Project
"Tackling multiple discrimination in Greece: Delivering equality by active exploration and enabling policy interventions"

Tackling Multiple Discrimination

Report of the Work Package 2.
"Codification of the national non-discrimination legislation for vulnerable groups"

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This is the final Deliverable of the Work Package 2.2 **"Codification of the national non-discrimination legislation for vulnerable groups"** of the EU Project "Tackling multiple discrimination in Greece: Delivering equality by active exploration and enabling policy interventions", carried out by an external expert.

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Abbreviations

CEDAW Convention on the Elimination of Discrimination Against Women

CETS Council of Europe Treaty Series

CoE Council of Europe

CRC Convention on the Rights of the Child

ECHR Convention for the Protection of Human Rights and Fundamental Freedoms or European Convention on Human Rights

ECtHR European Court of Human Rights

ECJ European Court of Justice (now Court of Justice of the European Union)

ECRI European Commission against racism and intolerance

ETS European Treaty Series

EU European Union

FRA European Union Agency for Fundamental Rights

HRC Human Rights Committee

ICCPR International Covenant on Civil and Political Rights

ICERD International Convention on the Elimination of All Forms of Racial Discrimination

ICESCR International Covenant on Economic, Social and Cultural Rights

ICJ International Court of Justice

TCN Third-country national

UN United Nations

UN CRPD UN Convention on the Rights of Persons with Disabilities

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INTRODUCTION

This Report is the final Deliverable of the Work Package 2.2 **"Codification of the national non-discrimination legislation for vulnerable groups"** of the EU Project "Tackling multiple discrimination in Greece: Delivering equality by active exploration and enabling policy interventions".

1. The scope of the Work Package 2.2.

The scope of this Work Package is to identify, summarize and analyze the key non-discrimination rules for vulnerable groups within the Greek legal order, as laid down both in international law applied in Greece and national initiatives outside the scope of international law. Focus was given to the following groups at high risk of poverty and social exclusion:

- racial or ethnic minorities
- disabled
- elderly
- young people
- religious minorities
- lesbian, gay, bisexual and transgender (LGBT).

It is important from the outset to note that both Greek judges and prosecutors are required to apply the protections provided for under the international law machinery applied in Greece (particularly the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Union non-discrimination Directives) irrespective of whether a party to the proceedings invokes them. The national courts and administrators of justice are not limited to the legal arguments advanced by the parties, but must determine the applicable law based on the factual matrix forwarded by the parties involved; essentially, this means that the parties to a case effectively choose how to present a non-discrimination claim through the arguments and evidence that they advance.

This is consequent to the governing legal principles evident in each respective system, for example, the direct effect of EU law in the 28 Member States that make up the EU and the direct applicability afforded to the ECHR, which means that it must be complied with in all EU and Council of Europe Member States. However, there is one significant constraint on this requirement, and this is in the form of any applicable limitation period. Before considering applying the non-discrimination protections, practitioners will have to familiarise themselves with any relevant limitation period applying to the jurisdiction being considered and determine whether the court in question can deal with the issue.

2. The structure of the Report

This Report is structured in five Chapters.

CHAPTER 1 presents the UN non-discrimination context and discusses its implementation in the Greek legal order, given that Greece has ratified the key UN International Treaties, all of which contain a prohibition on discrimination:

- the International Covenant on Civil and Political Rights (16 December 1966);
- the International Covenant on Economic Social and Cultural Rights (16 December 1966);
- the Convention on the Elimination of All Forms of Racial Discrimination (4 January 1969);
- the Convention Against Torture (9 December 1975);
- the Convention on the Elimination of Discrimination Against Women (18 December 1979);
- the Convention on the Rights of the Child (20 November 1989);
- the Convention on the Rights of Persons with Disabilities (13 December 2006).

CHAPTER 2 presents the Council of Europe non-discrimination context and discusses its implementation in the Greek legal order, given that Greece has ratified the key Council of Europe Conventions, all of which contain a prohibition on discrimination:

- the European Convention on Human Rights;
- the European Social Charter;
- the Revised European Social Charter;
- the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

CHAPTER 3 presents the EU non-discrimination context and discusses its implementation in the Greek legal order, given that Greece as a EU Member State since 1981 applies non-discrimination rules laid down in the following secondary binding law:

- Council Directive 76/207/EEC 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 (9 February 1976)
- Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security (19 December 1978)
- Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (29 June 2000)
- Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (27 November 2000)

- Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services (13 December 2004)
- Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (5 July 2006)
- Directive 2014/54/EU of the European Parliament and of the Council on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers (30 April 2014).

CHAPTER 4 presents and discusses the context of national legal initiatives to combat discrimination against vulnerable groups not related to the implementation of international binding law. These initiatives form the national anti-discrimination legal framework but according to Constitutional principles should be interpreted always in the light of international binding law.

CHAPTER 5 is focused on the development of a sound codification process of the non-discrimination rules for vulnerable groups within the Greek legal order, that should address two critical issues:

- the context of the current non-discrimination legal framework (both international law applied in Greece and national initiatives outside the scope of international law);
- the key gaps and shortcomings of this framework.

It also includes a set of recommendations concerning amendments of the current legislation with the view to address gaps and shortcomings.

CHAPTER 1. THE UN NON-DISCRIMINATION CONTEXT

Greece is bound of specific UN non-discrimination rules, given that it has ratified the key UN International Treaties, all of which contain a prohibition on discrimination:

- the *International Covenant on Civil and Political Rights* (16 December 1966)
- the *International Covenant on Economic, Social and Cultural Rights* (16 December 1966)
- the *Convention on the Elimination of All Forms of Racial Discrimination* (4 January 1969)
- the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (9 December 1975)
- the *Convention on the Elimination of Discrimination against Women* (18 December 1979)
- the *Convention on the Rights of the Child* (20 November 1989)
- the *Convention on the Rights of Persons with Disabilities* (13 December 2006)[1].

1. The implementation of UN law in Greece

(a) The **Convention on the Elimination of All Forms of Racial Discrimination** was ratified by **Legislative Decree No. 474/1970**[2], which provides the single definition of '***racial discrimination***'[3] in the Greek legal order. It should be noticed that Greece applies no distinction between discrimination based on 'race' and discrimination based on 'ethnic origin', since there is not any separate legal definition of 'ethnic origin' in the domestic system.

(b) The **International Covenant on Civil and Political Rights** was ratified by **Law No. 2462/1997,** the **UN Convention on the Elimination of Discrimination against Women** was ratified by **Law No. 1342/1983**, the **International Covenant on Economic, Social and Cultural Rights** was

[1] The Convention on the Rights of Persons with Disabilities (UNCRPD) contains an extensive list of rights for persons with disabilities, aimed at securing equality in the enjoyment of their rights, as well as imposing a range of obligations on the State to undertake positive measures. This binds the EU institutions, and will bind the Member States when they are applying EU law. In addition individual Member States are currently in the process of acceding to the UNCRPD in their own right, which will also impose obligations upon them directly. The UNCRPD forms a reference point for interpreting both EU and ECtHR law relating to discrimination on the basis of disability.

[2] Legislative Decree 474/1970 on ratification of International Convention on the Elimination of All Forms of Discrimination (OJ 77 A' /21.03.1970).

[3] Art. 1 par. 1 states that '*racial discrimination means any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life*'.

ratified by **Law No. 1532/1985** and the **UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment** was ratified by **Law No. 1782/1988**.

(c) The **Convention on the Rights of the Child** was ratified by **Law No. 2101/1992**, which guarantees in article 2 the rights of any child[4] without discrimination of any kind:

"*1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction* ***without discrimination of any kind****, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*

2. States Parties shall take all appropriate measures to ensure that the child is protected ***against all forms of discrimination*** *or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members*".

(d) The **Convention on the Rights of Persons with Disabilities** (UNCRPD) was ratified by **Law No. 4074 /2012**[5], which provides the key definition of '*disability discrimination*'[6] in the Greek legal order and includes non-discrimination among its principles, given that article 3 states:

"*The principles of the present Convention shall be:*

1. *Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;*
2. ***Non-discrimination;***
3. *Full and effective participation and inclusion in society;*
4. *Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;*
5. *Equality of opportunity;*
6. *Accessibility;*
7. *Equality between men and women;*
8. *Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities*".

This Convention contains an extensive list of rights for persons with disabilities, aimed at securing equality in the enjoyment of their rights, as well as imposing a range of obligations on the State to undertake positive measures. This binds the EU institutions, and will bind the Member States when they are applying EU law. In addition individual Member States are currently in the process of acceding to the UNCRPD in their own right, which

[4] A child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.
[5] Law 4074/2012 on the Ratification of the Convention on the Rights of Persons with Disabilities and the Optional Protocol (OJ 88 A'/11.04.2012).
[6] Art. 1 par. 2 states that '*persons with disabilities include those who have long-term physical, mental, 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*'.

will also impose obligations upon them directly. The UNCRPD forms a reference point for interpreting both EU and ECtHR law relating to discrimination on the basis of disability.

(e) The sound implementation of **Law No. 4074 /2012** is supported by **Law No. 4488/2017**[7]. This specific legislation introduces a series of reforms designed to promote their equal treatment, full enjoyment of fundamental rights, and to facilitate their lives and daily routine. At the same time, the proposed regulations promote their treatment not as persons with needs but as persons with potential, which the state must recognize, in order to allow them to gain access to every aspect of social and economic life. In this context, the new arrangements aim at specifying, clarifying and assisting the implementation of the provisions of the International Convention on the Rights of Persons with Disabilities.

As a principle, any natural person or public organisation in the wider public or private sector, is required to facilitate the equal exercise of the rights of persons with disabilities in their respective fields of competence or activity by taking all appropriate measures and refraining from any action which may affect the exercise of their rights. In this respect, they are required: a) to remove any existing barriers, b) to observe the principles of universal design in all areas of competence or activity in order to ensure that persons with disabilities have access to infrastructure, services or goods they offer, c) to provide, where necessary in a specific case, reasonable adjustments in the form of tailor-made and appropriate modifications, arrangements and appropriate measures, without imposing disproportionate or unjustified burden, d) to abstain from practices, habits and behaviours which discriminate against disabled people, e) to promote, through positive measures, the equal participation and exercise of the rights of persons with disabilities in the area of their competence or activity. Special sanctions are not provided but general obligations (such as “breach of duty” regarding public authorities) could be applied. Both obligations to remove barriers and to adopt positive measures are equally important.

In particular, Article 63 of the Law provides for the universal design of administrative products, environments and services and reasonable adjustments: Administrative bodies and authorities are required to take appropriate measures tailored to the particular needs of one or more people with disabilities in order to ensure the principle of equal treatment. Article 64 deals with access to the natural, structured and electronic environment: Administrative bodies and authorities within their competence should ensure equal access for people with disabilities to the electronic environment especially concerning electronic communications, information and services, including the media and internet services. Article 65 regulates the communication of people with disabilities with administrative authorities,

[7] Law No. 4488/2017 on insurance issues, on improvement of protection of employees and on rights of persons with disabilities, available at https://www.e-nomothesia.gr/kat-ergasia-koinonike-asphalise/nomos-4488-2017-fek-137a-13-9-2017.html.

languages and forms of communication. This means: recognizing sign language as equivalent to the Greek language, recognizing Greek Braille as a way of writing for Greek blind citizens, the obligation of the state to cover all communication needs of deaf and blind citizens.

Article 66 relates to information, awareness-raising, education and training on the rights of disabled people: Universities and Technical Educational Institutions, the National Centre for Public Administration and Local Government, the National School of Judicial Officers and the National School of Public Health should ensure the inclusion of the rights of people with disabilities, as derived from the Convention, within their teaching curricula and training seminars. Finally, Article 67 establishes non-discrimination in the media and audiovisual services: all public and private mass media, either newspapers or TV and radio, should promote consolidation and respect for the principle of non-discrimination. The responsible authority for this is the National Council of Radio and Television. The provision concerns only mass media companies and implies that not only are they obliged to promote non-discrimination as a principle within their programmes but that they are also obliged to provide services that are accessible to persons with disabilities.

The new legislation also provides the relevant definitions ("disabled people", “adjustments”, etc.) and guidelines for the equal exercise of the rights of people with disabilities and the mainstreaming of disability in all public policies. The Minister for Territorial Coordination is appointed as Coordinating Mechanism for monitoring all issues related to the Rights of Persons with Disabilities. The Law also establishes:

- the General Secretariat for Transparency and Human Rights of the Ministry of Justice, Transparency and Human Rights as a focal point of reference for issues related to the implementation of the Convention;
- the Secretary General or Administrator at each Ministry as a point of reference for monitoring the implementation of the Convention per sector of governmental competence;
- the Ombudsman, the constitutionally established Independent Authority, as the framework body for the promotion of the implementation of the Convention.

CHAPTER 2. THE COUNCIL OF EUROPE NON-DISCRIMINATION CONTEXT

Greece is bound of specific Council of Europe[8] non-discrimination rules, given that it has ratified :

- the European Convention on Human Rights (ECHR), known also as the Convention for the Protection of Human Rights and Fundamental Freedoms[9];
- the European Social Charter (ESC);
- the Revised European Social Charter (RESC)[10];
- the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT).

It has also signed - but not ratified - the Framework Convention for the Protection of National Minorities (FCNM) and the Convention on Action against Trafficking in Human Beings (CATHB), but it did not sign the European Charter for Regional and Minority Languages (CRML).

1. The European Convention on Human Rights

The ECHR sets out a legally binding obligation on its members to guarantee a list of human rights to everyone (not just citizens) within their jurisdiction. Its implementation is reviewed by the European Court of Human Rights (ECtHR) (originally assisted by a Commission), which hears cases brought against Member States. The Council of Europe currently has 47 members and any State wishing to join must also accede to the ECHR.

The ECHR has been altered and added to since its inception in 1950 through what are known as 'Protocols'. The most significant procedural change to the ECHR was Protocol 11 (1994), which turned the ECtHR into a permanent and full-time body, and abolished the Commission. This Protocol was designed to help the ECHR mechanisms cope with the growth in cases that would come from States in the east of Europe joining the Council of Europe after the fall of the Berlin Wall and the break-up of the former Soviet Union.

Currently EU law and the ECHR are closely connected. All Member States of the EU have joined the ECHR. The Charter of Fundamental Rights also reflects (though is not limited to) the range of rights in the ECHR. Accordingly, EU law, even though the EU is not yet actually a signatory to

[8] The Council of Europe (CoE) is an inter-governmental organisation that originally came together after the Second World War with the aim of promoting, among other things, the rule of law, democracy, human rights and social development (see Preamble and Article 1 of the Statute of the Council of Europe). The CoE Member States adopted the ECHR to help achieve these aims, which was the first of the modern human rights treaties drawing from the United Nations Universal Declaration of Human Rights.

[9] But it has not ratified yet the crucial Protocol 12.

[10] The Revised European Social Charter was signed by Greece on 3 May 1996 and ratified by Law No. 4358/2016 'on ratification of the Revised European Social Charter' (OJ 5 A'/20.1.2016). The vulnerable groups protected by the Charter include, *inter alia*, persons with disabilities, elderly, young persons and legal migrant workers.

the ECHR, is largely consistent with the ECHR. However, if an individual wishes to make a complaint about the EU and its failure to guarantee human rights, they are not entitled to take the EU, as such, before the ECtHR. Instead they must either: make a complaint before the national courts, which can then refer the case to the ECJ through the preliminary reference procedure; or complain about the EU indirectly before the ECtHR while bringing an action against a Member State.

Article 14 guarantees equality '[i]n the enjoyment of … [the] rights and freedoms' set out in the ECHR. The ECtHR will therefore not be competent to examine complaints of discrimination unless they fall within the ambit of one of the rights protected by the ECHR.

Whenever the ECtHR considers an alleged violation of Article 14, this is always done in conjunction with a substantive right. An applicant will often allege a violation of a substantive right, and in addition a violation of a substantive right in conjunction with Article 14. In other words, the interference with their rights was, in addition to failing to meet the standards required in the substantive right, also discriminatory in that those in comparable situations did not face a similar disadvantage. It is often the case that, where the ECtHR finds a violation of the substantive right, it will not go on to consider the complaint of discrimination where it considers that this will involve an examination of essentially the same complaint.

When applying Article 14, the ECtHR has adopted a wide interpretation of the scope of ECHR rights:

- firstly, the ECtHR has made clear that it may examine claims under Article 14 taken in conjunction with a substantive right, even if there has been no violation of the substantive right itself;86
- secondly, it has held that the scope of the ECHR extends beyond the actual letter of the rights guaranteed. It will be sufficient if the facts of the case broadly relate to issues that are protected under the ECHR.

Example 1 – The case of *E.B. v. France* (ECtHR, *E.B. v. France* [GC] (No. 43546/02), 22 January 2008)

National authorities refused an adoption application from a lesbian living with her partner. The applicant alleged a breach of Article 8 taken in conjunction with Article 14. The ECtHR noted that it was not being requested to rule on whether Article 8 of itself had been violated, which it regarded as significant because Article 8 did not of itself confer a right to found a family or to adopt. The ECtHR, however, underlined that it was possible for a complaint of discrimination to fall within the scope of a particular right, even if the issue in question did not relate to a specific entitlement granted by the ECHR. It found that because France had in its national legislation created a right to adopt, the facts of the case undoubtedly fell within the ambit of Article 8. On the facts of the case, it also found that the applicant's sexual orientation played a determinative role in the refusal of the authorities to allow her to adopt, which amounted to discriminatory treatment by comparison to other single individuals who were entitled to adopt under national law.

The ECtHR has found in many other cases where any form of State benefit becomes payable that this will either fall under the scope of Article 1 of Protocol 1[11] (because it is deemed to be property)[12] or Article 8 (because it affects the family or private life)[13], for the purposes of applying Article 14. This is particularly important in relation to nationality discrimination, since EU law is far more restrictive in this respect.

1.1. The Protocol 12

Protocol 12 prohibits discrimination in relation to 'enjoyment of any right set forth by law' and is thus greater in scope than Article 14, which relates only to the rights guaranteed by the ECHR. The Commentary provided on the meaning of these terms in the Explanatory Report of the Council of Europe states that this provision relates to discrimination:

- in the enjoyment of any right specifically granted to an individual under national law;
- in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
- by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
- by any other act or omission by a public authority (for example, the behaviour of law-enforcement officers when controlling a riot)[14].

The Commentary also states that while the Protocol principally protects individuals against discrimination from the State, it will also relate to those relations between private persons, which the State is normally expected to regulate, 'for example, arbitrary denial of access to work, access to restaurants, or to services which private persons may make available to the public such as medical care or utilities such as water and electricity'. Broadly speaking, Protocol 12 will prohibit discrimination outside purely personal contexts, where individuals exercise functions placing them in a position as to decide on how publicly available goods and services are offered.

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[11] Full consideration of Article 1 of Protocol 1 can be found on the CoE Human Rights Education for Legal Professionals website: Grgić, Mataga, Longar and Vilfan, 'The right to property under the ECHR', *Human Rights Handbook*, No. 10, 2007, available at: www.coehelp.org/mod/resource/view. php?inpopup=true&id=2123.

[12] For example, ECtHR, *Stec and Others v. UK* [GC] (Nos. 65731/01 and 65900/01), 12 April 2006 (pension payments and invalidity benefits); ECtHR, *Andrejeva v. Latvia* [GC] (No. 55707/00), 18 February 2009 (pension payments); ECtHR, *Koua Poirrez v. France* (No. 40892/98), 30 September 2003 (disability benefit); ECtHR, *Gaygusuz v. Austria* (No. 17371/90), 16 September 1996 (unemployment benefit).

[13] For example, ECtHR, *Weller v. Hungary* (No. 44399/05), 31 March 2009 (a social security payment for the purposes of supporting families with children).

[14] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177), Explanatory Report, para. 22. Available at: http://conventions.coe.int/Treaty/en/ Reports/Html/177.htm.

2. The ECHR non-discrimination framework

2.1. The discrimination context

The ECHR non-discrimination framework has two specific objectives:

Firstly, it stipulates that those individuals who are in similar situations should receive similar treatment and not be treated less favourably simply because of a particular 'protected' characteristic that they possess (**direct discrimination**).

Secondly, it stipulates that those individuals who are in different situations should receive different treatment to the extent that this is needed to allow them to enjoy particular opportunities on the same basis as others; thus, those same 'protected grounds' should be taken into account when carrying out particular practices or creating particular rules (**indirect discrimination**).

2.1.1. Direct discrimination

The ECtHR uses the formulation that there must be a 'difference in the treatment of persons in analogous, or relevantly similar, situations', which is 'based on an identifiable characteristic'[15].

Example 1 – The case of *Carson and Others v. UK* (ECtHR, *Carson and Others v. UK* [GC] (No. 42184/05), 16 March 2010)

The applicants complained that the UK government did not apply the same increment to the pension payments of those living in retirement abroad as those living in retirement in the UK.22 According to UK law, increments were only applied to UK residents with the exception of UK nationals who had retired to States with which the UK had a reciprocal social security arrangement. The applicants, who did not live in a State that had concluded such an agreement, argued that they had been discriminated against on the basis of their place of residence. The ECtHR disagreed with the applicants who argued that they were in a similar position to those living in retirement in the UK or to those UK nationals who had retired in countries with which the UK had a reciprocal agreement. The ECtHR found that, although these different groups had all contributed to government revenue through the payment of national insurance, this did not constitute a pension fund but rather general public revenue to finance various aspects of public spending. Furthermore, the duty of the government to apply increments was based on consideration of the rise in cost of the standard of living in the UK. The applicants were therefore not in a comparable situation to these other groups and there had accordingly been no discriminatory treatment.

[15] ECtHR, *Carson and Others v. UK* [GC] (No. 42184/05), 16 March 2010; para. 61. Similarly, ECtHR, *D.H. and Others v. the Czech Republic* [GC] (No. 57325/00), 13 November 2007, para. 175; ECtHR, *Burden v. UK* [GC] (No. 13378/05), 29 April 2008, para. 60.

2.1.2. Indirect discrimination

The ECHR framework acknowledges that discrimination may result not only from treating people in similar situations differently, but also from offering the same treatment to people who are in different situations. The latter is labelled 'indirect' discrimination because it is not the treatment that differs but rather the effects of that treatment, which will be felt differently by people with different characteristics.

The elements of indirect discrimination are:

- a neutral rule, criterion or practice;
- that affects a group defined by a 'protected ground' in a significantly more negative way;
- by comparison to others in a similar situation.

a) The first identifiable requirement is an apparently neutral rule, criterion or practice. In other words, there must be some form of requirement that is applied to everybody.

Example 1 – The case of *D.H. and Others v. the Czech Republic* (ECtHR, *D.H. and Others v. the Czech Republic* [GC] (No. 57325/00), 13 November 2007, para. 79)

A series of tests were used to establish the intelligence and suitability of pupils in order to determine whether they should be moved out of mainstream education and into special schools. These special schools were designed for those with intellectual disabilities and other sources of learning difficulty. The same test was applied to all pupils who were considered for placement in special schools. However, in practice the test had been designed around the mainstream Czech population with the consequence that Roma students were inherently more likely to perform badly – which they did, with the consequence that between 50% and 90% of Roma children were educated outside the mainstream education system. The ECtHR found that this was a case of indirect discrimination.

b) The second identifiable requirement is that the apparently neutral provision, criterion or practice places a 'protected group' at a particular disadvantage[16]. When considering statistical evidence that the protected group is disproportionately effected in a negative way by comparison to those in a similar situation, the ECtHR will seek evidence that a particularly large proportion of those negatively affected is made up of that 'protected group'.

c) National courts will still need to find a comparator in order to determine whether the effect of the particular rule, criterion or practice is significantly more negative than those experienced by other individuals in a similar situation.

[16] This is where indirect discrimination differs from direct discrimination in that it moves the focus away from differential treatment to look at differential effects.

2.2. The personal scope of application

The ECHR guarantees protection to all those within the jurisdiction of a Member State, whether they are citizens or not, and even beyond the national territory to those areas under the effective control of the State (such as occupied territories)[17].

The case-law of the ECHR shows that while a State may consider nationals and non-nationals not to be in a comparable situation (and consider it to be permissible for them to be treated differently in certain circumstances), in principle all the rights in the ECHR must be guaranteed equally to all persons falling within their jurisdiction. In this respect the ECHR places obligations on Member States with respect to TCNs which in some areas go beyond the requirements of EU law.

2.3. The material scope of application

Article 14 of the ECHR guarantees equality in relation to the enjoyment of the substantive rights guaranteed by the ECHR. In addition, Protocol 12 to the ECHR, which entered into force in 2005, expands the scope of the prohibition on discrimination to cover any right which is guaranteed at the national level, even where this does not fall within the scope of an ECHR right. However, the Protocol has been ratified by only 17 of the 47 CoE members, among which six are EU Member States. This means that among the EU Member States there exist different levels of obligations in European non-discrimination law.

2.3.1. Employment

Although the ECHR does not itself contain a right to employment, Article 8 has under certain circumstances been interpreted as covering the sphere of employment. In the above-mentioned case of *Sidabras and Džiautas v. Lithuania*, a government ban on former KGB agents accessing employment in the public sector and parts of the private sector was held to fall within the ambit of Article 8 in conjunction with Article 14 since it 'affected their ability to develop relationships with the outside world to a very significant degree and has created serious difficulties for them in terms of earning their living, with obvious repercussions on the enjoyment of their private lives'[18]. Similarly in the case of *Bigaeva v. Greece*, it was held that Article 8 can also cover employment, including the right to access a profession[19].

The ECtHR will also prohibit discrimination on the basis of membership of a trade union. Furthermore, the right to form trade unions is guaranteed as a stand-alone right in the ECHR[20].

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[17] ECtHR, *Loizidou v. Turkey* (No. 15318/89), 18 December 1996.
[18] ECtHR, *Sidabras and Džiautas v. Lithuania* (Nos. 55480/00 and 59330/00), 27 July 2004.
[19] ECtHR, *Bigaeva v. Greece* (No. 26713/05), 28 May 2009.
[20] For example, ECtHR, *Demir and Baykara v. Turkey* (No. 34503/97), 12 November 2008.

Example 1 – The case of *Danilenkov and Others v. Russia* (ECtHR, *Danilenkov and Others v. Russia* (No. 67336/01), 30 July 2009 79)

The applicants had experienced harassment and less favourable treatment from their employer on the basis of their membership of a trade union. Their civil claims before the national courts were dismissed, since discrimination could only be established in criminal proceedings. However, the public prosecutor refused to bring criminal proceedings because the standard of proof required the State to show 'beyond reasonable doubt' that discrimination had been intended by one of the company's managers. The ECtHR found that the absence in national law of effective judicial protection of freedom of association for trade unions amounted to a violation of Article 11 in conjunction with Article 14.

2.3.2. Access to social protection and social welfare

While there is no right to social security under the ECHR, it is clear from the jurisprudence of the ECtHR that forms of social security such as benefit payments and pensions will fall under the ambit of Article 1 of Protocol 1 or Article 8[21].

Example 1 – The case of *Stec and Others v. UK* (ECtHR, *Stec and Others v. UK* [GC] (Nos. 65731/01 and 65900/01), 12 April 2006)

The applicants complained that as a result of different retirement ages for men and women they had each been disadvantaged by the alteration of benefits payable to them, which had been determined according to pensionable age.180 The ECtHR found that in principle sex discrimination could only be justified where 'very weighty reasons' existed. However, 'a wide margin is usually allowed to the State under the [ECHR] when it comes to general measures of economic or social strategy … Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is … manifestly without reasonable foundation'. The ECtHR found that at their origin the different pensionable ages were actually a form of 'special measures' in that they were designed to offset the financial difficulties that women might suffer by reason of their traditional role in the home, which left them without independent monetary income. It was found that the government had begun gradually to make adjustments to equalise the pensionable ages of men and women and that they had not acted beyond their margin of appreciation either in choosing to do this over a number of years, or failing to implement changes sooner.

[21] In particular, see the following cases: ECtHR, *Andrejeva v. Latvia* [GC] (No. 55707/00), 18 February 2009; ECtHR, *Gaygusuz v. Austria* (No. 17371/90), 16 September 1996; and ECtHR, *Koua Poirrez v. France* (No. 40892/98), 30 September 2003

Although there is no right to healthcare under the ECHR, the ECtHR has held that issues relating to healthcare, such as access to medical records[22], will fall under Article 8 or Article 3 where a lack of access to health is serious enough as to amount to inhuman or degrading treatment. It might therefore be argued that complaints relating to discrimination in relation to accessing healthcare would fall within the ambit of Article 14.

It is unclear whether access to social advantages in the form of benefits in kind such as travel passes would fall within the ambit of the ECHR; however, the ECtHR's generous interpretation of Article 8 would suggest that this may be the case, particularly where these benefits are intended to benefit the family unit.

2.3.3. Access to supply of goods and services, including housing

The ECtHR has interpreted Article 8 to include cases relating to activities capable of having consequences for private life, including relations of an economic and social character. The ECtHR has also taken a broad approach to the interpretation of the right to respect for the home under Article 8; it has construed the right to a home widely to include mobile homes such as caravans or trailers, even in situations where they are located illegally[23]. Where state-provided housing is of particularly bad condition, causing hardship to the residents over a sustained period, the ECtHR has also held that this may constitute inhuman treatment.

Example 1 – The case of *Moldovan and Others v. Romania (no. 2)* (ECtHR, *Moldovan and Others v. Romania (no. 2)* Nos. 41138/98 and 64320/01), 12 July 2005)

The applicants had been chased from their homes, which were then demolished in particularly traumatic circumstances. The process of rebuilding their houses was particularly slow, and the accommodation that was granted in the interim was of particularly low quality. The ECtHR stated:

'… the applicants' living conditions in the last ten years, in particular the severely overcrowded and unsanitary environment and its detrimental effect on the applicants' health and well-being, combined with the length of the period during which the applicants have had to live in such conditions and the general attitude of the authorities, must have caused them considerable mental suffering, thus diminishing their human dignity and arousing in them such feelings as to cause humiliation and debasement.'

This finding, among other factors, led the ECtHR to conclude that there had been degrading treatment contrary to Article 3 of the ECHR, though the language used in the above extract suggests that the conditions experienced in the accommodation alone would have been sufficient for this finding.

[22] ECtHR, *K.H. and Others v. Slovakia* (No. 32881/04), 28 April 2009.
[23] ECtHR, *Buckley v. UK* (No. 20348/92), 25 September 1996.

2.3.4. Access to justice

A right of access to justice is guaranteed as a free-standing right within the ECHR in the context of the right to a fair trial under Article 6. The ECtHR has dealt with several cases relating to discrimination in access to justice.

Example 1 – The case of *Anakomba Yula v. Belgium* (ECtHR, *Anakomba Yula v. Belgium* (No. 45413/07), 10 March 2009)

National law, which made it impossible for the applicant to obtain public assistance with funding a paternity claim on the basis that she was not a Belgian national, was found to amount to a violation of Article 6 in conjunction with Article 14. This is not to suggest that non-nationals have an absolute right to public funding. In the circumstances, the ECtHR was influenced by several factors including that the applicant was barred because she did not have a current valid residence permit, even though at the time she was in the process of having her permit renewed. Furthermore, the ECtHR was also motivated by the fact that a one-year time bar existed in relation to paternity cases, which meant that it was not reasonable to expect the applicant to wait until she had renewed her permit to apply for assistance.

2.3.5. Private and family life

In addition to cases where protection under the ECHR coincides with that under the non-discrimination directives, there are significant areas where the ECHR will afford additional protection. A key area is that of family and private life, where the Member States have not given the EU extensive powers to legislate. Cases brought before the ECtHR in this respect have involved consideration of differential treatment in relation to rules on inheritance, access of divorced parents to children, and issues of paternity.

Example 1 – The case of *Muñoz Díaz v. Spain* (ECtHR, *Muñoz Díaz v. Spain* (No. 49151/07), 8 December 2009)

The applicant concluded a marriage with her spouse in accordance with Roma customs; however, it did not comply with requirements under national law and so was not formally constituted. Nevertheless, the applicant had been treated by the authorities as if she was married in terms of the identity documents they had been issued, benefits paid and the record of their 'family book'. On the death of her spouse, the applicant sought to claim a survivor's pension from the State, but it was refused because she had not been validly married under national law. The ECtHR found that because the State had treated the applicant as if her marriage was valid, she was in a comparable situation to other 'good faith' spouses (those who were not validly married for technical reasons, but believed themselves to be so), who would have been entitled to a survivor's pension. Although the ECtHR found that there was no discrimination in the refusal to recognise the marriage as valid (taking Article 12 with Article 14), there was discrimination in refusing to treat the applicant similarly to other good-faith spouses and accord the pension (taking Article 1 of Protocol 1 with Article 14).

2.4. The protected grounds

The ECHR contains an open-ended list of ***protected grounds***[24], which coincides with the EU Directives, but goes beyond them. Article 14 states that there shall be no discrimination 'on any ground 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'. The category of 'other status' has allowed the ECtHR to include those grounds (among others) that are expressly protected by the non-discrimination directives, namely: disability, age and sexual orientation.

2.4.1. Sex discrimination

Sex discrimination refers to discrimination that is based on the fact that an individual is either a woman or a man. The ECtHR has yet to deliver a decision on whether gender identity is covered as a protected ground under Article 14, and it has yet to indicate whether this would only encompass 'transsexuals' or whether it would interpret gender identity more widely. This is not to say that it has not dealt with the issue of gender identity at all. Thus, the ECtHR has determined that gender identity, like sexual orientation, forms part of the sphere of an individual's private life, and should therefore be free from government interference.

Example 1 – The cases of *Christine Goodwin v. UK* and *I. v. UK* (ECtHR, *Christine Goodwin v. UK* [GC] (No. 28957/95), 11 July 2002; ECtHR, *I. v. UK* [GC] (No. 25680/94), 11 July 2002)

The applicants, who had both undergone male-to-female gender reassignment surgery, complained that the government refused to allow amendment of their birth certificates in order to reflect their sex. Although other documents and the applicants' names could be amended, birth certificates were still used for certain purposes where gender became legally relevant, such as the area of employment or retirement, meaning that the applicants would face embarrassment and humiliation where obliged to reveal their legally recognised male gender. The ECtHR (reversing past case-law) decided that this amounted to a violation of the right to respect for private life and the right to marry under Article 12, but it did not go on to consider whether there had been a violation of Article 14.

2.4.2. Sexual orientation

Although Article 14 of the ECHR does not explicitly list 'sexual orientation' as a protected ground, the ECtHR has expressly stated that it is included among the 'other' grounds protected by Article 14 in a series of cases.

[24] A 'protected ground' is a characteristic of an individual that should not be considered relevant to the differential treatment or enjoyment of a particular benefit.

Example 1 – The case of *E.B. v. France* (ECtHR, *E.B. v. France* [GC] (No. 43546/02), 22 January 2008)

The applicant was refused an application to adopt a child on the basis that there was no male role model in her household. National law did permit single parents to adopt children, and the ECtHR found that the authorities' decision was primarily based on the fact that she was in a relationship and living with another women. Accordingly the ECtHR found that discrimination had occurred on the basis of sexual orientation.

It should be noted that the ECtHR also protects against government interference relating to sexual orientation *per se* under Article 8 of the ECHR on the right to private life. Thus, even if discriminatory treatment based on this ground has occurred, it may be possible simply to claim a violation of Article 8 without needing to argue the existence of discriminatory treatment.

Example 2 – The case of *Dudgeon v. UK* (ECtHR, *Dudgeon v. UK* (No. 7525/76), 22 October 1981)

This case addressed the UK national legislation, which criminalised consensual homosexual sexual relations between adults. The applicant complained that as a homosexual he therefore ran the risk of prosecution. The ECtHR found that of itself this constituted a violation of his right to respect for his private life, since the latter included one's 'sexual life'. It also found that, while the protection of public morality constituted a legitimate aim, it could be pursued without such a level of interference in private life.

The ECtHR has been particularly keen to ensure protection of individuals where state interferences relate to matters that are considered to touch core elements of personal dignity, such as one's sexual life or family life.

Example 3 – The case of *Karner v. Austria* (ECtHR, *Karner v. Austria* (No. 40016/98), 24 July 2003)

This case concerned the interpretation of the Austrian national legislation (section 14 of the Rent Act), which created a right for a relative or 'life companion' to automatically succeed to a tenancy agreement where the main tenant died. The applicant had been cohabiting with his partner, the main tenant, who died. The national courts interpreted the legislation so as to exclude homosexual couples, even though it could include heterosexual couples that were not married. The government accepted that differential treatment had occurred on the basis of sexual orientation, but argued that this was justified in order to protect those in traditional families from losing their accommodation. The ECtHR found that although protecting the traditional family could constitute a legitimate aim the 'the margin of appreciation … is narrow … where there is a difference in treatment based on sex or sexual orientation'. It thus made a finding of discrimination, since the State could have employed measures to protect the traditional family without placing homosexual couples at such a disadvantage.

2.4.3. Disability

The ECHR neither provides a single definition of disability, nor includes it in the list of protected grounds of the ECHR; however, disability has been included by the ECtHR in its interpretation of 'other' grounds under Article 14.

Example 1 – The case of *Glor v. Switzerland* (ECtHR, *Glor v. Switzerland* (No. 13444/04), 30 April 2009)

The ECtHR found that the applicant, who was a diabetic, could be considered as a person with a disability – irrespective of the fact that national law classified this as a 'minor' disability.194 The applicant was obliged to pay a tax to compensate for failing to complete his military service, which was payable by all those who were eligible for military service. To be exempted from this tax one either had to have a disability reaching a level of '40%' (considered equivalent to the loss of use of one limb), or be a conscientious objector. Conscientious objectors were obliged to perform a 'civil service'. The applicant's disability was such that he was found unfit to serve in the army, but the disability did not reach the severity threshold required in national law to exempt him from the tax. He had offered to perform the 'civil service' but this was refused. The ECtHR found that the State had treated the applicant comparably with those who had failed to complete their military service without valid justification. This constituted discriminatory treatment since the applicant found himself in a different position (as being rejected for military service but willing and able to perform civil service), and as such the State should have created an exception to the current rules.

As with other protected grounds under the ECHR, it is not uncommon for cases to be dealt with under other substantive rights, rather than a cumulative approach of a substantive right and Article 14, prohibiting discrimination.

Example 2 – The case of *Price v. UK* (ECtHR, *Price v. UK* (No. 33394/96), 10 July 2001)

The applicant was sentenced to prison for a period of seven days. She suffered from physical disabilities due to ingestion of thalidomide by her mother during pregnancy, with the result that she had absent or significantly shortened limbs as well as malfunctioning kidneys. Consequently she relied on a wheelchair for mobility, required assistance to go to the toilet and with cleaning, and needed special sleeping arrangements. During her first night in detention she was placed in a cell that was not adapted for persons with physical disabilities and consequently was unable to sleep adequately, experienced substantial pain and suffered hypothermia.

On her transferral to prison she was placed in the hospital wing where some adaptation could be made, but she still experienced similar problems. She was also not permitted to charge her electric wheelchair, which lost power. The ECtHR found that the applicant had been subjected to degrading treatment, in violation of Article 3. Discrimination based on one of the substantive rights of the ECHR under Article 14 was not raised in this case.

2.4.5. Age

The protected ground of age relates simply to differential treatment or enjoyment that is based on the victim's age. Although age discrimination *per se* does not fall within the ambit of a particular right in the ECHR (unlike religion, or sexual orientation), issues of age discrimination may arise in the context of various rights. As such the ECtHR has, as in other areas, adjudicated on cases whose facts suggested age discrimination, without actually analysing the case in those terms – in particular in relation to the treatment of children in the criminal-justice system. The ECtHR has found that 'age' is included among 'other status'[25].

Example 1 – The case of *Schwizgebel v. Switzerland* (ECtHR, *Schwizgebel v. Switzerland* (No. 25762/07), 10 June 2010)

A 47 year old single mother complained about a refused application to adopt a child. The national authorities based their decision on the age difference between the applicant and the child, and the fact that the adoption would impose a significant financial burden, given that the applicant already had one child. The ECtHR found that she was treated differently from younger women applying for adoption on the basis of her age. However, a lack of uniformity among States over acceptable age limits for adoption allowed the State a large margin of appreciation. In addition the national authorities' consideration of the age difference had not been applied arbitrarily, but was based on consideration of the best interests of the child and the financial burden that a second child might pose for the applicant, which in turn could affect the child's well-being. Accordingly the ECtHR found that the difference in treatment was justifiable.

2.4.6. Race, ethnicity, colour and membership of a national minority

While the ECHR lists 'nationality' or 'national origin' as a separate ground, analysis of the relevant case-law shows that nationality can be understood as a constitutive element of ethnicity. The CoE Commission Against Racism and Intolerance has also adopted a broad approach to defining 'racial discrimination', which includes within itself the grounds of '*race, colour, language, religion, nationality or national or ethnic origin*'[26]. Similarly, Article 1 of the UN Convention on the Elimination of Racial Discrimination, 1966 (to which all the Member States of the European Union and Council of Europe are party) defines racial discrimination to include the grounds of '*race, colour, descent, or national or ethnic origin*'. The Committee on the Elimination of Racial Discrimination, responsible for interpreting and monitoring compliance with the treaty has further stated that unless justification exists to the contrary, determination as to whether an individual is a member of a particular racial or ethnic group, 'shall … be based upon

[25] ECtHR, *Schwizgebel v. Switzerland* (No. 25762/07), 10 June 2010.
[26] ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, CRI(2003)8, adopted 13 December 2002, paras. 1(b) and (c).

self-identification by the individual concerned[27].' This prevents the State from excluding from protection any ethnic groups which it does not recognise.

In explaining the concepts of race and ethnicity, the ECtHR has held that language, religion, nationality and culture may be indissociable from race.

Example 1 – The case of *Sejdić and Finci v. Bosnia and Herzegovina* (ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* [GC] (Nos. 27996/06 and 34836/06), 22 December 2009)

The applicants complained that they were unable to stand in elections. As part of a peace settlement to bring an end to the conflict in the 1990s, a power-sharing agreement between the three main ethnic groups was reached. This included an arrangement that any candidate standing for election had to declare their affiliation to the Bosniac, Serb or Croat community. The applicants, who were of Jewish and Roma origin, refused to do so and alleged discrimination on the basis of race and ethnicity. The ECtHR repeated its explanation of the relationship between race and ethnicity, above, adding that '[d]iscrimination on account of a person's ethnic origin is a form of racial discrimination'. The ECtHR finding of racial discrimination illustrates the interplay between ethnicity and religion. Furthermore the ECtHR found that despite the delicate terms of the peace agreement this could not justify such discrimination.

The ECtHR has been extremely strict in relation to discrimination based on race or ethnicity stating: 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures[28].'

2.4.7. Nationality or national origin

Article 2(a) of the Council of Europe's **Convention on Nationality** (1996) defines it as '*the legal bond between a person and a State*'. While this treaty has not received widespread ratification, this definition is based on accepted rules of public international law, and has also been endorsed by the **European Commission against Racism and Intolerance**[29].

'National origin' may be taken to denote a person's former nationality, which they may have lost or added to through naturalization, or to refer to the attachment to a 'nation' within a State (such as Scotland in the UK).

[27] CERD, 'General Recommendation VIII concerning the interpretation and application of Article 1, paragraphs 1 and 4 of the Convention'.
[28] ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* [GC] (Nos. 27996/06 and 34836/06), 22 December 2009, para. 44. Similarly, ECtHR, *Timishev v. Russia* (Nos. 55762/00 and 55974/00), 13 December 2005, para. 58.
[29] ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, CRI(2003)8, adopted 13 December 2002, p. 6.

While the ECHR provides greater protection than EU law on the ground of nationality, it readily accepts that the absence of a legal bond of nationality often runs together with the absence of factual connections to a particular State, which in turn prevents the alleged victim from claiming to be in a comparable position to nationals. The essence of the ECtHR's approach is that the closer the factual bond of an individual to a particular State, particularly in terms of paying taxation, the less likely it is that it will find that differential treatment on the basis of nationality is justified.

Example 1 – The case of *Zeïbek v. Greece* (ECtHR, *Zeïbek v. Greece* (No. 46368/06), 9 July 2009)

The applicant was refused a pension entitlement intended for those with 'large families'. While she had the requisite number of children, one of her children did not hold Greek nationality at the time the applicant reached pensionable age. This situation had resulted from the government's earlier decision to remove nationality from the applicant's entire family (which itself was tainted with irregularities) and then reissuing nationality only to three of her children (since the fourth was already married). The ECtHR found that a policy of revocation of nationality had been applied in particular to Greek Muslims, and that the refusal of the pension could not be justified on the basis of preserving the Greek nation as this reasoning itself amounted to discrimination on the grounds of national origin.

The ECHR imposes duties on all Member States of the Council of Europe (which includes all the Member States of the EU) to guarantee the rights in the ECHR to all individuals within their jurisdiction (including non-nationals). The ECtHR has maintained a balance between the State's right to control what benefits it may offer those enjoying the legal bond of nationality, against the need to prevent States discriminating against those who have formed substantial factual bonds with the State. The ECtHR has applied great scrutiny in matters relating to social security, if individuals can show a strong factual tie to a State.

The entitlement of States to regulate entry and exit of their borders by non-nationals is well established under public international law and accepted by the ECtHR. In this connection, the ECtHR has primarily intervened in complaints relating to deportation of individuals where they face inhuman or degrading treatment or punishment or torture in the destination State (under Article 3), or have formed strong family ties in the host State which will be broken if the individual is forced to leave (under Article 8).

These cases should be compared to situations where the applicant has developed close factual links to the host State, through a long period of residence or contribution to the State through taxation.

Example 2 – The case of *Andrejeva v. Latvia* (ECtHR, *Andrejeva v. Latvia* [GC] (No. 55707/00), 18 February 2009)

The applicant was formerly a citizen of the former Soviet Union with a right to permanent residence in Latvia. National legislation classified the applicant as having worked outside Latvia for the period prior to independence (despite having been in the same post within Latvian territory before and after independence) and consequently calculated her pension on the basis of the time spent in the same post after independence. Latvian nationals in the same post, in contrast, were entitled to a pension based on their entire period of service, including work prior to independence. The ECtHR found the applicant to be in a comparable situation to Latvian nationals since she was a 'permanent resident non-citizen' under national law and had contributed taxes on the same basis. It was stated that 'very weighty reasons' would be needed to justify differential treatment based solely on nationality, which it said did not exist in the present case. Although it accepted that the State usually enjoys a wide margin of appreciation in matters of fiscal and social policy, the applicant's situation was factually too close to that of Latvian nationals to justify discrimination on that basis.

2.4.8. Religion or belief

The ECHR framework provides strong protection against discrimination on the basis of religion or belief,' given that Article 9 contains a self-contained right to freedom of conscience, religion and belief.

Example 1 – The case of *Alujer Fernández and Caballero García v. Spain* (ECtHR, *Alujer Fernández and Caballero García v. Spain* (dec.) (No. 53072/99), 14 June 2001)

The applicants complained that, unlike Catholics, they were unable to allocate a proportion of their income tax directly to their Church. The ECtHR found the case inadmissible on the facts since the applicant's Church was not in a comparable position to the Catholic Church in that they had not made any such request to the government, and because the government had a reciprocal arrangement in place with the Holy See.

In a series of cases relating to the substantive right to freedom of religion and belief under the ECHR, the ECtHR has made clear that the State cannot attempt to prescribe what constitutes a religion or belief, and that these notions protect '*atheists, agnostics, sceptics and the unconcerned'*, thus protecting those who choose '*to hold or not to hold religious beliefs and to practice or not to practice a religion'*. These cases also note that religion or

belief is essentially personal and subjective, and need not necessarily relate to a faith arranged around institutions[30].

The ECtHR has elaborated on the idea of 'belief' in the context of the right to education under Article 2 of Protocol 1 to the ECHR[31], which provides that the State must respect the right of parents to ensure that their child's education is 'in conformity with their own religious and philosophical convictions'. It has also addressed complex cases related to religious freedom in the context of States wishing to maintain secularism and minimise the potentially fragmentary effect of religion on their societies. Here it has placed particular weight on the State's stated aim of preventing disorder and protecting the rights and freedoms of others.

Example 2 – The case of *Köse and Others v. Turkey* (ECtHR, *Köse and Others v. Turkey* (dec.) (No. 26625/02), 24 January 2006)

This case concerned a dress code prohibiting the wearing of headscarves by girls in school, where it was claimed that this constituted discrimination on the basis of religion since wearing the headscarf was a Muslim religious practice. The ECtHR accepted that the rules relating to dress were not connected to issues of affiliation to a particular religion, but were rather designed to preserve neutrality and secularism in schools, which in turn would prevent disorder as well as protect the rights of others to non-interference in their own religious beliefs. The claim was therefore considered to be manifestly ill-founded and inadmissible.

2.4.9. Language

It should be noted that both the Council of Europe **Framework Convention for the Protection of National Minorities** (1995)[32] and the **European Charter for Regional or Minority Languages** (1992)[33], imposes specific duties on States relating to the use of minority languages. However, neither instrument defines the meaning of 'language'. Article 6(3) of the ECHR explicitly provides for certain guarantees in the context of the criminal process, such that everyone enjoys the right to have accusations against them communicated in a language which they understand, as well as the right to an interpreter where they cannot understand or speak the language used in court.

The ground of language forms a separate protected ground under the ECHR, and has been the subject of a ECtHR decision related to the context of education.

[30] ECtHR, *Moscow Branch of the Salvation Army v. Russia* (No. 72881/01), 5 October 2006, paras. 57-58; ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova* (No. 45701/99), 13 December 2001, para. 114; ECtHR, *Hasan and Chaush v. Bulgaria* [GC] (No. 30985/96), 26 October 2000, paras. 60 and 62.
[31] ECtHR, *Campbell and Cosans v. UK* (Nos. 7511/76 and 7743/76), 25 February 1982.
[32] CETS No. 157.
[33] CETS No. 148.

Example 1 – The *Belgium Linguistic* case (ECtHR, *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v. Belgium* (Nos. 1474/62 and others), 23 July 1968)

A few parents complained that national law relating to the provision of education was discriminatory on the basis of language. In view of the French-speaking and Dutch-speaking communities in Belgium, national law stipulated that State-provided or State-subsidised education would be offered in either French or Dutch depending on whether the region was considered French or Dutch. Parents of French-speaking children living in the Dutch-speaking region complained that this prevented, or made it considerably harder, for their children to be educated in French. The ECtHR found that while there was a difference in treatment this was justified. The decision was based around consideration that regions were predominantly unilingual. The difference in treatment was therefore justified since it would not be viable to make teaching available in both languages. Furthermore, families were not prohibited from making use of private education in French in Dutch-speaking regions.

2.4.10. Social origin, birth and property

It is possible to view these three grounds as interconnected as they relate to a status imputed to an individual by virtue of an inherited social, economic or biological feature. As such they may also be interrelated with race and ethnicity. Aside from the ground of 'birth', few, if any, cases have been brought before the ECtHR relating to these grounds.

Example 1 – The case of *Mazurek v. France* (ECtHR, *Mazurek v. France* (No. 34406/97), 1 February 2000)

An individual who had been born out of wedlock complained that national law prevented him (as an 'adulterine' child) from inheriting more than one quarter of his mother's estate. The ECtHR found that this difference in treatment, based solely on the fact of being born out of wedlock, could only be justified by particularly 'weighty reasons'. While preserving the traditional family was a legitimate aim it could not be achieved by penalising the child who has no control over the circumstances of their birth.

2.4.11. Political or other opinion

The ECHR expressly lists 'political or other opinion' as a protected ground; where a particular conviction is held by an individual but it does not satisfy the requirements of being a 'religion or belief' it may still qualify for protection under this ground. This ground has rarely been ruled upon by the ECtHR. As with other areas of the ECHR, 'political or other opinion' is protected in its own right through the right to freedom of expression under Article 10, and from the case-law in this area it is possible to gain an appreciation of what may be covered by this ground. In practice it would seem that where an alleged victim feels that there has been differential

treatment on this basis, it is more likely that the ECtHR would simply examine the claim under Article 10.

Example 1 – The case of *Steel and Morris v. UK* (ECtHR, *Steel and Morris v. UK* (No. 68416/01), 15 February 2005)

The applicants were campaigners who distributed leaflets containing untrue allegations about the company McDonalds, and they were sued in an action for defamation before the national courts and ordered to pay damages. The ECtHR found that the action in defamation constituted an interference with freedom of expression, but that this served the legitimate purpose of protecting individuals' reputations. However, it was also found that free speech on matters of public interest deserve strong protection, and given that McDonalds was a powerful corporate entity which had not proved that it had suffered harm as the result of the distribution of several thousand leaflets, and that the damages awarded were relatively high compared to the applicants' income, the interference with their freedom of expression was disproportionate.

Example 2 – The case of *Castells v. Spain* (ECtHR, *Castells v. Spain* (No. 11798/85), 23 April 1992)

This case concerned a member of parliament who was prosecuted for 'insulting' the government after criticising government inaction in addressing acts of terrorism in the Basque country. The ECtHR underlined the importance of freedom of expression in a political context, particularly given its important role in the proper functioning of a democratic society. As such, the ECtHR found that any interference would call for 'the closest of scrutiny'.

3. The Revised European Social Charter

The Revised European Social Charter of 1996 embodies in one instrument all rights guaranteed by the Charter of 1961, its additional Protocol of 1988 (ETS No. 128) and adds new rights and amendments adopted by the Parties. It is gradually replacing the initial 1961 treaty.

The European Social Charter (revised) guaranteed fundamental social and economic rights of all individuals in their daily lives. It takes account of the evolution which has occurred in Europe since the Charter was adopted in 1961, and includes the following:

New rights: right to protection against poverty and social exclusion; right to housing; right to protection in cases of termination of employment; right to protection against sexual harassment in the workplace and other forms of harassment; rights of workers with family responsibilities to equal opportunities and equal treatment; rights of workers' representatives in undertakings;

Amendments: reinforcement of principle of non-discrimination; improvement of gender equality in all fields covered by the treaty; better protection of

maternity and social protection of mothers; better social, legal and economic protection of employed children; better protection of handicapped people.

Enforcement of the new Charter is submitted to the same system of control as the Charter of 1961, developed by the Amending Protocol of 1991 (ETS No. 142) and by the Additional Protocol of 1995 providing a system of collective complaints (ETS No. 158).

4. The Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

The Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was concluded in the conviction that "*the protection of persons deprived of their liberty against torture and inhuman or degrading treatment or punishment could be strengthened by non-judicial means of a preventive character based on visits*"[34]. In its operative part, the Convention does not set or specify standards, neither does it provide for any complaint or adjudicatory procedures. The objective of the Convention is more complex; it is not to apply the law to certain established facts or situations and, if the circumstances so demand, to condemn a certain state for malconduct. The object is "*in a spirit of cooperation and through advice, to seek improvements, if necessary, in the protection of persons deprived of their liberty*". The underlying idea is to monitor and thereby improve the environment, i.e. places where persons are deprived of their liberty up to a point where torture and inhuman or degrading treatment or punishment will come under routine control or will no longer occur at all. Toward this end, the Convention provides for a complex and sensitive mechanism of *on-site inspections* of prisons and other places of detention, involving communication and interaction between the Committee, its members, including experts, the government of the Party concerned and its competent authorities, private persons deprived of their liberty and other persons who might supply relevant information, including NGOs.

5. The implementation of the Council of Europe law in Greece

(a) The European Convention on Human Rights was ratified by Legislative Decree No. 53/1974[35].

(b) The European Social Charter was ratified by Law No. 1426/1984 and the Revised European Social Charter was ratified by Law No. 4358/2016[36] (the vulnerable groups protected by the Charter include, *inter alia*, persons with disabilities, elderly, young persons and legal migrant workers).

(c) The Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was ratified by Law No. 1949/1991.

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[34] Preamble paragraph 5.
[35] But the crucial Protocol 12 was not ratified.
[36] The Revised European Social Charter was ratified by Law No. 4358/2016 'on ratification of the Revised European Social Charter' (OJ 5 A'/20.1.2016).

CHAPTER 3. THE EU NON-DISCRIMINATION CONTEXT

The original Treaties of the European Communities did not contain any reference to human rights or their protection. It was not thought that the creation of an area of free trade in Europe could have any impact relevant to human rights. However, as cases began to appear before the European Court of Justice (ECJ) alleging human rights breaches caused by Community law, the ECJ developed a body of judge-made law known as the 'general principles' of Community Law. According to the ECJ, these general principles would reflect the content of human rights protection found in national constitutions and human rights treaties, in particular the ECHR.

However, the situation has changed with the insertion of Article 13 in the **Treaty on European Union** (TEU) by the Treaty of Amsterdam in 1997, which is now Article 19 in the Treaty on the functioning of the European Union (TFEU). In particular, the first paragraph of article 19 TFEU (ex article 13 TEU) defines that:

"Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

In this context, non-discrimination secondary law was introduced in order to facilitate the functioning of the internal market, and was therefore traditionally confined to the sphere of employment. With the introduction of the Racial Equality Directive in 2000 this sphere was expanded to include access to goods and services, and access to the State welfare system, out of consideration that in order to guarantee equality in the workplace it was also necessary to ensure equality in other areas, which can have an impact on employment. The Gender Goods and Services Directive was then introduced in order to expand the scope of equality on the grounds of sex to goods and services. However, the Employment Equality Directive of 2000, which prohibits discrimination on the grounds of sexual orientation, disability, age and religion or belief, applies only in the context of employment.

As a EU Member State since 1981, Greece applies non-discrimination rules laid down in the following secondary binding law:

- Council Directive 76/207/EEC[37] 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 (9 February 1976)[38]

[37] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to em ploy ment, vocational training and promotion, and working conditions,OJ L 39/40, 14.2.1976.

[38] The Directive 76/207 was amended by the Directive 2002/73/EC and the Directive 2006/54/EC, in order to be harmonised with Directives 2000/43/EC and 2000/78/EC and bring together in a single text the main provisions existing in this fi eld of equal treatment for

- Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security (19 December 1978)
- Council Directive 2000/43/EC[39] implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (29 June 2000)
- Council Directive 2000/78/EC[40] establishing a general framework for equal treatment in employment and occupation (27 November 2000)
- Council Directive 2004/113/EC[41] implementing the principle of equal treatment between men and women in the access to and supply of goods and services (13 December 2004)
- Directive 2006/54/EC[42] of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (5 July 2006)
- Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity or contributing to the pursuit of such activity.

1. The EU Charter of Fundamental Rights

In recognising that its policies could have an impact on human rights and in an effort to make citizens feel 'closer' to the EU, the EU and its Member States proclaimed the EU Charter of Fundamental Rights in 2000. The Charter contains a list of human rights, inspired by the rights contained in the constitutions of the Member States, the ECHR and universal human rights treaties such as the UN Convention on the Rights of the Child. The Charter, as adopted in 2000, was merely a 'declaration', which means that it was not legally binding, although the European Commission (the primary body for proposing new EU legislation) stated that its proposals would be in compliance.

When the Treaty of Lisbon entered into force in 2009, it altered the status of the Charter of Fundamental Rights to make it a legally binding document.

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men and women as regards access to employment,vocational training and promotion, and working conditions, occupational social security schemes, equal pay for equal work or work of equal value, the burden of proof in cases of discrimination based on sex, as well as certain developments arising out of the case-law of the Court of Justice of the European Union.

[39] 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 180/22, 19.7.2000.

[40] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ* L 303/16, 2.12.2000.

[41] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373/37, 21.12.2004.

[42] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ, L 204/23, 26.07.2006.

As a result, the institutions of the EU are bound to comply with it. The EU Member States are also bound to comply with the Charter, but only when implementing EU law. A protocol to the Charter was agreed in relation to the Czech Republic, Poland and the UK which restates this limitation in express terms.

Article 21 of the Charter contains a prohibition on discrimination on various grounds[43], which means that individuals can complain about EU legislation or national legislation that implements EU law if they feel the Charter has not been respected. National courts can seek guidance on the correct interpretation of EU law from the ECJ through the preliminary reference procedure under Article 267 of the Treaty on the Functioning of the EU.

2. The EU non-discrimination Directives

The aim of EU non-discrimination law is to allow all individuals an equal and fair prospect to access opportunities available in a society. In this respect, the EU adopted in 2000 two secondary community law binding instruments: the **Racial Equality Directive 2000/43/EC**[44] and the **Employment Equality Directive 2000/78/EC**[45].

The principle rules laid down in the two Directives are as follows:

a) The Racial Equality Directive[46]

- Implements the principle of equal treatment between people irrespective of racial or ethnic origin.
- Gives protection against discrimination in employment and training, education, social protection (including social security and healthcare), social advantages, membership and involvement in organisations of workers and employers and access to goods and services, including housing.
- Contains definitions of direct and indirect discrimination and harassment and prohibits the instruction to discriminate and victimisation.
- Allows for positive action measures to be taken, in order to ensure full equality in practice.

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[43] This article is titled "Non-discrimination" and states that:
"*1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited".

[44] Council Directive 2000/43/EC, OJ 2000 L 180, p. 22.

[45] Council Directive 2000/78/EC, OJ 2000 L 303, p. 16.

[46] This Directive was the first adopted unanimously by the Council under the new Article 13 of the Treaty establishing the European Community which entered into force on 1 May 1999. It was part of a package of proposals put forward by the Commission in November 1999, which included a proposal for a second Directive on discrimination on grounds of religion and belief, age, disability and sexual orientation, and an action programme providing financial support for activities to combat discrimination.

- Gives victims of discrimination a right to make a complaint through a judicial or administrative procedure, associated with appropriate penalties for those who discriminate.
- Allows for limited exceptions to the principle of equal treatment, for example in cases where a difference in treatment on the ground of race or ethnic origin constitutes a genuine occupational requirement.
- Shares the burden of proof between the complainant and the respondent in civil and administrative cases, so that once an alleged victim establishes facts from which it may be presumed that there has been discrimination, it is for the respondent to prove that there has been no breach of the equal treatment principle.
- Provides for the establishment in each Member State of an organisation to promote equal treatment and provide independent assistance to victims of racial discrimination.

b) The Employment Equality Directive

- Implements the principle of equal treatment in employment and training irrespective of religion or belief, disability, age or sexual orientation in employment, training and membership and involvement in organisations of workers and employers.
- Includes identical provisions to the Racial Equality Directive on definitions of discrimination and harassment, the prohibition of instruction to discriminate and victimisation, on positive action, rights of legal redress and the sharing of the burden of proof.
- Requires employers to make reasonable accommodation to enable a person with a disability who is qualified to do the job in question to participate in training or paid labour.
- Allows for limited exceptions to the principle of equal treatment, for example, where the ethos of a religious organisation needs to be preserved, or where an employer legitimately requires an employee to be from a certain age group to be recruited.

This development[47] was a significant expansion of the scope of non-discrimination law under the EU, which recognised that in order to allow individuals to reach their full potential in the employment market, it was also essential to guarantee them equal access to areas such as health, education and housing. In 2004, the **Gender Goods and Services Directive**[48] expanded the scope of sex discrimination to the area of goods and services. However, protection on the grounds of sex does not quite match the scope of protection under the Racial Equality Directive since the **Gender Social Security Directive** guarantees equal treatment in relation to social security only and not to the broader welfare system, such as social protection and access to healthcare and education.

[47] The scope of the Employment Equality Directive was completed by the Gender Equality Directive (employment and occupation) recast (Council Directive 2006/54/EC, OJ 2006 L 204, p. 23).
[48] Council Directive 2004/113/EC, OJ 2004 L 373, p. 37.

The Member States had to introduce the detailed provisions set out in the Directives concerning the enforcement of rights, including the requirement that the burden of proof rests with the defendant once the alleged victim has presented facts from which discrimination may be presumed. Whilst Member States were familiar with this obligation in terms of discrimination between men and women in the employment field, Directive 2000/43/EC extended the rules on the burden of proof into new areas such as access to goods and services.

Moreover, the Racial Equality Directive, the Gender Goods and Services Directive and the Gender Equality Directive require EU Member States to designate a body (or bodies) which:

- provides independent assistance to victims of discrimination in pursuing their complaints;
- conducts independent surveys concerning discrimination;
- publishes independent reports and makes recommendations on any issue relating to such discrimination.

The body or bodies designated on the basis of the provisions of these three directives are generally referred to as equality bodies and "[...] may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights." It is important to underscore that, as a consequence, EU law requires EU Member States to designate equality bodies.

Equality bodies can in practice be divided into two basic types: promotional or quasi-judicial. EU Member States have one or the other or both – forming three categories of systems. Promotion-type equality bodies spend the bulk of their time and resources on activities that support good practices in organisations, raise awareness of rights, develop a knowledge base related to equality and non-discrimination and provide legal advice and assistance to individual victims of discrimination. Quasi-judicial-type equality bodies, on the other hand, focus their time and resources on hearing, investigating and deciding on individual cases of discrimination. Some equality bodies also combine these two characteristics, while some states have both types of bodies. Predominantly quasi-judicial equality bodies could theoretically fall within the category of the earlier mentioned administrative/judicial institutions, but this report deals with them separately.

2.1. The discrimination context

The EU non-discrimination law has two specific objectives:

Firstly, it stipulates that those individuals who are in similar situations should receive similar treatment and not be treated less favourably simply because of a particular 'protected' characteristic that they possess (**direct discrimination**).

Secondly, it stipulates that those individuals who are in different situations should receive different treatment to the extent that this is needed to allow them to enjoy particular opportunities on the same basis as others; thus, those same 'protected grounds' should be taken into account when carrying out particular practices or creating particular rules (**indirect discrimination**).

2.1.1. Direct discrimination

Article 2(2) of the Racial Equality Directive states that direct discrimination is '*taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin*'[49].

Example 1 – The *Richards* case (ECJ, *Richards v. Secretary of State for Work and Pensions*, Case C-423/04 [2006] ECR I-3585, 27 April 2006)

The complainant had undergone male-to-female gender reassignment surgery. She wished to claim her pension on her 60th birthday, which was the age that women were entitled to pensions in the UK. The government refused to grant the pension, maintaining that the complainant had not received unfavourable treatment by comparison to those in a similar situation. The government argued that the correct comparator here was 'men', since the complainant had lived his life as a man. The ECJ found that because national law allows an individual to change their gender, then the correct comparator was 'women'. Accordingly, the complainant was being treated less favourably than other women by having a higher retirement age imposed on her.

At the heart of direct discrimination is the difference of treatment that an individual is subject to. Consequently, the first feature of direct discrimination is evidence of unfavourable treatment. This can be relatively easy to identify compared with indirect discrimination where statistical data is often needed (see below). Here are examples taken from cases that are referred to in this Handbook: refusal of entry to a restaurant or shop; receiving a smaller pension or lower pay; being subject to verbal abuse or violence; being refused entry at a checkpoint; having a higher or lower retirement age; being barred from a particular profession; not being able to claim inheritance rights; being excluded from the mainstream education system; being deported; not being permitted to wear religious symbols; or being refused social security payments or having them revoked.

Unfavourable treatment will be relevant to making a determination of discrimination where it is unfavourable by comparison to someone in a similar situation. A complaint about 'low' pay is not a claim of discrimination unless it can be shown that the pay is lower than that of someone employed

[49] Similarly: Employment Equality Directive, Article 2(2)(a); Gender Equality Directive (Recast), Article 2(1)(a); Gender Goods and Services Directive, Article 2(a).

to perform a similar task by the same employer. Therefore a 'comparator' is needed: that is, a person in materially similar circumstances, with the main difference between the two persons being the 'protected ground'.

The apparent exception for finding a suitable 'comparator', at least in the context of EU law within the scope of employment, is where the discrimination suffered is due to the individual being pregnant. In a long line of ECJ jurisprudence, starting with the seminal case of *Dekker*, it is now well established that where the detriment suffered by an individual is due to their being pregnant then this will be classed as direct discrimination based on their sex, there being no need for a comparator[50].

European non-discrimination law is focused on a broad range of 'protected grounds', namely, sex, sexual orientation, disability, age, race, ethnic origin, national origin and religion or belief, starting from a rather simple question: would the person have been treated less favourably had they been of a different sex, of a different race, of a different age, or in any converse position under any one of the other protected grounds? If the answer is yes then the less favourable treatment is clearly being caused by the ground in question.

The rule or practice that is being applied does not necessarily need to refer explicitly to the 'protected ground', as long as it refers to another factor that is indissociable from the protected ground. Essentially, when considering whether direct discrimination has taken place one is assessing whether the less favourable treatment is due to a 'protected ground' that cannot be separated from the particular factor being complained of.

The courts have given a broad interpretation to the reach of the 'protected ground'. It can include 'discrimination by association', where the victim of the discrimination is not themself the person with the protected characteristic. It can also involve the particular ground being interpreted in an abstract manner. This makes it imperative that practitioners embark on detailed analysis of the reasoning behind the less favourable treatment, looking for evidence that the protected ground is causative of such treatment, whether directly or indirectly.

2.1.2. Indirect discrimination

Article 2 par. 2 (b) of the Racial Equality Directive states that '*indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons*'[51]. The elements of indirect discrimination are:

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[50] ECJ, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, Case C-177/88 [1990] ECR I-3941, 8 November 1990. Similarly, ECJ, *Webb v. EMO Air Cargo (UK) Ltd*, Case C-32/93 [1994] ECR I-3567, 14 July 1994.

[51] Similarly: *Employment Equality Directive*, Article 2(2)(b); *Gender Equality Directive (Recast)*, Article 2(1)(b); *Gender Goods and Services Directive*, Article 2(b).

- a neutral rule, criterion or practice;
- that affects a group defined by a 'protected ground' in a significantly more negative way;
- by comparison to others in a similar situation.

a) The first identifiable requirement is an apparently neutral rule, criterion or practice. In other words, there must be some form of requirement that is applied to everybody.

b) The second identifiable requirement is that the apparently neutral provision, criterion or practice places a 'protected group' at a particular disadvantage[52]. When considering statistical evidence that the protected group is disproportionately effected in a negative way by comparison to those in a similar situation, the ECJ will seek evidence that a particularly large proportion of those negatively affected is made up of that 'protected group'.

c) A court will still need to find a comparator in order to determine whether the effect of the particular rule, criterion or practice is significantly more negative than those experienced by other individuals in a similar situation.

Example 1 – The case of *Bilka-Kaufhaus GmbH v. Weber Von Hartz* (ECJ, *Bilka-Kaufhaus GmbH v. Weber Von Hartz*, Case 170/84 [1986] ECR 1607, 13 May 1986)

Part-time employees, who were excluded from the occupational pension scheme of Bilka (a department store), complained that this constituted indirect discrimination against women, since they made up the vast majority of part-time workers. The ECJ found that this would amount to indirect discrimination, unless the difference in enjoyment could be justified. In order to be justified, it would need to be shown that: 'the … measures chosen by Bilka correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued, and are necessary to that end'.

[52] This is where indirect discrimination differs from direct discrimination in that it moves the focus away from differential treatment to look at differential effects.

2.2. The personal scope of application

The prohibition on nationality discrimination in EU law applies in the context of free movement of persons and is only accorded to citizens of EU Member States. In addition, the non-discrimination directives contain various exclusions of application for third-country nationals (TCNs)[53].

The non-discrimination directives expressly exclude their application to nationality discrimination, which is regulated under the **Free Movement Directive**[54]. According to the latter, only citizens of EU Member States have a right of entry and residence in other EU Member States. After a period of five years' lawful residence in another EU Member State, an EU citizen is entitled to a right of permanent residence, giving them equivalent rights to those in the category of 'worker'.

This, of course, does not mean that nationals of other Member States are not protected by the non-discrimination directives. Thus, an Italian worker dismissed from employment in Greece because of his disability will be able to rely on the Employment Equality Directive. It simply means that when making a complaint of discrimination on the basis of nationality, either the victim will have to try to bring this within the ground of race or ethnicity, or they will have to rely on the Free Movement Directive.

Both the Racial Equality Directive and the Employment Equality Directive state that they do not create any right to equal treatment for third-country nationals (TCNs) in relation to conditions of entry and residence. The Employment Equality Directive further states that it does not create any right to equal treatment for TCNs in relation to access to employment and occupation. The Racial Equality Directive states that it does not cover 'any treatment which arises from the legal status of third-country nationals'. However, this would not appear to allow Member States to exclude totally protection for TCNs, since the preamble states that TCNs shall be protected by the directive, except in relation to access to employment. The Gender Equality Directive (Recast) and Gender Goods and Services Directive do not exclude protection for TCNs.

However, TCNs will enjoy a right to equal treatment in broadly the same areas covered by the non-discrimination directives where they qualify as 'long-term residents' under the **Third-Country Nationals Directive** (which requires, among other conditions, a period of five years' lawful residence)[55]. In addition, the **Family Reunification Directive**[56] allows for TCNs lawfully resident in a Member State to be joined by family members in certain conditions.

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[53] A TCN is an individual who is a citizen of a State that is not a member of the EU.
[54] Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, p. 77.
[55] Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.01.2004, p. 44.
[56] Directive 2003/86/EC on the right to family reunification, OJ L 251, 3.10.2003, p. 12.

Of course, these rules under EU law do not prevent Member States introducing more favourable conditions under their own national law. In addition, the case-law of the ECHR, shows that while a State may consider nationals and non-nationals not to be in a comparable situation (and consider it to be permissible for them to be treated differently in certain circumstances), in principle all the rights in the ECHR must be guaranteed equally to all persons falling within their jurisdiction. In this respect the ECHR places obligations on Member States with respect to TCNs which in some areas go beyond the requirements of EU law.

2.3. The material scope of application

Under the non-discrimination Directives, the scope of the prohibition on discrimination extends to three areas: employment, the welfare system, and goods and services. Currently, the Racial Equality Directive applies to all three areas. While legislation which will extend the Employment Equality Directive to all three areas is under discussion, this Directive currently only applies to employment. The Gender Equality Directive (Recast) and the Gender Goods and Services Directive apply to employment and access to goods and services but not to access to the welfare system.

2.3.1. Employment

Protection against discrimination in the field of employment is extended across all the protected grounds provided for under the non-discrimination Directives.

a) Access to employment

Access to employment covers '*not only the conditions obtaining before an employment relationships comes into being*', but also all those influencing factors that need to be considered before the individual makes a decision of whether or not to accept a job offer[57], while a period of training is itself considered as 'employment' both in its own right and as part of the process of obtaining a post[58].

b) Conditions of employment, including dismissals and pay

This category includes in principle any condition derived from the working relationship. In relation to the area of dismissals, this covers almost all situations where the working relationship is brought to an end. This has been held to include, for example, where the working relationship has been brought to an end as part of a voluntary-redundancy scheme[59], or where the relationship has been terminated through compulsory retirement[60].

c) Access to vocational guidance and training

[57] ECJ, *Meyers v. Adjudication Officer*, Case C-116/94 [1995] ECR I-2131, 13 July 1995.
[58] ECJ, *Schnorbus v. Land Hessen*, Case C-79/99 [2000] ECR I-10997, 7 December 2000.
[59] ECJ, *Burton v. British Railways Board*, Case 19/81 [1982] ECR 555, 16 February 1982.
[60] ECJ, *Palacios de la Villa v. Cortefiel Servicios SA*, Case C-411/05 [2007] ECR I-8531, 16 October 2007.

d) Worker and employer organisations

This not only deals with membership and access to a worker or employer organisation, but also covers the involvement of persons within these organisations. According to guidance issued by the European Commission, this acts to ensure that discrimination cannot occur in the context of membership or benefits derived from these bodies.

2.3.2. Access to social protection and social welfare

Of the non-discrimination Directives, only the Racial Equality Directive provides broad protection against discrimination in accessing the welfare system and other forms of social security. Encompassed within this is access to benefits in kind that are held 'in common' by the State such as public healthcare, education and the social security system. However, the Gender Social Security Directive does establish a right of equal treatment on the basis of sex in relation to the narrower field of 'social security'.

a) Social protection

The precise ambit of this area is uncertain since it is not explained within the Racial Equality Directive and has yet to be interpreted through the ECJ case-law. Nevertheless, the Gender Social Security Directive provides for equal treatment on the basis of sex in relation to '*statutory social security schemes*'[61], as opposed to 'occupational' schemes, which are classified as 'pay' by the Gender Equality Directive (Recast).

It is unclear what is meant by 'social protection', although the Explanatory Memorandum to the Commission's proposal for the Racial Equality Directive, as well as the wording of the Directive itself, does imply that this will be wider than 'social security'. Given the intended breadth of the provision, it should be understood that any form of benefit offered by the State whether economic or in kind would be caught within the category of social protection, to the extent that it is not caught by social security. In this sense, it is highly probably that the individual areas of application of the Racial Equality Directive overlap with each other.

The scope of the protection from discrimination in the field of healthcare also remains unclear. It would seem that this will relate to access to publicly provided healthcare at the point of delivery, such as treatment accorded by administrative and medical staff. Presumably, it will also apply to insurance where health services are provided privately, but patients are reimbursed through a compulsory insurance scheme. Here, it would seem that a refusal to insure an individual or the charging of increased premiums based on race or ethnicity would fall under the scope of this provision. In the alternative, this would fall under the provision of goods and services.

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[61] Article 1(3) defines these as schemes which provide protection against sickness, invalidity, old age, accidents at work and occupational diseases, and unemployment, in addition to 'social assistance, in so far as it is intended to supplement or replace' the former schemes.

b) Social Advantages

The scope of 'social advantages' is well developed through the ECJ case-law in the context of the law on the free movement of persons and has been afforded an extremely broad definition[62]. It applies to virtually all rights so long as they satisfy the *Even* definition: there is no distinction between a right that is granted absolutely or those rights granted on a discretionary basis. Further, the definition does not preclude those rights granted after the termination of the employment relationship being deemed a social advantage such as a right to a pension[63]. Essentially, in the context of free movement, a social advantage relates to any advantage that is capable of assisting the migrant worker to integrate into the society of the host State. The courts have been quite liberal in finding an issue to be a social advantage. Examples have included:

- the payment of an interest-free 'childbirth loan' (despite the rationale behind the loan being to stimulate childbirth, the ECJ considered this to be a social advantage as it was viewed as a vehicle to alleviate financial burdens on low-income families[64]);
- the awarding of a grant under a cultural agreement to support national workers who are to study abroad[65];
- the right to hear a criminal prosecution against an individual in the language of their home State[66].

c) Education

Protection from discrimination in access to education was originally developed in the context of the free movement of persons under Article 12 of **Regulation 1612/68**, particularly directed at the children of workers. The area of education will presumably overlap with that of vocational training. It is unclear whether it will also include those higher education programmes excluded from the area of vocational training that are intended only for the purposes of improving general knowledge.

2.3.3. Access to supply of goods and services, including housing

Protection from discrimination in the field of access to the supply of goods and services, including housing, applies to the ground of race through the Racial Equality Directive, and on the grounds of sex through the Gender

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62 See ECJ, *Criminal Proceedings against Even*, Case 207/78 [1979] ECR 2019, 31 May 1979, para. 22, which concluded that social advantages are advantages *"which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community".*

63 ECJ, *Commission v. France*, Case C-35/97 [1998] ECR I-5325, 24 September 1998.

64 ECJ, *Reina v. Landeskreditbank Baden-Württemberg*, Case 65/81 [1982] ECR 33, 14 January 1982.

65 ECJ, *Matteucci v. Communauté française of Belgium*, Case 235/87 [1988] ECR 5589, 27 September 1988.

66 ECJ, *Criminal Proceedings against Mutsch*, Case 137/84 [1985] ECR 2681, 11 May 1985.

Goods and Services Directive. Article 3(1) of the Gender Goods and Services Directive gives more precision to this provision, stating that it relates to all goods and services "*which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context*". It expressly excludes, in paragraph 13 of the Preamble, application to 'the content of media or advertising' and 'public or private education', though this latter exclusion does not narrow the scope of the Racial Equality Directive, which expressly covers education. The Gender Goods and Services Directive also refers to Article 57 of the Treaty on the Functioning of the EU[67].

It would thus seem that this area covers any context wherever a good or a service is normally provided in return for remuneration, so long as this does not take place in an entirely personal context, and with the exclusion of public or private education.

Case-law from national bodies suggests that this will cover scenarios such as gaining access to or the level of service received in bars, restaurants and nightclubs, shops, purchasing insurance, as well as the acts of 'private' sellers, such as dog breeders. Although healthcare is covered specifically under the Racial Equality Directive, it may also fall under the scope of services, particularly where this is private healthcare or where individuals are obliged to purchase compulsory sickness insurance in order to cover health costs. In this sense, the ECJ has interpreted services in the context of the free movement of services to cover healthcare that is provided in return for remuneration by a profit-making body[68].

The Racial Equality Directive does not define housing. However, it is suggested that this should be interpreted in the light of international human rights law, in particular the right to respect for one's home under Article 7 of the EU Charter of Fundamental Rights and Article 8 of the ECHR (given that all EU Member States are party and that the EU will join the ECHR at a future date) and the right to adequate housing contained in Article 11 of the International Covenant on Economic Social and Cultural Rights (to which all Member States are party). The ECtHR has construed the right to a home widely to include mobile homes such as caravans or trailers, even in situations where they are located illegally[69].

In this context, access to housing would include not just ensuring that there is equality of treatment on the part of public or private landlords and estate agents in deciding whether to let or sell properties to particular individuals.

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[67] *'Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration …*
"Services" shall in particular include: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions.'

[68] ECJ, *Kohll v. Union des Caisses de Maladie*, Case C-158/96, [1998] ECR I-1931, 28 April 1998; ECJ, *Peerbooms v. Stichting CZ Groep Zorgverzekeringen*, Case C-157/99 [2001] ECR I-5473, 12 July 2001; and ECJ, *Müller Fauré v. Onderlinge Waarborgmaatschappij*, Case C-385/99 [2003] ECR I-4509, 13 May 2003.

[69] ECtHR, *Buckley v. UK* (No. 20348/92), 25 September 1996.

It would also include the right to equal treatment in the way that housing is allocated (such as allocation of low-quality or remote housing to particular ethnic groups), maintained (such as failing to upkeep properties inhabited by particular groups) and rented (such as a lack of security of tenure, or higher rental prices or deposits for those belonging to particular groups).

2.3.4. Access to justice

While access to justice is not specifically mentioned by the non-discrimination Directives among the examples of goods and services, it is conceivable that they fall within this ambit to the extent that the courts system represents a service provided to the public by the State for remuneration. At the very least, the non-discrimination Directives require the Member States to establish judicial and/or administrative procedures allowing individuals to enforce their rights under the Directives[70]. In addition, it is a well-established principle of EU law that individuals should benefit from a 'right to effective judicial protection' of rights derived from EU law[71]. Thus, even if it cannot be said that 'goods and services' includes 'access to justice', it can certainly be said that access to justice exists as a free-standing right (without the requirement to prove discrimination) in relation to enforcing the directives themselves.

Article 7 of the Racial Equality Directive provides that:

"Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them".

Other equality Directives, such as the Employment Equality Directive, the Gender Goods and Services Directive and the Gender Equality Directive (employment and occupation) recast, contain equivalent provisions.

2.4. The protected grounds

The EU non-discrimination Directives prohibit differential treatment that is based on certain 'protected grounds', containing a fixed and limited list of protected grounds, covering sex (Gender Goods and Services Directive, Gender Equality Directive (Recast)), sexual orientation, disability, age or religion or belief (Employment Equality Directive), racial or ethnic origin (Racial Equality Directive).

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[70] Article 9(1), Employment Equality Directive; Article 17(1), Gender Equality Directive (Recast); Article 8(1), Gender Goods and Services Directive; Article 7(1), Racial Equality Directive.

[71] See, for example, ECJ, *Vassilakis and Others v. Dimos Kerkyras*, Case C-364/07 [2008] ECR I-90, 12 June 2010; ECJ, *Sahlstedt and Others v. Commission*, Case C-362/06 [2009] ECR I-2903, 23 April 2009; ECJ, *Angelidaki and Others v. Organismos Nomarkhiaki Aftodiikisi Rethimnis*, Case C-378/07 [2009] ECR I-3071, 23 April 2009.

2.4.1. Sex discrimination

Sex discrimination is relatively self-explanatory, in that it refers to discrimination that is based on the fact that an individual is either a woman or a man. This is the most highly developed aspect of the EU social policy and has long been considered a core right. The development of the protection on this ground served a dual purpose: firstly, it served an economic purpose in that it helped to eliminate competitive distortions in a market that had grown evermore integrated, and; secondly, on a political level, it provided the Community with a facet aimed toward social progress and the improvement of living and working conditions. Consequently, the protection against discrimination on the ground of sex has been, and has remained, a fundamental function of the European Union. The acceptance of the social and economic importance of ensuring equality of treatment was further crystallised by the central position it was given in the Charter of Fundamental Rights.

The concept of 'sex' has also been interpreted to include situations where discriminatory treatment is related to the 'sex' of the applicant in a more abstract sense, allowing for some limited protection of gender identity.

Example 1 – The case of *Defrenne v. SABENA* (ECJ, Defrenne v. SABENA, Case 43/75 [1976] ECR 455, 8 April 1976)

The applicant complained that she was paid less than her male counterparts, despite undertaking identical employment duties. The ECJ held that this was clearly a case of sex discrimination. In reaching this decision, the ECJ highlighted both the economic and social dimension of the Union, and that non-discrimination assists in progressing the EU towards these objectives.

Thus, the more broadly accepted definition of gender identity encompasses not only those who undertake gender reassignment surgery ('transsexuals'), but also choose other means to express their gender, such as transvestism or cross-dressing, or simply adopting a manner of speech or cosmetics normally associated with members of the opposite sex.

Example 2 – The case of *K.B. v. NHS Pensions Agency* (ECJ, *K.B. v. NHS Pensions Agency*, Case C-117/01 [2004] ECR I-541, 7 January 2004)

This case concerned the refusal of KB's transsexual partner a widower's pension on the ground that the transsexual couple could not satisfy the requirement of being married; transsexuals were not capable of marrying under English law at the time. In considering the issue of discrimination, the ECJ held that there was no discrimination on the ground of sex because, in determining who was entitled to the survivor's pension, there was no less favourable treatment based on being male or female. The ECJ then changed the direction of the consideration, and concentrated on the issue of marriage. It was highlighted that transsexuals were never able to marry, and thus never able to benefit from the survivor's pension, whereas heterosexuals could. Consideration was then given to the ECtHR case of *Christine Goodwin (*ECtHR, *Christine Goodwin v. UK* [GC] (No. 28957/95), 11 July 2002). Based on these considerations, the ECJ concluded that the British legislation in question was incompatible with the principle of equal treatment as it prevented transsexuals from benefiting from part of their partners pay.

The ground of 'sex' under the non-discrimination Directives will also encompass discrimination against an individual because he/she 'intends to undergo, or has undergone, gender reassignment'. It therefore appears that the ground of sex as construed under EU law currently protects gender identity[72] only in a narrow sense.

Generally speaking it appears that the law surrounding the ground of 'gender identity' requires considerable clarification both at the European and national level. Different studies of national legislation show no consistent approach across Europe, with States largely divided between those that address 'gender identity' as part of 'sexual orientation', and those that address it as part of 'sex discrimination'[73].

As a rule, EU law does not oblige Member States to adopt particular social security regimes, but where they do so a court will not allow the exclusion of certain groups simply out of fiscal considerations, since this could severely weaken the principle of equal treatment and be open to abuse. However, differential treatment may be tolerable if it is the only means of preventing the collapse of the entire system of sickness and unemployment insurance

[72] Gender identity refers to 'each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms'. This widely accepted definition is taken from the 'Yogyakarta Principles on the Application of International Human Rights law in Relation to Sexual Orientation and Gender Identity', March 2007, available at: www.yogyakartaprinciples.org/principles_en.htm.

[73] FRA, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis* (Vienna, FRA, 2009), pp. 129-144.

schemes – particularly where such a measure would only have forced people into unregulated labour.

2.4.2. Sexual orientation

Sexual orientation can be understood to refer to "*each person's capacity for profound emotional, affectional and sexual attraction to, and intimate relations with, individuals of a different gender or the same gender or more than one gender*"[74]. Typically relevant cases discrimination involve an individual receiving unfavourable treatment because they are homosexual/bisexual, but the ground also prohibits discrimination on being heterosexual.

Example 1 – The *HomO* case (Decision of 21 June 2006, Dossier No. 262/06)
In a case before the Swedish Ombudsman against Discrimination on Grounds of Sexual Orientation ('HomO'), a heterosexual woman complained of sexual orientation discrimination when she was turned down for a job with the Swedish national federation for lesbian, gay and transgender rights as a safer sex information officer. The organisation told her that they wished to employ a self-identified homosexual or bisexual man in order to allow for an approach of outreach through peers. It was found either that she could not claim to be in a comparable situation to a homosexual or bisexual man for the purposes of this job (and therefore could not prove less favourable treatment), or that in any event the discrimination was justifiable on the basis of a genuine occupational requirement.

2.4.3. Disability

The EU is a party to the **United Nations Convention on the Rights of Persons with Disabilities** (UN CRPD), with the result that the ECJ is guided by both the Convention itself[75] and the interpretations given by the Committee on the Rights of Persons with Disabilities, charged with its monitoring and interpretation. Once party to the UN CRPD, the EU and its institutions (and the EU Member States when interpreting and applying EU law) will be obliged to follow this wide and inclusive approach to interpreting the meaning of 'disability'.

The Employment Equality Directive does not provide a single definition of disability. Because of the nature of the ECJ's role, determinations of what constitutes a disability are frequently made by the national courts and presented as part of the factual background to disputes referred to the ECJ. However, the ECJ has had some opportunity to give limited guidance as to what constitutes a disability in its case-law.

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[74] This widely accepted definition is taken from the 'Yogyakarta Principles on the Application of International Human Rights law in Relation to Sexual Orientation and Gender Identity', March 2007, available at: www.yogyakartaprinciples.org/principles_en.htm.

[75] Article 1 of the UN CRPD states that:
'*Persons with disabilities include those who have long-term physical, mental, 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*'.

Example 1 – The *Chacón Navas* case (ECJ, *Chacón Navas v. Eurest Colectividades SA*, Case C-13/05 [2006] ECR I-6467, 11 July 2006)

The ECJ addressed the general scope of the disability discrimination provisions, and indicated that the term "disability" should have a harmonised EU definition. The ECJ indicated that a disability, for the purposes of the Employment Equality Directive, should be taken to refer to 'a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life' and it must be 'probable that it will last a long time'. In applying this definition to the *Chacón Navas* case, the applicant was found not to be disabled when she brought an action before the Spanish courts claiming disability discrimination after she had been dismissed for being off sick from work for a period of eight months. The ECJ made it clear that there is a distinction that must be drawn between illness and a disability, with the former not being afforded protection.

Article 5 of the Employment Equality Directive contains specific articulations of the general rule of specific measures in relation to persons with disabilities, which requires employers to make 'reasonable accommodation' to allow those with physical or mental disabilities to be given equal employment opportunities. This is defined as 'appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer'. This might include measures such as installing a lift or a ramp or a disabled toilet in the workplace in order to allow wheelchair access.

2.4.4. Age

Although the protected ground of age relates simply to differential treatment or enjoyment that is based on the victim's age, article 6 of the Employment Equality Directive provides two separate justifications of differences of treatment on grounds of age.

Article 6(1) allows age discrimination that pursues 'legitimate employment policy, labour market and vocational training objectives', provided that this meets the proportionality test. A limited number of examples for when differential treatment may be justified is provided: Article 6(1)(b) allows for the 'fixing of minimum conditions of age, professional experience or seniority in service for access to employment'. However, this list is not intended to be exhaustive and so could be expanded on a case-by-case basis.

Article 6(2) permits age discrimination with regard to access to and benefits under occupational social security schemes, without the need to satisfy a test of proportionality.

Example 1 – The case of *Palacios de la Villa* (ECJ, *Palacios de la Villa v. Cortefiel Servicios SA*, Case C-411/05 [2007] ECR I-8531, 16 October 2007)

In this case, the ECJ had its first opportunity to consider the ambit of Article 6, being asked to consider its application in the context of mandatory retirement ages. In finding that a mandatory retirement age did fall under Article 6, the ECJ then considered whether it could be objectively justified. The ECJ considered the following issues to be of importance:

- the original measure was expressed to create labour market opportunities against an economic background characterised by high unemployment;
- there was evidence that the transitional measure was adopted at the instigation of trade unions and employer organisations, to promote better distribution of work between the generations;
- Law 14/2005 was again enacted with the cooperation of trade unions and employer organisations, this time with an expressed requirement that that measure be 'linked to objectives which are consistent with employment policy and are set out in the collective agreement';
- the compulsory retirement clause in the collective agreement was expressed to be 'in the interests of promoting employment'.

Having considered these factors, the ECJ concluded that when 'placed in its context, the … transitional provision was aimed at regulating the national labour market, in particular, for the purposes of checking unemployment'. On this basis, the ECJ decided that the collective agreement fulfilled a legitimate aim. Having accepted that a legitimate aim was being pursued, the ECJ then needed to consider whether the measure was 'appropriate and necessary' in achieving that aim. The ECJ reiterated that Member States have a broad margin of discretion in the area of social and employment policy, and this has the implication that 'specific provisions may vary in accordance with the situation in Member States'. What appeared key was the requirement that the workers concerned have access to a retirement pension, 'the level of which cannot be unreasonable'.. On this basis, the ECJ held that the transitional measure, affecting Mr Palacios, and the collective agreement were objectively justified and thus compatible with EU law.

2.4.5. Race, ethnicity, colour and membership of a national minority

The Racial Equality Directive expressly excludes 'nationality' from the concept of race or ethnicity, but discrimination on the grounds of nationality is regulated in the context of the law relating to free movement of persons. Apart from expressly excluding nationality, the Racial Equality Directive does not itself contain a definition of 'racial or ethnic origin'. There are a number of other instruments which offer guidance as to how racial and ethnic origin should be understood[76]. Neither 'colour', nor membership of a national minority are listed expressly in the Racial Equality Directive.

Although EU law does not expressly list language, colour or descent as protected grounds, this does not mean that these characteristics could not be protected as part of race or ethnicity, in so far as language, colour and descent are inherently attached to race and ethnicity. It would also seem

[76] The EU Council's Framework Decision on combating racism and xenophobia under the criminal law defines racism and xenophobia to include violence or hatred directed against groups by reference to 'race, colour, religion, descent or national or ethnic origin'.

that to the extent that factors making up nationality are also relevant to race and ethnicity, this ground may, in appropriate circumstances, also fall under these grounds.

Religion is expressly protected as a separate ground under the Employment Equality Directive. However, an alleged victim of religious discrimination may have an interest in associating religion with the ground of race because protection from race discrimination is broader in scope than protection from religious discrimination. This is so because the Racial Equality Directive relates to the area of employment, but also access to goods and services, while the Employment Directive only relates to the area of employment.

2.4.6. Nationality or national origin

Although the ECHR provides greater protection than EU law on the ground of nationality[77], the ECJ has had some opportunity to give guidance as to what constitutes discrimination in grounds of nationality.

> ***Example 1 – The Chen case (ECJ, Chen v. Secretary of State for the Home Department, Case C-200/02 [2004] ECR I-9925, 19 October 2004)***
>
> This case concerned a question as to whether a child had a right to reside in one Member State when they were born in a different Member State, whilst their mother, on whom they depended, was from a non-Member State. The ECJ considered that when a Member State imposes requirements to be met in order to be granted citizenship, and where those were met, it is not open for a different Member State to then challenge that entitlement when they apply for residence.

2.4.7. Religion or belief

While EU law contains some limited protection against discrimination on the basis of religion or belief, what actually constitutes a 'religion' or 'belief' qualifying for protection under the Employment Equality Directive has not received extensive consideration by the ECJ.

2.4.8. Language

Although the ground of language does not feature, of itself, as a separate protected ground under the non-discrimination Directives, it may be protected under the Racial Equality Directive in so far as it can be linked to race or ethnicity. It has also been protected via the ground of nationality by the ECJ in the context of the law relating to free movement of persons[78].

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[77] EU law prohibits nationality discrimination only in the particular context of free movement of persons. In particular, EU law on free movement grants limited rights to third-country nationals.

[78] ECtHR, *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v. Belgium* (Nos. 1474/62 and others), 23 July 1968.

3. The implementation of EU law in Greece

(a) The **Racial Equality Directive** and the **Employment Equality Directive** were transposed into the Greek legal order through **Law No. 3304/2005**[79], which prohibits discriminatory treatment on the grounds of ethnic or racial origin or religious or other beliefs, disability, age or sexual orientation, during transactions regarding provision of goods or services to the public. For such offences, the law foresees imprisonment of between six months and three years and a fine of between €1,000 and €6,000. Following the provision of Article 3 par. 2 of the Racial Equality Directive, it does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

The task for the promotion of equal treatment was assigned to three institutions:

- the Ombudsperson, tasked with the promotion of equal treatment in regard to public authorities;
- the Committee for Equal Treatment supervised by the Ministry of Justice, Transparency and Human Rights, tasked with the promotion of equal treatment in regard to individuals and private entities;
- the Labour Inspectorate supervised by the Ministry of Employment and Social Security, tasked with the promotion of equal treatment in regard to employment.

(b) **Law No. 3304/2005** was replaced by Part A' of **Law No. 4443/2016**[80], which re-transposes the anti-discrimination Directives and transposes **Directive 2014/54/EE**[81]. Reflecting a single equality approach, this legislation merges the grounds of the anti-discrimination Directives, it adds new grounds and extends the protection afforded by Directive 2000/78 to all the grounds[82]; it also adds new fields and extends the Ombudsman's powers to the private sector. 'Sex' or 'gender' is not among the grounds, but it may be deemed to be concerned *via* the new ground of '*gender identity or gender characteristics'*.

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[79] Law No. 3304/2005, OJ A 16/2005 on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, available at www.ypakp.gr/uploads/files/2538.pdf.

[80] Law No. 4443/2016 '*On the transposition of Directive 43/2000/EC on the application of the principle of equal treatment irrespective of race and ethnic origin, and the transposition of Directive 78/2000/EC on the configuration of the general framework of equal treatment in employment and work*', OJ A' 232/9.12.2016.

[81] Directive 2014/54/EU of the European Parliament and of the Council on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, OJ L 128, 30.4.2014. pp. 8-14.

[82] Law No. 4443/2016 replaced by virtue of its Article 22 Law No. 3304/2005, which was into force till 9 December 2016.

The transposition of Directive 2014/54 is evaluated inadequate by leading national law experts[83]; 'EU nationality' is not a protected ground, while several provisions of this Directive are not transposed. On the other hand, mixing the transposition of the three Directives may well create confusion[84], as the legal basis, the aim and the scope of Directive 2014/54 differ from those of the anti-discrimination Directives[85]. The legal basis of the latter was Article 13 TEC (now Article 19 TFEU), which enables the competent EU institutions to take measures to combat discrimination on the grounds that it lists; the legal basis of Directive 2014/54 is Article 46 TFEU, which provides for the taking of measures for achieving freedom of movement of workers within the EU[86].

Part A' of Law No. 4443/2016 forms now the key anti-discrimination instrument in the domestic legal order[87]. Its aim, as laid down in art. 1, is to promote the equal treatment principle by combating discrimination on the grounds listed in the anti-discrimination Directives, plus 'colour', 'genetic features', 'chronic illness', 'family or social status' and 'gender identity or characteristics', and to implement Directive 2014/54.

The concept of discrimination is defined in art. 2, where states that 'any discrimination' on the above grounds is prohibited, but the terms 'direct or indirect' are missing. The definitions of direct and indirect discrimination, harassment and instruction to discriminate are copied from the anti-discrimination Directives and further concepts are defined: 'discrimination due to relationship', 'discrimination due to perceived characteristics'. Moreover, 'refusal of reasonable accommodation' for persons with a handicap or chronic illness constitutes discrimination. 'Multiple discrimination' is prohibited and defined by reference to the grounds covered by the Law. While 'sex' or 'gender' is not among these grounds, it may be

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[83] In this respect, A. Theodoridis, *Country report - Non-discrimination in Greece*, Reporting period 1 January 2016-31 December 2016, 2017, p. 10, argues that:
"*The new law does not improve the protection framework – with the exception of very limited cases – and under no conditions does it promote the homogeneity of the various fields of protection. To a certain extent, this undermines the overall attempt to reform the law; any improvement is only on a legal or technical level, making it nearly impossible to discern the point of such a radical change. The new law does not improve the level of protection from discrimination because it does not establish any new criminal sanctions, even though the Directives call for the adoption of effective, proportionate and dissuasive sanctions (something that does not apply even in the case of administrative sanctions imposed by the Labour Inspectorate Body). The new law fails to resolve discrepancies in the Civil Code, i.e. the lack of provisions linking non-discrimination law to actions for damages*".

[84] For this argumentation see S. Koukoulis-Spiliotopoulos, *Re-transposition of Directives 2000/43/EC, 2000/78/EC and transposition of Directive 2014/54/EU*, European Network of legal experts in gender equality and non-discrimination, 21.4.2017.

[85] The anti-discrimination Directives apply to '*all persons'* in the public and private sectors, while the Directive 2014/54 applies to '*Union workers and members of their family*'. It covers the fields listed in both anti-discrimination Directives, plus 'tax advantages', 'access to education, apprenticeship and vocational training for the children of Union workers', 'assistance afforded by the employment offices'.

[86] The Preamble to Directive 2014/54 stipulates that '*enforcement of that fundamental freedom should take into consideration the principle of equality between women and men'*.

[87] Art. 3 par. 5 states that the Law does not apply to the armed forces regarding different treatment on grounds of age, disability or chronic illness related to their service

deemed to be covered via 'gender identity or gender characteristics'; however, it would be more conform to the Treaty obligation to mainstream gender equality and to the purpose of the prohibition of multiple discrimination to add 'sex' or 'gender' for the purposes of 'multiple discrimination'.

Article 3 mentions the fields listed in art. 3 of Directive 2000/78, the additional fields listed in art. 3 of Directive 2000/43, plus '*tax facilitations or advantages*', as laid down in art. 2 of Directive 2014/54; however, other fields listed in that article ('access to education, apprenticeship and vocational training for the children of Union workers', 'assistance afforded by employment offices') are missing[88].

Protection of wronged persons is regulated in art. 8, which addresses both extra judicial (through the **Code of Administrative Proceedings** - CAP [89]) and judicial protection[90]. Par. 3 provides that legal entities, including trade unions, '*may represent the wronged person before the courts and any administrative authority or body, subject to this person's prior consent given by notarized act [...], or by private deed bearing a certified signature*'. The legal entities should act in their own name.

This system is provided in the **Code of Civil Procedure** (CCP) for persons or legal entities who/which, though not holders of the right affected, may become litigants in their own name. For example, *locus standi* is granted to workers' and employers' organisations to exercise in their own name before the courts some rights of their members and intervene in their favour in a trial initiated by them. The personal and material scope of the relevant provision is narrower that the scope of the provision of the Directives, but the *ratio* is the same.

This provision was not extended in line with the Directives; the EU rule is thus not applied, as it is unknown to litigants and judges. There is no such provision for administrative trials. According to the CAP, it is only when a legal entity is wronged itself that it can have recourse to the courts.

The requirement of '*prior consent'* of the wronged person is incompatible with the Directives which require an 'approval' that may be given after the legal entity has lodged the proceedings[91]. Moreover, this may well make the protection illusory, as until the consent is given, the time period for lodging the remedy may well have expired. Such time periods are often quite short. Thus, e.g., a civil action seeking a declaration of invalidity of a dismissal must be lodged within three months of the dismissal; an action before administrative courts for the annulment of an unlawful administrative act,

[88] Article 24 enables the competent Ministers to extend the scope of the Law by Decree.
[89] Law No. 2690/1999, OJ A' 45/1999.
[90] Par. 1 states that: '*In case of non-observance of the equal treatment principle in the context of administrative action, the wronged person is afforded, besides judicial protection, protection under the Code of Administrative Proceedings'*.
[91] The different context between 'consent' (to be given prior to the action concerned) and 'approval' (which may follow the action) is regulated by articles 236-238 of the Greek Civil Code.

such as a dismissal or a refusal to hire, must be lodged within 60 days from the date on which the wronged person learnt the act.

Par. 4 provides that the legal entities '*may intervene in favour of the wronged person in a trial initiated by this person in accordance with Articles 80 et seq. [CCP] and 113 et seq. [CAP]*'. The litigation costs are reduced when the entities intervene, but not when they take cases to court themselves. Under the CCP, interventions are allowed at all stages of the civil trial, including the final appeal trial before the Supreme Civil Court, but under the CAP, interventions are only allowed in first instance and appeal administrative trials. There is no provision in Greek procedural law granting *locus standi* to legal entities to intervene before the Council of State[92] (CS) in favour of a claimant. The procedural legislation prohibits interventions before the CS at the final appeal trial (art. 55 of Presidential Decree No. 18/1989)[93], and it only allows interventions in annulment trials in the CS in favour of the administrative act challenged, not in favour of the claimant (art. 49 of Presidential Decree No. 18/1989).

Article 11 provides for penal sanctions for violations of the Law in the provision of goods and services. No penal sanctions for other fields are provided, although they are otherwise common, in particular in the field of labour law. The only sanctions for violations in the field of employment are administrative[94]. As 'EU citizenship' is not a protected ground, neither the penal nor the administrative sanctions apply to violations of Directive 2014/54.

No civil sanctions are provided. However, the traditional remedies and sanctions, which are effective, proportionate and dissuasive and are also applied in gender equality cases, are not affected. The claimant is put in the position in which she/he would have been in had the illegal act or omission not occurred: civil courts declare an unlawful refusal to hire or promote null and void; the hiring or promotion is deemed to exist from the time it should have occurred. Administrative courts annul such a refusal and order a retroactive hiring or promotion[95]. Civil courts declare an unlawful dismissal null and void; administrative courts annul it[96]; the dismissal is deemed never to have occurred; the worker retains his/her post, reinstatement not being necessary.

One of the key provisions of the new legislation corresponds to the **unification of separate jurisdictions** - private and public - **under one**

[92] This is the Supreme Administrative Court.
[93] OJ A' 8/9.1.1989.
[94] By reference to art. 24 of Law No. 3996/2011 OJ A' 170/5.8.2011, as amended by art. 23 par. 6 of Law No. 4144/2013, OJ A' 88/18.4.2013.
[95] Refusals to hire due to maximum quotas for women: SCPC (Civil Section) 1360/1992 (nullity of refusal; retroactive effects); CS 1229/2008 (annulment of refusal; retroactive effects); CS 13/2015 (annulment of the exclusion of a pregnant candidate from the fire corps because she could not take the fitness tests).
[96] SCPC (Civil Section) 85/1995, 593/2006, 496/2011 (dismissal of women at pensionable age which was at the time lower than men's pensionable age); 2035/2002 (dismissal of a pregnant woman; knowledge of the pregnancy by the employer is irrelevant); 1591/2010 (dismissal of a mother during the period for which she was entitled to reduced working time).

equality body, the Ombudsman. Therefore, the Committee for Equal Treatment, established under previous anti-discrimination legislation, will no longer have jurisdiction over discrimination in the private sector and will thus be abolished.

This change was introduced in order to address a procedure which was initiated by the European Commission in 2014 on the possible breach of Directive 2000/43/EC of the Council. The breach concerned the effectiveness and independence of the previous equality bodies under Law 3304/2016 during the exercise of their special jurisdiction as bodies tasked with promotion and supervision of the principle of equal treatment.

Under art. 12, the Ombudsman will be tasked with the monitoring and promotion of equal treatment not only for the public sector but for the private sector as well. At the same time, 10 more staff positions will be created so as to accommodate permanent Legal Officers or Legal Officers with open-ended private law contracts. In reference to the services for the supervision and promotion of equal treatment, the General Secretariat for Transparency and Human Rights of the Ministry of Justice, within the framework of its jurisdiction for the protection of human rights and the combating of all forms of discrimination, will provide for the promotion of equal treatment. The Social Protection Directorate of the Ministry of Labour will, *inter alia*, monitor the application of anti-discrimination policies in the field of labour and employment, inform employees and employers on issues related to discrimination in the field of employment and raise awareness, as well as providing scientific support to the Labour Inspectorate Body.

In fact, art. 16 requires cooperation amongst all of the aforementioned bodies, as well as with the Economic and Social Committee, the senior union organisations in the private and public sectors, the National Social Solidarity Centre, the National Centre for Social Research, the Centre for Equality Research, the Centre for Disease Control and Prevention and the Central Union of Greek Municipalities, as well as with civil society organisations with expertise on anti-discrimination. In reference to raising awareness and disseminating information, art. 17 stipulates that employers, as well as those in charge of vocational training, shall ensure the application of anti-discrimination provisions and provide the equality bodies with all the necessary information for the promotion of equal treatment, as per their mandate. The union organisations shall inform their members of the content of anti-discrimination provisions, as well as the measures that are carried out for the application and promotion of equal treatment.

(c) The **Council Framework Decision 2008/913/JHA**[97] on combating certain forms and expressions of racism and xenophobia by means of

[97] Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328/55, 6.12.2008.

criminal law (Framework Decision on Racism and Xenophobia)[98] was transposed into the Greek legal order through **Law No. 4285/2014**[99].

(d) The **Directive 2000/31/EC** of the EP and EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market, was transposed into the Greek legal order through the **Presidential Decree No. 131/2003**[100]

(e) The **Audio-visual Media Services Directive**[101] was transposed into the Greek legal order[102] through the **Presidential Decree No. 109/2010**[103], which provides under Article 7 that audio-visual service providers must ensure that programmes do not cause hate due to race, sex, religion, beliefs, nationality, disability, age and sexual orientation, and they must also not take advantage of people's superstitions and prejudices. The National Council for Radio and Television is empowered through Article 4 par. 2 to temporarily suspend broadcasting of television programmes – under certain conditions that include notification of the European Commission – if their content "*encourages hate on grounds of race, sex, religion, beliefs, nationality, disability, age and sexual orientation*"[104].

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[98] The Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law was adopted on 28 November 2008 by the Council, with the aim to fight against racist and xenophobic speech and crime, by means of criminal law. It regulates that offences exist when directed against a group of persons (or a member of such a group) defined by reference to race, colour, religion, descent or national or ethnic origin. They include the following intentional actions:

- publicly inciting to violence or hatred, including via the public dissemination or distribution of tracts, pictures or other material;
- publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, as well as crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, when the conduct is carried out in a manner likely to incite violence or hatred against such a group or members of a group.

[99] Law No. 4285/2014 on the amendment of 927/1979 and its adjustment to the decision-framework 2008/913/JHA of 28 November 2009, for combating certain forms and manifestations of racism and xenophobia through criminal law and other provisions (OJ 191 A'/10.9.2014).

[100] Presidential Decree No. 131/2003 on the adjustment to Directive 2000/31/EC of the EP and EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market (OJ 116 A'/16.05.2003).

[101] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (*Audiovisual Media Services Directive*), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF.

[102] Article 6 of the Directive stipulates that "*Member States shall ensure by appropriate means that audio-visual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality*".

[103] Presidential Decree 109/2010, on the Harmonisation of the Greek radio-television legislation to the provisions of Directive 2010/13 of the EP and EC *et al* (OJ 190 A'/05.03.2010), available at: www.esr.gr/arxeion-xml/uploads/PD.109-2010.pdf.

[104] Such a penalty has not, however, been applied to date.

4. The discourse of anti-discrimination EU law in Greece

Law No. 4443/2016 codifies the framework of protected grounds, since it defines certain grounds of discrimination which are now explicitly protected against in national law: racial or ethnic origin, descent, colour, religious or other beliefs[105], disability or chronic illness, age[106], family or social status, sexual orientation[107], and gender identity or characteristics. 'Gender' is not covered by Law No. 4443/2016, however gender equality is ensured through other legislation[108].

4.1. The general discrimination context

Certain definitions which were not provided in the previous Law No. 3304/2005 have been added through Law No. 4443/2016.

a) ***Chronic illness***

'Chronic illness' includes illnesses that have developed either through a medical condition[109] or due to an accident which presents at least one of the following elements: indefinite duration and no known treatment, rebound effect or possibility of recurrence, permanency, long-term supervision, medical visits and diagnostic examinations, or a need for rehabilitation or special education in order to recover.

b) ***Family Status***

'Family status' was added in order to ensure the equal treatment of people who have entered into a civil union agreement, including same-sex couples, within the employment field. This is in accordance with Law No. 4356/2015, which introduced same-sex civil union agreements.

c) ***Social Status***

'Social Status' refers to the '*social stigmatisation'* of a person due to his/her link to a certain social sub-group such as former drug addicts or former detainees/prisoners. The Explanatory Report of Law No. 4443/2016 states that other types of group are also included, given that they constitute specific social sub-groups consisting of a group of people who are linked by a common characteristic, which is often inherent, unaltered or fundamental to the identity, conscience or the exercise of rights of the group's members.

d) ***Sexual orientation and Gender Identity or characteristics***

The Explanatory Report of Law No. 4443/2016 states that the term '*gender identity*' refers to transgender persons (*διεμφυλικά άτομα*), whose gender identity is different from their gender of birth. '*Gender characteristics'*, on the other hand, refers to 'intersex' persons (*διαφυλικά άτομα)*, who from birth do

[105] There is no definition of religious or other beliefs in the Greek legal order.
[106] There is no definition of age in the Greek legal order.
[107] There is no definition of sexual orientation in the Greek legal order.
[108] Laws No. 3769/2009, 3896/2010 and 4097/2012.
[109] Persons with HIV/AIDS are also protected.

not display the characteristics of a specific gender in order for them to be anatomically classified as male or female.

4.2. The multiple discrimination context

Law No. 3304/2005 did not address the issue of 'multiple discrimination'; the first legislative rule about 'multiple discrimination' in the domestic legal order is to be found in art. 2 par. 1 (h) of **Law No. 3996/2011**[110], which states that:

"... [the Labour Inspectorate] supervises the implementation of the principle of equal treatment irrespective of racial or ethnic origin, religion or other beliefs, disability, age or sexual orientation, taking into consideration instances of multiple discrimination in accordance with Article 19 of Law 3304/2005 [...]".

But a sound definition of 'multiple discrimination' was introduced by art. 2 par. 2 (g) of Law No. 4443/2016, which makes reference to:

"*any discrimination, exclusion or restriction of a person based on multiple grounds of discrimination".*

4.3. Assumed and associated discrimination

A sound definition of 'discrimination based on perception or assumption of a person's characteristics" was introduced by art. 2 par. 2 (f) of Law No. 4443/2016, which makes reference to:

"*the less favourable treatment of a person who is perceived to have specific characteristics of race, colour, national or ethnic origin, descent, religious or other beliefs, disability or chronic illness, age, family or social status, sexual orientation, gender identity or characteristics*".

A sound definition of 'discrimination based on association with people with particular characteristics" was introduced by art. 2 par. 2 (e) of Law No. 4443/2016, which makes reference to:

"*the less favourable treatment of a person due to his/her close association to a person or persons with specific characteristics of race, colour, national or ethnic origin, descent, religious or other beliefs, disability or chronic illness, age, family or social status, sexual orientation, gender identity or characteristics*".

According to the Explanatory Report of Law No. 4443/2016, 'close association' is defined as the relationship of a person especially with people that fall under the category of 'familiars', meaning family members, adopted family members, same sex partners, betrothed partners, siblings, spouses, or siblings' spouses/betrothed, custodial parent or a person under

[110] Law No. 3996/2011 "*Reform of the Labour Inspectorate Body, social security issues and other conditions*" (OJ 170 A'/13.8.2011).

someone's custody. One may argue that this specific definition is more limited, and does not follow the guidelines developed by the ECJ[111].

4.4. Direct and indirect discrimination

(a) A sound definition of 'direct discrimination" was introduced by art. 2 par. 2 (a) of Law No. 4443/2016, which makes reference to:

"*the less favourable treatment of a person 'due to race, colour, national or ethnic origin, descent, religious or other beliefs, disability or chronic illness, family or social status, sexual orientation, gender identity or characteristics' than that afforded to a person without these characterises in a comparable situation*".

On the other hand, the justification of direct discrimination in relation to all grounds is regulated by art. 3, which states that:

- the provisions of equal treatment shall not apply to cases which are provided with a 'specifically justified different treatment' due to nationality and as long as they do not violate the provisions and preconditions of the legal status of third-country nationals outside the EU or stateless persons living within Greek territory (par. 3);
- the provisions of equal treatment shall not apply to benefits provided by public or equivalent systems, including public systems of social security or healthcare and those that do not infringe upon measures which are necessary for the maintenance of public safety, ensuring public order, preventing criminal offences and the protection of the rights and freedoms of all (par. 4);
- the provisions of equal treatment shall not apply to the armed forces as long as the discriminatory measure refers to a difference of treatment due to age, disability or chronic illness which is crucial for carrying out the specific service (par. 5).

The test that must be satisfied to justify direct discrimination requires in principle a 'specifically justified difference in treatment' and adherence to provisions on the legal status of third-country national and stateless persons, when referring to nationality. Concerning all grounds, direct discrimination is justified when it is necessary for the maintenance of public safety, ensuring public order, preventing criminal offences and the protection of the rights and freedoms of all.

(b) A sound definition of 'indirect discrimination" was introduced by art. 2 par. 2 (b) of Law No. 4443/2016, which makes reference to any case:

"*when a seemingly neutral provision, criterion or practice places a person with certain characteristics of race, colour, national or ethnic origin, descent,*

[111] Reference should be made to the case *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia,* C-83/14, where the court ruled that associative discrimination also applies to indirect discrimination – in other words, in a situation where a neutral practice disadvantages people of a specific ethnic group and a person not of the same ethnicity suffers the same disadvantage by association with that group.

religious or other beliefs, disability or chronic illness, age, family or social status, sexual orientation and gender identity or characteristics, in a less favourable position in comparison to other people [without these characteristics]".

On the other hand, the justification of direct discrimination in relation to all grounds is regulated by the same art. 2 par. 2 (b), which states that:

"*There is no indirect discrimination if the provision, criterion or practice is objectively justified by a legitimate aim and the means for accomplishing this aim are appropriate and necessary, if the measures taken are necessary for maintaining public safety, ensuring public order, preventing the commission of crimes, protecting health, the rights and freedoms of others or when [the measures] are taken in favour of people with disability and chronic illness, in accordance with article 6 par. 5 of the Constitution and article 5 of the present law*".

4.5. Harassment

(a) A sound definition of 'harassment" was introduced by art. 2 par. 2 (c) of Law No. 4443/2016, which makes reference to:

"*any discrimination within the scope of paragraph 1 [prohibited discrimination] as long as it concerns unacceptable behaviour linked to the grounds of Article 1, which aims to or results in offending a person's dignity and creating an intimidating, hostile, derogatory, degrading or aggressive environment*".

Both art. 1 and art. 2 par. 2 (c) of Law No. 4443/2016 prohibit harassment based on all grounds covered by Law No. 4443/2016 and in all fields. However, there are no provisions concerning the extension of liability with regard to the actions of employees, third parties, co-workers or clients, members of trade unions or other trade/ professional associations[112].

4.6. The personal scope of application

Law No. 4443/2016 does not provide for any restriction related to residence. However, art. 3 par. 3 provides a restriction related to citizenship/nationality requirements, since it stipulates that it does not cover differences of treatment based on nationality[113], and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals or stateless persons on Greek territory and to any treatment which arises from the legal status of third-country nationals and stateless persons. Furthermore, **Law No. 2431/1996** provides that the precondition of Greek

[112] Under the general civil law (article 922 of the **Civil Code**), employers are liable for the actions of their employees. Employees are also liable.
[113] This is the case of the exercise of the general interest of public authorities or the State, as regulated by **Law No. 2431/1996** on appointment or employment of EU nationals in the public administration (OJ 175 A'/ 30.7.1996).

nationality is not included within the other prerequisites for the employment of EU nationals[114].

Foreign nationals[115] are entitled to the same rights as Greek nationals under the applicable law, pursuant to rules which allow foreign nationals to choose whether Greek law applies or not. Many Bilateral Treaties adopted by the Greek State also call for national or most-favoured-nation treatment of foreign nationals.

Presidential Decrees No. 358/1997 and 359/1997 confer equal employment rights on Greek citizens and all foreign nationals legally working in Greece, with no discrimination, racial or otherwise, while art. 4 of the **Civil Code** states that foreign nationals enjoy the same civil law rights as Greek nationals. Article 19 of **Law No. 4358/2016**[116] protects the rights of migrant workers and their families by ensuring their protection and assistance, particularly in obtaining accurate information, through the adoption of measures which will secure treatment for such workers that is no less favourable than that given to Greek nationals.

4.7. The material scope of application

National legislation prohibits discrimination in the following areas: access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy for the five grounds in both the private and public sectors.

Article 3 of Law No. 4443/2016 defines the material scope of application and states that:

"*1. Without prejudice to paragraphs 3 and 4 of this article, and to Article 4*[117]*, the principle of equal treatment, as established in this law, shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:*

(a) conditions for access to employment and occupation in general,78 including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, as well as the terms of professional growth including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, and retraining, vocational reorientation including practical work

[114] According to Article 1, the only exemption allowed requires that nationals of other Member States are employed in positions where the duties and competences do not result in direct or indirect participation in the exercise of the general interest of public authorities, the State or other public sector interests.
[115] According to Law No. 1975/1991 on the entry, departure, stay, employment and deportation of aliens, an '*alien is any person who does not have Greek nationality or a person who is not indigenous*'.
[116] Law No. 4358/2016 'on ratification of the Revised European Social Charter' (OJ 5 A'/20.01.2016).
[117] On professional requirements.

experience; c) employment and working conditions, including dismissals and pay; 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.

2. Without prejudice to paragraphs 3, 4, 6 of the present article and article 4, the principle of equal treatment shall apply to all persons as regards both the public and private sectors and concerning:

(a) social protection, including social insurance and healthcare;

(b) social and tax benefits;

(c) education and;

(d) access to goods and services available to the general public, including housing.

3. This Law does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.
4. This Law does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes (as long as it does not impede on measures necessary for public safety, public order, prevention of crimes, protection of health, the rights and freedoms of others).

5. This Law, in so far as it relates to discrimination on the grounds of age, disability or chronic illness, shall not apply to the armed forces as long as these requirements are relevant to the specific Service".

4.4.1. Employment

a) Access to employment and conditions of employment, including dismissals and pay

Presidential Decrees No. 358/1997 and 359/1997, which introduced a specific category of residence permits for foreign workers, have been repealed according to article 65 par. 2 of **Law No. 2910/2001**. However, they are considered to be important, as they first inaugurated equal rights and the substance of these provisions has been successfully transferred to **Law 2910/2001** (article 39).

Law 1556/1985 on the ratification of the International Labour Organization Vocational Rehabilitation and Employment (Disabled Persons) Convention (No. 159) of 1983, declares the principle of equal opportunities for disabled employees and employees in general and for male and female employees. In addition, under the provisions of **Law No. 2639/1998**, employers in breach of the non-discrimination legislation are liable to administrative fines and may be taken to court.

Law No. 4356/2015[118] recognised same-sex civil partnerships and eliminates discrimination on the ground of sexual orientation in various fields including employment. The new legal provisions recognise that persons who enter into civil partnerships acquire a similar legal status to that of married couples. More specifically, they are granted equal rights in relation to the tax system, health insurance and pensions, residence permits and citizenship rights, refusal to testify, next of kin status for medical purposes, etc.

Article 7 of Law No. 4358/2016 introduced a minimum age of 15 years for the employment of young persons, subject to specific exceptions, and a minimum age of 18 years for admission to employment for occupations regarded as 'dangerous' or 'unhealthy' – but without any further definition of the above terms. The same article bans the employment of children who are still attending compulsory education, as it would deprive them of the full benefit of their education; and it limits the working hours of persons under 18 years of age. Finally, it forbids the employment of persons under 18 years in night work and ensures their special protection against physical and moral dangers to which children and young people may be exposed, particularly those resulting directly or indirectly from their work.

b) Access to vocational guidance and training

Articles 9 and 10 of **Law No. 2224/1994**[119] ensures access by nationals of other contracting parties to all vocational guidance and training programmes run by the Greek Public Employment Service (OAED), while article 10 of **Law No. 4358/2016** guarantees the right of all persons to technical and vocational training, establishing a system of apprenticeship and other systematic arrangements for training young boys and girls that will provide adequate and readily available training facilities for adult workers.

Article 15 of **Law No. 4358/2016** ensures that persons with disabilities, irrespective of their age and the nature and origin of their disabilities, may effectively exercise their right to independence, social integration and participation in the life of the community.

c) Worker and employer organisations

Article 7 par. 1 of **Law No. 1264/1982**[120] guarantees the right of foreign nationals legally employed in Greece to be members of professional associations of any kind.

[118] Law No. 4356/2015 on civil partnership, exercise of rights, penal and other provisions (OJ 181 A'/24.12.2015).
[119] Law No. 2224/1994 on the regulation of employment, union rights, worker's health and safety and the organisation of the Labour Ministry and the legal bodies it supervises and other provisions (OJ 112 A'/6.7.1994).
[120] Law 1264/1982 on the democratisation of the union movement and the establishment of workers' union rights (OJ 71 A'/1.7.1982).

4.4.2. Access to social protection and social welfare

a) Social protection

Article 3 par. 2 of Law No. 4443/2016 follows the wording of the Racial Equality Directive, and only in relation to racial or ethnic origin discrimination: 'social protection including social security and healthcare, social advantages, education, access to and supply of goods and services which are available to the public, including housing'.

Article 1 par. 2 of **Law 2646/1998**[121] states that anyone legally residing in Greece who is in an emergency situation is entitled to social care[122] from the institutions of the national system, while article 3 par. 3 defines that social care services are provided without any distinction, according to the particular personal, family, economic and social needs of the beneficiaries.

b) Social Advantages

Article 3 par. 2 (b) of Law No. 4443/2016 prohibits discrimination relating to social advantages as formulated in the Racial Equality Directive, which only covers race and ethnic origin, but the category of 'social advantages' is not often explicitly addressed in Greek law and, when it is, it is generally and broadly defined. Law No. 139/1975[123] on the status of stateless persons, for example, explicitly addresses 'social advantages'. In this context this term covers housing, the supply of goods through coupons (basically beneficiaries are supplied with coupons they can use when shopping for products in supermarkets etc. instead of cash), as well as public education and care, and even the entirety of labour law protection and social security.

c) Education

Article 3 par. 2 of Law No. 4443/2016 includes the field of education in respect of race and ethnic origin, as required by the Racial Equality Directive. However, there is no explicit provision prohibiting discrimination in the field of access to education on the grounds of religion or other belief, age, disability or sexual orientation.

4.4.3. Access to supply of goods and services

Article 3 par. 2 (d) of Law No. 4443/2016 prohibits discrimination in the 'access to and supply of goods and services which are available to the public, including housing' on the grounds of race, colour, national or ethnic origin and descent, while article 16 par. 1 of **Law 3304/2005** (the former anti-

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[121] Law 2646/1998 on the development of a national care system and other provisions (OJ 236 A'/20.10.1998).

[122] Article 1 par. 1 of Law 2646/1998 defines as social care:
"*any protection provided to persons or groups through programmes of prevention and rehabilitation and aims to create the conditions for equal participation by these persons in economic and social life and safeguards a decent standard of living for them*".

[123] Law 139/1975 on the ratification of the UN Convention relating to the Status of Stateless Persons (OJ 176 A'/25.8.1975).

discrimination legislation) prohibited discriminatory treatment during transactions relating to the provisions of goods and services.

Article 29 of **Law No. 4356/2015**[124] amended the Criminal Code by introducing the punishment of offenders who treat others with contempt by refusing to provide them with goods and services based on grounds of race, colour, national or ethnic origin, descent, religious or other beliefs, sexual orientation, gender identity, or disability.

Refusal to provide goods or services also falls within the scope of criminal law when it takes place in the context of voluntary or humanitarian assistance (not only in cases of the commercial provision of goods and services) and usually following a relevant public announcement directed only at a specific group of people in a clearly discriminatory manner.

The current framework distinguishes between goods and services that are available to the public (to anyone) and those that are available privately (for instance goods/services provided only to members of an association). In this context, Article 3 par. 2 (d) of Law No. 4443/2016 states that:

"*Apart from the reservations of paragraphs 3, 4, 6 below and article 4 of the present, the provisions of the present chapter apply to all individuals in the public and private sector in relation to […] d. access to the availability and supply of goods and services which are (commercially - συναλλακτικά) available to the public, including housing*".

4.4.4. Access to housing

Article 3 par. 2 (d) of Law No. 4443/2016 covers 'access to and supply of goods and services which are available to the public, including housing', but only in respect of race and ethnic origin, as required by the Racial Equality Directive. Therefore, age, disability, religion or belief and sexual orientation are not covered, while migrants and refugees enjoy the same rights as Greek nationals when it comes to housing.

4.8. Positive action

Positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation is regulated by different pieces of the national legislation.

a) Article 7 of **Law No. 4443/2016** enshrines Article 5 of Directive 2000/43 and Article 7 of Directive 2000/78. It reiterates that any measures adopted for promoting and ensuring equal treatment are not considered to be discrimination.

b) The **Ministerial Decision No. F.152/11/B3/790/28.2.1996** provides for a special quota of 0.5% for the admission of students from the Muslim minority of Thrace to Greek higher education institutions. The new system was put into place for the first time in the academic year 1996-97 and it

[124] Law No. 4356/2015 on civil partnership, exercise of rights, penal and other provisions.

facilitated the admission of minority students to Greek universities. All Greek universities started to set aside places for minority students. By the introduction of the quota system, admission to Greek universities became much easier for minority students than before as they started to compete only among themselves, rather than with all the other Greek university applicants.

c) **Law No. 4440/2016**[125] established a 15 % quota for open-ended contract positions in the public sector which are announced (through a call for applications) by the Supreme Council for Civil Personnel Selection (ASEP). With regard to the system of compulsory placement for people with disability (which amount to quotas), employers are given little leeway in avoiding the obligations imposed. They cannot refuse to employ compulsorily placed disabled people, unless they invoke and can prove exceptionally bad economic conditions prevailing in their enterprise over the previous two years.

d) Article 23 of **Law No. 4358/2016** introduced an obligation to adopt appropriate measures that will enable elderly persons to remain full members of society for as long as possible, by means of adequate resources and the provision of information about the services and facilities that are available for them, as well as measures that will enable them to choose their lifestyle freely by providing housing suited to their needs, healthcare and the services that they may need regarding their situation/health.

e) The **Decision No. 131024/Δ1/2016 of the Minister of Education**[126] created zones of educational priority, preparatory classes[127] and tutor classes, as well as reception facilities for the education of refugees in accommodation facilities.

4.9. Law enforcement procedures

4.9.1. Procedures for enforcing the principle of equal treatment

Article 8 par. 3 of Law No. 4443/2016 states that:

"*Legal persons, unions or organisations including social partners and trade unions, whose purpose also includes the safe-guarding of the principle of equal treatment regardless of race, colour, national or ethnic origin, descent, religious or other beliefs, disability or chronic illness, age, family or social status, sexual orientation, gender identity or characteristics, may represent the injured party before the courts and represent them before any administrative authority or organ, as long as he/she provides in advance*

[125] Law No. 4440/2016 on a 'Uniform Mobility System for the Public and Local Administration, obligations, incompatibility and prevention of conflicts of interests and other provisions' (OJ 224 A'/2.12.2016).
[126] Ministerial Decision no. 131024/Δ1/2016 on Priority Education Zones *et al.* (OJ 2687 B/29.8.2016).
[127] This concerns the establishment of preparatory classes for all school-age children aged 4 to 15 in public schools, neighbouring camps or places of residence.

his/her consent through a notarial document or private document, which will bear their certified signature".

Article 8 par. 4 of Law No. 4443/2016 states that the aforementioned legal persons may also intervene in proceedings examining discrimination cases before the civil or administrative courts free of charge (i.e. they do not have to submit a separate court fee).

The following procedures exist for enforcing the principle of equal treatment (judicial, administrative, or alternative dispute resolution such as mediation):

- a victim of discrimination in the private sector, including the field of employment, can raise a complaint before the Greek civil courts and criminal courts;
- a victim in the public sector, including the field of employment, can raise a complaint not only before the Greek civil and criminal courts but also before the administrative courts;
- people with disabilities are entitled to request information to be supplied and/or trials be held using alternative formats, e.g. sign language, information in Braille.

According to article 44 of **Law No. 3386/2005** as amended by article 42 of **Law No. 3907/2011**[128], victims of criminal acts provided for by Articles 1 and 7 of the basic anti-racism **Law No. 927/1979**[129] if a criminal prosecution has been initiated, may be granted a residence permit on humanitarian grounds until the judgment is issued. If the victims are undergoing medical treatment the duration of the permit is extended until the treatment is completed, regardless of its relation to the crime.

4.9.2. Legal standing and associations

a) Associations, organisations and trade unions are entitled to act on behalf of victims of discrimination[130], in line with article 8 par. 3 of Law No. 4443/2016. They are entitled to engage in all types of proceedings (civil, administrative or criminal), and to act in support of victims by joining already existing proceedings, according to article 82 of the **Code of Civil Procedure**, which provides for the possibility of 'additional intervention' in a court process.

4.9.3. Burden of proof

The current legislation requires a full shift of the burden of proof from the complainant to the respondent. This means that the respondent has to prove

[128] Law No.3907/2011 on the establishment and organisation of the Asylum Service *et al.* (OJ 7 A'/26.1.2011).
[129] Law No. 927/1979 on penal sanctions for acts of discrimination based on race (OJ 139 A'/28.6.1979).
[130] The current legislation does not allow associations, organisations or trade unions to act in the public interest on their own behalf without a specific victim to support or represent (*actio popularis*).

that the complainant has not been discriminated against (exceptions apply to criminal procedures where the burden is partially shifted).

The burden of proof in cases where anti-discrimination law has been violated is regulated by article 9 of Law No. 4443/2016, which stipulates:

"*1. When persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment;*

2. Paragraph 1 shall not apply to criminal procedures;

3. Paragraph 1 shall also apply in the case of article 8, par. 1".

In cases of non-compliance with the principle of equal treatment within the framework of an administrative action, the victim is entitled to the protection granted by articles 24027 of the Code of Administrative Procedure.

4.9.4. Victimisation

Article 10 of Law No. 4443/2016 states that protection against victimisation includes such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the workplace, or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment. In cases of adverse treatment or an adverse consequence in reaction to a complaint or proceedings aimed at enforcing compliance with the principle of equal treatment in the field of racial or ethnic discrimination, the scope is wider than employment and occupation and covers everyone, as regards both the public and private sectors, in relation to the eight areas covered by article 3 par. 1 (a-h) of the Racial Equality Directive 2000/43/EC.

4.10. Sanctions and Remedies

(a) Article 11 of Law No. 4443/2016 lists criminal sanctions (six months' to three years' imprisonment and a pecuniary fine of 1.000 € to 5.000 €) and administrative sanctions (pecuniary fine of 146 € to 805 €) respectively. The maximum fine imposed on the discriminator in criminal cases is 5.000 € (fine to be paid to the State). The maximum fine imposed on those responsible for discrimination in administrative cases is EUR 30.000 € (fine to be paid to the State).

The victim is entitled to lodge an action for compensation before the civil courts for infringement of their personality rights in cases of 'unlawful harm' (article 57 of the Civil Code). Compensation for moral damage can be awarded under articles 920 and 932 (Restitution). Actions based on Civil Code violations and relevant restitution is available in administrative cases outside the field of employment through articles 105-106 of the Introductory Law of the Civil Code (annexed to the Civil Code).

b) The sanctions regulated by Law No. 4443/2016 include fines which must be paid to the State. However, in civil cases – where the victim has lodged an application for compensation – the victim can be awarded compensation by the civil courts under the procedures described above. In this case, there is no maximum amount of compensation, since it is determined at the discretion of the civil court.

c) **Law No. 927/1979** expressly provides for a criminal law means of defence and penalties in cases of discrimination on racial, ethnic or religious grounds, while article 57 of the Greek Civil Code provides for the protection of everyone's personality in cases of 'unlawful harm' (it entitles the victim to damages and to demand termination of the harm to their personality and its non-repetition in the future).

CHAPTER 4. NATIONAL LEGAL INITIATIVES TO COMBAT DESCRIMINATION AGAINST VULNERABLE GROUPS

The national legislative authority rests jointly with Parliament and the Government. Greece follows a civil law system (continental) with fields of law separated into specific bodies (civil law, public/administrative law, criminal law, commercial law, labour law etc.). Although Greece does not have a Constitutional Court[131], all courts of all degrees are obliged in principle to interpret rules and laws in conformity with the Greek Constitution.

The Greek Constitution of 1975 contains fundamental rules on the elimination of all forms of discrimination and the promotion of equality[132], most of which are contained in Part II '*Civil and Social Rights'*. These rights are, namely, the principle of human dignity, the free development of one's personality and participation in the financial, social and political life of the country, the principle of equality, the right to health and gender identity, religious freedom, freedom of speech and the press, the right to legal protection, the protection of personal data, free education, protection of family, marriage and children, protection of people with disabilities, the right to work and equal remuneration. In addition, the State is obliged to eliminate any existing discrimination. These fundamental rules are applicable to all national fields of law and should always be adhered to. However, special legislation has been adopted for each field.

Although the key anti-discrimination instrument in the domestic legal order is Law No. 4443/2016 which has transposed the relevant EU Directives, there are a few legal initiatives to combat discrimination against vulnerable groups not related to the implementation of international binding law. These initiatives form the national anti-discrimination legal framework but according to Constitutional principles should be interpreted always in the light of international binding law.

They may be classified in two categories:

- General anti-discrimination rules;
- Thematic anti-discrimination rules.

[131] Greece has three supreme courts: the Council of State (*Συμβούλιο της Επικρατείας*) (dealing with public law), the Supreme Court (*Άρειος Πάγος*) (dealing with private law) and the Chamber of Accounts (*Ελεγκτικό Συνέδριο*) (limited jurisdiction administrative court).

[132] The Greek Constitution includes the following articles dealing with non-discrimination: Article 4(1), Article 4(2), Article 5(1-2), Article 2(1), Article 9A, Article 16(4), Article 21(1), Article 22(1-2)(b), Article 25(1) and Article 116(2).

1. General anti-discrimination rules

This category includes rules laid down either in the key Codes of the Greek legal order or in the key implementing legislation.

a) In the Civil Code (civil law), there are certain *open-ended* clauses which could be invoked by people who have experienced discrimination and are seeking equal treatment and non-discrimination in their working life. However, in practice, such claims are rarely made, except in the employment sector, where the equal treatment principle is often invoked, but only with regard to equal pay and not based on the five discrimination grounds.

b) In the Penal Code (criminal law), there are no provisions outlawing general discriminatory practice, but there are criminal laws prohibiting discrimination on grounds of racial or ethnic origin, although these are never applied in practice.

For instance, **Law No. 4356/2015**, under Article 29, introduced the punishment of perpetrators who treat others with contempt by refusing to provide them with goods and services, on grounds of race, colour, national or ethnic origin, descent, religious or other beliefs, sexual orientation, gender identity, or disability, thus expanding the grounds covered in the field of goods and services. This conduct falls within the scope of criminal law when it takes place in the context of voluntary or humanitarian assistance, usually following a relevant public announcement, and directed only at a specific group of people in a clearly discriminatory manner. The same Law recognised same-sex civil partnerships and eliminated discrimination on the ground of sexual orientation in various fields including employment and social protection.

2. Thematic anti-discrimination rules

This category includes rules laid down in specific legislation, which focus on the following areas:

- employment;
- anti-racism;
- sexual orientation, gender identity or characteristics;
- law enforcement;
- language.

2.1. Employment

Protection against discrimination in the field of employment is focused particularly on the grounds of sex and racial or ethnic origin. For example, **Law No. 1414/1984** on the implementation of the principle of sexual equality in employment relations restricts discrimination, though it applies only to people who work in the private sector. There are also statutes which outline a protective framework within which employers are obliged to abide by the protective provisions and eliminate discriminatory practices, such as

dismissals of pregnant women or related to the race or ethnic origin of the employee.

2.2. Racial discrimination

The principal legal instrument addressing racism is **Law No. 927/1979** on punishing acts or activities aiming at racial discrimination[133], as amended by **Law No. 1419/1984**[134] and **Law No. 4285/2014**[135]. Such acts and activities can be prosecuted *ex officio* since 2005 (art. 71 par. 4 of **Law No. 3386/2005**).

The law provides that anyone who publicly, orally or in writing or through pictures or any other means intentionally incites people to perform acts or carry out activities that may result in discrimination, hatred or violence against other persons or groups of persons on the sole ground of the latter's racial or ethnic origin or religion[136] is punishable by a maximum imprisonment of two years and/or pecuniary penalty or both. The penalties also apply in cases where someone establishes or participates in organisations that aim at organizing propaganda or activities of any form whatsoever, leading to racial discrimination. The law prohibits the public expression orally, in writing or through pictures or any other means of offensive ideas against any individual or group on the grounds of the latter's racial or ethnic origin or religion. The penalty in this case is maximum imprisonment of one year and/or fine.

The notion of bias motivations based on ethnic, racial, religious or sexual orientation as aggravating circumstance was added in 2008 though art. 23 of **Law No. 3719/2008**[137] amending art. 79 of the Criminal Code. This article was further amended in 2013 through art. 66 of **Law No. 4139/2013**[138] adding genetic characteristics and gender identity as bias motivations and providing that sentences imposed may not be suspended[139].

Law No. 4356/2015, under Article 15, established a *National Council against Racism and Intolerance (the Council)* as an advisory body to improve the consultation process and cooperation amongst stakeholders as well as to improve services on issues related to preventing and combating racism and intolerance. Article 17 states that the Council is responsible for the harmonisation of national law and policies with international and European

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[133] Law No. 927/1979 on punishing acts or activities aimed at racial discrimination (OJ 22 A'/26.6.1979).
[134] Law No. 1414/1984 on the application of the principle of gender equality in labour relations and other provisions (OJ 10 A'/2.2.1984).
[135] Law No. 4285/2014 on the amendment of 927/1979 and its adjustment to the decision-framework 2008/913/JHA of 28 November 2009, for combating certain forms and manifestations of racism and xenophobia through criminal law and other provisions (OJ 191 A'/10.9.2014).
[136] The ground of religion was added in 1984 through art. 24 of Law No. 1419/1984.
[137] Law No. 3719/2008 (OJ A' 241/2008).
[138] Law N. 4139/2013 (OJ A' 74/2013).
[139] Council of Europe, European Commission against Racism and Intolerance (ECRI) (2009), *ECRI Report on Greece (fourth monitoring cycle),* Strasbourg, Council of Europe, 2 April 2009.

regulations and practice, and the development of initiatives throughout the whole public sector in order to achieve the most effective protection of people and groups which are targeted because of their race, colour, national or ethnic origin, descent, social origin, religious or other beliefs, sexual orientation, gender identity or disability.

2.2.1. The implementation of anti-racism legislation

ECRI highlighted in 2009 that the Greek authorities had "*acknowledged themselves that Law No. 927/1979 continues to be rarely applied although information indicates cases of incitement to racial hatred in Greece*"[140]. Another critique of Law No. 927/1979 is that it is only applicable if race, ethnic origin or religion is the sole ground motivating an action[141]. For example, the Supreme Court dismissed an appeal in cassation in 2010 concerning the publication of an anti-Semitic book, since the defendant was found not to revile Jews "solely because of their racial and ethnic origin, but mainly because of their aspirations to world power, the methods they use to achieve these aims, and their conspiratorial activities"[142]. However, on 20 November 2013, the first instance Magistrate Court of Athens accepted racism as bias motivation in sentencing two alleged Golden Dawn members to 41 months imprisonment for torching a shop belonging to a migrant.

A key criminal court decision on discrimination was issued in 2014[143] and concerned an incident which took place on 10 April 2013 where a bus driver with the private Urban Transport Organisation of the City of Thessaloniki (OASTH), acting in a provocative manner, compelled two passengers of African descent to leave the vehicle. The case was also examined under an appeal by the defendant, in which the court found the driver guilty –just as during the first instance – of denial of service based on racist grounds, with a sentence that was reduced by two months compared to that of the first-instance court. The penalty was suspended for three years, which means that if the defendant does not commit any other crime or offence during this period of time the penalty will not be imposed.

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[140] Council of Europe, ECRI (2009), *ECRI Report on Greece (fourth monitoring cycle),* Strasbourg, Council of Europe,
2 April 2009, p. 13, par. 17.

[141] See N. Sitaropoulos, *Transposition in Greece of the European Union Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,* 2002, www.mmo.gr/pdf/library/Greece/Sitaropoulos_GR-RACISM.pdf.

[142]Supreme Court Decision 3/2010, available at: www. areiospagos.gr/nomologia/apofaseis_DISPLAY.asp?cd=H9946F7BRL9LVHZJYRVYLEKBG78DDI&apof=3_2010.

[143] Reference number of court decision: 4232/2014.

2.3. Sexual orientation, gender identity or characteristics

(a) Law No. 4356/2015[144] established a new non-discrimination framework on grounds of *sexual orientation,* allowing same-sex couples to enter into cohabitation agreements[145]. The absence of a legal recognition of the relationship of same sex couples in Greece had been causing huge difficulties and obstacles in their everyday lives, since apart from their social marginalization, practical issues were raised with regards to property, insurance and taxation.

A cohabiting couple can make their relationship official and binding by signing, in person, a simple notarial deed, called a cohabitation agreement. A copy of such an agreement must be filed with the registrar's office of the place where the contracting parties are domiciled so that the cohabitation agreement is valid and official. The individuals wishing to conclude a cohabitation agreement must have full legal capacity.

The impediments to the conclusion of such an agreement are almost the same as to a marriage, such as existing marriage or cohabitation agreement and kinship up to a certain degree. In addition the cohabitation agreement is not allowed between the adopting parent and the adopted child.

The personal relations of the cohabitants are governed by the provisions regulating the personal relations of the spouses. The non-personal relations of the cohabitants are also governed by the provisions regulating the relations of the spouses unless the parties agree otherwise provided that such an agreement is based on the principles of equality and solidarity. The parties cannot abdicate from the claim for the participation to the acquisitions before such claim is born.

The cohabitation agreement is dissolved: a) by an agreement concluded in person by the cohabitants before a notary public, b) in case one of the cohabitants wishes to terminate the relationship, by a unilateral declaration before a notary public on the condition that an invitation for consensual dissolution of the cohabitation agreement has been served on the other cohabitant and a period of at least three months has elapsed from service and c) ipso jure if the cohabiting partners get married, but this applies only in the heterosexual couple's cohabitation as marriage between same-sex couples is not allowed under Greek legislation. The dissolution of the cohabitation agreement is effective upon its filing with the registrar's office where the cohabitation agreement was filed.

[144] Law No. 4356/2015 "Cohabitation agreement, exercise of rights, penal and other provisions" (OJ A' 181/24.12.2015).
[145] However, Law No. 4356/2015 does not allow joint adoption by same-sex couples and by cohabitants in general, as it is limited to married couples only and marriage between same-sex couples is not allowed under the applicable Greek legislation.

(b) Law No. 4491/2017[146] established a new non-discrimination framework on grounds of *sexual orientation, gender identity*[147] *or characteristics,* given that it allows – for the very first time in the Greek legal order - citizens over the age of 15 to change their official identifying documents to reflect their "gender identity" simply by obtaining a court ruling, and removes the former requirements for such changes to identifying documents, including the requirement that the individual had undergone a psychiatric assessment and "sex-change surgery". Although individuals may update their documents at will, they may only seek to change their "gender identity" twice, and may not be married when they do so. Additionally, individuals with children who are seeking to update their own identifying documents may not identify their child's documents (i.e. the child's birth certificate).

2.4. Law enforcement

(a) The **Police Circular (7100/4/3)** of 25 May 2006 is one of the key instruments to identify discrimination aspects during investigations of bias motivation, given that it requires that the police investigate the motivation of criminal offences; collect relevant information; and record/report incidents perpetrated on grounds of national or ethnic origin, colour, religion, disability, sexual orientation and gender identity when confessed by perpetrator(s) or reported by victim(s) or witness(s) and when there are indications that perpetrator(s) and/or victim(s) belong to different racial, ethnic, religious or social groups. In addition, racist motivation must be investigated in complaints against the police by persons belonging to vulnerable ethnic, religious and social groups or by foreigners.

This Police Circular, however, was not followed up by efforts to ensure its practical implementation, for example through systematic training or operational guidelines, according to reports by the national statutory human rights bodies. In May 2010, the Ministry of Public Order completed a *Guide of police conduct towards religious and vulnerable social groups*[148], including migrants, Roma, persons with disabilities and lesbian, gay, bisexual and transgender (LGBT) persons.

(b) The **Code of Police Ethics**[149] requires -under Article 2- police officers "*to respect the life and personal security of every individual; not to cause or tolerate acts of torture or inhuman or degrading treatment or punishment and to report, as appropriate every violation of human rights*". It further requires

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[146] Law No. 4491/2017 "*Legal Recognition of Gender Identity – National Mechanism for the Development, Monitoring and Evaluation of Action Plans on Children's Rights*" (OJ A' 152/ 13.10.2017).

[147] "Gender identity" is defined in the Law as "*the personal way in which a person experiences his or her sex, irrespective of the sex registered on their birth certificate on the basis of his/her biological characteristics, including the personal perception of the body, as well as the social and external expression of gender, which corresponds to the will of the person*".

[148] This was compiled in cooperation with civil society organisations and the Ombudsperson, but it was neither published nor distributed.

[149] Code of Police Ethnics, Presidential Decree 254/2004, available at: www.astynomia.gr/images/stories/Attachment14238_KOD_FEK_238A_031204.pdf.

them under Article 5 "*to develop relations of mutual trust and cooperation with citizens and to avoid prejudice on grounds of colour, gender, ethnic origin, ideology or religion, sexual orientation, age, disability, family situation, economic and social status or any other specific individual characteristic*".

2.5. Language

Article 4 of **Presidential Decree No. 77/2003** regulating radio and television news and political broadcasts prohibits the presentation of individuals in a way that, under specific conditions, could encourage their ridicule, social isolation or discrimination on grounds of racial or ethnic origin, nationality, religion and language, among others. It also prohibits broadcasting racist and xenophobic and intolerant views, in particular concerning ethnic or religious minorities and other vulnerable population groups.

CHAPTER 5. THE GREEK NON-DISCRIMINATION LEGAL CODIFICATION PROCESS

Any codification process[150] of the non-discrimination rules for vulnerable groups within the Greek legal order should address two critical issues:

- the context of the current non-discrimination legal framework (both international law applied in Greece and national initiatives outside the scope of international law);
- the key gaps and shortcomings of this framework.

1. The current legal non-discrimination framework

The analysis of the current legal framework leads to the conclusion that the non-discrimination rules for vulnerable groups are identified within the following key legislation:

1. Legislative Decree No. 474/1970 on the ratification of the *International Convention on the Elimination of All Forms of Racial Discrimination*;
2. Legislative Decree No. 53/1974 on the ratification of the *Convention for the Protection of Human Rights and Fundamental Freedoms*;
3. Law No. 927/1979 on penal sanctions for acts of discrimination based on race;
4. Law No. 1264/1982 on the democratisation of the union movement and the establishment of workers' union rights;
5. Law No. 1342/1983 on the ratification of the *UN Convention on the Elimination of Discrimination against Women*;
6. Law No. 1414/1984 on the implementation of the principle of sexual equality in employment relations;
7. Law No. 1426/1984 on the ratification of the *European Social Charter*;
8. Law No. 1532/1985 on the ratification of the *International Covenant on Economic, Social and Cultural Rights*;
9. Law No. 1556/1985 on the ratification of the *ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention* (No. 159) of 1983;
10. Law No. 1782/1988 on the ratification of the *UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*;

[150] The codification process will lead to many positive outcomes, as simplification and better implementation of legal rules. See N. Sarris, "The Institutional framework for combating Discrimination", p. 84, in Balourdos D. and Mouriki A. (eds.), *Combating Discrimination in Greece - State of the art, Challenges and Policy Interventions*, 2012, who argues:
"*The coding and simplification of the existing legislation is required in order for the State to contribute to the civil rights' protection. Sparse and complex legislation does not protect citizens from potential rights' violations*".

11. Law No. 2646/1998 on the development of a national care system and other provisions;
12. Law No. 1949/1991 on the ratification of the *Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*;
13. Law No. 2101/1992 on the ratification of the *UN Convention on the Rights of the Child*;
14. Law No. 2224/1994 on the regulation of employment, union rights, worker's health and safety and the organisation of the Labour Ministry and the legal bodies it supervises and other provisions;
15. Law No. 2430/1996 on the ratification of the *UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities*;
16. Presidential Decree No. 131/2003 on the adjustment to Directive 2000/31/EC of the EP and EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market;
17. Law No. 3488/2006 "*On the transposition* of Directive 2002/73/EC 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"
18. Presidential Decree No. 109/2010 on the Harmonisation of the Greek radio-television legislation to the provisions of Directive 2010/13 of the EP and EC *et al*;
19. Law No. 3907/2011 on the establishment and organisation of the Asylum Service *et al.;*
20. Law No. 3996/2011 "*Reform of the Labour Inspectorate Body, social security issues and other conditions*";
21. Law No. 4074/2012 on the ratification of the *UN Convention on the Rights of Persons with Disabilities and the Optional Protocol*;
22. Law No. 4139/2013 "*Narcotic Acts and other provisions*"
23. Law No. 4228/2014 on the ratification of the *Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*;
24. Law No. 4285/2014 on the amendment of Law No. 927/1979 and its adjustment to the *EU Decision-Framework 2008/913/JHA of 28 November 2009, for combating certain forms and manifestations of racism and xenophobia through criminal law and other provisions*;
25. Law No. 4356/2015 "Cohabitation agreement, exercise of rights, penal and other provisions";
26. Law No. 4358/2016 on the ratification of the *Revised European Social Charter*;
27. Law No. 4440/2016 on a 'Uniform Mobility System for the Public and Local Administration, obligations, incompatibility and prevention of conflicts of interests and other provisions';
28. Law No. 4443/2016 '*On the transposition of Directive 43/2000/EC on the application of the principle of equal treatment irrespective of*

race and ethnic origin, and the transposition of Directive 78/2000/EC on the configuration of the general framework of equal treatment in employment and work';

29. Law No. 4488/2017 on insurance issues, on improvement of protection of employees and on rights of persons with disabilities;
30. Law No. 4491/2017 "*Legal Recognition of Gender Identity – National Mechanism for the Development, Monitoring and Evaluation of Action Plans on Children's Rights*".

2. Key gaps and shortcomings of the current legal non-discrimination framework

a) Greece has not ratified yet the crucial Protocol 12 of the European Convention on Human Rights, which prohibits discrimination in relation to '*enjoyment of any right set forth by law*' and is thus greater in scope than Article 14, which relates only to the rights guaranteed by the ECHR.

b) Greece has not ratified yet the Framework Convention for the Protection of National Minorities and the Convention on Action against Trafficking in Human Beings.

c) Law No. 4443/2016 does not improve the protection framework against discrimination (with the exception of very limited cases)[151] or promote the homogeneity of the various fields of protection. This is due to the fact that it does not establish any new criminal sanctions, even though the EU Directives call for the adoption of effective, proportionate and dissuasive sanctions (something that does not apply even in the case of administrative sanctions imposed by the Labour Inspectorate Body).

The transposition of Directive 2014/54 is evaluated inadequate by leading national law experts[152]; 'EU nationality' is not a protected ground, while several provisions of this Directive are not transposed. On the other hand, mixing the transposition of the three Directives may well create confusion[153], as the legal basis, the aim and the scope of Directive 2014/54 differ from

[151] These may include the definition of reasonable accommodation, the role of the Ombudsman and the context of multiple discrimination.

[152] In this respect, A. Theodoridis, *Country report - Non-discrimination in Greece*, Reporting period 1 January 2016-31 December 2016, 2017, p. 10, argues that:
"*The new law does not improve the protection framework – with the exception of very limited cases – and under no conditions does it promote the homogeneity of the various fields of protection. To a certain extent, this undermines the overall attempt to reform the law; any improvement is only on a legal or technical level, making it nearly impossible to discern the point of such a radical change. The new law does not improve the level of protection from discrimination because it does not establish any new criminal sanctions, even though the Directives call for the adoption of effective, proportionate and dissuasive sanctions (something that does not apply even in the case of administrative sanctions imposed by the Labour Inspectorate Body). The new law fails to resolve discrepancies in the Civil Code, i.e. the lack of provisions linking non-discrimination law to actions for damages*".

[153] For this argumentation see S. Koukoulis-Spiliotopoulos, *Re-transposition of Directives 2000/43/EC, 2000/78/EC and transposition of Directive 2014/54/EU*, European Network of legal experts in gender equality and non-discrimination, 21.4.2017.

those of the anti-discrimination Directives[154]. The legal basis of the latter was Article 13 TEC, which enables the competent EU institutions to take measures to combat discrimination on the grounds that it lists; the legal basis of Directive 2014/54 is article 46 TFEU, which provides for the taking of measures for achieving freedom of movement of workers within the EU[155].

3. Recommendations to address key gaps and shortcomings of the current legal non-discrimination framework

The analysis of the current non-discrimination rules for vulnerable groups in the light of applied international law and relevant case law leads to a set of recommendations, that may be summarised as follows:

a) The extension of the international legal framework

Greece should ratify:

- the Protocol 12 of the European Convention on Human Rights;
- the Framework Convention for the Protection of National Minorities;
- the Convention on Action against Trafficking in Human Beings.

b) The improvement of Law No. 4443/2016

New rules should address the following issues:

- the introduction of provisions linking non-discrimination law to actions for damages;
- the establishment of penalties of imprisonment for all the areas of discrimination protected by the Law;
- the introduction of favourable conditions for the legal standing of NGOs before the courts.

c) The improvement of the Administrative Code of Procedure

Modifications must be made to the administrative Code of Procedure relating to the burden of proof.

d) The new role of the Ombudsman

The Codes of Procedure should be amended in order to provide for the *locus standi* of the Ombudsman as a third party before civil or administrative courts or as a civil party before criminal courts.

The *ratione temporis* 'jurisdiction' of the Ombudsman should also address cases which have been filed in the courts until the first hearing of the case

[154] The anti-discrimination Directives apply to '*all persons*' in the public and private sectors, while the Directive 2014/54 applies to '*Union workers and members of their family*'. It covers the fields listed in both anti-discrimination Directives, plus 'tax advantages', 'access to education, apprenticeship and vocational training for the children of Union workers', 'assistance afforded by the employment offices'.

[155] The Preamble to Directive 2014/54 stipulates that '*enforcement of that fundamental freedom should take into consideration the principle of equality between women and men*'.

or the issuing of interim measures. Given that a complaint submitted to the Ombudsman does not suspend the deadlines for judicial remedies, if the mediation of the Ombudsman is not fruitful, the discrimination victim could be deprived of their right to judicial protection. This extension might encourage discrimination victims to have recourse to the Ombudsman and limit the number of potential cases before the courts, a procedure which is more time-consuming and costly.

A sound systematic monitoring process by the Ombudsman should be introduced, in cooperation with the Labour Inspectorate, the Department for Equal Opportunities of the Ministry of Labour and the Organisation for Mediation and Arbitration of developments in employment and occupation, collective agreements, codes of ethics and practices regarding combating discrimination.

A new permanent consultative body should be established at the level of the Economic and Social Council, composed of representatives of NGOs and organisations in general, with the participation of the Ombudsman, tasked with carrying out, together with the plenary body of the Economic and Social Council, a social dialogue on equal treatment.

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