law - became more effective, and some minimum standards are now common throughout Europe. At the same time, specific exceptions with regard to all or only some of those grounds permit the continuation of certain measures that were already in place in most countries, which has led to different national practices, especially with regard to age. Some of these exceptions, measures and practices were subject to analysis and interpretation by national and European courts. Additional provisions on horizontal issues such as access to justice and sanctions, dissemination of information and necessary dialogue, left the details to be established by Member States according to their laws and customs. This analysis builds on the available documents and expertise in order to facilitate the debate on the implementation of the Employment Equality Directive to date and on how to best follow it up.

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## Executive summary

Equality is one of the fundamental values that the European Union is founded upon, and it is duly reflected in the Treaties, as well as in national laws of the Member States. The Charter of Fundamental Rights of the EU states explicitly that any discrimination based on - among other grounds - religion or belief, disability, age or sexual orientation, shall be prohibited. Specific international agreements, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, also prohibit discrimination on various grounds, with limited exceptions in justified cases. The Court of Justice of the European Union has taken this context into account when delivering judgments in specific cases.

Since employment is a key element in guaranteeing equal opportunities, it was important to indicate in EU law the ways in which discrimination on the relevant grounds should be avoided, prohibited or counterbalanced. In 2000, the Employment Equality Directive (EED) was adopted a few months after the Racial Equality Directive, the EED setting out the minimum rules on discrimination based on religion and belief, disability, age and sexual orientation. Contrary to the Racial Equality Directive, the EED only covers access to employment and occupation, vocational training, promotion, employment conditions and membership of certain bodies. Because of the minimum harmonisation rule, some Member States apply the rules set by the EED also to other areas. A new directive was proposed by the European Commission in 2008 to ensure equal treatment outside employment, but work on this has not yet been completed, especially in the Council.

Although 15 years have passed since the adoption of the EED, equality in employment remains a goal rather than a common fact, and will most likely continue to be dependent on the interpretation of key provisions of the Directive in specific cases. All EU Member States have transposed the basic provisions on four types of prohibited discrimination (direct, indirect, harassment, and instruction to discriminate) into their national laws, with some divergences. Importantly for the effective prevention of discrimination, there is a growing tendency to extend the protection not only to persons who possess the given characteristics (religion or belief, disability, age, sexual orientation) themselves, but also to others - through association or assumption. In addition, prohibition of victimisation should also be extended to other persons - supporting the individual who was or is subject to discrimination.

The principle of non-discrimination on the grounds of religion or belief is relatively new in European law, but has a large reference basis in the jurisprudence of the European Court of Human Rights. In addition to the basic rule of prohibiting direct discrimination, which is relatively easy to apply, there are, and will probably always be, challenging cases of alleged indirect discrimination, where a balance has to be found between, on the one hand, legitimate rules set by employers and, on the other, the fundamental freedom of religion, which includes the right not to hide one's beliefs. The additional exception provided for in the EED - namely for recruitment purposes of ethos-based organisations - is also subject to critical assessment.

The implementation of non-discrimination because of disability has an established history and practical results, such as physical modifications of the working environment made on the basis of reasonable accommodation. Thanks to the fact that the European Union signed the UN Convention on the Rights of Persons with Disabilities, there should be more clarity now with regard *inter alia* to the definition of disability itself, although precise limitations of this term

might evolve further in the future. Case-by-case analysis of proportionality and cost-benefit analysis will surely have an impact on specific measures taken by Member States, employers and other actors, covering also the concept of 'positive action' (encouraged by the EED).

Whereas there is no problem with the definition of age, the application of the EED to this grounds for discrimination is almost completely linked to the large exception clause, which permits different treatment (of old or young, or both) when it is well justified by a legitimate aim and achieved by appropriate and necessary means. Apart from the fact that setting the retirement age (for all workers or in special professions) is a national competence, all Member States have multiple, and often very different, provisions regarding restrictions or benefits for young and/or old workers, as well as specific professions. In addition to the need for assessing their coherence with EU law (i.e. whether they truly fulfil the requirements of the EED), the effectiveness of these measures, just as of any positive action also linked to age, is often difficult to prove.

Sexual orientation is the least complicated grounds for discrimination covered by the scope of the Directive, perhaps because the act contains no specific provisions on the matter. On the other hand, it is the least clear in terms of available data, probably due to the less obvious display of characteristics and the intimate aspect of sexual identity of a person. A few judicial cases where discrimination on the basis of sexual orientation was analysed, allowed for the development of concepts that also apply to other grounds (such as 'association', 'assumption', and 'harassment'), and the overlap with some religious beliefs contributed to the consideration of multiple discrimination. Notwithstanding the fact that only national laws regulate marital status and related benefits, the practical application of EED led the Court of Justice of the European Union, as well as some national courts, to grant more protection to homosexual couples than previously thought possible.

In addition to the four specific grounds for discrimination, a number of issues important for the effective protection against discrimination are dealt with by the EED in a horizontal manner, and apply equally to all grounds that it covers (religion or belief, disability, age and sexual orientation). This concerns access to information, availability of data, and procedural matters related to judicial proceedings.

Although the perception of discrimination has increased, as shown by the Eurobarometer figures, it is difficult to claim that all people who are victims of discrimination are aware of their rights or that they easily take legal action against discriminatory practices. The EED obliged Member States to ensure the dissemination of relevant information, and a number of initiatives were also taken at European level (including the 2007 European Year of Equal Opportunities for All). Awareness raising campaigns for potential victims and employers alike should be continued, preferably in cooperation with social partners and non-governmental organisations at European, national and local level.

The EED does not require Member States to collect equality data, but the lack of that data constitutes an obstacle in assessing the Directive's implementation and the state of play with discrimination practices in general. As European citizens are becoming more willing to provide sensitive personal information for statistical reasons, various means could be used to further facilitate the promotion of equality in employment and beyond.



Both in general terms and for individual cases, EU and national regulations, as well as popular awareness of rights, will not result in equality if discrimination cannot be effectively challenged by legal means. In addition to the initial problems with the transposition of the new concept of the burden of proof (where a presumption of discrimination is enough for the accused to be responsible for providing evidence against the charge), national legislation often differs with regard to such elements as time-limits for bringing a case to court, rights of specialised NGOs or equality bodies to actively take part in proceedings, and the level of sanctions. As the EED only contains general requirements in these matters, exchanging best practices seems to be the best way forward, especially through the European Network of Equality Bodies (Equinet).

Overall, the implementation of the EED has a largely positive record, with all 28 Member States having transposed its provisions (mostly correctly) and gained experience in its application. The persisting challenges to its effectiveness are partly related to the fact that, in addition to the general principle of equality and the prohibition of discrimination, specific provisions permit different treatment in justified cases. This requires constant attention and is subject to interpretation on a case-by-case basis (by national or European courts), especially when it comes to such issues as proportionality and the balance of competing rights.

It is up to the European Parliament, among other institutions and actors involved, to consider whether further informative efforts (such as continuous awareness-raising and exchange of practices) are enough to ensure non-discrimination in employment on the basis of religion or belief, disability, age or sexual orientation, or if additional legislative measures - which would also reflect the implementation of the EED so far - are necessary to achieve the general objective of this Directive - which is the creation of a level playing field as regards equality in employment and occupation in the European Union.

# 1. Background information

This section briefly explains the history of EU law on preventing discrimination in employment, the contents of the Employment Equality Directive adopted in 2000, and the major developments in reporting on its application and proposals for its revision in recent years.

## 1.1. Developing EU law on discrimination in general

The first ten recitals of the Employment Equality Directive<sup>1</sup> provide a short and clear description of the evolution which resulted in European law being established to prevent various sorts of discrimination, especially in the field of employment. Built on the general principle of equal treatment, which requires persons in the same situation to be treated in the same way, EU law has for a long time addressed the issue of sex/gender discrimination, and then given due attention to other factors. Reflecting the fundamental character of anti-discrimination objectives, all four grounds covered by the EED (religion and belief, age, disability and sexual orientation - which will be examined in detail later) are now among those listed in Article 10 of the Treaty on the Functioning of the European Union (TFEU) on combating discrimination in defining and implementing EU policies and actions. The direct legal basis of the EED is - at present - Article 19 of the TFEU, which permits the Council to take appropriate action unanimously, with the consent of the European Parliament<sup>2</sup>.

Interestingly, the Court of Justice of the European Union (CJEU) stressed, in *Römer*<sup>3</sup>, that the EED does not itself lay down the principle of equal treatment in the field of employment and occupation, but merely provides a general framework for combating discrimination on various grounds. The 2015 report on combating sexual orientation discrimination in the European Union<sup>4</sup> recalls the opinion of the Advocate General Jääskinen, provided in that case, that the prohibition of any discrimination *is not to create new rights but to reaffirm the fundamental rights recognised by Union law*. For the purpose of this analysis, the provisions of the Directive will nevertheless be considered as the regulatory point of reference in itself, especially given that the Member States were obliged to transpose it into their national law. Furthermore, the national courts must, as far as is at all possible, interpret national law in a way which accords with the requirements of European law<sup>5</sup>.

The most important broader context for this element of the EU legislative framework, is the parallel regime on the matter of discrimination – in the form of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR)<sup>6</sup>, to which all EU Member States are parties. Article 14 of the Convention prohibits discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status, while Article

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<sup>1</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16 - hereafter referred to as the EED, or the Directive.

<sup>2</sup> Previously it was Article 13 TFEU, introduced by the Amsterdam Treaty. Until the Lisbon Treaty, the Parliament only had to be consulted.

<sup>3</sup> Case C-147/08, *Römer* [2011] ECR I-3591.

<sup>4</sup> Available at [http://ec.europa.eu/justice/discrimination/files/sexual\\_orientation\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/sexual_orientation_en.pdf)

<sup>5</sup> Case C-262/97 *Engelbrecht* [2000] ECR I-7321, para. 39.

<sup>6</sup> Available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

18 provides that restrictions to the rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed. In addition to the fact that Article 6 of the Treaty on European Union (TEU) envisages the accession of the Union to the ECHR and confirms that the fundamental rights guaranteed therein shall constitute general principles of the Union's law, a direct reference to the Convention (among other international acts) is also made in the preamble of the Directive. As will be shown in the respective parts of the analysis below, the jurisprudence of the European Court of Human Rights (ECtHR; located in Strasbourg) already has, and will surely continue to have, influence on the interpretation and development of the EED.

More recently, the Charter of Fundamental Rights of the European Union (hereafter: the Charter) came into force with the Treaty of Lisbon in December 2009. Its Article 21 states clearly that any discrimination based *inter alia* on the four grounds of the EED shall be prohibited. In addition, other provisions of the Charter underline the rights of the elderly (Article 25), the integration of persons with disabilities (Article 26), the protection of young people at work (Article 32) and the right to an effective remedy and to a fair trial (Article 47). In accordance with Article 51, all provisions of the Charter are addressed to the Member States only when they are implementing Union law, and the Charter itself does not extend the field of application of Union law<sup>7</sup>. Importantly, Article 52 specifies that *in so far as this Charter contains rights which correspond to rights guaranteed by the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention* and the Preamble also refers to the case-law of the ECtHR (mentioned above).

In order to complete this broader picture, it is important to underline the relation of the EED with the Racial Equality Directive, adopted a few months earlier in 2000<sup>8</sup>. These two acts taken together constitute the backbone of anti-discrimination in the EU, and many documents (including monitoring reports of the European Commission) deal with both directives, as some of their provisions are either identical or very similar. The most noticeable difference between them is their material scope of application: while the EED (dealing with religion and belief, age, disability and sexual orientation) is limited to employment, occupation and vocational training, the Racial Equality Directive deals with discrimination on grounds of racial or ethnic origin in a wide range of areas also outside the sphere of employment (education, social protection, health care, access to goods and services, and housing). Many EU Member States have maintained or reproduced the diverging scopes in their national law, but some of them actually provide the same protection for all grounds of discrimination, going beyond the requirements of the EED.<sup>9</sup>

## **1.2. The EED and the implementation of its basic concepts**

### **1.2.1. Objective and structure of the Directive**

The ultimate objective of the EED, as specified in recital 37, is the creation of a level playing-field as regards equality in employment and occupation. Article 1 defines the Directive's

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<sup>7</sup> See also Declaration 1 to the Treaty of Lisbon, as well as Declarations of some Member States on that matter.

<sup>8</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. OJ L 180, 19.7.2000, p. 22.

<sup>9</sup> For examples, see [Developing Anti-Discrimination Law in Europe \(2014\)](#), pp. 70-71.

purpose as laying down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation with a view to putting into effect - in the Member States - the principle of equal treatment. It is thus clearly the application of the Directive's provisions in the national contexts that has to be analysed in order to assess the implementation of the EED.

Like many other EU directives, the EED sets out minimum requirements whereas Member States may provide for a higher level of protection against discrimination in national legislation. Article 8 of the Directive also precluded the lowering of such levels which were above those established by the EED, which indicates that practical harmonisation of the protection against discrimination was not intended by the European legislator. A critical assessment of this situation was presented by the EU Agency for Fundamental Rights in its Opinion published on 1 October 2013<sup>10</sup>, considering that a 'vertical' asymmetry of protection (different at national and European level) is additionally complicating the situation of 'horizontal' asymmetry (due mostly to the different scope of the Racial Equality Directive).

The structure of the EED is relatively straightforward, with the first few articles in Chapter I setting out its coverage across all four grounds (religion or belief, age, disability and sexual orientation), followed by provisions relating to specific grounds, and concluding - again - with issues applicable horizontally. Chapter II regulates mostly procedural matters, essential for the judicial and out-of-court application of its provisions (transposed into national law), while Chapter III only contains one article with specific provisions for Northern Ireland (on police service and employment of teachers)<sup>11</sup>. The last six articles of the Directive are standard final provisions, with the exception of Article 18 on implementation by social partners, and temporary derogations.

### 1.2.2. Types of discrimination

Formal equality requires that people in the same situation should be treated in the same way, and this type of equality can be seen mostly in the definition of direct discrimination. In accordance with the Directive's Article 2, there are four types (forms) of prohibited discrimination to be considered: direct, indirect, harassment and instruction to discriminate.

a) **Direct discrimination** - when a person is treated (or has been or would be treated) less favourably than others, in a comparable situation. There is no general exception that would formally allow direct discrimination, and the remaining provisions of the EED - such as those on genuine occupational requirements, ethos-based organisations and age - provide justification for different treatment that excludes the use of term 'discrimination' in these cases.

b) **Indirect discrimination** - where an apparently neutral provision, criterion or practice would put a given person at a particular disadvantage compared to others. This concerns measures

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<sup>10</sup> Available at <http://fra.europa.eu/en/opinion/2013/fra-opinion-situation-equality-european-union-10-years-initial-implementation-equality>

<sup>11</sup> Both parts of Article 15 in fact represent a blank-cheque acceptance of national legislation authorising differences of treatment on the basis of religion, aimed at further reconciliation between the Catholic and Protestant communities. Without undermining the political reasons for the introduction of these provisions, it could be argued that the measures hinted at within them would be easily acceptable under the general rules of the EED, as analysed below.

which may look neutral and unproblematic at first sight but nevertheless have a discriminatory effect on a particular group of people. Such a measure may be justified in some situations if it has a legitimate aim and if the means of achieving that aim are appropriate and necessary. This has to be assessed on a case-by-case basis. The intentions of the discriminating person or body are not relevant, as it is enough for the measure to be likely to create a discriminatory effect. Statistical evidence is not necessary in that assessment, but can be useful (as indicated explicitly in recital 15). Importantly, the protection against indirect discrimination means that employers cannot use seemingly neutral rules to circumvent the prohibition of direct discrimination, and the Directive recognises that an equally applied rule can put certain people at a particular disadvantage and should thus be avoided in order to achieve substantive equality<sup>12</sup>.

c) **Harassment** - an unwanted conduct that takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this case it would seem that there is no need for a comparator (forming part of the definition of direct discrimination), but the EED also refers to the national laws and practices of the Member States<sup>13</sup>. The Directive does not provide any rules on determining whether the specific conduct violates a person's dignity and/or creates an environment as described in Article 3(3)<sup>14</sup>. Another issue left open is the responsibility of the employer for acts of harassment by other workers or by third parties such as customers, and Member States have filled this 'gap' in different ways<sup>15</sup>.

d) Separately from the last consideration above (or at least part of - as far as other employees are concerned), an **instruction to discriminate** is considered by the Directive to also constitute direct discrimination, and thus be prohibited.

As a result of the Directive's transposition into national law of the EU Member States, there are occasionally small differences in the definitions of these types of discrimination. Given the frequent absence of case law interpreting that legislation, it is difficult to assess whether these differences will be resolved through purposive judicial interpretation or whether there are substantive gaps in national implementation<sup>16</sup>. The table below shows the transposition of the basic concepts of the Directive into the law of 28 Member States of the European Union, with an indication of certain reservations as regards the coherence with the EED.

| Definitions | <i>Direct discrimination</i> | <i>Indirect discrimination</i> | <i>Harassment</i> | <i>Instruction to discriminate</i> |
|-------------|------------------------------|--------------------------------|-------------------|------------------------------------|
| Austria     | +                            | +                              | +                 | +                                  |
| Belgium     | +                            | +                              | +                 | +                                  |
| Bulgaria    | +                            | +                              | +                 | +<br>(only intentional)            |

<sup>12</sup> Study by Erica Howard on the implementation of Directive 2000/78/EC with regard to the principle of non-discrimination on the basis of religion or belief, January 2016, pp. 29-30.

<sup>13</sup> In Cyprus, the Code of Conduct on Disability Discrimination issued by the equality body in September 2010 explains the law and provides concrete examples regarding harassment in the workplace.

<sup>14</sup> The use of five adjectives in Article 2(3) of EED, of which some could at least partly be considered as synonyms, will not be analysed here.

<sup>15</sup> For some examples of national legislation, see Developing Anti-Discrimination Law in Europe (2014), pp. 53/54, and (on personal scope) p. 59.

<sup>16</sup> Developing Anti-Discrimination Law in Europe (2014), p. 46.

| Definitions    | <i>Direct discrimination</i>                        | <i>Indirect discrimination</i>  | <i>Harassment</i>                         | <i>Instruction to discriminate</i> |
|----------------|---|---|---|------------------------------------|
| Cyprus         | +   | +   | +   | +                                  |
| Croatia        | +   | +   | +   | +                                  |
| Czech Republic | +   | +   | +   | +                                  |
| Denmark        | +   | +   | + *                                       | +                                  |
| Estonia        | +   | +   | +   | +                                  |
| Finland        | +   | +   | +   | +                                  |
| France         | +<br>(no hypothetical comparator)                   | +   | + *                                       | +                                  |
| Germany        | +   | +   | +   | +                                  |
| Greece         | +   | +   | +   | +                                  |
| Hungary        | +   | +   | + *                                       | +                                  |
| Ireland        | +<br>(no hypothetical comparator)                   | +   | +   | +                                  |
| Italy          | +   | +   | +   | +                                  |
| Latvia         | +   | +   | +   | +                                  |
| Lithuania      | +   | +   | +   | +                                  |
| Luxembourg     | +   | +   | +   | +                                  |
| Malta          | +   | +   | +   | +                                  |
| Netherlands    | +   | +   | + *                                       | +                                  |
| Poland         | +<br>(with erroneous comparator in the Labour Code) | +   | +   | +                                  |
| Portugal       | +   | +   | +   | +                                  |
| Romania        | +   | +   | +<br>(purpose without effect not covered) | +                                  |
| Slovakia       | +   | +   | + *                                       | +                                  |
| Slovenia       | +   | +<br>(legal requirement for the individual complainant to be in an 'equal or similar situation and conditions') | +   | +                                  |

| Definitions    | Direct discrimination | Indirect discrimination | Harassment   | Instruction to discriminate        |
|----------------|-----------------------|-------------------------|--|------------------------------------|
| Spain          | +                     | +                       | +<br>(two terms: hostile and degrading, are not included - see footnote 14 on previous page) | +                                  |
| Sweden         | +                     | +                       | + *<br>(violating the dignity of a person is enough)   | +                                  |
| United Kingdom | +                     | +                       | +  | +<br>(not explicit in legislation) |

*\* In these countries, the term 'unwanted' is not included in the definition of harassment in national law, which could be considered as a broader protection than required by the EED (in line with its principle of minimum harmonisation).*

### 1.2.3. Material scope of the application

As was already mentioned above (especially in comparison with the Racial Equality Directive), the EED prohibits discrimination (on the four grounds: religion or belief, age, disability and sexual orientation) only in the context of employment relations. It is nevertheless important to specify the detailed scope of its application, in order to appreciate the fact that 'within the limits of the areas of competence conferred on the Community [Union]', the Directive covers quite a large area of socio-economic relations.

As in many other EU directives, but not the Racial Equality Directive or acts dealing with gender, a general exception is established by Article 2(5) in respect of the national security measures, as well as those aiming at the protection of health and other people's rights and freedoms.

Article 3 provides the detailed explanation, underlining 'both public and private sectors, including public bodies'. Institutionally, the only exception provided explicitly in the Directive is the non-application of disability and age (but not religion or belief, or sexual orientation) restrictions in the armed forces. The obvious rationale for this provision - safeguarding the combat effectiveness - is given in recital 19 but has its precise limits and consequences, namely that the Member State using this option must define the scope of any such derogation. Some countries have in fact included this exemption in their national law in relation to both age and disability (Denmark, France, Greece, Ireland, Italy, Slovakia and the United Kingdom) while others maintained relevant age and capability requirements in their regulations on the armed forces without expressly declaring an exemption from the equal treatment principle (e.g. Bulgaria, Portugal, Romania and Spain). Separately, recital 18 of the EED indicates the preservation of operational capacity of services other than just the army (namely, the police,

prison and emergency services) as a legitimate objective in recruitment policy<sup>17</sup>. Since there is no matching/equivalent Article, the criterion of capacity required to carry out the range of functions to be performed, should be understood as an example of either occupational requirements (permitted by Article 4(1) and covering also disability), or justified different treatment because of age (covered by Article 6(1)).

Additionally, it is worth noting that the principle of non-discrimination does not exclude the application of such legitimate requirements in recruitment as competence, capability and availability to perform - all of which are mentioned in recital 17 of the EED.

In terms of the subject matter, four separately indicated fields are covered (the text of four points under Article 3(1) of the Directive is provided here in full):

- a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- c) employment and working conditions, including dismissals and pay; and
- d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

The EED does not cover social security and social protection schemes, nor any kind of payment by the Member States that is 'aimed at providing access to employment or maintaining employment' (see also recital 13), and some Member States have reproduced Article 3(3) in their anti-discrimination legislation<sup>18</sup>.

#### 1.2.4. Personal scope of the application

First and foremost, the EED aims to protect the **persons that have certain characteristics** – being disabled or of a certain age, religion or certain beliefs, and/or having specific sexual orientation – from discrimination in the employment context. But the personal scope of the EED also covers other cases, in order to ensure that the prohibited conduct does not escape the regulatory objective with the excuse of a victim not having the given characteristic itself.

Secondly, discrimination by **association** is also covered by the EED. The CJEU ruling in the widely referred to *Coleman* case<sup>19</sup> in July 2008 interpreted the meaning of the prohibition of direct discrimination and harassment in employment and occupation in such a way as to ensure its effective application. The Court stated clearly that limiting the Directive's scope only to people who are themselves disabled is liable to deprive that legislative act of an important element and to reduce the protection which it is intended to guarantee. In effect, an employer

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<sup>17</sup> E.g. Greek and Irish law provides exemptions on the basis of age in respect of the police, the prison service or any emergency service.

<sup>18</sup> e.g. Cyprus, Finland and Greece.

<sup>19</sup> Case C-303/06, *Coleman* [2008] ECR I-05603.



who treated a specific employee less favourably than others because of that person's disabled child (requiring special care), was considered to be discriminating against the employee directly<sup>20</sup>. This judgment was indeed very important, as it established the general principle that discrimination should also be prohibited when it occurs as a result of the association of a person with other persons to whom prohibited discrimination grounds apply (be it disability or any other, including those covered by the EED).

Thirdly, discrimination can also occur because of an **assumption** about another person which may or may not be factually correct, e.g. that the person has a disability or is homosexual.

In many Member States, the application of discrimination law to such scenarios is neither stipulated nor expressly prohibited by national law, and only future judicial interpretation will clarify this issue (this is the case for instance in Finland, Greece, Iceland, Italy, Latvia, Liechtenstein, Malta, Poland, Romania and Slovenia). In other countries, different formulations are used to cover discrimination due to various associations (Ireland, Croatia, Czech Republic, Bulgaria, France, Netherlands, Austria, Belgium and Spain).<sup>21</sup>

Additionally, protection against discrimination might also need to extend to persons who support the victim (especially when these are that person's colleagues in employment), in addition to the basic prohibition of **victimisation**. Victimisation is understood to occur (as simply explained *inter alia* in the European Commission's Guidance to victims<sup>22</sup>) if a person suffers negative consequences in reaction to his or her complaint about discrimination, or because of being a witness in a discrimination case.

### 1.2.5. The question of positive action

In a separate Article 7, the EED stipulates that the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds covered. It is important to underline that this 'positive action' (spelled out in the article's title) can also be a formal exception to the principle of equal treatment, but it should eventually constitute a measure which is necessary to ensure 'full equality in practice', indicated as the aim by the Directive itself.

As specified in the Opinion of the EU Agency for Fundamental Rights<sup>23</sup>, a preventive rather than reactive approach to discrimination and the adoption of positive action measures across the Member States could contribute to reducing the gap between the law on the books and the reality on the ground. The 2015 report on Combating Sexual Orientation Discrimination in the European Union<sup>24</sup> also stressed that the Directive's minimum protection character implies that positive action should not be seen as a derogation from the principle of non-discrimination, but 'rather as a positive obligation'.

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<sup>20</sup> The same reasoning was given by the Court in relation to harassment.

<sup>21</sup> For details - see Developing Anti-Discrimination Law in Europe (2014), pp. 40-41, including a Belgian case where the national court referred directly to the *Coleman* ruling, which confirms that further development of anti-discrimination practices in Member States does not only depend on legislative changes.

<sup>22</sup> SWD(2014)5 final, p. 5.

<sup>23</sup> See link in footnote 10, p. 5.

<sup>24</sup> Prepared by the European Network of Legal Experts in the Non-discrimination field, see footnote 4, p. 5.

Because of the rather general regulation of this matter in the EED itself, national application remains very different, with such examples as the Cypriot Supreme Court developing a practice of declaring void and unconstitutional any law introducing positive action in employment which is challenged.

More precisely, although paragraph 2 of the said article deals specifically with disability (the attention to which should not undermine the protection of health and safety at work), the earlier provision on positive action (in paragraph 1) applies equally to all grounds covered by the Directive, but has not been widely used for other grounds of the EED.

### **1.2.6. Deadlines and techniques of transposition**

The EED had to be transposed by 2 December 2003 by the EU15 (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and United Kingdom), by 1 May 2004 by the EU10 (Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia), and by 1 January 2007 by Bulgaria and Romania. In accordance with Article 18 (second paragraph), a few Member States used the possibility of an additional period of time for transposing the provisions on age and disability.<sup>25</sup>

A number of different methods were used by the EU Member States to transpose the Directive into national law, from the adoption of anti-discrimination acts reproducing the European provisions to the combination of amendments of various specific legislative acts<sup>26</sup>. In addition, all countries (with the exception of Denmark and the UK - the latter not having a written constitution) have included the general principle of equal treatment or specific grounds of discrimination in their constitutions. But the constitutional provisions are of course just the basis for specific legislation, which in some countries has been up-dated and brought together in single acts, with more or less success.<sup>27</sup>

Moreover, Article 16 of the EED required Member States to ensure that all their legal texts comply with the Directive, demanding on the one hand that *'any laws, regulations and administrative provisions that are contrary to the principle of equal treatment are abolished'*, and - on the other - that *'any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, declared void or are amended'*. According to the most recent analysis of the implementation of these provisions, only a few countries have systematically ensured that all existing legal texts are in line with the principle of equal treatment<sup>28</sup>. It will therefore remain mostly a task of national courts to address the matter, in order to identify any remaining discriminatory laws, following individual complaints. As for the contracts and collective agreements, a number of Member States allow the invalidation of discriminatory clauses. For example, in Malta state law provides that any provisions in individual or collective contracts or agreements, internal rules of undertakings, or rules governing registered organisations that are contrary to the principle of

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<sup>25</sup> Details in respective sections below.

<sup>26</sup> Details in *Developing Anti-Discrimination Law in Europe* (2014), p. 9.

<sup>27</sup> *Idem*, p. 11.

<sup>28</sup> *Idem*, pp. 135-137.

equal treatment, will be considered void<sup>29</sup>. Even more promising is the French case, where - in accordance with established case-law - the EED is directly applicable.

### **1.3. Follow-up and perspectives**

#### **1.3.1. The first EC report and the case-law of the Court of Justice**

In accordance with the reporting obligation set out by Article 19, the European Commission provided its first report on the application of the EED in June 2008<sup>30</sup>. The report did not provide a detailed account of the Directive's transposition by Member States, but described 'certain aspects that seem[ed] to the Commission particularly problematic or important'<sup>31</sup>. A transposition table covering all Member States was annexed to that report in a separate document<sup>32</sup>, with references to national regulations concerning the four grounds (sexual orientation, religion, age and disability), as well as short comments on positive action, role of equality bodies, and protection of victims.

Nevertheless, the 2008 report underlined that because of the minimum harmonisation character of the EED, applying only to the fields of employment, occupation and vocational training, a number of Member States already then provided more extensive protection from discrimination on grounds of age, disability, religion and sexual orientation. A 'single equality approach' was clearly supported, with a similar level of protection for the various grounds of discrimination (especially in comparison with the Racial Equality Directive).

At the same time, infringement procedures were opened by the European Commission against a number of Member States, as the transposition of concepts that were previously not found in national legislation of some countries proved somewhat difficult. The European Commission also commented on the low amount of discrimination case law at national level, which could be explained by other actual and perceived obstacles to justice<sup>33</sup>. Not surprisingly, the awareness of rights by potential victims of discrimination remained low in many countries<sup>34</sup>. In the years before and after the first implementation report of the European Commission, multiple activities were undertaken in all EU Member States with regard especially to raising awareness of all relevant actors about the rules and practices relevant to non-discrimination<sup>35</sup>.

The Court of Justice of the European Union (CJEU), as in many other policy areas, also played and continues to play an important role in providing interpretation of the Directive's provisions, mostly in response to preliminary questions asked in specific cases by the national courts.

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<sup>29</sup> Regulation 12 of Legal Notice 461 of 2004.

<sup>30</sup> Replaced in July by the document COM(2008) 225 final/2.

<sup>31</sup> COM(2008) 225 final/2, p. 2.

<sup>32</sup> SEC(2008) 524.

<sup>33</sup> COM(2008) 225 final/2, p. 8.

<sup>34</sup> According to the Eurobarometer Report on Discrimination from January 2007, less than one third of Europeans were aware of their rights:

[http://ec.europa.eu/employment\\_social/eyeq/uploaded\\_files/documents/Eurobarometer\\_report\\_en\\_2007.pdf](http://ec.europa.eu/employment_social/eyeq/uploaded_files/documents/Eurobarometer_report_en_2007.pdf)

<sup>35</sup> A number of documents are available at

[http://ec.europa.eu/justice/discrimination/document/index\\_en.htm#Raising\\_awareness](http://ec.europa.eu/justice/discrimination/document/index_en.htm#Raising_awareness)

Annex II to the subsequent implementation report of the European Commission (published in January 2014 and described below) contains a summary of that case law, covering the EED and the Racial Equality Directive, as well as some relevant judgments of the European Court of Human Right (ECtHR) and cases that were dealt with by national courts without referring it to CJEU. Selected judgments are referred to in the relevant parts of this analysis below.

### **1.3.2. The proposed horizontal directive and the second EC report**

As already announced in its 2008 report, the European Commission eventually proposed legislation implementing the principle of equal treatment outside employment, addressing the fact that the level of protection from discrimination based on religion or belief, age, disability or sexual orientation is lower than that in place for discrimination based on race. This proposal for a horizontal directive<sup>36</sup> - now requiring consent, and not just consultation, of the European Parliament - became blocked in the Council<sup>37</sup>, where unanimity is required. Interestingly though, the minutes from the meeting of the High Level Group on Non-Discrimination, Equality and Diversity (chaired by the European Commission) in May 2015 stated that the 'Anti-Discrimination Directive is a priority for this Commission' and that 'good progress has been made' towards achieving that unanimity.<sup>38</sup> In any case, this new legislative act would not replace the EED with regard to employment matters.

The second implementation report of the European Commission was published in January 2014, covering both the EED and the Racial Equality Directive<sup>39</sup>, with a separate staff working document<sup>40</sup> including three annexes: guidelines for victims, a compilation of case law, and an overview of national provisions on age. According to this joint report, all 28 EU Member States transposed the two Directives and gained experience in their application, with the Commission receiving annually 20 to 30 complaints on individual cases of discrimination that – since they were not about incorrect transposition - did not lead to infringement proceedings.

It is underlined that the Member States are not required to collect equality data (namely, there is no such obligation in the Directive itself), although their collection and analysis provides evidence of existing discrimination and allows to quantify it. In conclusion, the Commission repeated a common statement that legislation is not enough to achieve full equality, and that awareness of existing protection needs to be increased. In addition to the possibility of using the EU Programme for Employment and Social Solidarity for specific actions, the strengthening of national equality bodies is strongly advised.

### **1.3.3. The draft EMPL report and further interest in the European Parliament**

In May 2013, a draft report<sup>41</sup> on the implementation of the EED was presented in the European Parliament's Committee on Employment and Social Affairs (EMPL), but finally was not adopted. The draft document made *inter alia* the following observations:

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<sup>36</sup> COM(2008) 426 final

<sup>37</sup> Its last orientation debate on that proposal took place on 19 December 2014.

<sup>38</sup> [http://ec.europa.eu/justice/discrimination/files/hlg1\\_2015summary\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/hlg1_2015summary_en.pdf)

<sup>39</sup> COM(2014)2 final

<sup>40</sup> SWD(2014)5 final

<sup>41</sup> <http://parltrack.euwiki.org/dossier/2012/2324%28INI%29>

- Although more than 12 years have passed since the adoption of Council Directive 2000/78/EC, many obstacles must still be overcome to ensure equality before the law in accordance with Article 20 of the Charter of Fundamental Rights of the European Union<sup>42</sup>;
- Employment is the most important condition for social inclusion and independent living and the levels of unemployment among many groups, in particular young people, those with disabilities and older people, who are particularly targeted in Articles 25 and 26 of the Charter of Fundamental Rights, are far too high;
- Employment is often shown to be the most critical aspect for all people at risk of discrimination based on the grounds prohibited by Council Directive 2000/78/EC;
- The Commission's evaluation of the case-law of the Court of Justice of the European Union on Council Directive 2000/78/EC<sup>43</sup> points out that a lack of consistency can be noted in the implementation of existing legislation at Member State level, including in the differing interpretations by national courts.

In addition, 55 amendments were tabled to the draft report, including on such matters as support for mediation, critical remarks on the implementation of certain procedural provisions of the Employment Equality Directive, and the awareness-raising measures.

Also, after the publication of the second EC report, the European Parliament expressed its interest in the way the EED is implemented and a quick procedure was launched to allow an exchange of views on this matter after the European elections in May 2014. In an oral question discussed in Parliament's plenary in November 2014, Members asked the new European Commission about the measures that it plans to take in order to improve the implementation of EED, to raise awareness and to improve the quantity and quality of the equality data<sup>44</sup>. The response given then by Commissioner Thyssen was as follows: *'The implementation report highlights that more needs to be done to ensure effective implementation of the directives [the EED and the Racial Equality Directive] on employment equality. Member States have put in place implementing legislation, but effective protection to victims of this discrimination on the ground still has to be improved. [...] The Commission will carefully monitor the national developments, including any new legislation and the development of national case law. We will also pay more attention to what happens at regional and local level, using all available means - including the use of infringement proceedings - to ensure correct application in all Member States'*.

### **1.3.4. Perception of citizens and cooperation of experts**

The fourth Eurobarometer which has been conducted on the matters of discrimination<sup>45</sup> found that more Europeans are tolerant of groups at risk of discrimination (for example - 71% in favour of equal rights for LGBT persons) and are also better informed about their rights in case of discrimination (45%), as compared with the previous survey (conducted in 2012). The assessment indicated that a perception of more widespread discrimination could actually reflect a greater awareness rather than an increase in discrimination. In any case, many respondents were critical with regard to the effectiveness of national efforts to fight discrimination and a

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<sup>42</sup> *Everyone is equal before the law.*

<sup>43</sup> The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC, published in November 2012.

<sup>44</sup> [2014/2862\(RSP\)](#)

<sup>45</sup> EBS 437, published in October 2015.

majority considered the need for new measures to raise the level of protection. Importantly for the later analysis of data collection and information, most Europeans are willing to provide sensitive personal information if this could help combat discrimination and are in favour of information about diversity being provided at schools.

The transposition and implementation of the EED and the Racial Equality Directive into the national legal systems of the 28 EU Member States (and a few other countries) are described in a series of annually updated country reports produced by the European Network of Legal Experts in the Non-discrimination Field. A comprehensive document<sup>46</sup>, published in January 2015, compared and analysed the information set out in the 2013 country reports and drew some conclusions from the information contained in them. Interestingly, the introduction to this document clearly states that: *'It goes beyond the scope of this report to assess the extent to which Member States have fully complied with the Directives or to assess the legislative impact of the European Directives on the laws of all the countries examined, although the report could potentially be used as one of the instruments for making such an assessment'*. In 2015 the network of experts mentioned above was merged with the equivalent European Network of Legal Experts in the field of gender equality - thus forming one single European network of legal experts in gender equality and non-discrimination<sup>47</sup>.

Separately, also in 2015, the European Commission set up a High Level Group on Non-Discrimination, Equality and Diversity (HLG) replacing the Government expert group (whose mandate expired in 2013). The mandate of HLG specified that the group shall<sup>48</sup>:

- Accompany the development and implementation of policies and programmes at EU and national level aimed at combating discrimination, promoting equality and diversity;
- Deepen cooperation and coordination between Member States' relevant authorities and the Commission on questions relating to achieving diversity and full equality in practice, and eliminating discrimination; in particular through the exchange of experiences and good practices on related issues of common interest to be defined by the Group and the establishing, when appropriate, of common policy objectives;
- Deepen the coherence of effort for equality and against discrimination between the members of the Group, the Presidency, the Council, the European Parliament, the European Commission, and the European Union Agency for Fundamental Rights;
- Follow any other topic that may emerge which is found relevant by the Commission and the Group.

The HLG already met twice in 2015 (May and October), and dealt with issues much broader than the scope of the EED itself. As expressed in the minutes from the first meeting, it is an informal group with no formal deadline directly linked to thematic priorities of the Presidencies of the Council.

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<sup>46</sup> [Developing Anti-Discrimination Law in Europe \(2014\)](#) - The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared.

<sup>47</sup> <http://www.non-discrimination.net/>

<sup>48</sup> [http://ec.europa.eu/justice/discrimination/files/hlg\\_mandate\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/hlg_mandate_en.pdf)

## 2. The implementation of specific provisions on the four grounds of discrimination

This section contains a separate analysis of the implementation of the Directive's provisions relevant for the four grounds of discrimination covered by the EED, although some elements are either directly valid for all of these grounds, or could be considered for more than one (it is then explained why).

As presented in the Report on Developing Anti-Discrimination Law in Europe (2014)<sup>49</sup>, most countries did not define the grounds of discrimination in their implementing legislation, while some EU Member States (Austria, Estonia, Ireland, the Netherlands, Sweden and the United Kingdom) included statutory definitions or provided them in accompanying documents, such as explanatory memoranda. In many countries, definitions or guidelines for definitions have subsequently been provided by national court rulings.

### 2.1. Religion and belief

The protection against discrimination on the grounds of religion and/or belief in the European Union is currently provided in two different ways: through human rights law and through anti-discrimination law. An external study requested for the purposes of this analysis<sup>50</sup> will be mostly referred to below, complemented by other available sources.

#### 2.1.1. Introduction

At the level of international human rights law

- the Universal Declaration of Human Rights of 1948,
- the International Covenant on Civil and Political Rights of 1966, and
- the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950)

all guarantee freedom of thought, conscience and religion. This includes freedom to change one's religion or belief and freedom, either alone or in community with others and in public or in private, to manifest one's religion or belief in worship, teaching, practice and observance. Importantly, the right to manifest one's religion or belief can be restricted - according to Article 9(2) of ECHR - but only if the restriction is prescribed by law and necessary in a democratic society for the protection of public safety, public health or morals, or for the protection of the rights and freedoms of others.

The above justification and the inherent proportionality test mean that a balancing of all rights involved has to take place in any given case of alleged discrimination. An example of such balancing was indicated already in the EC report of 2008 mentioned above, referring to national case law on conflicts between employee dress codes and manifestations of religious belief.

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<sup>49</sup> See footnote 46.

<sup>50</sup> [Study by Erica Howard on the implementation of Directive 2000/78/EC with regard to the principle of non-discrimination on the basis of religion or belief](#), EP publication, January 2016 - hereafter referred to as Howard.



Although some of these cases were treated as human rights matters (covering the freedom of religious expression) rather than discrimination cases, this area was considered likely to be a sensitive issue in implementing the Directive, which was later confirmed.

As far as the relation with international law (explained briefly in part 1.1. of this analysis) is concerned, the ECHR and the case law of the European Court of Human Rights (ECtHR) are set to play an important role in the application of the EED. The EU institutions have also produced additional reference documents which complement the Directive, such as the EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief<sup>51</sup>, adopted by the Council in June 2013.

### 2.1.2. Definition

Almost all EU Member States have constitutional provisions on freedom of religion and belief and against related discrimination<sup>52</sup>. The prohibition of discrimination on grounds of religion or belief has thus been rather easily transposed in all Member States by the time of the first EC implementation report of 2008, but the majority among them did not define the terms in their legislation.

It should certainly not be considered as a fault in implementation as the EED itself does not define these terms. The UK's Equality Act 2010 refers to the ECtHR case law in its explanatory notes to Section 10, which also does not really give a definition but determines that '*religion means any religion and a reference to religion includes a reference to a lack of religion*'<sup>53</sup> and states that '*belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief*'<sup>54</sup>. Political beliefs are not covered by the EED, although in some Member States they are considered as being covered<sup>55</sup>.

In recent cases, the ECtHR accepted that the wearing of a headscarf, face veil, cross, turban or other forms of dress is a manifestation of the individual claimant's religion or belief, focusing on the legal examination of the justification and proportionality of alleged interferences with these manifestations<sup>56</sup>. It could be suggested as a good practice for the CJEU and the national courts in the EU Member States to accept that approach, only making sure that an assertion of religious belief is made in good faith, since assessing the validity or correctness of a religion or belief is practically impossible. On the other hand, the different ways in which a person can manifest his or her religion or belief, can indeed be subject to some restrictions, possibly leading to discrimination.

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<sup>51</sup>[http://eeas.europa.eu/delegations/fiji/press\\_corner/all\\_news/news/2013/eu\\_guidelines\\_on\\_the\\_promotion\\_and\\_protection\\_of\\_freedom\\_of\\_religion\\_or\\_belief\\_28june\\_24\\_2013\\_fac%29.pdf](http://eeas.europa.eu/delegations/fiji/press_corner/all_news/news/2013/eu_guidelines_on_the_promotion_and_protection_of_freedom_of_religion_or_belief_28june_24_2013_fac%29.pdf).

<sup>52</sup> With the exception of Denmark and the UK (the latter not having a written Constitution); for detailed references – see table 2 in Howard, pp. 13-14.

<sup>53</sup> This *idem per idem* explanation in itself could suffice to illustrate the difficulty for any legislator.

<sup>54</sup> Howard, p. 16.

<sup>55</sup> For details – see Howard, p. 21.

<sup>56</sup> Howard, p. 19.



### 2.1.3. Prohibited conduct

The EED prohibits direct religion or belief discrimination which cannot be justified, but the difference of treatment is permitted in certain circumstances provided for in the Directive itself (analysed further below).

In accordance with the general concepts described above, indirect discrimination is also prohibited, unless it is objectively justified by a legitimate aim and the means used to achieve that aim are proportionate and necessary. Since the principle of proportionality has already been interpreted by the CJEU in cases concerning gender discrimination, it is relatively well established as a tool to balance competing and sometimes conflicting rights. In the assessment of the comparability, which is part of the definition of indirect discrimination as much as the direct one, it is suggested that the Court of Justice and national courts in Member States should easily accept the existence of different treatment in cases of indirect discrimination, and concentrate on the scrutiny of whether the differentiating provision, criterion or practice is objectively justified and proportionate<sup>57</sup>.

A good example of indirect discrimination is a case from Denmark, where a Muslim woman who was studying to become a nutrition assistant had to stop her vocational training programme because the school would not exempt her from the requirement to taste pork. The Board of Equal Treatment found that the requirement was incompatible with her religious beliefs, and that the school had not shown that it was necessary to complete her training. The Board thus found indirect discrimination on the grounds of religion.<sup>58</sup>

In another case, a hospital in The Netherlands imposed new clothing requirements, including the wearing of short sleeves, after recommendations from a commission of experts following an outbreak of a bacterial infection. The claimant refused to wear short sleeves on the grounds of her religious beliefs, as this was prohibited by the Islamic dress code she followed. The Rotterdam District Court held that the clothing requirements were indirectly discriminatory on the grounds of religion, but they could be justified by the legitimate aim of preventing the risk of infection.<sup>59</sup>

With regard to the most widely discussed issue of bans on the wearing of an Islamic headscarf, there is no agreement as to whether it would always constitute direct or indirect discrimination at work. This could be assessed on a case-by-case basis by the relevant court, but is also a matter of consideration under occupational requirements and ethos-based organisations (see below).

Another issue where the balancing of competing rights might be even more difficult is the relation between harassment on the basis of religion and belief (considered by the Directive to constitute direct discrimination) and the freedom of speech. In view of the fact that there is no fundamental human right not to be offended (although such elements exist at least in some Member States), prohibiting religious expressions just because someone might be offended could be considered as an unjustified restriction of the freedom of expression<sup>60</sup>. At the same time, Article 11 ECFR guarantees freedom of expression and information, which can be

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<sup>57</sup> Idem, p. 33.

<sup>58</sup> Cited after Howard, p. 31: Equal Treatment Board Decision no 213/2012 of 8 February 2012 as reported in *European Anti-Discrimination Law Review*, 15 (November 2012), p. 53 and 17 (November 2013), p. 54.

<sup>59</sup> Howard, p. 34. There also other examples on assessing proper justification.

<sup>60</sup> Idem, p. 40.

restricted only for the protection of the rights of others, which includes the right to be free from discrimination and harassment. It remains to be seen how that balance will be identified at the European level in the interpretation of the provisions of the EED.

#### **2.1.4. Exceptions**

##### **- Public security**

In accordance with Article 2(5) of the EED, which applies to all four grounds, the prohibition of discrimination on the basis of religion or belief shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others. Since the Directive only applies in employment relations, the inclusion of such a broad provision could be surprising, and it was only inserted in the legislative act during the final negotiations in the Council, with the argument that it is *'necessary to prevent members of harmful cults, paedophiles and people with dangerous physical and mental illnesses from gaining protection from the directive'*.<sup>61</sup> The provision of Article 2(5) is directly reproduced in legislation in Cyprus, Greece and Malta, and in Italy it is largely incorporated. In response to the terrorist attacks in Paris on 14 November 2015, articles in Belgian media cited young Muslims who expected that it will become even more difficult to get a job, and it will be important to observe if the increased awareness of difficult integration of Muslim immigrants might lead some EU Member States to use this exception more often than previously.

##### **- Occupational requirements and ethos-based organisations**

In accordance with Article 4(1) of the Directive, Member States may provide that 'a difference of treatment [...] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'.

The CJEU has consistently held, in relation to the gender occupational requirement, that this provision, as a derogation from an individual right laid down in the Directive, must be interpreted strictly. The Court will soon have a chance to interpret it in relation to a woman wearing an Islamic headscarf as a request for a preliminary ruling has been made by the French *Cour de Cassation* in April 2015.<sup>62</sup>

In addition, Article 4(2) permits Member States to authorise differential treatment in occupational activities within churches (and other public or private organisations the ethos of which is based on religion or belief), if an individual person's religion or belief constitutes a genuine, legitimate and justified occupational requirement in view of the nature of these

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<sup>61</sup> Citing after Howard, p. 44: E. Ellis and P. Watson, *EU Anti-discrimination Law*, 2<sup>nd</sup> ed., Oxford University Press, Oxford, 2012, pp. 402-403.

<sup>62</sup> C-188/15 *Asma Bougnaoui Association de défense des droits de l'homme (ADDH) v Micropole Univers SA*, preliminary reference 24 April 2015.

activities or of the context in which they are carried out. The difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on other grounds.

While it could be argued that Article 4(2) is a more explicit application to ethos-based organisations of the rule set out in Article 4(1), it clearly allows some of them to require its employees to practice a specific religion. The obligation of demonstrating that the nature and context of the employee's activities actually requires them to share the specific organisation's religion in order to maintain the ethos remains the main issue subject to interpretation.

Because of the proportionality test under Article 4(1), it could be considered easier to establish a genuine occupational requirement under Article 4(2), but it must still be linked to the specific job. This is best illustrated by the difference between the post of a priest (devoted to promote or represent a specific religion) and that of a cleaner (where the employee's religion should make no difference).<sup>63</sup> More generally, it remains possible that Article 4(2) could be understood as broadly allowing ethos-based organisations to require individuals working for them to act in good faith and with loyalty to that ethos.

However, in *Ebrahimian v France*,<sup>64</sup> the ECtHR referred to the constitutional principle of the secular nature of France as a state, as stated in Article 1 of the French Constitution, and held that the restriction on the applicant's manifestation of her belief (in the form of a scarf) pursued the legitimate aim of protecting the rights and freedoms of others. The ECtHR came to the conclusion that France had not exceeded its margin of appreciation in deciding to give precedence to the requirement of neutrality and impartiality of the state, although it is not clear if this constitutional principle of secularity can be applicable as an ethos for the purpose of Article 4(2) of the EED<sup>65</sup>.

In the EC implementation report of 2008, the exception provided by Article 4(2) of the Directive was already indicated as a potential problem, namely that - contrary to its final sentence - it could be used to justify discrimination on other grounds (for example, sexual orientation), instead of being clearly linked with the nature of the activities carried out. The second EC report (published in January 2014) provided more details on the Commission's monitoring of the consistency of national laws with that derogation, with the understanding that any exception to the general rule has to be interpreted narrowly. Six Member States were mentioned as having initial problems in its correct implementation, but the relevant infringement proceedings were eventually closed before reaching the Court of Justice.

This is thus an area in need of clarification by the CJEU, which will also need to consider the right to religious freedom of the employer along with other competing interests such as the equality, privacy and dignity rights of employees when assessing the proportionality of any occupational requirement imposed by an ethos-based employer<sup>66</sup>. It is probably unlikely that

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<sup>63</sup> For concrete - and problematic - national examples see Howard, p. 47-53, and [Equality Law in Practice - A Question of Faith: Religion and Belief in Europe](#), Equinet, Brussels, 2011, p. 7.

<sup>64</sup> *Ebrahimian v France*, App. No. 64846/11, 26 November 2015.

<sup>65</sup> Howard, p. 50. At the same time, the German land of Lower Saxony changed its rules and now allows teachers in public schools to wear headscarves, after a court ruled that a ban is against principles of religious freedom.

<sup>66</sup> Vickers, Religion and Belief Discrimination in Employment under the Employment Equality Directive: a Comparative Analysis, 1, *European Equality Law Review*, 227, p. 35.

the Court of Justice will allow for justification of direct (religion or belief) discrimination outside the exceptions provided for in the EED, *inter alia* because it has already rejected in a number of cases any general justification of direct sex/gender discrimination. In the view of Dr Howard, there appears to be no reason why this should not also apply to indirect discrimination on the other grounds of discrimination covered by the EED and the Racial Equality Directives and, as the CJEU is generally concerned with a uniform application of EU law, it should be expected that it will apply the same rule to all grounds of discrimination covered by EU law, including religion or belief<sup>67</sup>.

### 2.1.5. Positive action and reasonable accommodation

As Article 7 of the EED on positive action applies equally to all grounds of discrimination covered by the Directive, it is also legitimate to consider positive action with regard to religion or belief. In the absence of any examples from national legislation or case-law<sup>68</sup>, these considerations are only hypothetical, such as a measure allowing an employer to give preference to a Muslim candidate for a job over a non-Muslim candidate, because Muslims are under-represented among the workforce and the employer is aiming to have a more diverse workforce<sup>69</sup>. In any case, the CJEU has also held that positive measures, as an exception to or derogation from the principle of equal treatment, must be interpreted strictly. In effect, they should also be subject to a proportionality test and possibly be limited in time, lasting until a moment when full equality in practice has been achieved<sup>70</sup>.

Separately, an analysis of the structure of the Directive's provisions on indirect discrimination - with the justification test being the first exclusion, and reasonable accommodation being the second - could also lead to an implicit duty of providing that accommodation in the workplace in case of religion or belief requests. This could be done either in the interpretation of law or in future modifications thereof.

However, the EED only imposes this duty in relation to disability, in Article 5. Some Member States impose it beyond disability (for example in Bulgaria, Croatia, Romania, Spain, France, Germany and Sweden, as well as in the Vienna region of Austria and the Flemish region of Belgium<sup>71</sup>). Additionally, in a specific case in Slovenia the lack of accommodation was held to be indirectly discriminatory on the grounds of religion. As it stands at the moment, concrete examples are available in the private sector, where people with a specific religion can benefit from reasonable accommodation on religious grounds, such as not working on religious holidays or adapting working hours for Muslims during Ramadan.<sup>72</sup>

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<sup>67</sup> Howard, p. 28.

<sup>68</sup> The application of special provisions for police in Northern Ireland (explicitly permitted by Article 15 EED), ended on 28 March 2011.

<sup>69</sup> Howard, p. 55.

<sup>70</sup> *Idem*, p. 58.

<sup>71</sup> [Reasonable Accommodation beyond Disability in Europe?](#) - prepared by the European Network of Legal Experts in the Non-discrimination Field, 2013.

<sup>72</sup> See [Developing Anti-Discrimination Law in Europe \(2014\)](#), pp. 30-31.

### **2.1.6. Conclusions**

At present, the EED only imposes a duty on Member States to have legislation against discrimination in employment and occupation on the grounds of religion and belief, but almost all Member States go beyond the minimum requirements and provide protection also beyond that area (the exceptions being Greece and Poland), mostly reflecting the protection granted under the Racial Equality Directive<sup>73</sup>.

The external study, which was produced on the European Parliament's request with regard to this grounds for discrimination, underlined the importance of the broader context of international law, such as the ECHR, for the interpretation of the Directive's provisions. It also provided details of various national laws (including at constitutional level) that match the EED in protection against direct and indirect discrimination on the basis of religion or belief, as well as in cases of harassment and instruction to discriminate. Apart from the fact that EU Member States often used different wording to introduce these concepts into their national law, the importance of a thorough analysis of the employer's justification for measures which have a discriminatory effect is shown by specific case-law.

There are no open infringement procedures against any of the Member States in relation to religion or belief aspects of the Directive but the real application of its provisions depends largely on the different practices, with special attention given to the exceptions under Article 4 on occupational requirements.

## **2.2. Disability**

### **2.2.1. Introduction**

In comparison with other grounds covered by the EED, disability has a significant record of attention given to it at various levels, including the European one. The Council has addressed this matter on a number of occasions, such as in its Recommendation of July 1986, which set some examples of positive action to promote employment and training of disabled people<sup>74</sup>, and its Resolution of June 1999 on equal employment opportunities<sup>75</sup>. In December 1999, the European Council agreed Employment Guidelines, which covered - among other issues - combating discrimination against persons with disability.

Within the Directive, a separate point under the definition of indirect discrimination in Article 1(2), spells out the obligation to take appropriate measures in order to eliminate related disadvantages, in line with the principles of reasonable accommodation (regulated by Article 5). Possibly reflecting the fact that this obligation might result in significant costs for employers and other bodies, France and the UK used the opportunity of extending the transposition deadline for this provision by the full three years and Denmark for one year.

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<sup>73</sup> For details see Howard, pp. 10-11.

<sup>74</sup> Recommendation 86/379/EEC of 24 July 1986 on the employment of disabled people in the Community - OJ L 225, 12.8.1986, p. 43.

<sup>75</sup> Resolution of 17 June 1999 on equal employment opportunities for people with disabilities - OJ C 186, 2.7.1999, p. 3.

Importantly, the European Union signed the UN Convention on the Rights of Persons with Disabilities<sup>76</sup> (CRPD) in March 2007 and ratified it in December 2010. This Convention - which covers employment, but also many other areas, such as access to education, transport, infrastructure and buildings open to the public, improving political participation and ensuring full legal capacity of all people with disabilities - entered into force with respect to the EU on 22 January 2011, which means that all legislation, policies and programmes at the European level must comply with its provisions. The first periodic report on the implementation of the CRPD by the EU was published on 5 June 2014 and is the subject of a separate own-initiative report being prepared by the Parliament's Committee on Employment and Social Affairs<sup>77</sup>.

### 2.2.2. Definition

The EED does not contain any definition of 'disability', and this notion was thus subject to various interpretations in practice. Following the first years of the Directive's application, the European Commission's 2008 report referred to the clarifications made by the Court of Justice<sup>78</sup> that the concept of disability must be understood as referring to a limitation which results from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life, and that it does not cover 'sickness', although can include conditions caused by incurable or curable long-term illnesses<sup>79</sup>. This was also later confirmed by the CJEU in the *HK Danmark* cases<sup>80</sup>.

In Article 1 of the CRPD, persons with disabilities are considered to include those who have long-term physical, mental<sup>81</sup>, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. This could lead to a claim that countries that do not make - in their national legislation - a reference to the interaction with various barriers, and only focus on the limitations and impairments of the person concerned, are not consistent with the CJEU case law and with CRPD; but it can also be argued that the limiting effect of disabilities logically implies the existence of such barriers, regardless of their nature.

The draft EMPL report discussed in 2013 considered that the absence of a definition of disability in EED could be considered as a loophole, and appreciated the definition built by the CJEU on the basis of the WHO ICF standard<sup>82</sup>. The Court of Justice acted in support of a coherent application of EC law by stating (in a case of EC against Italy<sup>83</sup>, where the Italian government raised the argument of EED not defining disability) that Member States must respect both the previous ruling of the CJEU in this regard (such as *HK Danmark*, see above), and the CRPD, both of which provide definitions of disability.

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<sup>76</sup> <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>

<sup>77</sup> SWD(2014)182 final. See also the analysis by Irmgard Anglmayer, EU Implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD): European Implementation Assessment. European Parliament, February 2016.

<sup>78</sup> Case C-13/05 *Chacón Navas*, judgement of 11 July 2006.

<sup>79</sup> COM(2014)2 final, p. 14.

<sup>80</sup> Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Verge)*, judgment of 11 April 2013.

<sup>81</sup> Difficulty with access to justice for persons with mental disability is analysed by an article in the [European Equality Law Review 2015/2](#).

<sup>82</sup> International Classification of Functioning, Disability and Health (World Health Organisation, United Nations), 2001.

<sup>83</sup> Case C-312/11 *Commission v. Italy*, judgement of 4 July 2013.

Certain national courts have also supported that line. For example, on 19 December 2013<sup>84</sup> the German Federal Labour Court reversed the decisions of first and second instance courts with regard to the definition of disability (defined by the national Social Code) on the basis of the argument that correct interpretation in the light of EU law must lead to a wide concept of disability, combining the elements that are advantageous for a disabled person. It remains to be seen if further evolution of this approach would eventually lead to the protection of those likely to have a future disability<sup>85</sup>.

A case where national law should rather be amended in order to ensure compliance with EED, is Bulgaria, which – in addition to a permanence of what is effectively the equivalent of a hindrance to participation (without that ‘hindrance’ being mentioned explicitly) – requires a threshold of 50% of incapacity and official medical certification.

### **2.2.3. Prohibited conduct**

The prohibition of discrimination on the grounds of disability has one aspect which is identical to other grounds (namely the general prohibition of discrimination) and another related to the duty of ensuring ‘reasonable accommodation’ in favour of disabled persons (to eliminate the possibility of indirect discrimination). Again, the CRPD is helpful to understand discrimination on the basis of disability, by defining it in Article 2 as ‘any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’. It includes all forms of discrimination, including denial of reasonable accommodation.

The general recruitment exception regulated by Article 4(1) of EED, on the basis of which a difference of treatment could be justified where a characteristic related to disability constitutes a genuine and determining occupational requirement, while the objective is legitimate and the requirement is proportionate, seems not to have been used by any Member State (which in such a case is obliged to provide detailed information to the European Commission). In a specific case in Belgium, a Labour Tribunal<sup>86</sup> held that an employer cannot directly distinguish an employee based on a physical or genetic characteristic and/or an alleged disability in order to respond to the needs and preferences of colleagues and/or customers, as this distinction could not be considered as a genuine and determining occupational requirement<sup>87</sup>. In Poland, the Constitutional Court ruled in 2009 that legal provisions, on the basis of which HIV-positive persons could not work in the police, are not compatible with the principle of equality.

Interestingly, employment agencies in the Czech Republic have been prohibited since 1 January 2012 from assigning persons with a disability to temporary work, which was considered by the national legislator to be a measure protecting persons with disabilities from exploitation and to ensure their regular employment. The European Commission considered that this measure was in breach of EED as it provided for an absolute ban on employing persons with disabilities in a

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<sup>84</sup> Decision No 6 AZR 190/12, referred to in *Developing Anti-Discrimination Law in Europe* (2014), p. 2.

<sup>85</sup> *Developing Anti-Discrimination Law in Europe* (2014), p. 23.

<sup>86</sup> President of the Labour Tribunal of Bruges, Judgments No 12/2552/A and No 12/2596/A of 10 December 2013.

<sup>87</sup> *Developing Anti-Discrimination Law in Europe* (2014), pp. 103-104.

certain category of work, and launched an infringement procedure. However, the Czech Republic amended its law in June 2014 and removed the said prohibition from 1 January 2015<sup>88</sup>.

#### **2.2.4. Reasonable accommodation**

Provision on ensuring reasonable accommodation by the employer is regulated by Article 5 of EED in order 'to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training'. Three recitals (16, 20 and 21) correspond to this provision, containing also some examples of appropriate measures, such as adapting premises or patterns of working time. The CRPD defines reasonable accommodation in Article 2 as 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'. Basically, the adjustments should allow the disabled person to be on an equal footing with other workers in a given environment, and the assessment needs to be made with regard to the individual nature of this provision (the EED also adds 'where needed in a particular case'). The European Commission in its 2008 report clarified that the employer must take steps to allow a person who is suitably qualified for the job, apart from his or her disability, to be able to actually take up the job, advance in it and undertake training<sup>89</sup>.

Over the years, this provision of EED has been implemented in a variety of ways by the EU Member States. The CJEU clarified this issue with a reference to the CRPD in its decision in *HK Danmark*, stating that correct interpretation should aim at the 'elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers'<sup>90</sup>. In effect, reasonable accommodation can take the form either of material or organisational measures, as already shown by the specific examples provided in the Directive's preamble. The question that might be considered in the future is whether reasonable effort should be made to adapt all workplaces to special needs with a view to potentially employing persons with any disability, or does the law 'only' require relevant adaptations once an individual case appears (which seems to be the current interpretation).

While the general idea of accommodating the needs of disabled people can be seen as a quasi-human right in development, the limits of the legal obligation ('unless such measures would impose a disproportionate burden on the employer' – also spelled out by Article 5 of EED) can be subject to a cost-benefit analysis. Recital 21 of the Directive provides the criteria to be taken into account in determining the reasonableness of a particular accommodation. These are: the financial and other costs entailed, the scale and financial resources of the organisation or undertaking, and the possibility of obtaining public funding or any other assistance. In effect, the burden is not considered unreasonable where Member States provide sufficient remedies within their disability policies (for example – as suggested by the European Commission – by relevant grants or subsidies to employers in respect of expensive adjustments). The European Parliament's Policy Department Study on 'Reasonable accommodation and sheltered

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<sup>88</sup> *Idem*, p. 23.

<sup>89</sup> COM(2008)225 final/2, p. 5.

<sup>90</sup> CJEU joined cases C-335/11 and C-337/11, *HK Danmark (Ring and Skouboe Werge)*, para 54.



workshops for people with disabilities: costs and returns of investments', published in January 2015, provided a comprehensive analysis of this matter<sup>91</sup>.

The Study presents evidence of a positive return depending on the type of intervention and the methodology chosen, including reasonable accommodations, sheltered workshops, alternative labour market services, universal design, and the European Social Fund. All Member States are shown to offer grants or subsidies to employers to adapt their workplaces for people with disabilities, with evidence suggesting that 'investments in reasonable accommodation are cost beneficial and provide a return in terms of increased productivity and reduced absenteeism', although the limited existing data on these costs, and the lack of any coherent calculation method, was identified as a problem.<sup>92</sup> The Study recommends *inter alia* the adoption of a universal design standard for creating working surroundings which take account of the needs of persons with disabilities.

In many Member States, failure to provide reasonable accommodation constitutes (mostly considered as direct) discrimination, and this tendency is also visible in national case law<sup>93</sup>. So far, it was the matter of one of the only two infringement cases which led to a CJEU decision finding the country in question in breach of its obligation to properly implement EED<sup>94</sup> (the other concerned age - see point 2.3.3. below). Any future modification of the EED should address the content of Article 5, possibly to cover also grounds other than disability, or to clarify its relation to the basic provisions on direct and indirect discrimination.

### 2.2.5. Positive action

Separately from the disability-related provision on reasonable accommodation, the EED regulates (in Article 7(1) covering all four grounds) the possibility for Member States to maintain or adopt measures intended to prevent or compensate for disadvantages, and permits organisations whose main object is the promotion of the special needs of specific persons (as explained in recital 26), under the name of positive action. With regard only to disability, Article 7(2) further clarifies that national provisions on the protection of health and safety at work, as well as measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting the integration of disabled persons into the working environment, are allowed<sup>95</sup>.

Most EU Member States have put in place positive action measures for disability, with the quota system for the employment of disabled people being the most common instrument (see table below). However, alternatives to employing disabled people, such as paying a fee or tax, are almost always offered. The European Commission 2014 report identified only one country (Lithuania) which did not adopt any positive action measures<sup>96</sup>. In addition, other interventions

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[http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536295/IPOL\\_STU\(2015\)536295\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536295/IPOL_STU(2015)536295_EN.pdf)

<sup>92</sup> Idem, pp. 12 and 20.

<sup>93</sup> For details, see Developing Anti-Discrimination Law in Europe (2014), pp. 27-28.

<sup>94</sup> Case C-312/11 *Commission v. Italy*, judgment of 4 July 2013. Italy actually amended its legislation even before (a few days in advance of) the ruling. For details, see Developing Anti-Discrimination Law in Europe (2014), pp. 24-25.

<sup>95</sup> Some countries (Croatia, Cyprus, Greece, Ireland, Luxembourg and the Netherlands) have explicitly interpreted this provision (on health and safety) as permitting exceptions to non-discrimination on the grounds of disability, which can be disputed.

<sup>96</sup> COM(2014)2 final, p. 9.

in the labour market, supporting the employment of people with disabilities, can be identified under the common name of active labour market policies (ALMP). The 2015 study mentioned above conducted a cost-benefit analysis on two ALMP schemes (the 'Towards Work' programme in Lithuania and the EQOLISE study of an Individual Placement and Support for people with severe mental illness in six European cities) that were found to be well designed and managed, and likely to be cost-beneficial<sup>97</sup>. Passive labour market policies (PLMP) such as tax breaks or cash incentives are considered to be more controversial, and at least in some Member States appeared not to have the intended positive impact. The conclusions of the Study stated that PLMP appear to be more efficient where a large spectrum of policies is accessible to people with disabilities and when they are provided for a limited period of time<sup>98</sup>.

Other provisions or facilities for safeguarding or promoting the integration of disabled persons into the working environment also cover the adoption of Universal Design (seeking to ensure that the needs of people with disabilities are taken into account in the design of creating working surroundings<sup>99</sup>), where established standards will probably replace the need for *ad hoc* accommodations which are currently required, and sheltered workshops - which are organisations that specifically employ disabled people. With regard to the latter, Parliament's Study identified a trend towards training and supporting disabled persons to enter the open labour market, but found that only 3% of participants in these workshops actually moved on from there (less than in the United States)<sup>100</sup>.

#### **2.2.6. Additional actions**

Following the adoption of EED, significant activity was undertaken at the EU level with regard to the grounds of disability, including the European Year of People with Disabilities in 2003<sup>101</sup> and the European action plan on equal opportunities for people with disabilities (2003-2010)<sup>102</sup>. The action plan contained three main aims for EU Member States: to fully implement the Directive, to reinforce mainstreaming of disability issues in national policies, and to improve accessibility for all disabled persons. Specific initiatives included increased financial support measures regarding the European Social Fund (ESF) programmes, EQUAL (an initiative co-funded by the ESF and Member States focused on supporting innovative, transnational projects aimed at tackling discrimination and disadvantage in the labour market)<sup>103</sup>, and additional activities by national governments. With regard to the ESF and its use in employment matters, 93% of Member States pledged to promote the inclusion and facilitate the situation of disabled people, but only 50% actually undertook concrete measures<sup>104</sup>.

At present, the 'European Disability Strategy for the years 2010-2020: A Renewed Commitment to a Barrier-Free Europe'<sup>105</sup> is in force, aiming to further reduce inequalities for disadvantaged persons, and to promote their social and economic inclusion and independence. The Strategy

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<sup>97</sup> See Study referred to in footnote 91, p. 62.

<sup>98</sup> *Idem*, p. 63.

<sup>99</sup> At the EU-level, it was introduced as 'Design for All' by the Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, recently replaced by Directive 2014/24 on public procurement.

<sup>100</sup> See Study referred to in footnote 91, pp. 31-32.

<sup>101</sup> [www.eypd2003.org](http://www.eypd2003.org)

<sup>102</sup> COM(2003)0650

<sup>103</sup> [http://ec.europa.eu/employment\\_social/equal/consolidated/](http://ec.europa.eu/employment_social/equal/consolidated/)

<sup>104</sup> See Study referred to in footnote 91, pp. 81-91.

<sup>105</sup> COM(2010)0636

covers many areas, including employment, and provides the basis for action related to awareness-raising, financial support, data collection and monitoring of the implementation of CRPD<sup>106</sup>. As from 2014 the European Social Fund is one of the five European Structural and Investment Funds (ESIF), operating under a common framework and pursuing complementary policy objectives.<sup>107</sup>

*Overview of EU Member States' implementation of EED provisions on disability:*

| Disability     | Transposition             | Reasonable accommodation                                    | Special provisions relevant for defining disability  | Selected best practices                           |
|----------------|---------------------------|---|--|---|
| Austria        | +                         | +   | Impairments must be likely to last for more than six months in order to amount to disabilities | Quota system in employment                        |
| Belgium        | +                         | +   |  | Quota system in employment (mostly public sector) |
| Bulgaria       | Restricted scope          | +   |  | Quota system in employment                        |
| Cyprus         | Discrepancy in definition | +   | Impairment to be indefinite in duration  | Quota system in employment                        |
| Croatia        | +                         | +   |  | Quota system in employment (only public sector)   |
| Czech Republic | +                         | +   |  | Quota system in employment <sup>108</sup>         |
| Denmark        | +                         | +(employers' duty is independent of the employee's demands) |  |   |
| Estonia        | +                         | +   |  |   |
| Finland        | +                         | +   |  |   |
| France         | +                         | +   |  | Quota system in employment                        |
| Germany        | +                         | +   | Impairment must be likely to last for more than six months in order to amount to disability    | Quota system in employment                        |
| Greece         | Discrepancy in definition | +   |  | Quota system in employment                        |
| Hungary        | +                         | +   |  |   |

<sup>106</sup> See also <http://ec.europa.eu/social/main.jsp?catId=1137>

<sup>107</sup> Detailed info at <http://ec.europa.eu/esf/main.jsp?catId=62>

<sup>108</sup> Employers with more than 25 workers have a choice between recruiting at least 4% of employees with disabilities, commissioning goods or working programmes from others employers with at least 50% of workers with disabilities, or making payments to the state budget. This system has been criticised as non-effective - Developing Anti-Discrimination Law in Europe (2014), p. 82.

| Disability     | Transposition             | Reasonable accommodation   | Special provisions relevant for defining disability                    | Selected best practices   |
|----------------|---------------------------|--|--|---|
| Ireland        | +                         | +  |  | Legislation covers discrimination on past, present, and possible future grounds           |
| Italy          | +                         | +<br>(public employers to apply the duty without additional burden and with resources available) |  | Quota system in employment  |
| Latvia         | +                         | +  |  |   |
| Lithuania      | +                         | +  |  |   |
| Luxembourg     | +                         | +  |  |   |
| Malta          | +                         | +<br>(restricted to employees only)  |  | Quota system in employment  |
| Netherlands    | +                         | +  |  | Law covers an actual or assumed disability or chronic disease                             |
| Poland         | Discrepancy in definition | +  |  | Quota system in employment  |
| Portugal       | +                         | +  |  | Quota system in employment  |
| Romania        | +                         | +  |  | Quota system in employment  |
| Slovakia       | Discrepancy in definition | +  |  | Discrimination also covers previous disability and presumption based on external symptoms |
| Slovenia       | +                         | +  |  | Quota system in employment  |
| Spain          | +                         | +  |  | Quota system in employment  |
| Sweden         | +                         | +  | Impairment to be indefinite in duration                                |   |
| United Kingdom | +                         | +<br>(plus guidance on the practical application)  | The impairment should last or be likely to last for at least 12 months | Protection of individuals with respect to past disabilities                               |

### 2.2.7. Conclusions

The principle of non-discrimination because of disability has an established history in Europe and multiple practical results, such as the modifications of working environments made by the employers (often with financial support of national authorities) within the framework of reasonable accommodation. The adoption of the EED allowed for establishing these concepts in a similar way throughout the EU, although the application on the ground is diverse.

The signature of the UN Convention on the Rights of Persons with Disabilities, not just by all EU Member States individually, but also by the European Union as such, allowed the Court of Justice to underline the importance of interpreting the Directive in a manner which is consistent with the CRPD. In effect, there should be more clarity now with regard *inter alia* to the definition of disability itself, although precise limitations of this term might further evolve in the future.

Case-by-case analysis of proportionality and cost-benefit calculations, as difficult as they may be, will continue to have an impact on specific measures taken by Member States, employers and other actors, especially covering the concept of positive action (encouraged by the EED and largely accepted within the EU).

## 2.3. Age

### 2.3.1. Introduction

This specific grounds for discrimination covered by the EED has been the one which has seen most development and attracted most attention, especially in that the Directive (in Article 6) contains the largest exception from the principle of non-discrimination - in the case of different treatment that is objectively and reasonably justified by a legitimate aim, and dealt with by means that are appropriate and necessary. This exception reflects, of course, not only the reality of specific conditions that young and/or older people have or might have, but also various national regulations and practices that take these conditions into consideration.

As mentioned in Annex II to the European Commission's 2014 report, most judgments of the CJEU on the two anti-discrimination directives (EED and the Racial Equality Directive) concerned age-related cases.<sup>109</sup> In one of the most important ones (*Mangold*<sup>110</sup>), the Court of Justice stated that the principle of non-discrimination on grounds of age is a general principle of European Union law, its source being in various international instruments and the constitutional traditions of the Member States, and that the EED simply expresses it at the EU level. This interpretation, if applied consequently, would mean that also other discrimination grounds should be treated as such, and that there would be no reason not to extend it also to areas beyond employment, without the need for a separate legal act (such as the horizontal directive mentioned above in point 1.3.2.).

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<sup>109</sup> SWD(2014)5 final, p. 26.

<sup>110</sup> Case C-144/04, *Mangold* [2005] ECR I-9981.

With regard to the transposition deadlines, five countries (Belgium, Germany, the Netherlands, Sweden and the UK<sup>111</sup>) notified the European Commission that they would extend the deadline in relation to age discrimination for the full three years - until 2 December 2006. Denmark notified its intention to extend the deadline for one year - until 2 December 2004.

As it stands now, all Member States have legislation that forbids discrimination based on age, but the EC 2008 report complained that only a few of them had carried out comprehensive surveys of national law concerning age distinctions (which should be the result of the Directive's Article 16 on compliance - applicable much more to age than any of the other grounds covered by EED). Too little discussion in some Member States as to the legality of certain existing provisions and practices in the context of transposing the Directive led - in the opinion of experts - to confusion that still remains<sup>112</sup>. A positive exception is the Netherlands, where every government department was obliged to produce a report giving an inventory of age criteria in its legislation in order to review the legitimacy of such distinctions<sup>113</sup>.

### 2.3.2. Definition and scope

Lack of a definition of age within the EED - contrary to other grounds - does not raise any problems since age is 'generally assumed to be an objective characteristic with a natural meaning'<sup>114</sup>. The way in which the general principle of non-discrimination on the grounds of age was transposed by the EU Member States nevertheless indicates (with three examples mentioned in the table below) that the traditional borderline between education and employment might need some revision, without undermining the prohibition of child labour (which is not dealt with in any way by the EED and this analysis) or the concept of life-long-learning (likewise).

Importantly, although this was spelled out only in a specific recital (14), the Directive is without prejudice to national provisions laying down retirement ages. This reflects the clear fact that setting such provisions is the sole competence of Member States, but the Court of Justice considered that the EED also covers the related termination of employment contract, although leaving it to the national authorities to find the right balance between different interests involved<sup>115</sup>.

Separately, it should be noted that all Member States introduced age-related derogations and requirements for their armed forces, which is specifically permitted by Article 3(4)<sup>116</sup>.

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<sup>111</sup> According to experts, this happened because of elaborate legislative debate at the national level as to how the age discrimination requirements of the Directive might be fully and immediately integrated within existing law and practice - see [Developing Anti-Discrimination Law in Europe \(2014\)](#), p. 34.

<sup>112</sup> *Idem*, p. 40.

<sup>113</sup> *Idem*, p. 44.

<sup>114</sup> *Idem*, p. 33.

<sup>115</sup> Case C-411/05, *Palacios de la Villa* [2007] ECR I-8531, paragraphs 70 and 71.

<sup>116</sup> For details, see point 8 in Annex III to EC report 2014 (SWD(2014)5 final).

### 2.3.3. Prohibited conduct and exceptions

With the general principle of non-discrimination, and the existence of three different exception provisions: the general one in Article 2(5) (on public security and order, public health and the protection of rights and freedoms of others - applicable in theory also to other grounds), the occupational requirements permitted under Article 4(1) (also applicable to all grounds covered by EED), and the specific one on age-justified differences in treatment permitted by Article 6, the analysis of the practical application of the Directive comes down to individual cases and consideration as to whether or not relevant criteria are met.

The application of **Article 2(5)** was accepted by the Court of Justice on two occasions, the first being *Petersen*, where protection of the health of patients and the financial balance of the health-care system were indicated by Germany as reasons for limiting the age of dentists in public practices to 68 years<sup>117</sup>. The Court considered that, in view of the fact that the legally set age limit for dentists in private practices was higher (70 years), a stricter limit did not qualify for the EED exception. It left it to the national court to examine the other element (although it is not quite convincing how the public finances - important as they may be - fall under the remit of public order or security).

In the other case, the CJEU examined a collective agreement providing for the automatic termination - at retirement age - of employment contracts of Lufthansa pilots<sup>118</sup>. Air traffic safety was considered to qualify as a public security matter covered by Article 2(5), but the Court stressed that exceptions should be interpreted restrictively and did not find the measure in question to be justified. The Court also assessed the possible application of Article 4(1) on genuine and determining occupational requirements, and - in view of national and international legislation authorising pilots to work until the age of 65 - considered automatic retirement at the age of 60 to be disproportionate. Moreover, the Court went through the justification test under Article 6 and ruled that air traffic safety did not constitute a legitimate aim related to employment policy, labour market and vocational training. In effect, the Court declared the contested provision to constitute a direct discrimination on grounds of age. A different conclusion was reached by the Dutch Supreme Court in the case of KLM pilots, who are obliged - also by collective agreement - to retire at the age of 56 (unless they work part-time and can continue to work until 60), mainly because the defence of such a provision (backed by the company's management and supported by a trade union) was based on specific social policy objectives (permitted under Article 6(1)), and not public safety<sup>119</sup>.

In *Wolf*, a German national rule limiting the entry into the active fire service (the maximum age being 30 years old) was considered by the CJEU as a legitimate, genuine and determining occupational requirement (permitted under **Article 4(1)** of the EED), in view of the scientifically proved effects of age on physical activity. However, in a more recent case (*Perez*), the CJEU declared the same limit set by a Spanish municipality in a specific police recruitment announcement as disproportionate<sup>120</sup>.

<sup>117</sup> Case C-341/08, *Petersen* [2010] ECR I-47.

<sup>118</sup> Case C-447/09, *Prigge* [2011] ECR I-08003.

<sup>119</sup> For details, see *Developing Anti-Discrimination Law in Europe* (2014), p. 37.

<sup>120</sup> Case C-229/08, *Wolf* [2010] ECR I-1; Case C-416/13, *Perez*, judgment of 13 November 2014.



On the basis of **Article 6**, Member States are allowed to regulate in national law that certain differences of treatment on grounds of age are allowed. Such rules must be objectively and reasonably justified by a legitimate aim, including employment policy, as well as labour market and vocational training objectives, and the means of achieving the aim must be appropriate and necessary. Recital 25 additionally indicates that specific provisions may vary in accordance with the situation in Member States, which is indeed illustrated by a huge variety of rules in force throughout the European Union.

The second sub-paragraph of Article 6(1) contains three examples (thus not an exclusive list) of justified differences of treatment on grounds of age:

- 1) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities, in order to promote their vocational integration or ensure their protection;
- 2) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment; and
- 3) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

The justification test was indicated as crucial for the application of the EED by the European Commission 2008 report, which also mentioned that some Member States provided for general exceptions to the principle of non-discrimination which are broader than the provisions of Article 6. Among the five countries that were then identified as not having transposed this exception as such<sup>121</sup>, only two (Estonia and Hungary) still do not have it today.

An early reference to the two CJEU cases already mentioned above<sup>122</sup> confirmed that national authorities have broad discretion with regard to social policy choices, and that the suitability and proportionality of the aims and means has to be analysed in each case. The European Commission 2014 report also underlined the considerable flexibility left to Member States<sup>123</sup>. Some experts go as far as considering Article 6 of the EED as one of the most vague in the field of European equality legislation.<sup>124</sup>

An overview of national and CJEU rulings in cases referred to in the relevant literature and the European Commission reports<sup>125</sup> confirms that the Court has been quite relaxed with regard to Member States setting the aims accepted as legitimate, but stricter in its scrutiny of the proportionality of the measures used to reach those aims. Minimum and maximum age requirements, in particular in access to employment, are thus widely permitted, as well as requirements of a certain number of years of experience. Notably the solidarity between

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<sup>121</sup> Estonia, Ireland, Hungary, Poland, UK.

<sup>122</sup> Case C-144/04, *Mangold*, judgement of 22 November 2005 and Case C-411/05, *Palacios de la Villa*, judgement of 16 October 2007.

<sup>123</sup> COM(2014)2 final, p. 14.

<sup>124</sup> See [http://www.era-comm.eu/oldoku/Adiskri/08\\_Age/2010\\_09\\_OCinneide%20EN.pdf](http://www.era-comm.eu/oldoku/Adiskri/08_Age/2010_09_OCinneide%20EN.pdf) - containing a detailed and critical assessment of the CJEU jurisprudence with regard to age.

<sup>125</sup> Especially in Annex II to COM(2014)2 final - in SWD(2014)5 final, point 7.



generations (including the process of older workers leaving their jobs to let the young take over) is identified as the single most important legitimate aim justifying differences of treatment based on age, accepted by the Court. In that context, Member States are free to decide how to manage the scarce resource of employment. The main advice from the Court of Justice of the European Union could thus be summarised by an indication that discriminatory practices need to be carefully scrutinised by national courts.

With regard to **young workers**, Member States have mostly introduced measures that are intended to constitute recruitment incentives, but some might seem to contradict each other as both more and less protection is supposed to increase those persons' employment<sup>126</sup>. The European Parliament's Policy Department Study on the 'Differential treatment of workers under 25 with a view to their access to the their labour market'<sup>127</sup>, published in October 2014, found that young people tend to be disadvantaged when entering the labour market (for example by being excluded from the rules on minimum wages), with some compensation in the form of positive action measures (such as career guidance or training). It also confirmed that the circumstances under which difference of treatment based on age may be justified (legitimate aim, appropriate and necessary means) leave considerable room for discretion to the Member States and are extremely varied. Incentivising employers to hire or train young people is notably done by some Member States via subsidised apprenticeships and employment or reduced social security contributions, but the effectiveness of these measures is contested, as the results depend on various other elements of socio-economic context.

In the case of **older workers**, national regulations mostly take into account their physical limitations<sup>128</sup>, but can also entail the abolition of previously existing provisions concerning obligatory retirement. As previously mentioned, the Court of Justice of the European Union distinguished the definition of retirement age for the purposes of being entitled to a pension (which is a national competence) from the termination of a contract of employment (which is within the material scope of EED), but in the end that automatic termination and compulsory retirement was accepted in principle in both national legislation and collective agreements, leaving the Member States the decision as to where to set the balance between prolonging occupational activity and retirement. Specific provisions in national laws can sometimes be seen - similarly to those on young workers - as contradictory, reflecting the dilemma as to whether or not employment of older workers should actually be encouraged (see table below).

In a relatively recent case, the European Commission launched infringement proceedings against Hungary on the lowering of the compulsory retirement age of judges, prosecutors and public notaries<sup>129</sup>. Interestingly, the problem was not the lowering of the mandatory retirement age for public sector employees as such (to the general level of 62 to 65), but rather the issue of the absence of any transitional period for those professions where it was previously fixed at 70 (at least part of the rationale for that change was in fact the wish to quicken the generational change in the legal professions). In November 2012 the CJEU found that this legislation was in breach of the EED, and the Hungarian government submitted a bill introducing a transitional

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<sup>126</sup> See Annex III in SWD(2014)5 which is a compilation of information sent by Member States.

<sup>127</sup> [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536299/IPOL\\_STU\(2015\)536299\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536299/IPOL_STU(2015)536299_EN.pdf)

<sup>128</sup> Such as the provision of additional holidays for employees aged above 58, which was found by the German Federal Labour Court to be justified in the view of additional need for rest of older workers in a specific field of work (shoe production) - Developing Anti-Discrimination Law in Europe (2014), p. 35.

<sup>129</sup> Case C-286/12 *Commission v. Hungary*, judgement of 6 November 2012.

period for the implementation of the 2011 legislation. Following that amendment of national law (in March 2013) the case was closed.

In a separate example, the Greek Council of State declared in May 2012 that an age limit for access to a profession is unconstitutional unless it is justified by reason of necessity<sup>130</sup>. However, it is noteworthy that the Council of State did not invoke national anti-discrimination law or the Employment Equality Directive, but only the constitutional principles of proportionality, professional freedom and participation in economic and social life.

*Overview of selected national provisions on age-related matters.*

| Age            | Transposition  | Article 6 exceptions                        | Provisions on young workers  | Provisions on older workers   | Retirement   |
|----------------|--|---|--|---|--|
| Austria        | +  | Yes, including occupational social security |  |   |  |
| Belgium        | +  | Yes, including occupational social security | Possibility of lower salary for workers 15-18  | Additional leave, options for part-time                             | Retirement ages for public sector employees only (65)            |
| Bulgaria       | +  | Yes, including occupational social security | Financial incentives to employers  | Financial incentive to employer, additional leave for older workers | Age limits for remaining in service (army, police)               |
| Cyprus         | +  | Yes, including occupational social security |  |   | Retirement ages for public sector employees only (65)            |
| Croatia        | +  | Yes, including occupational social security |  | Special privileges possible   | Possible compulsory retirement in public and private sector (65) |
| Czech Republic | +  | Yes, including occupational social security |  |   | No compulsory retirement age                                     |
| Denmark        | Limited application to persons under 18, and none under 15 | Yes, including occupational social security | Collective agreements allowed to establish different conditions for employees under 18 | Additional leave  | Mandatory retirement possible in collective agreements           |

<sup>130</sup> Decision No 1624 /2012 - referred to in Developing Anti-Discrimination Law in Europe (2014), p. 40.

| Age     | Transposition   | Article 6 exceptions                        | Provisions on young workers                                | Provisions on older workers   | Retirement   |
|---------|---|---|--|---|--|
| Estonia | +   | No  |  | Additional leave  | No compulsory retirement age   |
| Finland | +   | Yes, including occupational social security | Assistance to job-seekers                                  |   | Possible compulsory retirement in public and private sector (68)                                       |
| France  | +   | Yes   |  | Minimum quotas of workers over 50 in collective agreements                          | General retirement ages for public sector employees only (65)  |
| Germany | +   | Yes, including occupational social security |  | 1 day more in leave for public sector workers above 55                              | Mandatory retirement age for some public servants, and allowed in collective and individual agreements |
| Greece  | +   | Yes, including occupational social security |  |   |  |
| Hungary | +   | No  | Assistance to job-seekers, increased protection            | Financial incentives to employers, but also protection of workers in pre-retirement | Mandatory retirement age for public sector employees   |
| Ireland | Scope restricted to persons above the maximum age at which a person is statutorily obliged to attend school | Yes, including occupational social security | Assistance to job-seekers                                  |   | An employee may be dismissed after he or she reached the 'normal retiring age' for a relevant position |
| Italy   | +   | Yes, including occupational social security | Financial incentives to employers, but also reduced salary | Financial incentives to employers   | Possible compulsory retirement in public and private sector (70)                                       |

| Age         | Transposition | Article 6 exceptions                        | Provisions on young workers   | Provisions on older workers   | Retirement  |
|-------------|---------------|---|---|---|---|
| Latvia      | +             | Yes, including occupational social security | Increased protection  |   | Retirement ages for public sector employees only (65)                           |
| Lithuania   | +             | Yes   | No probation period for workers under 18                            |   |   |
| Luxembourg  | +             | Yes, including occupational social security |   |   | Retirement ages for public sector employees only (68)                           |
| Malta       | +             | Yes   |   | Financial incentives to employers; special training courses for unemployed above 40 | Possible compulsory retirement in public and private sector (65)                |
| Netherlands | +             | Yes, including occupational social security |   |   | Possible compulsory retirement in public and private sector (67)                |
| Poland      | +             | Yes, including occupational social security |   | Repeal of the possibility to terminate employment                                   | No compulsory retirement age  |
| Portugal    | +             | Yes   |   |   | Retirement ages for public sector employees only (70)                           |
| Romania     | +             | Yes, including occupational social security | Financial incentives to employers                                   | Financial incentives to employers   | Possible compulsory retirement in public and private sector (63 women / 65 men) |
| Slovakia    | +             | Yes, including occupational social security | Obligation for the employer to create a favourable work environment |   | No compulsory retirement age  |

| Age            | Transposition           | Article 6 exceptions                        | Provisions on young workers  | Provisions on older workers       | Retirement  |
|----------------|-------------------------|---|--|-----------------------------------|---|
| Slovenia       | +                       | Yes   |  | Protection of workers above 55    |   |
| Spain          | +                       | Yes, including occupational social security | Financial incentives to employers  | Financial incentives to employers | Retirement ages for public sector employees only (65)                                 |
| Sweden         | +                       | Yes, including occupational social security |  |                                   | Possible compulsory retirement in public and private sector (67)                      |
| United Kingdom | No application under 18 | Yes, including occupational social security | Permits age distinctions in the payment of the national minimum wage in order to encourage - employers to employ younger workers |                                   | Since 1 October 2011, all age-related dismissals have to be justified by the employer |

### 2.3.4. Conclusions

The introduction of the principle of non-discrimination on grounds of age into European law contributed to positive changes in many Member States<sup>131</sup>, but the variety of national provisions related specifically to young and old workers (including certain professions) was reflected in a large exception clause that permits different treatment. In addition to the need for assessing the coherence of such provisions with the criteria set by the EED - that is whether they are justified by a legitimate aim, and achieved by appropriate and necessary means - the effectiveness of these measures, just as any positive action also linked to age, often remains difficult to prove.

The Court of Justice, having dealt with numerous age-related cases, considered that Member States have a significant freedom in setting the aims of national legislation on labour policies, but - together with national courts - developed important indicators to assess the proportionality of the means used to achieve those aims, including references to international law and existing provisions on retirement age (which remains a national competence). While it is surely possible to improve the exchange of best practices between Member States, also with the use of instruments available at the European level, defining in a more precise way the Directive's exceptions related to age might be seen as too ambitious<sup>132</sup>.

<sup>131</sup> COM(2014)2 final, p. 13.

<sup>132</sup> Such a recommendation - in addition to better dialogue with social partners and adopting guidelines for a harmonised approach - was made by the Study referred to in footnote 127.

## 2.4. Sexual orientation

### 2.4.1. Introduction

The order in which the four grounds covered by the EED are addressed in this analysis follows the one provided for in the Directive, starting with recital 11 and repeated elsewhere. But it might also be useful here to recall that until the entry into force of the Treaty of Amsterdam (1 May 1999), European law only addressed discrimination on the grounds of nationality and sex (gender). The latter was notably addressed by Council Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions<sup>133</sup>, later replaced by Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation<sup>134</sup>.

The introduction into EU law of provisions against discrimination on the grounds of sexual orientation followed a number of European Parliament resolutions in the 1980s and 1990s, and a clause was introduced in the Staff Regulations for EU officials in 1998. The prohibition of discrimination on grounds of sexual orientation was also developed in the Council of Europe (CoE), but its Committee of Ministers adopted only in 2010 a Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity<sup>135</sup>, which addressed *inter alia* the area of employment. In a wording similar to the EED, the CoE Member States were called on to '*ensure the establishment and implementation of appropriate measures which provide effective protection against discrimination [...] in employment and occupation in the public as well as in the private sector. These measures should cover conditions for access to employment and promotion, dismissals, pay and other working conditions, including the prevention, combating and punishment of harassment and other forms of victimisation*'.

In 2000, when the Directive was adopted, the prohibition of discrimination on the grounds of sexual orientation was new for nearly all Member States and its implementation was sometimes challenging. Portugal and Malta were the first countries to define sexual orientation within their national anti-discrimination legislation. A comprehensive report on Combating Sexual Orientation Discrimination in the European Union, prepared by the European Network of Legal Experts in the Non-discrimination field and published in December 2014<sup>136</sup>, constitutes the main reference document for the following analysis.

### 2.4.2. Definition

At first sight, sexual orientation has a relatively clear meaning - with any given person being heterosexual, homosexual or bisexual - but the lack of a legal definition can also lead to limiting interpretations, which would leave people of a very specific sexual orientation (such as asexuality) without protection. A broad definition of 'sexual orientation', under the Yogyakarta

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<sup>133</sup> OJ L 39, 14.2.1976, p. 40

<sup>134</sup> OJ L 204, 26.7.2006, p. 23.

<sup>135</sup> It followed the Parliamentary Assembly's Resolution on 'Discrimination on the basis of sexual orientation and gender identity'.

<sup>136</sup> Hereafter referred to as Report on Combating Discrimination; see [http://ec.europa.eu/justice/discrimination/files/sexual\\_orientation\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/sexual_orientation_en.pdf)

Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, has thus been suggested as referring 'to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender'<sup>137</sup>, although it seems not to cover the option of 'no gender'.

Importantly for a matter of high individual sensitivity, the Directive grants protection without requiring the person concerned to actually provide evidence of a given sexual orientation. Moreover, this protection also covers persons whose sexual orientation is only assumed (which might be more valuable in relation to this grounds for discrimination than for others covered by EED), as was confirmed by the CJEU in a case of a football player and homophobic speech that concerned him<sup>138</sup>. This element of the scope of protection is sometimes explicitly mentioned in national law (Sweden) or additional guidelines (Austria). In a Polish case, clear discrimination was found by the national court with regard to the dismissal of a worker after he took part in a Gay Pride march, whereas his sexual orientation was only assumed<sup>139</sup>.

In another case dealt with at the European level, the Court of Justice underlined that discrimination on grounds of sexual orientation does not fall within the prohibition of discrimination on grounds of sex<sup>140</sup>. Trans-sexuality should also be covered by gender matters, and is explicitly covered by national provisions on sexual identity in some Member States.

### 2.4.3. Prohibited conduct

In its first report on the application of the EED, the European Commission underlined that most Member States had to provide legal protection in the area of sexual discrimination for the first time. Nevertheless, discrimination based on this grounds is now prohibited in all EU Member States, although there are very few examples of cases being brought before the national courts. This was partly explained by the reluctance of complainants to make their sexual orientation public, in a context where discrimination based on this characteristic is still considered by many Europeans to be widespread and a taboo issue in their society<sup>141</sup>. Also, the CJEU considered only a limited number of cases in relation to sexual orientation (especially in comparison with other grounds for discrimination) and all of them concerned direct discrimination.<sup>142</sup> In the absence of case-law on indirect discrimination on the grounds of sexual orientation, the Report on Combating Discrimination refers to some hypothetical examples, such as the employer organising training for staff in a country (outside the EU) where homosexuality is illegal.

Taking into account the significant link with the European Convention for Human Rights and Fundamental Freedoms (ECHR), the jurisprudence based on its anti-discrimination provisions

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<sup>137</sup> See Report on Combating Discrimination, p. 58.

<sup>138</sup> Case C-81/12 *Asociația ACCEPT*, judgement of 25 April 2013.

<sup>139</sup> Report on Combating Discrimination, p. 59.

<sup>140</sup> Case C-249/96 *Grant*, [1998] ECR I-621, paras 24-47.

<sup>141</sup> According to the Eurobarometer Report on Discrimination (January 2007), around half of Europeans consider discrimination based on sexual orientation to be widespread and to be a taboo topic in their country - see

[http://ec.europa.eu/employment\\_social/eyeq/uploaded\\_files/documents/Eurobarometer\\_report\\_en\\_2007.pdf](http://ec.europa.eu/employment_social/eyeq/uploaded_files/documents/Eurobarometer_report_en_2007.pdf).

<sup>142</sup> Full description - see Report on Combating Discrimination, pp. 41-49.



is surely worth mentioning. In *Eweida*<sup>143</sup>, the European Court of Human Rights (ECtHR) found that a public employer was entitled to dismiss staff who declined carrying out certain duties for homosexual couples on the basis of religious convictions, acknowledging at the same time that it is the responsibility of national authorities to find a proper balance between competing rights (in this case, also of religious freedom).

Harassment with regard to sexual orientation often takes place towards an employee who disclosed his homosexual orientation, for example in the form of humiliating comments. Such a situation also requires an analysis of the employer's responsibility for the behaviour of other employees, even outside the scenario of instructions to discriminate. In a UK case, harassment by posting false status updates on a colleague's social network profile – during working hours – led to the employer being held liable for not ensuring an appropriate working environment<sup>144</sup>. On the other hand, a national court in Poland effectively blamed the person who disclosed homosexuality in a work place for the negative consequences of that disclosure (namely verbal comments from colleagues), which is certainly not what the EED intended. As rightly pointed out by the Report on Combating Discrimination, people should not be expected to conceal their sexual orientation in order to avoid discrimination and the fact of any person voluntarily disclosing his or her orientation cannot be used as a justification for discriminatory treatment.<sup>145</sup>

#### **2.4.4. Marriages and the situation of same-sex couples**

Recital 22 of the EED clearly states that the Directive is without prejudice to national laws on marital status and the benefits dependent thereon. As with the reservation concerning the setting of retirement age (recital 14), this is not reflected in any of its Articles, as this matter remains the competence of Member States.

The implementation of the two equality directives adopted in 2000 (the EED and the Racial Equality Directive) came at a time when an increasing number of countries in Europe are allowing same-sex couples to marry or to register partnerships and to benefit from the same benefits as married couples<sup>146</sup>. Notwithstanding the fact that questions of marital status and registered partnerships remain a matter for national law, the Court of Justice contributed (in *Maruko* case<sup>147</sup>) to the understanding that if the Member State grants similar status to same-sex couples as to opposite-sex couples, the work-related social benefits available to spouses should also be applied equally. The CJEU considered that it is for the national courts to determine whether the situation is really comparable. In effect, the German Constitutional Court (which was dealing with the case in question on a pension entitlement for a surviving spouse) overruled its previous case law, and clarified that both same-sex couples living in a life partnership and married spouses have to be treated equally with regard to social benefits.<sup>148</sup> In a separate case, the CJEU ruled that paid leave and salary bonuses paid by a company on the

<sup>143</sup> *Eweida v British Airways Plc*, judgement of 15 January 2013, [2010 IRLR 322 (CA)].

<sup>144</sup> Report on Combating Discrimination, p. 55.

<sup>145</sup> *Idem*, p. 34.

<sup>146</sup> Developing Anti-Discrimination Law in Europe (2014), p. 78.

<sup>147</sup> Case C-267/06, *Maruko*, [2008] ECR I-1757.

<sup>148</sup> German Federal Constitutional Court (Bundesverfassungsgericht), 7 July 2009, 1 BvR 1164/07.



occasion of an employee's marriage must be considered as pay<sup>149</sup>, clarifying also the scope of the Directive.

Thus, similarly to the issue of setting the retirement age dealt with above (in point 2.3.2.), a distinction was made between the competence of the Member States and its exercise in a field that is covered by EU law - namely employment. In the latter context, the Member States must respect Union law such as the EED<sup>150</sup>. Nevertheless, there remain many countries where restricting work-related benefits to married employees is likely to be regarded as lawful, since same-sex partnerships are not granted similar status to traditional marriages.

In a matter not directly related to employment, but worth mentioning in the context of discrimination on the grounds of sexual orientation, the UK Supreme Court upheld the decision of a lower court that the refusal to provide a standard double room to a same-sex couple amounted to direct discrimination<sup>151</sup>. Especially interesting is the fact that the defendants (running the private hotel) claimed that their refusal was based on religious grounds (considering same-sex partnership a sin), which again highlights the need to balance competing rights and/or discrimination on multiple grounds.

#### **2.4.5. Other concepts**

As with other grounds covered by the EED, the application of Article 4(1) on occupational requirements and of Article 7(1) on positive action could be considered in this context, with the former constituting an exception to the prohibition of discrimination, and the latter contributing to the disadvantaged position of people with certain characteristics.

With the general exception of Article 4(1) on genuine and determining occupational requirement understood as an ability to perform the specific job more effectively in comparison with other persons, it is difficult to find such employment-related activities where sexual orientation could be considered to qualify under the requirement of the Directive. A rare practical example identified by the relevant literature concerns the Swedish position of a counsellor for homosexual men, on the basis of the assumption that they would only have trust in a person sharing the related characteristic.<sup>152</sup>

In the other case - of Article 7(1) - there is no EU Member State that would implement measures on positive action focused on sexual orientation. Ireland is the only country with a specific legislative provision to that effect, and the Report on Combating Discrimination provides some interesting, albeit purely hypothetical, examples.<sup>153</sup> In advance of the part of this analysis describing national equality bodies (see point 3.3. below), it is worth stressing that establishing good cooperation between such bodies and LGBT organisations<sup>154</sup> is an example of good

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<sup>149</sup> Case C-267/12 *Frédéric Hay*, judgement of 12 December 2013.

<sup>150</sup> Report on Combating Discrimination, p. 43.

<sup>151</sup> Supreme Court decision *Bull & Anor v Hall & Anor* [2012] UKSC 73 of 27 November 2013.

<sup>152</sup> Report on Combating Discrimination, pp. 35-36 and 61.

<sup>153</sup> *Idem*, p. 36.

<sup>154</sup> LGBT stands for lesbian, gay, bisexual, and transgender; it is also sometimes complemented with IQQA for intersex, queer, questioning and allies.

practice in combating sexual orientation discrimination, since, without gaining the trust of those exposed to discrimination, equality laws might indeed not be applied at all.<sup>155</sup>

Last, but not least, the problematic use of the exception for ethos-based organisations, provided for by Article 4(2) of the EED, should be mentioned, as even though it clearly relates to religion and belief only, it could possibly lead - also in the absence of clear national rules - to practices of discrimination on the grounds of sexual orientation. Similarly to the two cases referred to before (*Eweida* and the UK hotel), a line needs to be drawn between a *belief* that is protected as the individual right, and discriminatory *conduct* that should be prohibited in the view of legal principle<sup>156</sup>.

#### 2.4.6. Conclusions

Sexual orientation might be the least complicated grounds for discrimination covered by the EED, as - contrary to religion and belief, disability and age - the Directive contains no specific provisions on that matter. At the same time, there is much less information available on the application of the principle of non-discrimination with regard to this characteristic, and only a limited amount of case-law at the national or European level (including the ECtHR). This might be due to the less obvious display of characteristics of sexual orientation, the intimate aspect of sexual identity of a person, and cultural contexts which in many EU Member States prevent individuals from disclosing non-heterosexual orientation and/or pursuing the right to equal treatment (in employment and beyond).

A few judicial cases where discrimination on this basis was analysed, allowed for the development of concepts (such as association, assumption, and harassment) that also apply to other grounds, and the overlap with some religious beliefs contributed to the consideration of multiple discrimination and of a balanced approach needed in case of conflicting rights. Notwithstanding the fact that only national laws regulate marital status and related benefits, the practical application of EED led the CJEU, as well as some national courts, to grant more protection to homosexual couples than previously thought possible.

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<sup>155</sup> Report on Combating Discrimination, p. 71. See also the [EP Briefing](#) of May 2015.

<sup>156</sup> Report on Combating Discrimination, p. 37. See also point 2.1.4. above.

### 3. Horizontal matters

A number of additional provisions (especially in Chapter II of the Directive - on remedies and enforcement) concern all grounds of discrimination, and are very important for the practical application of specific rules dealt with above. This concerns such issues as the access to information, availability of data, and procedural matters related to judicial proceedings. In addition, the activity of national equality bodies is of huge importance, even though the EED (contrary to the Racial Equality Directive) does not contain an obligation for Member States to establish such an entity for employment-related matters. This part of the analysis covers these elements on the basis of publicly-available assessments made by other institutions and experts.

#### 3.1. Providing information

The big problem with the effective protection of individuals against discrimination is often the fact that they are not sufficiently informed of these rights and/or of the protection mechanisms that are put in place for the cases of alleged discrimination to be reported and properly considered by advisory or judiciary instances. As rightly pointed out by the European Commission in an answer to the question *'Should I report discrimination?'* in the Guidance to victims of discrimination: *'[Yes.] You can only obtain a remedy (e.g. reinstatement in your job or compensation) if you complain. Filing a complaint will also help others by enhancing awareness of discrimination and changing attitudes. Real change often requires a critical mass of cases.'*<sup>157</sup>

Article 12 of the EED obliges the Member States to inform the persons concerned about the national provisions regarding equality in employment, by all appropriate means and indicating the workplace as an example. In addition, appropriate dialogue between social partners and with non-governmental organisations is encouraged by separate Articles 13 and 14 (but both issues are covered jointly by recital 33), including the possibility to entrust adequate entities with the implementation of the Directive's provisions in collective agreements. In its 2008 report, the European Commission considered that the provisions on dissemination of information and social dialogue were implemented to a limited extent by various instruments, such as legal requirements and the use of already existing channels of consultation<sup>158</sup>. More structured dialogue with NGOs and social partners was found to take place for disability than for the other grounds of discrimination, especially at the stage of transposing the Directive, but the duty to disseminate information and establish permanent mechanisms for dialogue is not necessarily a high priority at the national level<sup>159</sup>. The joint 2014 report (covering both the EED and the Racial Equality Directive) mentioned a number of countries which have made specific efforts with regard to awareness-raising, including with the funding available through EU Progress<sup>160</sup>.

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<sup>157</sup> See Question 11 in SEC(2014)5 [Annex 1]. A modified version, in all EU languages, is available [on-line](#) and distributed in the form of [booklets](#).

<sup>158</sup> COM(2008)225 final/2

<sup>159</sup> Developing Anti-Discrimination Law in Europe (2014), pp. 130/131 and 133/134. Examples of activities are: information campaigns, conferences and seminars, trainings aimed at various professions, and networking efforts.

<sup>160</sup> COM(2014)2 final, p. 5.

Informative campaigns have also been organised at the European level, such as 'For diversity. Against discrimination' launched in 2003 and featuring public events, awards for journalists and competitions for young people, with the aim to make more people aware of their rights and responsibilities<sup>161</sup>. The 2007 European Year of Equal Opportunities for All also contributed to that effect, with political commitments to equal opportunities in individual Member States, numerous debates, exhibitions and other events. Various documents related to other awareness-raising campaigns are available on the European Commission's website<sup>162</sup>. In one of the amendments to the draft EMPL 2013 report, the European Commission was invited to carry out further public campaigns to increase the popular awareness of the advantages of the Directive and to create greater opportunities for relevant NGOs to work also at the European level and exchange experiences in order to create a truly inclusive society<sup>163</sup>. An opinion of the Fundamental Rights Agency (FRA) also supported addressing information campaigns to the persons at risk of being discriminated against, as well as employers who might otherwise discriminate against their staff or candidates<sup>164</sup>. Together with the European Court of Human Rights and the Council of Europe, FRA published a comprehensive Handbook on European non-discrimination law, addressed to legal practitioners such as judges, prosecutors and lawyers, as well as law-enforcement officers<sup>165</sup>.

### 3.2. Collection of data

Recital 15 of the Directive: The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence.

As correctly stated in an Equality Data Initiative paper<sup>166</sup>, reliable data is needed to ensure equality and actively fight discrimination, and this is done by measuring existing inequalities, facilitating the development of adequate policies and monitoring whether these policies work. Apart from the above-mentioned reference in a separate recital, the EED does not contain any provisions on data collection and among the grounds covered by the Directive, only disability is covered by an obligation to collect data via another instrument - Article 31 of the CRPD<sup>167</sup>. The European Parliament's Study on reasonable accommodation and sheltered workshops for people with disabilities<sup>168</sup> also pointed out the lack of comparable data among Member States,

<sup>161</sup> This campaign was followed in 2012 by an advertising campaign.

<sup>162</sup> [http://ec.europa.eu/justice/discrimination/document/index\\_en.htm#Raising\\_awareness](http://ec.europa.eu/justice/discrimination/document/index_en.htm#Raising_awareness)

<sup>163</sup> AM 49 in PE513.299v01-00, see footnote 41.

<sup>164</sup> <http://fra.europa.eu/en/opinion/2013/fra-opinion-situation-equality-european-union-10-years-initial-implementation-equality>

<sup>165</sup> [http://fra.europa.eu/sites/default/files/fra\\_uploads/1510-FRA-CASE-LAW-HANDBOOK\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA-CASE-LAW-HANDBOOK_EN.pdf)

<sup>166</sup> See <https://www.opensocietyfoundations.org/publications/equality-data-initiative-background-paper>

<sup>167</sup> A critical assessment of how this obligation is implemented so far in seven EU Member States is provided by a separate Open Society Foundations report '[Ethnic origin and disability data collection in Europe: measuring inequality and combating discrimination](#)', published in November 2014.

<sup>168</sup> See footnote 91.

and suggested the development of a common typology of measures to facilitate the collection of data on the return on investment of these measures.

Apart from public statistics, useful data on discrimination can be collected via administrative registers, open surveys, monitoring mechanisms in private enterprises and public bodies, information from the judicial system, as well as complaints made to other institutions. All EU Member States have arranged this in a different way, if at all, while - for example - no data on complaints are collected in Lithuania, Greece, Spain and the United Kingdom<sup>169</sup>. Another amendment to the draft EMPL report mentioned above<sup>170</sup> suggested that it is necessary to harmonise the basic data to be entered in the registers of the Member States' labour inspectorates, in order to facilitate regular monitoring of discrimination in employment.

The European Commission, in its joint 2014 report, admitted that many Member States do not collect equality data or do it in a very limited way, and emphasised that data protection laws (including those at EU level) do not prevent the collection of data - provided that the relevant safeguards are respected.<sup>171</sup> A minimum safeguard could be that data is anonymised and used for statistical and evidence purposes only, excluding the identification of natural persons concerned. In addition to the fact mentioned earlier that Europeans are increasingly willing to provide sensitive personal information if this could help combat discrimination<sup>172</sup>, the European Commission is at present assessing the means to promote collection of such data, in cooperation *inter alia* with the Fundamental Rights Agency.

### 3.3. Judicial remedies

Recital 29 of the Directive (extract): Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection.

Adequate means of legal protection are essential for any rights to be properly implemented. Articles 9, 10 and 11 of the EED introduced specific rules, albeit respecting the Member States' competence for regulating procedural law (especially with regard to time limits, representation before the courts, and the obligations of the court or other competent body to investigate the facts). This covers the basic assurance of access to justice for the person subject to discrimination (Article 9(1)), legal standing of relevant associations or organisations (Article 9(2)), burden of proof (Article 10(1)) and protection against victimisation (Article 11). Separately, the Member States were obliged to introduce effective, proportionate and dissuasive sanctions - which is a relatively standard formulation in EU law - under Article 17 of the Directive.

The EED does not address in any way the basic institutional set-up of Member States' implementation of its provisions, but in view of its principal scope of application - i.e. employment relations, it is not surprising that in many countries (Finland, Hungary, Latvia,

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<sup>169</sup> Developing Anti-Discrimination Law in Europe (2014), p. 123.

<sup>170</sup> AM 46 in PE513.299v01-00, see footnote 41.

<sup>171</sup> COM(2014) 2 final, p.6.

<sup>172</sup> See point 1.3.4.

Lithuania, France, Greece, Poland, Portugal, Romania, Slovakia and Spain) it is the relevant labour inspectorates that are charged with enforcing the equal treatment provisions<sup>173</sup>.

Article 9(3) of the Directive leaves it to national law to set any time limits for bringing an action related to discrimination in employment; clearly, if that time limit is short, it could be a potential obstacle for specific cases. All EU Member States permit the claims to be made also after the employment relationship has ended, in accordance with Article 9(1).

Once a person considers themselves to have been discriminated against on the basis of any of the grounds covered by the Directive, it should be enough to establish a factual presumption of discrimination before the courts or other competent authorities, and it is then the respondent's obligation to prove that there has been no discrimination. This shifting of **the burden of proof** is being considered as a key element of ensuring fair consideration of discrimination claims<sup>174</sup> and the European Commission's 2008 report already indicated that most Member States correctly inserted such a provision in their national law<sup>175</sup>. In Austria, the interpretation in line with the EED was assured by the Supreme Court<sup>176</sup>.

It also took some time for the EU Member States to fully transpose the provision on **protection against victimisation** in order to ensure that discriminated persons do not suffer from retaliation ('dismissal or other adverse treatment') after making a complaint or bringing a case to court. The positive examples are those where – as mentioned earlier under point 1.2.4. – this protection covers more persons than the victims themselves. In Italy, amendments to anti-discrimination decrees have extended it to 'any other person' beyond the complainant. In Croatia it is prohibited to place the person who has reported discrimination, filed a complaint or witnessed discrimination, in a less favourable position. In Belgium, protection against victimisation covers those filing a complaint of discrimination and any formal witness in the procedure. A proactive protection against victimisation takes place in Slovenia, where upon finding discrimination in a given case, the Advocate of the Principle of Equality should order the entity concerned to apply appropriate measures protecting the person who faced discrimination and also the persons assisting the victim of discrimination. The UK Equality Act adopted in 2010 deleted the provision which required the complainant to show less favourable treatment than a real or hypothetical comparator, but did not extend the protection to post-employment acts of victimisation. Inclusive interpretation of these national provisions was made in some cases by Employment Appeals Tribunals<sup>177</sup>.

The requirement for Member States to have effective, proportionate and dissuasive **sanctions** in place for employment discrimination cases also resulted in different regulations of administrative, civil or penal character. The level of protection is thus uneven throughout the EU, with some countries providing for penal sanctions which include imprisonment and no limitations on the amount of civil damages, and others having administrative fines of a limited amount and specific ceilings on the level of compensation to be paid to the victim. On the basis of CJEU case-law with regard to sex discrimination, it is ultimately suggested that sanctions

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<sup>173</sup> Developing Anti-Discrimination Law in Europe (2014), p. 86. A detailed analysis of labour inspectorates in discrimination cases in European Anti-discrimination Law Review, issue 17, p. 23.

<sup>174</sup> *Nota bene*, Article 10(3) contained a reservation that this concept does not apply to criminal procedures.

<sup>175</sup> Estonia, Italy, Latvia and Poland have done so with some delay, and Malta did it with the exception of disability.

<sup>176</sup> Developing Anti-Discrimination Law in Europe (2014), p. 101.

<sup>177</sup> *Idem*, p. 105.

should be determined in each concrete case in the light of individual circumstances<sup>178</sup>. In a case concerning discrimination on the grounds of sexual orientation, the Court of Justice considered that purely symbolic sanctions are not compatible with the EED<sup>179</sup>. A specific Study on remedies and sanctions in EC non-discrimination law was published in 2005 to facilitate the comparison of best practices<sup>180</sup>, and the European Commission announced in its 2008 report that it will undertake a comparative study on the level of sanctions in all Member States. The 2014 report considered that the sanctions provided for by national laws are generally appropriate, but expressed concern as to whether all sanctions imposed in concrete cases comply fully with the requirements of the two Directives (the EED and the Racial Equality Directive), as the courts often apply the lower scale of possible sanctions and compensations awarded. An Equinet paper published in December 2015 identified in detail the different types of sanctions (compensatory, punitive, preventive and socio-preventive), challenges in implementing them and ways to make them more effective<sup>181</sup>.

The lack of sufficient means to pursue a case is another financial matter to consider, together with the issue of **adequate representation**. Member States are obliged by Article 9(2) of the EED to allow associations, organisations or other legal entities which have a legitimate interest in ensuring compliance with the Directive's provisions, to get involved in the relevant administrative or judicial procedures, with the approval of the person concerned. The possibility of supporting the victim is generally more common than acting on their behalf, with such positive exceptions as the Slovak national equality body (National Centre for Human Rights) or an NGO seeking to protect the victims of discrimination, entitled to intervene as a third party in court proceedings. In Italy, only those associations that have been included in an official list may act on behalf or in support of victims of discrimination, and the list contains more than 550 associations<sup>182</sup>. Collective redress, where a single organisation can act in the interest of many individual victims, is permitted for discrimination cases in 12 countries, while *actio popularis* - allowing organisations to act in the public interest on their own behalf, without a specific victim to support or represent - exists in 16 countries<sup>183</sup>.

In Austria, the National Council of Disabled Persons has the possibility to file an action on behalf of an unidentifiable group of affected persons, but no financial compensations are possible in such a case<sup>184</sup>.

### 3.4. Equality bodies

The EED does not oblige Member States to establish official equality bodies, but almost all of them have such structures with authority in the matters of equality and discrimination, as the

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<sup>178</sup> Developing Anti-Discrimination Law in Europe (2014), p. 107.

<sup>179</sup> Case C-81/12 *Asociatia Accept*, judgement of 25 March 2013. Details in Developing Anti-Discrimination Law in Europe (2014), p. 110. This case is also interesting with regard to the personal scope of the EED on the side of the defendant, as the Court considered that statements made in relation to recruitment matters by a person who only claims to play an important role in the management of an employer (but who appears to do so), can constitute 'facts from which it may be presumed that there has been discrimination' in the sense of the Directive.

<sup>180</sup> See <http://bookshop.europa.eu/en/remedies-and-sanctions-in-ec-non-discrimination-law-pbKE6905496/>

<sup>181</sup> See <http://www.equineteurope.org/The-Sanctions-Regime-in> discrimination cases and its effects.

<sup>182</sup> Developing Anti-Discrimination Law in Europe (2014), p. 97.

<sup>183</sup> See *idem*, p. 98 for detailed lists.

<sup>184</sup> See paragraph 13 of the Federal Disability Act.



Racial Equality Directive (also adopted in 2000) contains such an obligation. The dominant model is the one where the equality body is a dedicated institution specialised in equal treatment issues and dealing with all grounds of discrimination (including religion or belief, age, disability and sexual orientation)<sup>185</sup>. Some Member States have chosen an existing body dealing with general human rights issues (such as an Ombudsman) to address discrimination issues, and only a few countries have an equality body dealing with race and ethnic origin only (see table below). Some concerns are raised about those bodies that are not fully independent from the national government, while their effectiveness also depends on financial resources granted from the public budgets. Cooperation on the European level is arranged within the framework of the European Network of Equality Bodies (Equinet)<sup>186</sup>, currently funded by the European Commission under the Rights, Equality and Citizenship Programme 2014-2020.

As regards the specific powers of those bodies, they usually provide assistance to victims of discrimination in a variety of ways. In a number of Member States, they are entitled to examine individual complaints but the instruments and outcomes of investigations differ greatly. In certain countries financial compensation or fines can be imposed, whereas in others only non-binding recommendations are issued. In Austria, Bulgaria, Cyprus, France, Hungary, Ireland, Lithuania, Romania and Sweden, compliance of the persons involved can be ensured. The Irish Equality Authority can issue a notice which may set out the steps to be taken to prevent further discrimination, where non-compliance may result in an order from either the High Court or the Circuit Court<sup>187</sup>. Complaints with regard to the public sector are commonly dealt with separately from the private sector. In its joint 2014 report, the European Commission underlined that strengthening the role of the national equality bodies could further contribute to better implementation and application of the anti-discrimination directives and that those bodies' effectiveness would promote equal treatment faster and more cheaply than enforcement through judicial procedures at national or European level.

*The following table contains the names, website links, as well as the basic scope of activity of equality bodies in EU Member States.*

| Member State | Name  | Website  | Activity  |
|--------------|---|--|---|
| Austria      | Ombud for Equal Treatment                   | <a href="http://www.gleichbehandlungsanwaltschaft.at">www.gleichbehandlungsanwaltschaft.at</a> | Promotion and legal assistance  |
|              | Austrian Disability Ombudsman               | <a href="http://www.behindertenanwalt.gv.at">www.behindertenanwalt.gv.at</a>                   | Advice and support (incl. legal proceedings), independent surveys                                 |
| Belgium      | Interfederal Centre for Equal Opportunities | <a href="http://www.diversitybelgium.be">www.diversitybelgium.be</a>                           | Support in taking legal action, assistance to victims, independent surveys, advice to authorities |

<sup>185</sup> Developing Anti-Discrimination Law in Europe (2014), p. 114.

<sup>186</sup> <http://www.equineteurope.org/>

<sup>187</sup> Idem, p. 123.



| Member State   | Name  | Website  | Activity  |
|----------------|---|--|---|
| Bulgaria       | Commission for Protection Against Discrimination  | <a href="http://www.kzd-nondiscrimination.com">www.kzd-nondiscrimination.com</a>   | Assistance to victims, independent surveys  |
| Cyprus         | The Equality Authority of The Office of the Commissioner for Administration (Ombudsman) | <a href="http://www.no-discrimination.gov.cy">www.no-discrimination.gov.cy</a>   | Informs victims of their rights, independent surveys  |
| Croatia        | Office of the Ombudsman   | <a href="http://www.ombudsman.hr">www.ombudsman.hr</a>   | Support in taking legal action, assistance to victims, independent surveys                                  |
| Czech Republic | Public Defender of Rights   | <a href="http://www.ochrance.cz">www.ochrance.cz</a>   | Assistance to victims, independent surveys  |
| Denmark        | Danish Institute for Human Rights   | <a href="http://www.humanrights.dk">www.humanrights.dk</a>   | Provides opinions on complaints, assistance to victims, independent surveys                                 |
|                | Board of Equal Treatment  | <a href="http://www.ligebehandlingsnaevnet.dk">www.ligebehandlingsnaevnet.dk</a>   |   |
| Estonia        | Commissioner for Gender Equality and Equal Treatment                                    | <a href="http://www.vordoigusvolinik.ee">www.vordoigusvolinik.ee</a>   | Assistance to victims, independent surveys  |
|                | Chancellor of Justice   | <a href="http://www.eesti.ee/eng/topics/citizen/riik/oiguskantsler2">www.eesti.ee/eng/topics/citizen/riik/oiguskantsler2</a> | Constitutionally based official dealing <i>inter alia</i> with civil rights                                 |
| Finland        | Non-Discrimination Ombudsman  | <a href="http://www.syrjinta.fi">www.syrjinta.fi</a>   | Assistance to victims, independent surveys  |
| France         | Defender of Rights  | <a href="http://www.defenseurdesdroits.fr">www.defenseurdesdroits.fr</a>   | Assistance to victims, independent surveys  |
| Germany        | The Federal Anti-discrimination Agency  | <a href="http://www.federal-anti-discrimination-agency.com">www.federal-anti-discrimination-agency.com</a>                   | Assistance to victims, independent surveys, providing recommendations                                       |
| Greece         | Equal Treatment Service (Ombudsman)   | <a href="http://www.synigoros.gr">www.synigoros.gr</a>   | Provides opinions on complaints, assistance to victims, independent surveys                                 |
| Hungary        | Equal Treatment Authority   | <a href="http://www.egyenlobanasmod.hu">www.egyenlobanasmod.hu</a>   | Support in taking legal action, provides opinions on complaints, assistance to victims, independent surveys |

| Member State | Name   | Website  | Activity  |
|--------------|--|--|---|
| Ireland      | Human Rights and Equality Commission                                       | <a href="http://www.ihrec.ie">www.ihrec.ie</a>   | Support in taking legal action, assistance to victims, independent surveys  |
| Italy        | National Equality Councillor   | <a href="http://www.lavoro.gov.it/ConsiglieraNazionale">www.lavoro.gov.it/ConsiglieraNazionale</a> | Support in taking legal action, assistance to victims, independent surveys  |
| Latvia       | Ombudsman  | <a href="http://www.tiesibsargs.lv">www.tiesibsargs.lv</a>   | Provides opinions on complaints, assistance to victims, independent surveys |
| Lithuania    | Equal Opportunities Ombudsperson   | <a href="http://www.lygybe.lt">www.lygybe.lt</a>   | Independent surveys   |
| Luxembourg   | Centre for Equal Treatment   | <a href="http://www.cet.lu">www.cet.lu</a>   | Assistance to victims, independent surveys                                  |
| Malta        | National Commission for the Promotion of Equality                          | <a href="http://www.equality.gov.mt">www.equality.gov.mt</a>                                       | Assistance to victims, independent surveys                                  |
|              | National Commission for the Persons with Disability                        | <a href="http://www.knpd.org">www.knpd.org</a>   | Investigative and enforcement powers, monitoring and research               |
| Netherlands  | Human Rights Institute   | <a href="http://www.mensenrechten.nl">www.mensenrechten.nl</a>                                     | Provides opinions on complaints, independent surveys                        |
|              | Art.1 <sup>188</sup>   | <a href="http://www.art1.nl">www.art1.nl</a>   | Assistance to victims, independent surveys                                  |
| Poland       | Ombudsman  | <a href="http://www.rpo.gov.pl">www.rpo.gov.pl</a>   | Independent surveys   |
| Portugal     | Three separate bodies deal with gender and race/ethnicity/nationality only |  |   |
| Romania      | National Council for Combating Discrimination                              | <a href="http://www.cncd.org.ro">www.cncd.org.ro</a>   | Assistance to victims, independent surveys                                  |
| Slovakia     | National Centre for Human Rights   | <a href="http://www.snslp.sk">www.snslp.sk</a>   | Support in taking legal action, assistance to victims, independent surveys  |
| Slovenia     | Advocate of the Principle of Equality                                      | <a href="http://www.zagovornik.net">www.zagovornik.net</a>   | Provides opinions on complaints and assistance to victims                   |
| Spain        | A specialised body only deals with race and ethnicity                      |  |   |

<sup>188</sup> A non-governmental organisation named after Article 1 of the Dutch Constitution.

| Member State          | Name  | Website  | Activity   |
|-----------------------|---|--|--|
| Sweden                | Equality Ombudsman  | <a href="http://www.do.se">www.do.se</a>                                     | Assistance to victims, independent surveys                                 |
| UK - Great Britain    | Equality and Human Rights Commission                      | <a href="http://www.equalityhumanrights.com">www.equalityhumanrights.com</a> | Support in taking legal action, assistance to victims, independent surveys |
| UK - Northern Ireland | Equality and Human Rights Commission for Northern Ireland | <a href="http://www.equalityni.org">www.equalityni.org</a>                   | Support in taking legal action, assistance to victims, independent surveys |

### 3.5. Conclusions

Throughout the 15 years since the adoption of the EED, the general perception of discrimination has increased, but people who might be victims of discrimination are not necessarily aware of their rights and when they face discriminatory practices they do not always dare to take legal action. The Directive obliged EU Member States to ensure the dissemination of relevant information, and a number of initiatives at European level also contributed to awareness-raising. This should be continued, preferably in cooperation with social partners and non-governmental organisations at European, national and local level. Improvements should be discussed in relation to the collection of data, as the lack of any obligation constitutes an obstacle in assessing the implementation of EU law on discrimination in employment and other areas. It remains to be seen if the European Commission's assessment of the means to promote the collection of relevant information - being prepared in cooperation with other players, such as the Fundamental Rights Agency - will be accompanied by concrete proposals for action.

Apart from the crucially important procedural requirement of the burden of proof, other matters related to remedies and enforcement are specified only in general terms by the Directive. The national laws often differ with regard to the time-limits for bringing a case to court, rights of specialised NGOs or equality bodies to actively take part in proceedings, or the level of sanctions that are applicable in employment discrimination cases. Further development of cooperation is facilitated by the European Network of Equality Bodies (Equinet), funded from the EU budget, but other ideas (notwithstanding the limits of possible further harmonisation of laws) could also be considered by all the actors involved.

In a response to the European Parliament's oral question of November 2014<sup>189</sup>, the European Commission also considered that easy access to justice, availability of remedies and effective sanctions are not yet sufficiently secured everywhere in the EU and that many victims of discrimination are unaware of their rights. Practical guidance for victims of discrimination needs to be complemented by further campaigns and training on equality law addressed to employers as well as judges and other lawyers, so that the mechanism of sharing information and best practices is as efficient as possible.

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<sup>189</sup> See footnote 44.

## 4. Overall conclusions and recommendations

More than 15 years have passed since the adoption of the EED and the principle of equality in employment has been implemented in many different ways. While the general objective of the Directive was to create a level playing field in the EU, Member States retained a significant degree of independence in implementing it in practice and also the power to pursue anti-discrimination policy independently. It is important to observe that the main purpose of the EED, as set out in its first article, is 'only' to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation, and that it does not attempt to regulate these matters in all detail. The minimum harmonisation approach took account of, and also contributed to, the fact that differences between Member States exist in these fields.

Following the formal transposition of the Directive's provisions into national law, which in some countries required covering new grounds of discrimination, the actual implementation of these provisions (covering the basic concepts, general and specific exceptions, and horizontal provisions) was often a challenge, addressed by a few infringement procedures launched by the European Commission, but also a number of cases brought to the CJEU by national courts. Importantly, not only the landmark rulings of this court, but also the international law on non-discrimination (such as the ECHR and CRPD) led to more clarity in defining the basic concepts of the Directive and declaring the existence or not of discrimination in actual cases. Within that process, elements such as proper justification and proportionality tests were analysed and developed.

As with many other laws, the enforcement of the principle of anti-discrimination is crucial for real equality in employment. While it is generally admitted that awareness of rights and access to justice improved thanks *inter alia* to the EED, further efforts and cooperation at all levels are still required for the persons concerned, employers and employees alike, as well as adequate public bodies and other institutions. Although not required by the Directive, the establishment in almost all EU Member States of independent equality bodies empowered to act also within the scope of the EED substantially improves the chances of reaching its aim.

The largely positive record of the implementation of this Directive could be further improved by:

- addressing slight divergences identified with regard to the definitions of discrimination in the national law of respective Member States,
- giving even more attention to the various provisions which permit different treatment in justified cases, interpreted by the national or European courts, especially with regard to the proportionality of measures and the right balance of competing rights,
- providing some clarification with regard to positive action - which is sometimes considered to be an obligation, rather than an exception to the principle of equal treatment - contributing to more efficient use of very different measures across the EU without undermining the importance of the specific contexts in which they are applied.

In terms of legislative proposals, extending the duty of reasonable accommodation to grounds other than disability could be considered in the light of its broad potential use (as already shown in the case of religion or belief), while maintaining the reservation that this duty should not impose a disproportionate burden on employers or other entities.

Last, but not least, further informative efforts - including awareness-raising campaigns and exchange of best practices - are certainly needed to build on the experience already gathered by institutions and organisations involved in non-discrimination in Europe.

Religion or belief, disability, age and sexual orientation will certainly continue to characterise people and make them different from each other, but the application of the EED shows and confirms that this does not need to hamper their substantive equality in employment.





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The adoption of the Employment Equality Directive in 2000 extended the protection against discrimination provided under EU law. By explicitly obliging the Member States to prohibit discrimination in employment on the grounds of religion or belief, age, disability and sexual orientation, the general principles set out in the Treaties became more effective, and some minimum standards are now common throughout Europe. At the same time, specific exceptions with regard to all or only some of those grounds permit the continuation of certain measures that were already in place in most countries, which has led to different national practices, especially with regard to age. Additional provisions on horizontal issues such as access to justice and sanctions, dissemination of information and necessary dialogue, left the details to be established by Member States according to their laws and customs. This analysis builds on the available documents and expertise in order to facilitate the debate on the implementation of the Employment Equality Directive to date and on how best to follow it up.

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