

HANDBOOK FOR TRAINING JUDGES

on anti-discrimination law

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Executive Summary



Executive Summary

This Handbook is intended as a simple tool providing basic guidance to judges on identifying discrimination and rendering judgments. Even when a situation is clearly discriminatory, difficult choices will have to be made about finding the best remedy. Should the case be brought before an equality body, a civil or labour court, the police, or a labour, consumer or school inspectorate? Would mediation yield quicker, less confrontational and more effective results? Can assistance in formulating the claim be sought from an CSO or legal aid organisation? What type of evidence can be used to prove discrimination? Are there specific types of evidence for discrimination claims? What kinds of remedies are available in the many different proceedings? These are complex questions and the answers have far-reaching consequences.

The Handbook hence provides a practical framework to assist beginners in this field. It focuses on giving victims the skills and knowledge to identify a situation that is illegal and to seek a remedy. It strives to focus on practice instead of theory.

Why this practical focus? For the simple reason that the ultimate objective of anti-discrimination legislation is to tackle discrimination in Macedonian society by enabling victims of discrimination to seek justice and secure remedies against unequal treatment. In order to achieve this objective, judges must be provided with practical tools and advice on how to apply anti-discrimination law in practice.

Law enforcement officials, including judges need to know more about the right to equal treatment. Surveys, including Eurobarometers, indicate a relatively low awareness of Anti-discrimination Law. Not many cases are brought to the courts, equality bodies or other competent authorities.

Macedonian legislation provides strong protection from discrimination. It is only natural that victims of any unlawful action want to have access to such a high level of protection. It is important to bear in mind, however, that this protection cannot be accessed by anyone at any time. It applies only to people treated unfavourably on account of a characteristic that usually leads to discrimination in certain fields.

At the same time, discrimination does not only occur at the individual level. It is often directed against groups or communities and also arises from unequal social structures. The Non-discrimination Directives provide the best tools to fight discrimination at the individual level. However, if victims work together and involve non-governmental organisations, it is possible to challenge structural discrimination.

The section dealing with the facts is central to the Handbook:

- what facts can support a discrimination claim (Basic information in a discrimination claim);
- how to present these facts (The ‘three plus one steps’ to establishing discrimination relying on the reversed burden of proof); and
- how to collect evidence to substantiate these facts (General and specific evidence).

The Handbook provides a useful summary of sanctions that can be imposed to remedy discrimination.

Despite the complexity of national anti-discrimination law, basic questions are now clear and simple. The uniform European definition of the many different forms of discrimination makes it easy to identify unequal treatment. Similarly, its common sense approach to the personal characteristics protected and the existence of procedural novelties – such as the reversed burden of proof and the standing of non-governmental organisations – make challenges to discrimination simpler.

Indeed, if and when national legislation appears vague or too complex, it is worth relying on European non-discrimination law and jurisprudence from the very beginning of proceedings, regardless of whether they are instituted before a court, an equality body or administrative authorities. Even if a claim is not brought directly before a court, it may be referred there on appeal or review from an administrative authority, inspectorate, or even an equality body. Arguments based on European non-discrimination law can be made before national and international judicial fora, such as the European Court of Human Rights.

Introduction



I. Introduction

The Handbook's language is simple, it does not use footnotes and it strives to explain basic legal concepts to non-specialists. It runs readers through the process of bringing a case, from collecting evidence through to making a complaint at national level and up to making an application to the European Court of Human Rights (ECtHR). It includes basic information on invoking European anti-discrimination law at the national level as well as on applications to the ECtHR and the role of national lawyers in such proceedings. The Handbook explains the purpose and basics of the concepts used in European anti-discrimination law as well as relevant jurisprudence. It also gives some examples from EU Member States.

In order to stay on the practical side, we have provided practical tips, described typical scenarios for the application of key concepts, provided examples based on domestic and European case law and indicated easy access to on-line materials on basic issues. There are check lists in this Handbook to assist you in decision making and litigation. The Handbook regularly relies on internet sources and we would like to encourage readers to search for information beyond what is indicated.

The Handbook is composed of five main chapters:

- “ Chapter II provides a background to Macedonian and European anti-discrimination law, and its key concepts;
- “ Chapter III deals with definitions of protected personal characteristics, the areas in which discrimination is prohibited, the legal meaning of discrimination and situations where discrimination may be lawful, as well as discrimination-specific evidence and the rules making it easier for victims to establish discrimination;
- “ Chapter IV explains how individuals can enforce anti-discrimination law with the help of non-governmental organisations, trade unions and specialised equality bodies. It also deals with sanctions and remedies at civil, administrative and criminal law as well as mediation;
- “ Chapter V provides tools to invoke European anti-discrimination law in domestic and international proceedings;
- “ Chapter VI contains a list of handbooks in English languages.

As European and national non-discrimination laws are constantly changing, the Handbook can only serve as a very basic guide. It focuses on key concepts and instruments, but includes references and links to sources more specific to protected groups as well as to fields. Examples are provided in yellow boxes, useful links in green boxes, practical tips in pink boxes and typical scenarios in orange boxes.

The Handbook reflects case law and interpretation up until 30 October 2011. The author takes no responsibility for the accuracy of the information found in the many external references and web-links in the text.

The Handbook uses the following fundamental references:

- “ Wikipedia for the definition and detailed description of legal terms. Available in English at http://en.wikipedia.org/wiki/Main_Page and in other languages as well.
- “ Developing Anti-discrimination Law in Europe: The 27 EU Member States Compared (2009): a comparative analysis published by the Network of Legal Experts in the Non-discrimination Field and available in English at <http://www.non-discrimination.net/content/media/Comparative%20EN.pdf>
- “ Thematic reports and the European Anti-discrimination Law Review published by the Network of Legal Experts in the Non-discrimination Field, including detailed legal analysis on disability and religion or belief-based discrimination, indirect discrimination, structural discrimination against the Roma in state education, and the meaning of housing and services under European law, available in English, French and German at <http://www.non-discrimination.net/en/publications?jsEnabled=1>
- “ Country reports on the transposition of the Non-discrimination Directives into national laws and on remaining inconsistencies, summaries of case law and legislative reports prepared by the Network of Legal Experts in the Non-discrimination Field, available in English in the 'Latest documents' section of <http://www.non-discrimination.net>

- “ Combating Discrimination: a Training Manual, a manual including practical information on the basic structure of anti-discrimination law in 24 languages and available at http://www.migpolgroup.com/publications_detail.php?id=192
- “ Strategic Litigation of Race Discrimination in Europe: from Principles to Practice: a strategic litigation manual published by the ERRC, Interights and the MPG available at http://www.migpolgroup.com/publications_detail.php?id=198
- “ Activists and advocates – disability rights training programme, a disability rights advocacy handbook published by the National Confederation of the Disabled People of Greece, available at http://www.edf-feph.org/Page_Generale.asp?DocID=13356&la=1&langue=EN
- “ Non-discrimination in International Law: A Handbook for Practitioners; an international handbook published by Interights, available at <http://www.interights.org/handbook/index.htm>

Anti-discrimination Law



II. Anti-discrimination Law

Useful links:

Website of the Macedonian Commission for protection from discrimination: <http://kzd.mk>

Access to European law: <http://eur-lex.europa.eu/en/index.htm>

Website of the Court of Justice of the European Union where cases can be found using the numbers indicated in this Handbook: http://curia.europa.eu/jcms/jcms/j_6/accueil

Website of the Council of Europe Treaties <http://www.coe.int/lportal/web/coe-portal>

European Court of Human Rights where useful information on instituting proceedings, various reports and relevant documents can be found:
http://www.echr.coe.int/ECHR/Homepage_EN

HUDOC, the database of the ECtHR's case law:
<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

Access to the website of the Council of Europe Commissioner for Human Rights:
http://www.coe.int/t/commissioner/default_en.asp

European Commission against Racism and Intolerance (ECRI) of the Council of Europe, which monitors problems of racism and discrimination, prepares reports and issues recommendations to member States of the Council of Europe:
http://www.coe.int/t/dghl/monitoring/ecri/default_EN.asp

Treaties of the Council of Europe <http://www.conventions.coe.int/>

Typical scenarios:

European Union law is useful when it is believed to ensure stronger or more extensive protection from discrimination than national equality legislation. It has been invoked for instance:

- to define disability as broadly as possible;
- to ensure wider protection from age discrimination both for old and young workers;
- to apply the reversal of the burden of proof to victimisation cases;
- to extend protection to associated discrimination on the ground of disability;
- to clarify that protection is due against a discriminatory job advertisement without an actual application for the job.

The case law of the ECtHR ensures stronger protection as follows:

- the Convention is a living instrument which evolves by the ECtHR's interpretation of its provisions. The ECtHR has extended the rights afforded and has applied them to situations that were not foreseeable when the Convention was first adopted (for example, it gives a very broad definition of the notion of private life).
- as a result of such interpretation, the ECtHR has found that the ban on discrimination set out in Article 14 applies, apart from the grounds enumerated in this Article, to sexual orientation, age, nationality, birth and property.

A. Domestic legislation

In the country, citizens have the possibility to lodge so-called "Request for protection of human rights and freedoms" when they believe that they have been discriminated on the grounds stipulated in the Constitution (constitutional court procedure).

Macedonia adopted specific anti-discrimination law in 2010¹ and the implementation of the new Anti-discrimination Law started on 01.01.2011. Other remedies can be found in different laws.

Protection through criminal procedure could be initiated or undertaken based on Article 417 of the Criminal Code - The racial and other discriminations. Grounds covered by this article are: the racial and ethnic origin. The missing grounds are: disability, age, sexual orientation and religion or other belief. It is worth mentioning that first, the Public Prosecutor could start the procedure. Once this institution estimates that they cannot undertake the proceedings citizens could lodge a so-called 'Private Criminal Lawsuit'.

Protection through litigation could be undertaken in accordance with the Labour Law. The, recently amended Labour Law² covers race, belief, disability, age, sexual orientation, and an open-ended list - sex, health condition, membership of trade union, social origin, position of the family, property, or other personal circumstances. Discrimination is prohibited in different fields: conditions for employment (criteria and selection); career promotion; vocational training and qualification; working conditions, equal payment and working rights; dismissal; rights of membership in the association of workers and employers, or in professional organizations. It prohibits any direct or indirect discrimination, as well as victimization. Harassment, sex harassment and mobbing are to be considered discrimination. The Labour Law stipulates shifted burden of proof in proceedings before the Court and provides opportunity to claim compensation according the Tort Law.

The Law on Social Protection, adopted in June 2009, covers race and disability, as well as religion. It prohibits direct or indirect discrimination and the ban is explicitly related to both public and private institutions for social care, there is shift of the burden of proof. Yet, there are no provisions on harassment or mobbing. Remedies can be sought in civil litigation and misdemeanour procedure. When the state inspection bodies detect cases of discrimination there is a possibility for financial penalty (fine) of 3000-5000 EURO-s.

B. ECHR

B.1. Introduction

Founded on 5 May 1949 by 10 European States, the Council of Europe is an inter-governmental organisation, the aim of which is to create a common democratic and legal area throughout the whole of the continent, ensuring respect for its fundamental values: human rights, democracy and the rule of law. It should not be confused with the Council of the European Union or the European Council, which are Institutions of the European Union. The Council of Europe, based in Strasbourg (France), now covers virtually the entire European continent, with its 47 member countries and over 800 millions citizens. Its activities concern human rights, democracy, media and communications, health, culture and cultural heritage, education, language, sports and youth. It has several institutions: Committee of Ministers (decision-making body), Parliamentary Assembly (deliberative body), European Court of Human Rights (adjudicative body), Congress of Local and Regional Authorities (consultative body) and Conference of international NGOs. One of its main achievements, which is the same time a cornerstone of the system of human rights and freedoms, is the European Convention on Human Rights. The Convention was signed on 4 November 1950 in Rome and entered into force in 1953. To date, several additional protocols have been adopted, which added certain rights to the Convention. They are binding on those States that have signed and ratified them. For example, in July 2003, Protocol No. 13 introduced the abolition of the death penalty in all circumstances. In April 2005, Protocol No. 12 provided for a general ban on discrimination. Protocol No. 14, which came into force in June 2010, introduced smaller judicial formation (single-judge) and empowered the three-judge committee to give judgments in cases coming within well-established case-law. It also introduced the „insignificant disadvantage” as a new admissibility criterion. Protocol No. 11 of 1998 transformed the supervisory system, creating a single, full-time Court to which individuals have direct recourse.

The Convention is an international treaty of unprecedented scope under which the member States of the Council of Europe promise to secure the fundamental civil and political rights, not only to their own citizens, but also to everyone within their jurisdiction. Part I of the Convention (Articles 2-19) sets out a list of human rights and freedoms, which observance is ultimately secured by the ECtHR. The Convention secures in particular: the right to life, the right to a fair hearing, the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association and the protection of property. It also prohibits in particular: torture and inhuman or degrading treatment or punishment, slavery and forced labour, death penalty, arbitrary and unlawful detention and discrimination in the enjoyment of the rights and freedoms set out in the Convention. In addition to laying down a catalogue of civil and political rights and freedoms, the ECHR set up a mechanism for the enforcement of the obligations entered into by the Contracting States. Part II (Articles 19-51) regulates the ECtHR, its

1 Official gazette No.50/2010

2 Official gazette No. 16/2010

structure, organisation and jurisdiction. The Rules of Court is another document which regulates the procedure in more details.

The European Court of Human Rights is an international court set up in 1959. It rules on individual (Article 34) or State applications (Article 33) alleging violations of the civil and political rights set out in the ECHR. The ECtHR's judgments are binding on the States concerned and have led governments to alter their legislation and administrative practice in a wide range of areas.

The number of judges is equal to that of State Parties to the Convention (currently 47). Judges sit in their individual capacity and do not represent the State in respect of which they are elected. Their mandate is nine years without possibility for re-election. Judges hear cases in four different formations: 1) single judge examines clearly inadmissible applications (Article 27), 2) a three-judge Committee may rule by a unanimous vote on the admissibility and merits of cases that are already covered by well-established case-law of the ECtHR (Article 28), 3) a seven-judge Chamber, which rules by a majority vote, on the admissibility and merits of a case (Article 29), and 4) exceptionally, the Grand Chamber of 17 judges, which hears cases referred to it either after relinquishment of jurisdiction by a Chamber (Article 30) or when a request for referral has been accepted (Article 43).

Monitoring the ECtHR's judgments in which a violation was found is the task of the Committee of Ministers, which ensures that States take any general measures needed to prevent further violations (changing legislation, case-law, rules of practice). It also makes sure that just satisfaction awarded by the ECtHR is paid to the applicants and, in certain cases, that other concrete measures are taken to make sure full compensation is granted (such as reopening procedures, lifting a ban or confiscation order, granting a residence permit etc.).

B.2. Discrimination

B.2.1. Article 14 of ECHR

Article 14 is the last provision in the catalogue of rights and freedoms set forth in the ECHR. The respective provision stipulates the prohibition of discrimination. Accordingly,

„The enjoyment of the rights and freedoms set forth in this Convention (emphasis added) shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

If the wording and the formulation of this provision are carefully considered, one can notice its accessory, complementary role, i.e. it prohibits discrimination only in conjunction with the „enjoyment of rights and freedoms set forth in the ECHR”. The ECtHR shall not accept any allegations of discrimination to be admissible if applicants invoke only this provision. Success is possible only if the applicant requests that violation of Article 14 is established in conjunction with some other substantive provisions of the ECHR. It implies that this provision has a „parasitic” position with regard to the other substantive provisions of the ECHR. It does not exist independently and its application is linked to the other rights and freedoms from the ECHR. Accordingly, in *Marckx v. Belgium* (1979), § 32, the ECtHR stated the following:

„Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to „the enjoyment of the rights and freedoms” safeguarded by those provisions,,

However, it does not necessarily mean that Article 14 is a dead provision without a specific role in the practical implementation of the ECHR. The case law verifies that the ECtHR can establish violation of Article 14 (in conjunction with another provision) even in situations when there is no violation of the respective provision. It means that though Article 14 has complementary nature, yet it has some specific autonomous meaning. Accordingly, in *Rasmussen v. Denmark* (1984), § 29, the ECtHR held:

„Although the application of Article 14 does not necessarily presuppose a breach of (the substantive) provisions - and to this extent it has an autonomous meaning - there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter,,

Given the afore mentioned, what really expands the application of Article 14 in practice is its broad interpretation by the ECtHR in relation to the rights and freedoms set forth in the ECHR. Having such an interpretation, many rights and freedoms, which are not explicitly listed in the ECHR do not fall outside of ambit of Article 14. In *Okpiz v. Germany* (no. 59140/00, § 31), the ECtHR stated the following:

„Article 14 comes into play whenever “the subject-matter of the disadvantage... constitutes one of the modalities of the exercise of a right guaranteed”, or the measures complained of are “linked to the exercise of a right guaranteed,,.

The ECtHR broad interpretation of certain rights and freedoms is most evident with regard to the right to respect for private life from Article 8 of the ECHR. The respective right encompasses a range of other sub-rights or aspects of the right to respect for private life, which are not explicitly listed in the ECHR, but the case law crystallized that they are constituent part of the right to respect for privacy.

“The notion of ‘private life’ within the meaning of Article 8 of the Convention is a broad concept which encompasses, inter alia, the right to establish and develop relationships with other human beings. It encompasses elements such as names ... gender identification, sexual orientation and sexual life, which fall within the personal sphere protected by Article 8 ... and the right to respect for both the decisions to have and not to have a child.” (E.B. v. France [GC], no. 43546/02, § 43).

In this sense, according to the ECtHR interpretation, the general ban to employ people in the private sector, who had cooperated with the secret services in the past, was an attack on the right to private life (Sidabras and Džiautas v. Lithuania, nos. 55480/00 and 59330/00). Furthermore, the right to use the maiden name (which was important for the applicant so that she can be able to successfully work as a lawyer) falls within the ambit of the right to respect for private life (Ünal Tekeli v. Turkey, no. 29865/96). Or, beyond the context of the right to respect for private life, the ECtHR accepted that the obligation to be a lay-judge falls within the ambit of Article 4 of the ECHR (Zarb Adami v. Malta, no. 17209/02).

Article 14 of ECHR, however, is open and stipulates that prohibition of discrimination shall not be secured only on the grounds listed in the article. Accordingly, this Article shall secure the enjoyment of rights and freedoms set forth in the ECHR without discrimination on the ground of „any other status”. It implies that the provision encompasses an open-ended list of discriminatory grounds, which are not explicitly listed; however they are part of this provision. It emanates from the ECtHR case law, whereby besides the “protected” grounds which are explicitly listed in Article 14 of the ECHR, the other discriminatory grounds shall also be the discrimination on the ground of sexual orientation, gender, age, disability etc. (more details in the section on discriminatory grounds below).

When an applicant invokes a violation of Article 14 in conjunction with some other provision of the ECHR, the ECtHR usually proceeds in two ways:

- first, the ECtHR examines the allegations in relation to the „main” provision of the ECHR that the applicant complains about. If the ECtHR establishes the violation of the respective provision, it may conclude that it would be unnecessary to examine the allegations in respect of Article 14 separately (Airey v. Ireland (1979); Dudgeon v. the United Kingdom (1981); Keegan v. Ireland (1994); Philis v. Greece (no. 1) (1991); Castells v. Spain (1992); Elsholz v. Germany [GC], no. 25735/94; Kroon and Others v. the Netherlands (1994)); and
- finds violation of Article 14 (in conjunction with some other provision) and shall no further deal with the „main” provision (Hoffmann v. Austria (1993); Burghartz v. Switzerland (1994); Gaygusuz v. Austria 1(996); Mazurek v. France (1997)).

Common characteristic in the ruling of the ECtHR is that it shall proceed with the examination of the allegations in respect of Article 14 of the ECHR „only if the difference in treatment with regard to the enjoyment of the concerned right is obvious, and it represent a fundamental aspect of the case,, (Airey v. Ireland, 1979, § 30).

B.2.2. General prohibition of discrimination: Article 1 of Protocol No. 12

Article 1 of Protocol 12 of ECHR sets forth that „the enjoyment of any right set forth by law (emphasis added) shall be secured without 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. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

It is obvious that this provision stipulates the same discriminatory grounds as Article 14 of the ECHR. However, there is one essential difference in this provision, i.e. it prohibits discrimination in the enjoyment of „any right set forth by law”. The aim of this provision is to expand the prohibition of discrimination and its generalization not only in respect of the fundamental rights and freedoms set forth in the ECHR, but also the rights and freedoms set forth in the domestic legislation. In the Council of Europe (Explanatory Report to Protocol No. 12), it is stated that this provision prohibits discrimination in the enjoyment of 1) all individual rights set forth in the domestic

legislation, 2) any individual right arising from any obligation of the public authorities, 3) any right which results from the discretionary authorizations of the state authorities and 4) any right that arises from any completed or uncompleted action by the state authorities. This provision implies not only the obligation of the states that state authorities prevent discrimination, but also discrimination that occurs in private-legal relations. The idea is that Article 1 of Protocol No. 12 does not replace Article 14, but it should only complement its application given the already established case law of the ECtHR. It does not annul Article 14, which is being further applied. Although these two provisions may overlap, the ECtHR provides the final interpretation of the allegations in the light of the facts of the case. Yet, one can conclude that the aim of Article 1 of Protocol No.12 is to eliminate the „drawback” of Article 14 by setting forth a general prohibition of discrimination in the enjoyment of any right, regardless if it is set forth by the ECHR. It does not stipulate a new principle of interpretation, new standard of protection from discrimination, but only extends the ambit of the prohibition which is initially set forth in Article 14 of the ECHR. It can be expected that when the applicant complains about discrimination in respect of the two provisions, the ECtHR would apply Article 14 if the discrimination refers to the enjoyment of particular right or freedom set forth in the ECHR. Otherwise, if the case concerns allegations for discrimination in the enjoyment of a particular right or freedom which are not set forth in the ECHR, the allegations for discrimination would be examined in respect of Article 1 of Protocol No. 12.

The afore mentioned is supported in *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, which is the only case in which ECtHR established violation of Article 1 of Protocol No.12. The application was submitted by two nationals of Bosnia and Herzegovina, one of them was Roma and the other one was Jewish. They complained to the ECtHR that they had been discriminated against on racial, i.e. ethnic ground because they could not exercise their passive electoral right, i.e. to run as candidates for members of the state Parliament and the federal Presidency. According to the Constitution of Bosnia and Herzegovina, only members of the three constitutional nations of Bosnia and Herzegovina (Serbs, Croats and Bosnjaks) can run for these functions. ECtHR found violation of Article 14, and in conjunction with the enjoyment of the right to free parliamentary elections set forth in Article 3 of Protocol No. 1 of the ECHR (concerning the possibility that they run for member of the Parliament) and violation of Article 1 of the Protocol No. 12 (concerning the right to run for member of the federal Presidency).

C. European Union directives

There are 27 Member States of the European Union (EU), and the EU has four principal institutions that carry out its tasks. The Council of the EU passed the Non-discrimination Directives that are the main subject of this Handbook the Racial Equality Directive and the Framework Employment Directive. The European Parliament has been engaged in the process of passing further directives in the field of non-discrimination. The European Commission's main task is to propose new legislation as well as to enforce existing European law and implement related policies. The Court of Justice of the European Union (CJEU) interprets European law.

The EU has the power to legislate or take other action in certain areas, including non-discrimination. Such areas have expanded over the years from primarily economic fields to social and political matters. Member States are subject to primary European laws, including treaty provisions such as on equal pay and other pieces of legislation, such as directives on sex, race, disability, and age discrimination or discrimination based on religion or belief and sexual orientation.

One of the most important characteristics of the EU system is that its laws take precedence over domestic law within its field of competence. This 'supremacy' of EU law entails that national courts must give priority ('primacy') to EU law over inconsistent domestic provisions. The EU legal system is thus 'supranational' in character. This means that unlike, for instance, the European Convention on Human Rights, EU non-discrimination law is not distinct from domestic law, but is part and parcel of it and under certain conditions has direct effect. Not only can national courts refer to EU law, they have an obligation to enforce it. Individuals can claim rights provided by European law in domestic courts if the provision they invoke has direct effect.

Certain equality provisions of the Treaties are directly applicable in domestic courts and must be enforced by them both against Member States and individuals. Directives also form part of EU legislation, but their application in domestic courts is more complex. They bind Member States to achieving the result they envisage, but leave them a time-period for transposition and a choice of implementing measures (form and method).

Prior to 2000, the European Union legislated in the field of equality and non-discrimination in relation to sex and nationality. Non-discrimination on the basis of nationality was essential for a common labour market to be established in Europe. A treaty provision prohibits discrimination on grounds of nationality in order to ensure the

free movement of workers (Article 45 of the present Treaty on the Functioning of the European Union; ex-Article 39 of the Treaty Establishing the European Community, EC Treaty). Issues in this regard included the legal requirement for foreign nationals acting as plaintiffs before national courts to give security for costs and lawyers' fees and rules discriminating against workers seconded by suppliers of services established in other Member States. The CEJ held, for example, that the above-mentioned treaty provision was directly applicable in the legal systems of Member States so as to render inapplicable a provision in the French maritime code that required a certain proportion of the crew of a French ship to be of French nationality (ECJ Case C-212/99).

The principle of equality of women and men was also considered important for ensuring that fair competition among employers in different Member States was not distorted by differences in employment regulations. A treaty provision provides for equal pay between men and women (Article 157 of the present Treaty on the Functioning of the European Union, ex-Article 141 of the EC Treaty). Directives relating to sex discrimination cover the field of employment. They include council directives on equal pay (75/117), equal treatment in employment (76/207), social security (79/7), the burden of proof in cases of sex discrimination (97/80), part-time work (97/81) and parental leave (96/34). The most recent pieces of legislation on the ground of gender are:

- 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: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:373:0037:0043:EN:PDF>

- 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): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:204:0023:0036:en:PDF>

Article 19 of the present Treaty on the Functioning of the European Union, ex-Article 13 of the EC Treaty, gives the European Union specific powers to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, age, disability or sexual orientation.

The Council has also passed two directives (referred to in this Manual as the Non-discrimination Directives), which oblige Member States to introduce measures to eliminate discrimination:

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Racial Equality Directive) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:EN:HTML>

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Framework Employment Directive): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:EN:HTML>

The key concepts of the Non-discrimination Directives and other European equality law include the definitions of direct and indirect discrimination and harassment; the prohibition of victimisation and instructions to discriminate; the reversal of the burden of proof; reasonable accommodation for the disabled in employment; the defence of victims' rights by non-governmental organisations and trade unions; and effective, proportionate and dissuasive sanctions including compensation. The practical use of these key concepts will be explained in this Handbook. Macedonia as a candidate country of the EU has modelled its anti-discrimination Law on EU non-discrimination directives.

III.1. Protected grounds - definitions

Macedonian anti-discrimination law applies to all persons, which means that protection is not conditional on citizenship, nationality or residence status. It applies to both individuals and legal persons such as companies, public authorities, local councils, etc. It protects various grounds from discrimination enumerated in Article 3 (Ground of Discrimination), and repeated in article 5(3) within the definition of discrimination. It covers race and ethnic origin, age, disability, religion, gender, language, citizenship, social origin, personal or social status, property status, health condition, 'belonging to marginalized group' (defining that marginalized group in Article 5(11)) and any other ground.

Most European states have chosen not to define protected grounds. A considerable number of states have opted not to restrict their new anti-discrimination laws to the grounds specified in European anti-discrimination law. Others, including Macedonia have made the list non-exhaustive by adding a phrase such as 'or any other circumstance'. This is a fundamental concern for victims: who is protected and who is not under anti-discrimination law?

This chapter specifies the personal characteristics, in other words the grounds of discrimination, on which claims can be made. It provides simple definitions as well as definitions taken from international treaties.

Useful links:

Quick and easy source: <http://en.wikipedia.org/wiki/Racism> and related sites on sexism, ageism, etc.

Domestic definitions from across the EU in country reports: www.non-discrimination.net

Practical tip:

Define protected grounds using the common, everyday meaning of words such as sex, race, age, etc. In case of doubt, follow the interpretations used in national or international law.

Typical scenarios:

In the majority of cases, protected grounds can be easily and clearly defined. Some States may define ethnic origin or disability very narrowly or recognise a group as religious rather than ethnic. National laws may be divided in how they treat transgender people, protecting them under sex or sexual orientation. Some national laws may protect Scientology and certain new age religious convictions under religion and belief, whereas others do not. It is often worth challenging these definitions.

Race and ethnic origin

This ground certainly includes race, skin colour, national or ethnic origin. It also includes Roma, Gypsies and Travellers. Ethnic minorities are identified both by themselves and by others as people with a shared history, culture and traditions, who possibly speak a minority language and adhere to a minority religion. One of the dividing lines between race and ethnic origin is the length of time the given minority group has spent in a State. An ethnically Turkish person would for instance be treated as a member of an ethnic minority in Bulgaria and of a racial minority in Germany.

In national laws there may be overlaps between race and ethnic origin on the one hand and nationality, language, religion and belief on the other hand. The term 'race' is defined in the International Convention on the Elimination of All Forms of Racial Discrimination. This United Nations Convention has been signed and ratified by Macedonia, and thus here

“racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin. [our emphasis]

Domestic law has provided its own definitions, for instance laws in Poland, Germany, Hungary and Latvia highlight that a long shared history, cultural tradition, common geographic origin or descent, common language and common religion etc. are all essential characteristics of an ethnic group.

Race and ethnic origin are among the protected grounds that are explicitly mentioned in Article 14 of the ECHR.

In *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 146, the ECtHR stated that “racial discrimination is a particularly invidious kind of discrimination” with “perilous consequences”.

In *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 58 the ECtHR stated that “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”.

In *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 145 it further noted that “the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of enrichment ... where there is suspicion that racial attitudes induced a violent act it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society’s condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence”.

In *Šečić v. Croatia*, no. 40116/02, whereby a Roma person was brutally beaten by a group of unknown skinheads, the ECtHR established the absence of an efficient investigation and violation of Article 14 in conjunction with the procedural aspect of Article 3 of the ECHR, thus identifying that even in a situation when the violent act is committed by private individuals (not members of the state security forces) States „have the additional duty to take all reasonable steps to unmask any racial motive and to establish whether or not ethnic hatred and prejudice may have played a role in the events ...”, The ECtHR further stated that „treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights”.

In *Timishev v. Russia*, the applicant was a Russian national with Chechen origin, who was prohibited by the Russian authorities to cross through Republic of Ingushetia to go to Kabardino-Balkar Republic. The prohibition was based on a verbal order issued by a high military officer, whereby no one with Chechen origin should have been allowed to cross. The applicant succeeded to convince the ECtHR that the concrete case concerned discrimination on the ground of ethnicity, that is, violation of Article 14 in conjunction with Article 2 of the Protocol 4 of the ECHR (freedom of movement). The ECtHR closely examined the verbal order, given the fact that the ethnicity was not recorded in any of the personal identification documents, because it was crucial to prove the existence of discrimination not only against the people who were really of Chechen origin, but also the people who could be perceived that belong to that ethnic group. Accordingly, the ECtHR accepted that the claimant had been discriminated against on the basis of his ethnicity.

In *D.H. and Others v. the Czech Republic* [GC], no. 57325/00 и *Oršuš and Others v. Croatia* [GC], no. 15766/03, the ECtHR established violation of Article 14 in conjunction with Article 2 of the Protocol No. 1 of the ECHR (right to education) because of disproportional placement of Roma children in specialized schools for children with special needs, i.e. specialized classes within regular schools (see below the section on indirect discrimination). The ECtHR established that such segregation had the effect of unjustified discrimination against Roma on the ground of their ethnicity, and despite the fact that it had a legitimate aim (raising the educational level of Roma students), still it was disproportional.

In *Bekos and Koutropoulos v. Greece* no. 15250/02, the ECtHR established violation of Article 14 in conjunction with Article 3 of the ECHR concerning the procedural duty of Greece to conduct an efficient investigation whether the inhuman treatment of Greek Roma by the police officers, while they were detained due to suspicion of having committed a theft, was racially induced. The ECtHR established that in addition to the written statement of one of the applicants that the policemen were using racial language against them, the report of the Greek Helsinki Committee according to which there were 30 similar cases of physical maltreatment of Roma people, as well as reports from other international organizations on alleged discrimination against Roma by the police, the authorities had done nothing that could be reasonably expected in order to establish the truth whether the physical maltreatment was racially induced.

Disability

Disability is not defined in European anti-discrimination law. The CJEU ruled that ‘illness in itself’ does not amount to disability, but that in the context of the Framework Employment Directive it must be understood as ‘a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life’ (ECJ Case C-13/05 Chacón Navas).

Theories about ‘disability’ as a ground of discrimination are divided between the medical and the social model of disability. National definitions rely heavily on the medical model. The Activists and advocates – disability rights training programme describes these models:

Essentially, the medical model says that the disadvantages which disabled people face in daily life are a direct consequence of their impairment. The impairment could be a person’s paraplegia, blindness, deafness, or intellectual disability etc. In other words, this model locates the ‘problem’ of disability within the disabled person. The problem is the person’s impairment. [...]

The social model argues that the impairment has little to do with disadvantage experienced by disabled people. The social model tells us that ‘disability’ is a so-called ‘social construct’. By this we mean that it is society that ‘constructs’, or creates, disability by taking as a starting-point an ‘able bodied’ standard from which a ‘disabled’ standard necessarily differs. Put briefly: it is society itself which creates ‘disability’ through negative attitudes, stigmatisation, prejudice and importantly, by always taking as a starting-point the standard of ‘a normal person’. Thus, according to this model, it is not the medical impairment as such which causes ‘disability’. [our emphasis]

For more detail on this topic, Disability and Non-discrimination Law in the European Union: An analysis of disability discrimination law within and beyond the employment field is available at:

<http://www.non-discrimination.net/content/media/Disability%20non-discrimination%20law.pdf>

Disability is not included in the list of protected grounds expressly specified in Article 14 of the ECHR. However, it does not mean that this ground is out of scope of this provision. The ECtHR has, on number of occasions, confirmed that disability falls within the ambit of “other status” to which the prohibition of discrimination applies.

In *Glor v. Switzerland*, no. 13444/04, 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. The applicant was obliged to pay a tax as compensation for his failure to serve his 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. 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.

The case of *Pretty v. the United Kingdom*, no. 2346/02, concerned domestic legislation according to which it was not punishable to commit suicide but it was a crime to assist another to do so. The applicant claimed that such legislation discriminated against those who, like herself, could not because of incapacity take their own lives without assistance. Her complaint was focused on the fact that she was treated in the same way as those whose situations were significantly different. She claimed that the applicable legislation was discriminatory because it prevented disabled persons to exercise their right to commit suicide. The Court agreed with the domestic courts in holding that, as the relevant legislation did not create a right to commit suicide in domestic law, her claim was misconceived.

The ECtHR examined allegations of discrimination based on disability in other cases, but did not find a violation for different reasons. In *Zehnalová and Zehnal v. the Czech Republic* (dec.), no. 38621/97 and *Botta v. Italy* (1998), the applicants – who were wheel chair users – alleged having been discriminated against on the basis of their disability in relation to their right to respect for their private life because many public buildings and a private bathing facility on a beach were not equipped with access facilities for persons with disabilities. The ECtHR held that Article 8 of the Convention was not applicable, so it did not consider Article 14 complaint.

Age

Age is not defined in European anti-discrimination law. Protection may apply to all ages, including young and old. Age is a protected ground in relation to employment, which in practice excludes people under 16, but in general there is no upper age limit.

For more details on this topic read *Age Discrimination and European Law*, available at http://www.non-discrimination.net/content/media/Age%20discrimination%20and%20European%20Law_en.pdf

As with the disability, the ECtHR has found that “age” is included among “other status”. In *Schwizgebel v. Switzerland*, no. 25762/07 a 47 year old single mother complained about being refused 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. Accordingly the ECtHR found that the difference in treatment was justified.

Religion or belief

Religion and belief are not defined in European anti-discrimination law. These terms may apply to different religious or philosophical beliefs, background, outlook or none (from deists to atheists) if the personal views or convictions are coherent and possess a certain degree of importance, cogency and seriousness. This means that a victim does not necessarily have to belong to an ‘established’ church to be protected on the ground of religion or belief. The European Court of Human Rights has dealt with issues relating to religion and belief, so its case law may prove useful.

In *Hoffmann v. Austria* (1993) the applicant, a Jehovah’s Witness, complained that the Austrian courts had violated her rights under Articles 8 and 9 and Article 14 in conjunction with Article 8 since they refused to grant custody of her children to her, but they granted it instead to her husband. In so doing, they stated that the father would better protect the children’s interests because Jehovah’s Witnesses refused to authorize blood transfusions and because the children could be labelled ‘social outcasts’ as a result of their faith. The ECtHR held that the domestic courts’ decision discriminated the applicant with respect to her rights under Article 8 on the basis of her religion. In this later context it found that the distinction based upon religion was not justified by any legitimate aim. The ECtHR held that „notwithstanding any possible arguments to the contrary, a distinction based essentially on a difference in religion is not acceptable. The Court therefore cannot find that a reasonable relationship of proportionality existed between the means employed and the aim pursued; there has accordingly been a violation of Article 8 taken in conjunction with Article 14”.

In *Thlimmenos v. Greece* [GC], no. 34369/97, the Greek law barred those with a criminal conviction from joining the profession of chartered accountants, since a criminal conviction implied a lack of honesty and reliability needed to perform this role. The applicant had been criminally convicted for having refused to wear military uniform during his military service. This was because he was a member of the Jehovah’s Witnesses, which is a religious group committed to pacifism. The ECtHR found that there was no reason to bar persons from the profession where their criminal convictions were unrelated to issues of reliability or honesty. The ECtHR held that, unlike other criminal convictions, a conviction for refusing to wear military uniform on religious or philosophical grounds cannot imply any dishonesty likely to undermine the applicant’s ability to exercise this profession. It therefore found that the applicant had been discriminated against on the ground of his religion in violation of Article 14 taken in conjunction with Article 9 of the Convention.

The case of *Milanović v. Serbia*, no. 44614/07 concerned the lack of an effective investigation into the allegations of the applicant, a leading member of the Hare Krishna Hindu community in Serbia, that between 2001 and 2007, he had been subjected to series of physical assaults from members of a local branch of a far-right organisation called *Obraz*. Each incident was reported to the police. The police took some investigative steps, but failed to identify the perpetrators. Later, the Public Prosecutor petitioned the Constitutional Court to ban the suspected organisations, in particular because of their incitement to racial and religious hatred throughout Serbia. In its records, the police noted that the applicant was a member of a ‘religious sect’ and had a ‘strange appearance’. It was further noted that most of the attacks had taken place around a major orthodox religious holiday. Besides finding a violation of the

procedural obligation of the respondent State to conduct an effective investigation as required under Article 3 of the Convention, the ECtHR considered unacceptable that, being aware that the applicant's attackers likely belonged to one or several far-right organisations, the authorities had allowed the investigation to last for many years without taking adequate action to identify or prosecute the perpetrators. The statements made by the police in their reports, referring to the applicant's beliefs and his appearance, implied that they had doubts as to whether he was a genuine victim in respect of his religion. The Court therefore held that there had been a violation of Article 14 taken together with Article 3.

In the case of *Leyla Şahin v. Turkey*, no. 44774/98 the applicant, a student, was refused access to a written examination on one of the subjects she was studying because she was wearing the Islamic headscarf. Subsequently the university authorities refused on the same grounds to enrol her on a course, or to admit her to various lectures and a written examination. The faculty also issued her with a warning for contravening the university's rules on dress and suspended her from the university for a semester for taking part in an unauthorised assembly that had gathered to protest against them. The ECtHR found that the regulations on the Islamic headscarf were not directed against the applicant's religious affiliation, but pursued, among other things, the legitimate aim of protecting public order and the rights and freedoms of others and were manifestly intended to preserve the secular nature of educational institutions. In view of the State's margin of appreciation such regulations could be regarded as "necessary in a democratic society". The ECtHR accordingly did not find a violation of Article 14 in view of Article 9 of the Convention.

Similar approach was taken in the cases of *Köse and Others v. Turkey*, no. 37616/02 and *Dahlab v. Switzerland*, no. 42393/98, which concerned a dress code prohibiting the wearing of headscarves by girls and teachers in school.

In the case of *Kosteski*, no. 55170/00, which is the only Macedonian case in which the ECtHR examined the merits of an Article 14 complaint, the applicant was fined for taking a day's holiday without permission to celebrate Bayram, a Muslim religious festival. The Constitutional Court dismissed the applicant's constitutional appeal since he had refused to give any evidence concerning his beliefs. Consequently, it concluded that the applicant had not been discriminated against by the requirement to establish the objective facts. The applicant complained that he was the only person of the Muslim faith who has been required to prove his adherence to that religion. The ECtHR noted that the applicant was making claim to a privilege or exemption to which he was not entitled unless he was a member of the faith concerned. It further stated that where an employee sought to rely on a particular exemption, it was not oppressive or in fundamental conflict with freedom of conscience to require some level of substantiation of his claim. For more details on this topic, read *Religion and belief: discrimination in employment – the EU law*, available at <http://www.nondiscrimination.net>.

Sexual orientation

Whether a person is gay, lesbian, bisexual or heterosexual. Depending on the country in question, transgender people may be protected on this ground or the gender/sex ground. The trade union Unison explains this ground as follows (*Equality Representatives Handbook*, <http://www.unison.org.uk/acrobat/18781.pdf>)

Every person has a sexual orientation and a gender identity. Your sexual orientation is who you are attracted to. Most people are attracted to others of the opposite sex (straight or heterosexual) but an estimated 10% of people are attracted to others of the same sex (lesbian or gay) or to people irrespective of their sex (bisexual). Your gender identity is your internal sense or your own gender. For most people this conforms to the sex assigned at birth – female or male. For a minority of people (transgender people), their gender identity does not conform to the sex they were assigned at birth. Some transgender people change their name and personal details and live permanently in the gender they identify with.

In *Bączkowski and Others v. Poland*, no. 1543/06 the applicants were members of an CSO campaigning for the rights of gays and lesbians. They complained of violation of their right to peaceful assembly under Article 11 together with Article 14 as they were banned from organising a public march to raise awareness of the rights of homosexuals. Following the submission of their request for permission to hold the march, a national newspaper published an interview with the Mayor of Warsaw, where he explicitly stated that „propaganda about homosexuality is not tantamount to exercising one's freedom of assembly". In its judgment, the ECtHR noted that the authorities gave permission to other groups to hold demonstrations. Most importantly the Court noted that the Mayor's statement which was made while the applicants' request for permission was pending could be regarded as instructions to those employees whose career depended on him to ban the march. The ECtHR held that there was a violation of Article 14 together with Article 11.

In the case of *E.B. v. France* [GC], no. 43546/02 the national authorities refused an adoption application from a lesbian living with her partner. The ECtHR 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 lack of paternal image in her household, to which the authorities relied in their decision to refuse adoption, as well as the wording used, namely the ambiguous nature of the applicant's partner, were sufficient for the ECtHR to conclude that the authorities' decision was primarily based on the fact that she was in a relationship and living with another woman. Accordingly the ECtHR found that discrimination had occurred on the basis of sexual orientation.

In several cases, the ECtHR held that the existence of legislation making it a criminal offence to engage in male homosexual activities under 18 years of age whereas the age threshold of consent for heterosexual activities was fixed at a lower level was in violation of Article 14 of the Convention taken in conjunction with Article 8 (*Sutherland v. the United Kingdom* (1997); *S.L. v. Austria* (2003); *B.B. v. the United Kingdom* (2004)).

Sex/gender

Whether a person is a man, a woman or a transsexual. The CJEU held that discrimination against a transsexual constituted discrimination on the grounds of sex (*Case C-13/94 P. v S.*).

The general rule developed by the CJEU in its case law is that direct discrimination based on sex can never be justified. However indirect discrimination may be objectively justified if (a) the measures used correspond to a genuine need, (b) the measures are appropriate to achieving their objectives and (c) the measures are necessary to that end (*Case C-170/84, Bilka*). The most significant case law has concerned (i) employment, (ii) maternity, (iii) indirect discrimination and part-time work and (iv) social benefits. The CJEU has been active in attempts to stop indirect discrimination against women in the job market. In response to challenges by men, it has set limits for positive action to remedy structural discrimination against women.

In *Zarb Adami v. Malta*, no. 17209/02 (see below the section on indirect discrimination) the applicant complained that the manner in which the lists of lay judges in Malta were compiled and the conditions under which a person could be exempted from this obligation were discriminatory and put men in less favorable position than women. After 26 years of service as lay judge, the applicant was fined because he refused to perform this duty. During the procedure when he attempted to prove the existence of discriminatory practice to the detriment of men, despite the acceptance of the submitted statistics that led to the conclusion that realistically there was a trend whereby men were predominantly engaged as lay judges, the national authorities rejected his claim that there was a practice that disproportionately affects more men than women. Contrary to their position, the ECtHR relied on the statistical data which showed that more than 95% of the lay judges recruited in Malta in the past five years were men, and accordingly established violation of Article 14 in conjunction with Article 4 of the ECHR.

The case *Ünal Tekeli v. Turkey*, no. 29865/96 concerns the national authorities' refusal to allow the applicant to bear only her maiden name after her marriage. The ECtHR noted that Turkey was the only State to legally impose the husband's name as the couple's surname. It further addressed the importance of equality of the sexes in the Council of Europe system, in international law general and among member States. It concluded that there was no reasonable justification to prevent the applicant, a lawyer who was recognisable under her maiden name, to bear only her maiden name after her marriage. The ECtHR found that she was discriminated against on the basis of her sex. In a similar case, the ECtHR found that the applicants had been discriminated against on the grounds of sex since the Swiss authorities had refused to allow them to register the wife's name as their family name (*Burghartz v. Switzerland* (1994)).

In another case, the ECtHR found that the availability of parental leave allowance to mothers, but not to fathers did not amount to discrimination on the grounds of sex (it held that the difference in treatment in law on the grounds of sex had been justified), (*Petrovic v. Austria* (1998)).

The allegations of discrimination on the grounds of sex were examined in the cases of *Rasmussen v. Denmark* (1984) and *Mizzi v. Malta*, no. 26111/02 which concerned the introduction, in the national legislation, of time-limit for a presumed father to contest paternity of a child born during marriage, while wives could institute such proceedings at any time. The ECtHR found that the difference in treatment between men and women was justified.

Discrimination based on „other status” of the victim

In *Gaygusuz v. Austria* (1996) the applicant was a Turkish national who lived and worked in Austria. He was denied an unemployment benefit on the grounds that he was not an Austrian national. The applicant claimed that there was no objective and reasonable justification for this differential treatment. The ECtHR held that the applicant was legally resident in Austria and paid regularly contributions to the unemployment insurance fund. In the absence of any other ground for rejecting his claim to obtain the benefit, the ECtHR concluded that factually he was in a similar position to Austrian nationals with regard to his entitlement to this particular benefit. The differential treatment for reasons of nationality was not based on any reasonable or objective justification.

Similarly, in *Luczak v. Poland*, no. 77782/01 the applicant was a French stockbreeder who lived many years in Poland and complained that he was not allowed to be registered under the special social insurance regime, which was open “only” for Polish nationals. The ECtHR established that he was in similar position with the Polish stockbreeders because he had regulated residence permit in Poland, and paid the public charges in regular and orderly manner just like the native nationals. In addition, he was also part of the general social insurance of Poland. In this way, on one hand the ECtHR equalized the factual links between the state and the fulfillment of public obligations with the citizenship on the other hand.

In *Chassagnou and Others v. France*, nos. 25088/94, 28331/95 and 28443/95, 24/04/1999 the ECtHR found inter alia a violation of Article 1 of the Protocol 1 in conjunction with Article 14 in view of the fact that according to applicable laws small landowners were obliged to transfer hunting rights over their land to a hunting association so that all hunters in the area could hunt on their land. On the other hand, no such requirement existed with respect to the owners of large areas of land who could use their land as they wish. The ECtHR established discrimination based on the difference in treatment between large and small landowners.

In *Mazurek v. France* (2000), the applicant, who had been born out of wedlock, complained that national law imposed, unlike children born in wedlock, an upper threshold of his mother’s estate that he could have inherited. The ECtHR found that this difference in treatment, based solely on the fact of being born out of wedlock, was not justified since it penalised children who have no control over the circumstances of their birth.

Multiple discrimination

A victim of discrimination may be protected on more than one ground: she may be a Muslim minority ethnic woman, an elderly Rastafarian, a disabled Roma, etc.

Victims may feel that the discrimination they have suffered is due to a combination of protected grounds and cannot be covered by one of them alone. This may be the case for instance if a Muslim Roma woman employed in Bulgaria feels that her lack of promotion is due to the combined grounds of religion, ethnic origin and sex. The concern is that she may not succeed in establishing discrimination solely on the ground of religion, or ethnic origin, or sex, or even on two grounds combined.

If it is not possible to claim multiple discrimination under domestic law because different grounds are protected to different extents and/or in different pieces of legislation, then victims have to make a choice. They may select the ground on which they can make the strongest claim and take action on that ground alone. Alternatively, they may bring a claim of multiple discrimination. In Macedonia where the list of protected grounds is open, multiple discrimination may be brought under the ‘any other ground or characteristic’ clause.

Real, assumed or associated ground

In many cases the victim is told clearly on what ground she faces discrimination: ‘we do not serve Travellers’ (ethnic origin or race), ‘sorry, no guide dogs’ (disability), ‘young female staff sought’ (multiple sex and age discrimination).

However, there are also instances where victims feel that assumptions have been made about a protected ground, but it is not clearly stated. Discrimination based on an assumed ground – whether or not true in reality – is equally prohibited under European law. If an employee is assumed to be gay, Jewish, Muslim or pregnant and is therefore not employed, not promoted or laid off, she can seek protection under European law. It does not matter whether or not she is really gay, Jewish, Muslim, or pregnant.

The Employment Appeal Tribunal in the United Kingdom dismissed a claim for harassment brought by a man who was not gay and who was known by his harassers not to be gay, but who was nevertheless subject to homophobic abuse. The Tribunal took the view that the claimant was not subject to harassment on the grounds of his actual sexual orientation. The Court of Appeal overturned the Tribunal's decision and ruled that the fact that the harassment occurred on the grounds of the applicant's sexual orientation, in the sense of being based upon or linked to his real or imagined sexual orientation, was sufficient to bring the complaint within the scope of the applicable legal provisions (*English v Thomas Sanderson Blinds Ltd*, Court of Appeal, 19 December 2008, [2009] IRLR 206, <http://www.bailii.org/ew/cases/EWCA/Civ/2008/1421.html>).

There are other instances when friends, relatives or colleagues of a victim who has a real or assumed protected characteristic also suffer discrimination together or through the victim. For instance, if an ethnic minority couple together with their majority friends are denied entry to a bar, the friends suffer discrimination based on associated race or ethnic origin, in other words 'on the ground of ...'.

The CJEU held that the prohibition of direct discrimination and harassment in the Framework Employment Directive was not limited only to people who were themselves disabled. This prohibition extended to an employee whose child was disabled and who was the primary carer of her child (ECJ Case C-303/06 *Coleman*).

III.2. Fields covered - In which areas is discrimination prohibited?

In Macedonian legislation, both the public and private sectors are covered, as well as public life (i.e. civil and political rights, such as equality before the law).

Protection against discrimination is not conditional on nationality, citizenship or residence status. In the majority of states, both natural and legal persons are protected against discrimination. In the Anti-discrimination Law vicarious liability is present. However, the issue of third parties would depend, at this stage of legal practice upon the character of the relationship with the legal person involved and the court decision.

In Europe, protection against discrimination in the provision of goods and services is mostly restricted to those available to the public. A variety of ways of distinguishing publicly available goods from privately available goods have emerged.

Pay includes employment-related benefits provided as part of remuneration. cover contract work, military service and statutory office. Employment in both the public and private sectors is covered. lack of protection for all employees and the self-employed.

A self-employed person is defined as an independent worker who works independently of an employer, in contrast with an employee who is subordinate to and dependent on an employer. The self-employed are generally concentrated in a number of occupations such as farming, shop keeping, construction and law and accountancy. Membership and involvement in trade unions and work councils, bar and medical associations is also covered.

The meaning of 'services' is also unclear, but certainly includes services performed for remuneration and probably excludes services available only privately. all aspects of housing: sale and letting of properties, allocation of tenancies and management of rented accommodation in the public and private sectors, housing loans, and residential care institutions.

The Explanatory Memorandum to the proposal for the Racial Equality Directive notes that 'social advantages' include benefits of an economic or cultural nature which are granted within the Member States either by public authorities or private organisations. Examples given in the Explanatory Memorandum include concessionary travel on public transport, reduced prices for access to cultural or other events and subsidised meals in schools for children from low-income families.

For more details on this topic read:

The Prohibition of Racial and Ethnic Discrimination in Access to services under EU Law in European Anti-discrimination Law Review 10/2010

Housing Rights and Racial Discrimination in European Anti-discrimination Law Review 10/2009, both available at www.non-discrimination.net/en/publications.

Fields covered by the Macedonian ADL, RED and ECHR

FED/RED	Macedonian legislation	ECHR
(a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion	(1) Employment and working relations	1) Rights and freedoms set out in the Convention (with respect to Article 14) 2) Rights and freedoms set forth by law (general ban on discrimination/ Article 1 of Protocol No. 12)
(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience		
(c) employment and working conditions, including dismissals and pay		
(d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organizations	(8) Membership of and involvement in trade unions, political parties, CSOs, foundations, and other organizations based on membership	
(e) social protection, including social security and healthcare	(3) Social security, including social protection, pension and disability insurance, health insurance and healthcare	
(f) social advantages		
(g) education	(2) Education	
(h) access to and supply of goods and services which are available to the public, including housing	(7) Access to goods and services (5) Housing	
	(10) "Other areas stipulated by law"	

III.3. Key Concepts

A. What is meant by discrimination? What kind of conduct is prohibited?

In everyday life the word discrimination is often used interchangeably with injustice, unfairness, inequality, or a lack of equal opportunities. Discrimination does relate to these moral and philosophical values, but the law understands it in a much narrower sense. Discrimination does not mean any injustice, (human) rights violation or unlawful act, and protection from discrimination is only due to those who share a protected characteristic. What is more, the law may provide rules under which seemingly unfair, unjust or even unequal treatment is justifiable. As discrimination can be justified in certain instances it may not seem morally fair or just, but it is still legal.

The non-discrimination principle requires the equal treatment of an individual or group irrespective of a certain personal characteristic, or in other words, their protected ground. Equal treatment means that similar situations should be treated alike (a disabled and a non-disabled worker should receive equal pay for equal work) and dissimilar situations should be treated differently (reasonable adjustments should be made to allow the disabled worker to do her job). The non-discrimination principle is also used to provide protection from conditions or rules that are seemingly unrelated to a protected ground but that produce effects which systematically disadvantage people who have that characteristic.

Discrimination may consist of conduct that intends to discriminate (for instance, when employees over 50 are made redundant because they cost too much and are assumed to work less efficiently and fall ill more often) or of practices that may have a discriminatory effect (for example, when public sector employees, including cleaning and catering staff, are required to have perfect language skills, which has a detrimental effect on certain racial and ethnic minorities).

Under Article 9 of the Macedonian Anti-discrimination Law discrimination shall be taken to mean every activity with which one person directly or indirectly invoke, encourage, give instructions or instigate other person to commit discrimination.

Discrimination does not only occur at the individual level. It is often directed against groups or communities and also results from unequal social structures. The Non-discrimination Directives provide the best tools to fight discrimination at the individual level. However, if victims work together and involve non-governmental organisations, it is possible to challenge structural discrimination.

Structural discrimination arising from national rules which permit employers to dismiss employees aged 65 or over by reason of retirement was challenged in a domestic court by Age Concern England, an CSO representing an interest group. The case was referred to the CJEU, which ruled that the issue fell within the scope of the Framework Employment Directive, which imposes on Member States the burden of establishing to a high standard of proof the legitimacy of employment, labour market or vocational training policies, including policies on mandatory retirement ages. The age of retirement has since been the subject of many other challenges and preliminary referrals and is currently the subject of debate in various Member States. (ECJ Case C-388/07 Age Concern England).

1. Direct discrimination

Direct discrimination is common in Europe and is relatively easy to spot. Definition in macedonian legislation is problematic, as it mixes Directive definitions with that found in international treaties. The new Anti-discrimination Law, Art. 6(1) defines direct discrimination as discrimination on any of the discrimination grounds, when one person is treated less favourably, or there is differentiation, exclusion, or limitation that results or could result as deprivation, violation or restriction of the equal recognition or exercise of the human rights and basic freedoms compared to the treatment another person has or could have in the same or similar condition.

Useful links:

Domestic anti-discrimination law analysed and compared in detail across Member States in *Developing Anti-discrimination Law in Europe: The 27 EU Member States Compared*:
<http://www.non-discrimination.net/content/media/Comparative%20EN.pdf>

Practical tip:

Often the ‘but for’ test will help you identify direct discrimination. But for my disability, would I have been treated this way? Is unequal treatment based on my age?

Can you identify a discriminatory purpose behind the unequal treatment? Then it is more likely to be direct discrimination.

NOTE: direct discrimination can sometimes be lawful!

Typical scenarios:

- Failure to recruit because of any protected characteristic;
- Discriminatory job advertisements;
- Difficulties in enrolling in schools for disabled or ethnic minority children;
- Bars, restaurants or shops denying entry on racial grounds or not adapting their premises to wheelchair users;
- Estate agencies or property owners not renting to minority racial or ethnic tenants;
- Pay differences: in certain Member States statistics indicate that minority men earn less than majority men and minority women earn even less than majority women;
- Restrictions on wearing religious clothing or symbols;
- Employees over 50 made redundant;
- Mandatory retirement age set at 58, 60 or 65;
- Racially segregated social housing and education.

Direct discrimination under ECHR

The ECHR does not set forth a definition on direct discrimination. Nevertheless, in *Willis v. United Kingdom*, no. 36042/97 the ECtHR stated the following:

“Article 14 of the Convention affords protection against discrimination, that is treating differently, without an objective and reasonable justification, persons in relevantly similar situations”.

In addition to the so-called positive definition, which requires equal treatment of people in similar situations, the case law of the ECtHR includes another interpretation of direct discrimination which refers to cases when persons in different situation should be treated differently to the extent required that they have the conditions to enjoy the respective right and freedom. In such cases, discrimination occurs if people in different situations receive the same treatment. Thus, in *Thlimmenos v. Greece* the ECtHR established the following:

“The right not to be discriminated against ... is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different”.

In this case the applicant was not allowed to become member of the association of chartered accountants because he had been previously convicted of „insubordination” as a Jehovah’s Witness for having refused to wear a military uniform during the military service. The ECtHR established that the association, having refused the application of

the applicant on this ground, did not make distinction between him and the other convicted persons, given that his conviction was based only on his religious beliefs. The ECtHR concluded that because the applicant was not treated differently from the other convicts, besides that his conviction was solely based on his religious beliefs and as such it was different from the convictions of the other convicts, he was subjected to discrimination which was disproportional and did not have a legitimate aim.

Accordingly, it is clear from these definitions that the focus is on the unequal treatment in matters of direct discrimination. Yet, it does not necessarily mean that any form of unequal treatment accounts to discrimination. In *Belgian Linguistics case* (1968), the ECtHR stated that under Article 14 the states are not required to prohibit any different treatment of their citizens. On the contrary, in certain situations different treatment is imposed as a legitimate need in order to overcome certain differences that exist in the society. What matters about discrimination is that there should be an unequal treatment of people who are in comparable situations. Unequal treatment may be problematic from the aspect of prohibition of discrimination only if people, who are in same or similar situation with other people, get less favorable treatment than their comparators. When one speaks about different treatment of people in comparable situation, it should be underlined that the comparison is made in respect of particular characteristic of the people by which they are distinguishable from each other. In the case *Kjeldsen v. Denmark* (1976), the Court pointed out that Article 14 prohibits “discriminatory treatment having as its basis or reason a personal characteristic („status”) by which persons or groups of persons are distinguishable from each other.”

A comparator is a person with relatively identical status with the person who complains to be subject of discriminatory practice, and the only difference being a certain characteristic, on basis of which, the person who is subject of observation, is treated differently from the respective comparator. In *Fredin v. Sweden*, the ECtHR stated the following “For a claim of violation of Article 14 to succeed, it has to be established, inter alia, that the situation of the alleged victim can be considered similar to that of persons who have been better treated”

In general, it is not difficult to identify such comparators in practice. Yet, the burden of proof and the identification of the comparator falls on the complainant, that is, the person who claims to be victim of discrimination. In the ECtHR case-law:

- Spouses and civil partners regarding their entitlement to certain economic and social rights (*Munoz Diaz v. Spain*);
- Foreign national (Moroccan) is not in identical situation with the nationals of the country regarding the possibility for extradition from the country in which he seeks asylum (due to being convicted for a crime). Although the ECtHR established that the applicant is in similar situation with regard to the possibility for extradition with the nationals of member-states of European Union (who, just like the nationals of the states could not be extradited because of the EU regulation that guarantees the freedom of movement for this category of citizens), still the ECtHR found that such different treatment is justified (*Moustaquim v. Belgium*);
- Blood relatives (two sisters in the respective case) are not in the same position as the spouses and civil partners (who also live in the same household) regarding the right to acquire ownership through inheritance of property obtained during the common life in partnership. This is so because marriage and civil partnership represent separate partnerships established on voluntary and conscientious basis and create certain contractual rights and obligations that do not exist among blood relatives (*Burden v. UK*);
- Attorneys at law, who were obligated according to the national regulations to provide pro bono legal services at the start of their careers, cannot be equalized with other professions (public notaries, accountants) for whom the pro bono obligation did not exist (*Van der Mussele v. Belgium*).

In European law direct discrimination is when one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of his or her protected characteristic.

The company Firma Feryn specialising in selling and installing doors was advertising job vacancies. In a radio interview, its director stated that the company was only seeking to recruit fitters of Belgian origin as its customers were reluctant to let foreign fitters into their homes. The national equality body (established to assist victims of discrimination) took legal action against the company, arguing that this public statement amounted to direct discrimination. In a preliminary reference, the CJEU confirmed that the Racial Equality Directive applied to discriminatory job advertisements. It also stated that sanctions need to be applied even if there is no identifiable victim (ECJ Case C-54/07 Feryn).

Direct discrimination can be obvious as in the Feryn case or disguised (overt or covert discrimination). A typical scenario of covert discrimination is when bars or clubs maintain a members-only entrance policy, but membership is not granted in a racially neutral fashion.

More recently, the CJEU has identified direct discrimination in cases where a formally neutral criterion in fact affects one group only – by its nature or on the basis of a rule that has the force of law.

German law permits same sex couples to form life partnerships, but they cannot get married. Mr Maruko survived his life partner, who had been making payments into an occupational pension fund. He applied for a survivor's pension from the fund but was refused. In a preliminary reference, the CJEU ruled that the Framework Employment Directive applied to his case. It also ruled that partners in a same-sex life partnership were in a comparable situation to spouses in relation to a survivor's pension paid out of an occupational pension fund (Case C-267/06 Maruko). This ruling has already been implemented by the German Federal Labour Court in another case (Az: 3 ATR 20/07, 14.01.2009).

Direct discrimination can be lawful when European law permits an exception to the general principle of anti-discrimination, but different exceptions apply to different protected grounds. This means that when you identify unequal treatment as direct discrimination, you need to check whether an exception applies to your case before you take action.

In general, racial or ethnic direct discrimination is the most difficult to justify, while disability and age-based direct discrimination can be more easily justified. The exceptions to the principle of equal treatment permitted under the Non-discrimination Directives have largely been taken up in national law. In some instances it is suspected that the exceptions are wider than the Directives allow.

Exceptions to direct discrimination in European law

TYPE OF EXCEPTION	GROUND	EXAMPLE
Genuine and determining occupational requirements (GDOR)	All grounds	It may be lawful to only employ a Black actor to play Othello or a Chinese chef in an authentic Chinese restaurant.
Positive action	All grounds	Disability quotas in employment, extra language classes for minority racial or ethnic groups, financial incentives to promote employment of younger and/or older workers.
Employers with an ethos based on religion or belief	Religion or belief	It is lawful to only employ a member of a certain church to be head of a denominational school.
Armed forces and other specific occupations not covered	Disability and age	National law may provide that it is lawful not to employ a person over a certain age or a certain level of disability as a soldier.
Family benefits	Sexual orientation	It is lawful to exclude same sex partners from family benefits if same sex couples can also get married in the Member State.
Health and safety	Disability	It is lawful not to employ a disabled job seeker if her employment would inevitably lead to a breach of fire regulations.
Exceptions related to age	Age	It may be lawful to put maximum limits on the age of recruitment to certain professions. NOTE: this exception is subject to a number of challenges before the ECJ, including on maximum and minimum age requirements for pilots and firemen.
Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others	Disability, age, sexual orientation, religion or belief	National law may allow a registrar of births, deaths and marriages to be laid off if she refuses to marry same sex couples on the basis of her religious convictions.

Please note that the more general exceptions listed towards the end of the table may lead to judgments that are specific to the historical and political context of a particular State.

National definitions of direct discrimination share common features, which means you always need to consider 3+1 aspects when planning legal action in any country (see below)

Common elements of direct discrimination in national laws

ELEMENT OF NATIONAL DEFINITION	EXAMPLE
There is a need to demonstrate less favourable treatment.	I was not hired. I am paid less. I could not get into the bar last night. The insurance company refused to issue a policy to me.
There is a need to find a 'comparator', i.e. another person in a similar situation but with a contrasting characteristic that is usually shared by the majority.	I am disabled, he is not. I am a lesbian, he is heterosexual. I am a Sikh, she is white British.
It is possible to use a comparator from the past or a hypothetical comparator, or to compare treatment to an ideal minimum standard of treatment.	A previous employee who earned more doing the same job. In equal pay cases, a person at the same grade employed by a similar employer can be used as a comparator. No person should be treated like this out of respect for human dignity.
In general, direct discrimination cannot be justified except on the ground of age	See, for instance, challenges before the ECJ on maximum and minimum age requirements.

It may jeopardise your chances if you do not identify the correct comparator. For instance, in age discrimination cases it may prove difficult to identify the right age groups to prove unequal treatment. In racial, ethnic and religious discrimination it may be important to avoid comparisons with other minority racial, ethnic or religious individuals or groups instead of a majority individual or group. In multiple discrimination cases the best comparator may not be a person who belongs to the majority group in every respect. Finding the best comparator depends on social attitudes towards different minority groups. For instance, the best comparator for a Muslim Roma in southern Bulgaria who is trying to prove ethnic discrimination may be a Muslim Turk rather than a Christian Bulgarian.

In some States discrimination can be established in comparison with an ideal minimum standard of treatment, for instance conduct required by respect for human dignity.

2. Indirect discrimination

Under Article 6(2) of the Macedonian Anti-discrimination law, indirect discrimination on any discrimination grounds is when an apparently neutral provision, criterion or practice would put person or group at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Useful link:

Limits and potential of the concept of indirect discrimination is full of practical examples, tables and charts to help you understand how the concept of indirect discrimination is applied in practice. Available at:

http://www.non-discrimination.net/content/media/limpot08_en.pdf

Practical tip:

Ask yourself why a practice that seems OK at first sight disadvantages some people more than others. Are people of a protected ground disproportionately represented among those disadvantaged? You may become aware of a discriminatory intention, but in general indirect discrimination is about the effect of a practice, not the intention behind it. Keep in mind that it is NOT necessary to prove the existence of a discriminatory intention in order to establish the existence of a discriminatory rule or practice.

Typical indirect discrimination scenarios:

- ♦ Language requirements that are not in fact necessary to fill lower ranking positions (language usually serves as a proxy for non-nationals who may belong to a minority race or for nationals who may belong to a minority ethnic group);
- ♦ Inappropriately high requirements for vocational or academic qualifications;
- ♦ General ban on an occupation or activity that is only typical of people who share a certain protected characteristic (fortune telling, collection of scrap metal, street art and trading);
- ♦ Having performed military service as a requirement for recruitment (may discriminate against some religions);
- ♦ Dress codes.

Indirect discrimination in the ECHR

The ECHR does not set forth or define the indirect discrimination just like the direct discrimination. Yet, the ECtHR does recognize indirect discrimination whereby the focus is not mainly on the unequal treatment, but on the effects of such treatment which are differently experienced by people in different situation. Thus „*a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group*„ (*D.H. and Others v. the Czech Republic [GC]*, No. 57325/00; *Opuz v. Turkey*, No. 33401/02; *Zarb Adami v. Malta*, No. 17209/02).

The first case in which the ECtHR accepted the existence of indirect discrimination is *Hugh Jordan v. the United Kingdom*, no. 24746/94. In this case, according to the applicant, the circumstances in which his son was killed by the security forces in Great Britain indicated to existence of discrimination on the ground of religion. Namely, the applicant complained that majority of the people killed in Northern Ireland during the period 1969- 1994 were young Catholics, as opposed to insignificant number of killed Protestants. In support of this argument, the applicant also provided statistics that showed this trend. The Government denied the claim and stated that imprecise statistics cannot serve as sufficient evidence to be able to make analogy regarding the murders or, more over, the different treatment. The ECtHR, although not having accepted the statistics as credible evidence, stated the following: „Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group..“

Later, in *Zarb Adami v Malta* (2006) the ECtHR complemented the definition on indirect discrimination, thus saying that „*discrimination potentially contrary to the Convention may result not only from a legislative measure, but also from a de facto situation*“.

According to the national legislation in Malta, lay judge could be any adult who was national of Malta, spoke the Maltese language and had good character. The exemption from this obligation, inter alia, was allowed for people who were taking care of their family. The ECtHR established that such legally prescribed requirement for the function of a lay judge had a neutral character. Yet, the ECtHR based its judgment on statistical data, whereby there were more than four thousand men who were lay judges as opposed to only five women lay judges. In percentages, it meant that more than 95% of the lay judges in Malta were men, although there were more women in the adult population. Therefore, the ECtHR concluded that the manner in which lists of lay judges were being compiled in Malta and the conditions under which a person could have been exempted from this obligation, were discriminatory and put men in less favorable position than women. The ECtHR did not accept the argument of the state that the practice was conditioned on the traditional values of the Maltese society where women were the ones who were taking care of the family and the fact that defense councils had a practice to request that women lay judges are exempted. Accordingly,

the legal provision was not problematic in this particular case, but the practice which had the effect to discriminate men as opposed to women.

Given the respective cases, one can conclude that the first element in the analysis of such more complex type of discrimination is the existence of apparently neutral provision, criterion or practice, which although being applied equally for everyone, considering the effects it generates, it leads towards placing individuals or members of certain group (based on certain characteristic) in less favorable position than other people (comparators).

The second element to be established is the existence of disproportional harmful effects on the individual or members of a group, deriving from the application of such apparently neutral provisions, criteria or practices. This makes the essential difference between direct and indirect discrimination. The focus of the latter is on the existence of harmful effects from certain legislation or practice, and not on the unequal treatment. Accordingly, the focus of attention is shifted towards the harmful effects that emerge in practice. Given the specifics of indirect discrimination, it is more difficult to prove this type of discrimination. Most often, the basic tool which is used is statistics. If the statistical data are credible, representative and convincing, they may serve as a base, but not as essential evidence to establish the existence of indirect discrimination. The power of statistics as evidence is further elaborated in the section on practical aspects and evidence which can be used in the procedure to establish indirect discrimination. The test of proportionality comes at the end of the analysis also for this type of discrimination, whereby one should establish if the respective provision, criterion or practice can be objectively justified, i.e. if there is legitimate aim and if the measures, which are subject of observation, had been adequate and indispensable to achieve that aim.

In European law the general definition of indirect discrimination is: where an apparently neutral provision, criterion, or practice would put people sharing a protected characteristic at a particular disadvantage compared with other people.

In some Member States very strict language proficiency requirements for both speaking and writing in the national language need to be met for employment in the public sector. As a result, racial and ethnic minorities are vastly underrepresented among public sector employees not only in higher ranking executive positions but also in the lowest ranking positions that in general require few or no writing skills.

What could be seen as indirect discrimination is often lawful because European law permits a general exception to the definition above based on the aim of the provision, criterion or practice. This general exception asks why a certain provision, criterion or practice was adopted, what is its aim? It also asks whether the way, the model, the solution used in the practice is necessary and appropriate? Or could the aim be achieved in any other way?

When challenging language requirements you need to find out why they have been imposed. Do they ensure that the best public service is available to all citizens? Was the imposition of language requirements the only way to achieve the best public service? Are there other ways in which this could have been done? Are the best language skills necessary in all jobs to provide the best public service?

Indirect discrimination is lawful if the provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. This is for respondents to prove, but it is also useful for victims to examine whether what they think is discrimination is in fact lawful. In practice, there is a broad range of justifications that may render a certain type of indirect discrimination lawful under European law. However, there are certain principles that limit which justifications are acceptable:

- Purely budgetary (financial) considerations can never serve as objective justification for discrimination.
- The aim of the practice must be unrelated to discrimination and mere generalisations are not sufficient.
- Proportionality requires that the concrete measure taken in order to achieve the legitimate aim should be suitable for achieving that aim.
- Proportionality also requires the respondent to show that another measure with a lesser or no detrimental effect would not be effective.

How does this test apply to our example?

If the aim of the language requirements is to ensure the best public service to all citizens, that seems to be unrelated to discrimination based on race and ethnic origin. However, there are many potentially suitable ways in which this aim could have been achieved, including requirements relating to academic qualifications, length and diversity of professional experience and knowledge of foreign or minority languages, depending on the kinds of public service in question. A combination of these requirements appears particularly appropriate. It is also clear that for public sector jobs that are not dependent on language skills, these alternative selection criteria would in principle be even more appropriate than a language requirement.

How does this apply in practice?

In *D.H. and Others v. the Czech Republic*, the applicants are Roma who were excluded from the regular educational process and were enrolled in special schools for children with special needs. They complained that this treatment was based on their ethnicity and subsequently they were subject of discrimination in violation of Article 14, in conjunction with their right to education from Article 2 Protocol No. 1. They did not complain that the educational system of selecting the students was explicitly and intentionally directed towards isolation of Roma, but considered that the manner in which it was implemented in practice led to having a disproportionately big number of Roma students enrolled in these schools. The placement in these schools was based on tests that examined the intellectual capacities of children. The same tests were applied for all students who could potentially be enrolled in those schools. Though of neutral character, in practice the tests have proved to be exceptionally difficult for Roma children. As a consequence, Roma students received less quality education than the education provided in the regular schools, which resulted in aggravated access to the secondary schools and limited employment opportunities. Having relied on statistics, the ECtHR found that extremely big percentage of all the students attending the special schools were Roma. According to the statistics provided by the applicants, around 50 to 56% of all enrolled children in the respective special schools in that particular region in Czech Republic were Roma, whereas there were only 2% Roma from the total number of children enrolled in the schools in Czech Republic. Data from international organizations suggested that between 50% and 90% of the Roma in the whole country attended such special schools. Such data were sufficient for the ECtHR to conclude that Roma were „disproportionally affected” given their overall share in the total population in the country. The ECtHR did not accept the argument of the state that the aim of this practice was to help Roma raise their low educational level, given the difficulties that Roma people encountered to learn the Czech language as well as the lack of preschool education. Furthermore, the ECtHR found it irrelevant that such practice was not prejudiced, i.e. that the authorities did not have the intention to specially target the Roma students with the use of such tests. Ultimately, the ECtHR found it irrelevant that the parents of Roma students consented to such a practice given the fact that parents did not dispose of sufficient information to be able to make the rightful and reasonable decision, and moreover, there was no possibility for an individual to give up the right to education.

Similarly, in *Oršuš and Others v. Croatia*, the ECtHR found violation of Article 14 in conjunction with Article 2 of protocol No. 1 of the ECHR, given the fact that Roma were dominantly enrolled in specialized classes within the regular schools, and according to the Croatian government it resulted from their exceptionally poor fluency in Croatian language.

3. Harassment

Under Article 7 of the Macedonian Anti-discrimination law, harassment or degrading conduct is violation of the dignity of person or group of persons generated from discriminatory ground and which has purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, humiliating or frightening environment, approach or practice.

Practical tip:

Forget comparators when you are thinking about harassment. Concentrate on the feelings the treatment arouses in you. Check if the conduct can be said to violate your dignity as a human being and create a degrading environment.

Typical scenarios:

- ♦ Sexist, racist or homophobic jokes or stories told in the workplace;
- ♦ Posters, e-mail messages, ordinary mail or graffiti with similar content.

Under European law harassment is unwanted conduct related to a protected ground with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. Even if the purpose is not to harass, establishing a hostile environment that violates a person's dignity (effect) is sufficient for a finding of harassment.

There are uncertainties in national laws about the definition of a 'degrading environment' because this can be subjective: what is a degrading environment to one person may not appear degrading to people who do not have the protected characteristic.

It can also be difficult to decide who is liable for harassment, which is often committed by colleagues in the workplace. Member States provide for the liability of employers in these cases and some even place a special duty on employers to prevent or redress harassment. Public authorities and institutions such as hospitals, schools or local councils have a duty to tackle harassment committed by their employees, otherwise they can be held liable under civil law.

So far one claim of harassment has reached the CJEU, involving a mother who was the primary carer of a disabled child. Harassment included: labelling the mother 'lazy' when she asked for time off to care for her son, even though this was granted to the parents of non-disabled children; inappropriate and insulting comments made about both her and her child, whereas other employees took time off to look after their non-disabled children without provoking such comments; and threats of dismissal when she occasionally arrived late for work due to her child's condition, whereas other parents did not incur such threats (ECJ Case C-303/06 Coleman).

Many Member States have transposed the Non-discrimination Directives to cover more fields in national law. This is how hate speech can be deemed harassment in Romania and Bulgaria, where equality bodies have found newspapers, mayors and politicians guilty of hate speech both at the local and national levels. This may be relevant for the Macedonian context as well.

4. Victimisation

In Article 10 of the Macedonian Anti-discrimination Law victimization is declared as a form of discrimination and covers persons who report discrimination, persons who file complaints, as well as witnesses.

Practical tip:

Forget comparators when you are thinking about victimisation – you do not need one under European law. Is victimisation linked to a complaint of discrimination? Victimisation not linked to a complaint of discrimination may be widespread, but it is not protected by European non-discrimination law.

Victimisation describes any adverse measure taken by an organisation (including employers and public authorities) or by an individual in retaliation for efforts to enforce the right to equal treatment. The most common example is where an employee complains about unequal treatment and the employer responds by dismissing or failing to promote the employee.

The Non-discrimination Directives define victimisation as one form of unlawful discrimination: it is any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment. There is an obligation on Member States to ensure protection from it in their national legal systems.

An air stewardess complained to the management that she had been discriminated against on the grounds of race. The airline dealt with the complaint, but failed to inform the stewardess of the outcome of the disciplinary procedure. In fact, it remained unclear what measures the airline took against the offender. The refusal of the stewardess to 'mediate' with the offender was seen by the management as a refusal to cooperate and a reason not to renew her contract. The Dutch Equal Treatment Commission (ETC) saw this as a clear case of victimisation. In an action challenging the dismissal, the judge found against the airline and ruled that complaints of discrimination should be dealt with in a timely and transparent fashion and that feedback must always be given to the complainant e.g. on disciplinary action against the offender. Both the ETC and the judge came to the conclusion that the employer had failed to put in place transparent procedures to deal with complaints about discrimination. The ETC found a breach of equal treatment legislation, whereas the civil court simply referred to a general provision of the civil code to the effect that an employer should make sure that working conditions are safe (good employership), which includes providing working conditions that are free from discrimination and a transparent complaints procedure (ETC Opinion 2010-52, 29 March 2010, <http://www.cgb.nl/node/15109/volledig>; Haarlem District Court, Judgment of 27 April 2010, LJN: BM5906 <http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BM5906>).

5. Instructions to discriminate

Under Article 9 of the Macedonian Anti-discrimination law, discrimination shall mean every activity with which one person directly or indirectly invoke, encourage, give instructions or instigate other person to commit discrimination.

Both Non-discrimination Directives prohibit instructions to discriminate. This covers, for instance, night club proprietors who instruct doormen to deny customers access on grounds of race or home owners who instruct estate agents not to let or sell their property to ethnic minorities. It would also cover instances where employers instruct temping agencies not to refer employees over a certain age to them.

A municipal employment office was not referring job applications from candidates of certain ethnic origins or ages if the employer indicated that they did not wish to employ such people. When asked about this practice, the manager of the office said that employers' requests indicated their working methods. He explicitly mentioned employers who said that they would not accept applicants who were over 50 or of Turkish origin. He believed that it was pointless to ignore such requests as exposing candidates to inevitable rejection would have only discouraged them. The municipality launched an internal inquiry as requested by an CSO monitoring the case, but concluded that no discrimination had taken place as the proportion of older people and immigrants referred by the employment office was sufficient (25%). The national equality body concluded otherwise. It found that the municipality was guilty of discrimination as employment of a certain proportion of job seekers from protected groups did not justify direct discrimination against them. It also held that employment offices were responsible for calling employers to account for discriminatory instructions (Dutch Equal Treatment Commission Opinion 2009-40 of 13 May 2009).

6. The requirement to make reasonable accommodation for people with disabilities

Macedonian law makes twofold provisions for the accommodation of the disabled. First, in Article 5(12) a definition is incorporated from the Article 5 of the Framework Employment Directive. The, in Article 8(2) the lack of reasonable accommodation for people with mental and physical disability is declared as discrimination.

The Framework Employment Directive places employers under the duty to 'take 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 burden is not disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

The reasonable accommodation duty is often subject to the limitation that it should not create a 'disproportionate burden' for the employer. The type and cost of reasonable accommodation may differ from disability to disability. For instance, mentally disabled people may only need short on-the-job training to excel as shelf stackers, while a deaf employee may need written notes and email messages to communicate. The Directive provides an indication of three criteria to be taken into account when determining whether a particular accommodation is reasonable (Recital 21 of the Preamble).

The three-pronged test is based on:

1. the financial and other costs entailed;
2. the scale and financial resources of the organisation or company; and
3. the possibility of obtaining public funding or any other assistance.

A university student who used a wheelchair complained against his university for failing to make reasonable accommodations that would allow him to access to all lectures, exams, libraries and other student facilities. He also complained that the university did not comply with the general provisions of the law on the built environment. The university explained that it had taken all appropriate measures to enable the student to participate as fully as possible. As requested by the student, the university had made various adaptations, including installing a ramp and separate tables in the lecture theatre and providing personal assistance in the library. The Dutch Equal Treatment Commission appointed an expert to investigate compliance with the law on the built environment and concluded that the university was not at fault. The ETC also found that the university had made several reasonable accommodations and that the extra measures requested by the student (full access to the library and a separate reading room) were not proportionate to the investment required from the university. In sum, there had been no breach of equal treatment (ETC Opinion, 2010-11 of 27 January 2010, <http://www.cgb.nl/node/15039/volledig>).

Similar to Macedonian legislation, in Bulgaria courts have found that the failure to provide reasonable accommodation constituted direct discrimination. Moreover, Bulgarian law goes beyond the reasonable accommodation duty as formulated in the Framework Employment Directive, and places an absolute duty on public authorities to make built infrastructure accessible to people with disabilities.

Bulgarian Supreme Court acknowledges as absolute the positive duty of public authorities to build infrastructure accessible to people with disabilities. Namely, on 30 June 2008 the Supreme Court of Cassation ruled against the Municipality of Plovdiv, the second largest Bulgarian city, and held the public authorities liable for discrimination against a woman with a disability. She initiated court proceedings on the basis of the accessibility of public places to people with disabilities, including herself. She alleged that the general existence of non-accessible public buildings and transportation deprived her of opportunities to enjoy a social life. She did not refer to a specific incident but to the overall inaccessibility of the city's buildings and infrastructure to people with mobility disabilities. The Supreme Court ruled that the authorities' obligation laid down in the relevant legislation to eliminate barriers for people with disabilities was absolute. It awarded the plaintiff €5 250 in non-pecuniary damages for social isolation and deprivation of the right to professional and personal fulfilment. In addition, the Court ordered the authorities to remedy their failure to provide access without barriers to public buildings and means of transport to people with disabilities as well as to refrain from such infractions in the future (Supreme Court of Cassation, Decision N. 556 of 30 June 2008).

B. Can discrimination ever be justified?

In the Anti-discrimination Law there is a general clause that difference of treatment which is based on a characteristic related to any of the discriminatory grounds shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement does not overstep the level necessary for implementation.

The Anti-discrimination articles in Macedonian legislation do not include specific provisions on an exemption for employers with an ethos based on religion or belief. However, Article 8 of the Labour Law titled "Exemptions from prohibition of discrimination" may be sufficient for the churches, religious communities and groups to be exempt. In the Anti-discrimination Law this exception is elaborated in length in article 14(3-5).

It should be noted that it shall not constitute discrimination (art. 14(5)) if members of duly registered religions (it also goes for CSOs, political parties, trade unions and other organizations) act in accordance with their belief.

The Law on Service in the Army of the Republic of Macedonia envisages different age limitation, while disability is grounds for losing the status of military person. Disabled people are prevented from entering the Army since general and specific health and physical condition is unavoidable prerequisite³. Even in case the disability is result of the army service - that person would lose the status of military person.

In the Anti-discrimination Law there is general exception based on nationality understood as citizenship (in Macedonian: државјанство) relying on Article 3(2) of the Directives. The Anti-discrimination law provides protection to foreign citizens and stateless persons⁴; however in Art. 14 it is clearly declared that: the different treatment of people who are not citizens of Republic of Macedonia related to the freedoms and rights which are connected with the citizenship, will be not considered as discrimination.

In the Anti-discrimination Law there are three clauses stipulating exceptions in relation to “pregnant woman or mother” (art. 15(1)); to educational needs of invalid people (i.e. people with disability); and generally to “*special protection of ... invalid people*” (art. 15(7)).

In the Anti-discrimination Law there are two clauses exempting discrimination in relation to the minimum age in relation to professional requirements and career advancement (art. 14(18)) as well maximum age in relation to employment selection or, (we quote): *...for the need of rational time limitations connected to retirement and stipulated by law...*

Concerning protection of the rights and freedoms of others, in the Anti-discrimination Law there there is one exception that concerns the *...freedom of speech, public appearance, thought and public information...*” (Art. 14(7)).

General objective justification defence under the ECHR: The test of proportionality

Under the ECHR, the general defence is available with regard to both direct and indirect discrimination. In the case *Marckx v. Belgium* the Court stated: *„a distinction is discriminatory if it has no objective and reasonable justification”,* that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised,.. It means that the justification of unequal treatment of persons in similar or identical situation will have to be examined in the context of the aim and effects of the measure, which is subject of observation, thus taking into account the principles in a democratic society. It would not be sufficient if the unequal treatment is only directed towards the fulfillment of one legitimate aim, but the applied means should also be proportional to the aim which is to be realized. The existence of objective and reasonably acceptable justification for the unequal treatment of persons in same situation is determined on a case by case basis. Just like the analysis of the allegations for violation of some of the substantive rights and freedoms set forth in Articles 8-11 of the ECHR, also with regard to the application of the non-discrimination concept from Article 14 or Article 1 of the Protocol No. 12 of the ECHR, the ECtHR shall apply the margin of appreciation principle, whereby the states are given certain amount of freedom to regulate certain matters in the most adequate manner for their societal and economic system. This principle is deeply embedded in the ECtHR jurisprudence. In *Petrovic v. Austria*, the ECtHR stated the following:

“The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (European standard).”

If there is certain consensus among the State parties about some matter, that is, certain matter is regulated in similar way in majority of the member-states of Council of Europe, in that case the margin of appreciation shall be very narrow, if one can generally speak about a margin of discretionary appreciation for a country to be able to solve the respective matter in a different way. In other words, in a situation when the margin is „narrow”, the ECtHR applies a higher level of control whether the unequal treatment is justified. In *Frette v. France*, the ECtHR stated as follows:

„This margin of appreciation should not, however, be interpreted as granting the State arbitrary power, and the authorities’ decision remains subject to review by the Court for conformity with the requirements of Article 14 of the Convention.”

3 Articles 25 of the Law on Service in the Army

4 Art. 3

Legitimate aim

It was already stated that the first step of the proportionality test application is to examine whether the measure, which is subject of observation, is directed towards the attainment of certain legitimate aim. The legitimate aim existence is the first indispensable element to justify the measure which is presupposed to be discriminatory. Once the unequal treatment of people in similar or comparable situation is established, then it will be necessary that certain legitimate aim is offered which is to be attained through different treatment. In the ECtHR case law, the respondent states have stated the following legitimate aims in different cases: effective implementation of the policy to stimulate the linguistic union among the two biggest linguistic communities in the country (Belgian Linguistic case), stimulation and development of traditional family values (Marckx v. Belgium); protection of the labor market and public peace and order (Abdulaziz, Cabales and Balkandali v. The United Kingdom); protection of national security, public safety, economic well-being of the state as well as rights and freedoms of other people (Sidabras and Džiautas v. Lithuania); protection of child health and rights (Hoffmann v. Austria). In Rasmussen v. Denmark, the father complained that the national legislation specifies a deadline only for men, and not for women, when they challenge the fatherhood. The ECtHR found that the case concerns the different treatment of men and women (different treatment on the ground of gender) about the legally specified deadline to launch proceeding to challenge the fatherhood, however, it stated that the solution was aimed to secure the safety and stability for children. Such deadline ensured the prevention of possible abuse when the fathers are challenging the fatherhood, and that could negatively impact the status of the children. In Dudgeon v. UK, subject of observation was the national legislation, whereby voluntary engagement of adult homosexuals in sexual relationship was subject to punishment. The ECtHR established that the regulation itself accounts to violation of the right to respect for private life of the applicant, given that the sexual life of an individual falls in the ambit of the right to respect for private life from Article 8 of the ECHR. The ECtHR, however, accepted that the public morale protection is a legitimate aim that the state strives to achieve. In Darby v Sweden (1990), non-residents of Sweden, were obligated to pay tax for the church although they were not members of the respective church, whereas the people with residence permits, who also did not belong to that church, were allowed to be excluded from that obligation. The ECtHR did not accept the argument of the Swedish government that the same possibility was not provided to the non-residents only due to administrative problems.

Proportionality

It is not sufficient that a legitimate aim exists in order to justify an unequal treatment of people who are in same position. It would be necessary to prove the existence of a real link between the respective aim and the different treatment, which is challenged by the victim of alleged discrimination. The proportionality test ends with the analysis whether there is „reasonable relationship of proportionality between the means employed and the aim sought to be achieved,“. In Belgian Linguistic case, the Court stated „the Convention does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention.”

The proportionality test implies to examine whether the applied measure on the complainant for the attainment of a legitimate aim was excessive, i.e. whether the same aim could have been achieved by application of a less stricter measure. If so, there is a big probability that the different treatment is discriminatory, i.e. unjustified. While the proving of the legitimate aim existence in the application of allegedly discriminatory measure is the obligation of the respondent state (i.e. the state in the procedure in front of the ECtHR), the applicant has the obligation to prove the absence of proportionality between the respective measure and the aim which was to be attained. The ECtHR shall punish the use of disproportional measures which led to arbitrary unequal treatment of the holders of rights.

An example of the disproportional limitation on the right to respect for private life is the case Sidabras and Džiautas v. Lithuania, nos. 55480/00 and 59330/00, whereby the ECtHR established that the general ban to employ former agents of KGB in the private and public sector is disproportional to the aim which was supposed to be achieved with the respective measure, that is, protection of the national security. The ECtHR held that such ban on employment in the private sector was excessive.

EU anti-discrimination law

European law provides limited opportunities to defendants to prove that their conduct is legal, despite being less favourable to victims. However, before legal proceedings arrive at a stage when a defence of justification is examined, victims have the duty to make a prima facie case – as explained below in Chapter III.3.B.

Direct discrimination can be justified on the basis of ground-specific exceptions. Indirect discrimination can be justified on the basis of a general test. The failure to make reasonable accommodation can be justified using a three-pronged financial test. Harassment, victimisation and instructions to discriminate cannot be justified.

C. What is positive action?

Macedonian domestic law provides for taking positive action in respect of ethnic origin, disability and age (young people). It does not provide it for religion or belief, age (elder people) or sexual orientation. The main instrument of positive action measures related to persons with disability is the Law on Employment of the People with Disability. Its main goals are integration of the disabled people in the working environment and their safety at workplace. In relation to age (young people) action is undertaken on the basis of Government decrees.

In the Anti-discrimination Law there is a special provision in article 13 named Affirmative measures that corresponds to the term 'positive action'. This article encompasses measures in favor of: (1) person, group of persons or community, in order to eliminate or diminish factual inequality; and (2) marginalized groups with the same aim.

The Non-discrimination Directives specifically provide that positive action is a justification for unequal treatment. Challenges against positive action measures usually come from members of majority groups who feel that they face unlawful discrimination as a result of positive action measures designed to improve the situation of protected groups. For example, challenges have been made by men to positive action measures designed by some Member States to promote equal opportunities for women.

The CJEU allows automatic preference on the basis of a protected ground in limited circumstances and only where candidates are deemed to have equivalent merit after individual assessment. The effect of CJEU case law has been to limit the scope of positive action in cases concerning sex equality/discrimination.

For more information on this topic, read:

Beyond Formal Equality, available at http://www.non-discrimination.net/content/media/Beyond%20formal%20equality%20-%20Positive%20action%20under%20Directives%2007_en.pdf and

Equal rights versus special rights? Minority protection and the prohibition of discrimination, available at http://www.non-discrimination.net/content/media/Equal%20rights%20versus%20special%20rights%20-%20Minority%20protection%20and%20the%20prohibition%20of%20discrimination_en.pdf

ECJ Case C-476/99 Lommers concerned the rules of a public sector employer under which subsidised nursery places were made available to female employees only, except in the case of an emergency. The CJEU found that the situations of a male and female employee were comparable and hence there was a clear difference of treatment. The CJEU examined whether the measure was permissible under European law. It held that the measure in principle fell into the category of measures designed to eliminate the causes of women's reduced opportunities for access to employment and careers. The CJEU observed that any derogation from the individual right to equal treatment must comply with the principle of proportionality. Key facts the Court noted were the insufficiency of nursery places available for all of the women who required them, the availability of alternative nursery places in the relevant services market and the fact that places could be allocated to male officials in emergency situations. The conclusion was that the scheme at issue complied with European law; however, this was the case only in so far as the 'emergency' exception was construed as allowing male officials who took care of their children by themselves to have access to nursery places on the same conditions as female officials.

Victims having a protected characteristic may encounter cases where it is questionable whether measures actually constitute real positive action. For instance, measures labelled as positive action may serve as an excuse to put an upper limit on the number of ethnic minority employees recruited or sheltered employment offered to disabled employees may pay discriminatory wages. If such measures in fact disadvantage a protected group, they will be deemed discriminatory and cannot qualify as an exception to the prohibition of discrimination.

The Non-discrimination Directives permit Member States to take positive action measures to ensure full equality in practice, which means that they are permitted to maintain or adopt specific measures to prevent or compensate for disadvantages linked to a protected ground. This is in contrast to the Convention on the Elimination of All Forms of Racial Discrimination, which all the Member States are parties to and which makes positive action mandatory. This difference may prove relevant in practice if a victim argues that the discrimination she or her group has suffered can only be remedied through mandatory positive action measures.

III.4. PROVING A CASE: SPECIFIC EVIDENCE AND THE BURDEN OF PROOF

Useful links:

Redressing the Balance of Power in Discrimination Cases: the Shift in the Burden of Proof, European Anti-discrimination Law Review 4/2006, available at: http://www.migpolgroup.com/publications_detail.php?id=173

Discrimination can be established in any legal proceeding. In civil or labour cases the general rule is that each party bears the burden of proving the facts that it alleges and which it hopes will lead to a favourable outcome. In general, a complaint of discrimination in a civil or labour court must be proven to be more probable than not. In administrative and criminal cases it is usually for the authorities to investigate and establish the facts to various degrees of certainty. Equality bodies either conduct administrative proceedings or investigate complaints according to their internal rules.

Victims have the most active role in civil and labour cases, and usually they have a more active role to play in administrative proceedings compared to criminal cases. The standard of proof is highest in criminal cases because defendants may be sentenced to severe sanctions including imprisonment. This is why in criminal cases a complaint of discrimination must be proven beyond reasonable doubt. In practice, the offender's discriminatory intent must be established in criminal cases. Even if the case is being heard by an equality body or referred to mediation, the stronger the evidence a victim has, the better her position.

Typical evidence in all sorts of proceedings includes witness statements, documents or common knowledge. In all proceedings victims have the duty to provide any evidence that they have. In many cases, discrimination is established using defendants' oral or written statements that can be proven through witnesses or documents or that pertain to be matters of common knowledge.

In Germany, an employer's statement that a company employing too many foreigners is seen by customers as a 'shit business' established the assumption that a subsequent dismissal was based on the ethnic origin of the dismissed employee (Regional Labour Court Bremen, 1 Sa 29/10 of 29 June 2010).

In Hungary, the high proportion of Roma children in a particular school has been taken by courts to be common knowledge (Debrecen Appeals Court Judgment No. 13.P.21.660/2005).

The Non-discrimination Directives define the different types of discrimination. Whatever the type of discrimination, when making a claim victims need to provide information to equality bodies, courts, the police, employment, consumer, school inspectorates or other administrative authorities on the following.

Basic information in a discrimination claim

QUESTIONS	ANSWERS
1. Who?	The bouncer
2. Did what?	Refused entry
3. To whom?	To me and my friends
4. When?	DD/MM/YY. Must have been around 23.00
5. Where?	Bar Bar
6. How?	By telling us that we needed to be members to enter
7. What is the result of the wrongdoing?	We could not enter Bar Bar and felt humiliated when saw everybody else going in
8. Who is responsible for the wrongdoing?	The bouncer, the owner or the bouncer's employer, or all of them
9. Who witnessed the wrongdoing?	We were a group of five and there were other clients and passers-by, and the bouncer of course
10. Are there documents, statistics or expert opinions to prove the claim?	No, but my friend videoed people going in on his mobile afterwards and we carried out situation testing afterwards. It's the first time we've heard anything about membership. We have also heard on campus that this place has already sent other African students away.
11. What is the victim's protected characteristic: race or ethnic origin, age, disability, sexual orientation, religion or belief? Is it real, assumed, associated, multiple?	Four of us are Black African students + a friend is a native
12. Who is the control person or group to which the treatment suffered by the victim is comparable? NB: There is no need to identify a comparator in cases of harassment, victimisation, an instruction to discriminate, or a failure to provide reasonable accommodation. In some Member States discrimination can be established by comparison to an ideal minimum standard of treatment, for instance conduct required by respect for human dignity.	Every other client, none of whom were Black Africans
13. Does the case fall under (European) anti-discrimination law?	Yes, we believe it comes under the Racial Equality Directive: access to services available to the public

A. Specific evidence

There are various pieces of evidence that can make it easier for victims of discrimination to establish their claim, including statistics, situation testing, questionnaires, audio or video recording, forensic expert opinions and inferences drawn from circumstantial evidence.

1. Situation testing

Situation testing is often used to uncover discriminatory practices such as refusal of access to bars, restaurants or employment. It has also been used to uncover different treatment in access to rented apartments and even to a denominational school. Use of situation testing has spread throughout the European Union over the years. The United Kingdom and the Netherlands have been familiar with the technique for a long time, but in Belgium, Bulgaria, the Czech Republic, Denmark, Finland, France, Hungary, Latvia, Slovakia and Sweden cases based on situation testing are becoming more common. In Hungary the systematic use of testing has led to important legal victories combating widespread discrimination against Roma. NGOs and equality bodies in Austria, Cyprus and Italy are starting to use situation testing.

An applicant for a property rental with an immigrant background suspected that he was the target of discrimination. Two Swedish friends agreed to apply to the estate agency for apartments as well. They were both given a chance to see the apartment while their immigrant friend was not. Although this test was not decisive, it did help to prove the overall case. The case was decided in favour of the plaintiff and damages were awarded (Göteborg District Court, dom meddelad 2007-11-06 (mål nr T13077-05).

In Denmark and the UK journalists also use situation testing to uncover and report on Situation testing is established in statutory law only in Hungary, France and, to a certain extent, Belgium. In other Member States, the matter is dealt with on the basis of the general law of evidence.

Definition of situation testing in Hungarian law

... in relation to the conduct of the alleged discriminator, the Equal Treatment Authority shall put into an identical situation persons who are different from the point of view of a [protected ground] but are similar from the point of view of other characteristics, and it shall examine the action of the alleged discriminator in respect of these persons from the point of view of respect for equal treatment (Article 13(1) of Government Decree 362/2004 on the Equal Treatment Authority and on the Detailed Rules of its Procedure).

For further information on situation testing, read:

Proving discrimination cases: the role of situation testing, available at: http://www.migpolgroup.com/publications_detail.php?id=172

2. The questionnaire procedure

In a few Member States national law provides another tool that may facilitate access to information needed to establish a prima facie case – the questionnaire procedure. Prior to making a formal complaint or starting a legal action, victims have the opportunity or obligation to contact the alleged discriminator and seek clarification of his or her conduct. Answers provided to such a questionnaire – or a lack of response – allow courts to draw inferences in relation to discrimination.

In Ireland the Equality Tribunal uses the questionnaire procedure. A person who believes that they may have experienced discrimination is entitled under Section 76 of the Acts to write to the person they believe may have discriminated against them, asking for certain information. A statutory form of questionnaire (Forms EE.2 and ES.1) is available from the Tribunal and can be downloaded from the website. A statutory reply form gives the person who receives the questionnaire an opportunity to set out their version of events. This form is available (Form EE.3 and ES.2) from the Tribunal and can be downloaded from the website. The Acts state that the Director may draw such inferences as seem appropriate from a respondent failing to reply or supplying false, misleading or inadequate information. For a sample questionnaire, see : http://www.equalitytribunal.ie/uploadedfiles/AboutUs/ee_2.pdf

Although the questionnaire procedure may not have been formalised in other Member States, general national rules on evidence provide victims with the ability to use any evidence, including responses by an alleged discriminator to a written inquiry about their conduct. A detailed response may also provide a plausible explanation to the victim herself and persuade her that she has not suffered discrimination.

3. Statistical evidence

The Non-discrimination Directives mention statistical evidence as a possible means of establishing indirect discrimination. In general, national laws do not specify statistics as a type of evidence but permit their use.

In practice, victims have established discrimination by using statistics particularly in cases relating to unequal pay based on sex, collective redundancy based on age and segregation based on ethnicity. However, statistics are not available in many cases and statistical evidence is not a prerequisite for establishing indirect discrimination. Using statistics helps to shift the focus away from the individual victim towards broader underlying structural inequalities. This is helpful if a victim knows that there are many others who share his fate but are unwilling to bring an action against the discriminator. By using statistics he can establish patterns of discrimination against others to prove his own case.

In ECJ Case C-167/97 *Seymour-Smith and Perez*, the CJEU suggested that the conditions for obtaining certain employment rights or privileges would constitute a prima facie case of indirect discrimination if available statistics indicated that a considerably smaller percentage of women than men were able to satisfy the condition.

German courts routinely allow statistical evidence to establish indirect discrimination. The groups compared are formed on a case by case basis in line with the general principles of equality law. It has been consistently held in case law that essentially equal groups have to be treated equally. It depends on the specific context which criteria are used to establish that groups are essentially equal or not. There is no settled case law on a specific quantitative measure for establishing a disproportionate effect of a rule on one group in comparison to another group. Statistics on society in general are used if available. If not, statistics relevant for the individual case are calculated. The groups to be compared are determined by the personal scope of the rule challenged. For example, if a collective agreement is in dispute, everyone bound by this agreement forms the relevant group. If a challenge is made to a recruitment selection guideline, the relevant group consists of the job applicants, although it is disputed whether all applicants should be considered or only sufficiently qualified applicants.

In Ireland, courts are likely to rely on statistics put forward by the victim. Where statistics are not available in a particular case, courts rely on an employer's statistics. When collecting statistical data or requesting them from defendants, some basic questions need to be considered:

- Is the time period long enough to show disproportionate impact?
- What is the best statistical range (employees aged 50 and over or employees aged 55 and over compared to the below-30s or below-28s)?
- Are the groups compared in essentially similar positions?

The Hungarian Equal Treatment Authority most often relies on statistics in relation to complaints concerning failure to recruit on the ground of age in cases when large numbers of employees are recruited at the same time. In a case where a victim complained that he had not been selected for a job due to his age (51 years), the Authority required statistics on the age of the new recruits as well as the age of all the employees in the same job. The Authority established that the company had employed several people above the age of 35 and 40, and that the oldest person in the given position was 47 years old. Based on this, the Authority rejected the claim. It needs to be pointed out that the age limits for comparator groups need to be chosen very carefully in such cases, as employees of around the age of 35 may not be comparable to the 51-year-old victim (<http://www.egyenlobanasmod.hu/zanza/453-2008.pdf>).

4. Other types of evidence

Other types of evidence include audio or video recording if permitted by law or court practice, preliminary statements from the parties, demonstration of a typical tendency, the opinion of expert witnesses, inferences drawn from circumstantial evidence and public statements published or broadcast.

The Romanian Anti-discrimination Law allows the use of audio and video recordings. In practice, the Steering Board of Romania's equality body, the National Council for Combating Discrimination (NCCD), can accept any evidence relevant to the case during its hearings and before its deliberations. This is an exception from ordinary civil procedure and while the NCCD regards this evidence as unproblematic, there is still a significant need for judges to be educated in this respect. The NCCD's internal procedural rules state that the taking and rebuttal of evidence should take place at the same time if possible.

In Italy litigation against institutional discrimination can be supported by statements by government officials that reveal inconsistencies between written policies and verbal statements. This could apply for instance to cases where policies were introduced on an allegedly 'ethnically blind' basis using ambiguous terms like 'settlements of nomadic communities' but government representatives mentioned the Roma directly in interviews published on official websites.

In Hungary the Equal Treatment Authority most frequently appoints an expert in equal pay for equal work complaints, in the case of which special technical expertise is often needed to assess whether two different (or not identical) positions may be regarded as equal work. Another field where special expertise is frequently needed is education cases. In one case for example, an expert was appointed to evaluate whether conditions provided by a school met legal requirements in order to establish whether the local council had violated its obligations towards children with slight learning disabilities (<http://www.egyenlobanasmod.hu/zanza/103-2009.pdf>).

5. Rules enabling access to documents and obtaining witness statements prior to court hearings

Victims are often dissuaded from challenging a discriminatory act or practice because they fear that the evidence they know exists will not be accessible or that witnesses will not testify. While it cannot be guaranteed that witnesses will give an account of events identical to the victim's recollections, it is worth inquiring whether they would be willing to testify prior to taking legal action. Steps can also be taken to ease access to documents otherwise not available to the victim prior to or during proceedings. In practice, equality bodies, administrative bodies or the police may be more effective in obtaining documents in support of the victim's case. The questionnaire procedure or any other similar attempt can also facilitate access to information.

During the proceedings defendants are normally under a duty to provide the documents requested. Some administrative bodies and the police can search the premises of defendants in order to recover documents. A French judgment illustrates this: 'the Defendant cannot argue that the Plaintiff's evidence is inadequate if he failed to provide the documents requested by the court. The corollary of the right to have access to the evidence of the opposing party is that failure to comply transfers the burden of proof to the Defendant' (IBM v Buscail, Court of Appeal, Montpellier, no. 0200504, 25 March 2003).

The Romanian Anti-discrimination Law obliges all public and private agents in possession of relevant documents to share them with the equality body (the NCCD) or face an administrative fine. However, a similar provision is not available in relation to the plaintiff when preparing for a court case. If the plaintiff chooses to file a complaint to the courts instead of the NCCD, only the court can request documents and the court order will be based on general rules of civil procedure.

B. Proving a case: the shared or reversed burden of proof

Macedonian Anti-discrimination law provides for the reversal of the burden of proof in Article 38.

The CJEU understood early on that victims ‘could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory’ (ECJ Case C-109/88 Danfoss). This principle, first formulated in case law, was then adopted in European law and serves as the basis for proving discrimination under the Non-discrimination Directives.

The Non-discrimination Directives provide for the reversal of the burden of proof: when victims establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it is for the respondent to prove that there has been no breach of the principle of equal treatment. More favourable rules can be introduced in national laws, but the reversal of the burden of proof does not apply to criminal proceedings. Member States can also exclude its application to administrative or judicial proceedings of an inquisitorial nature where a state body investigates the facts of the case. France does not allow for a reversal of the burden of proof in administrative proceedings, while Portugal excludes it from the proceedings of courts that carry out investigations. Whereas all EU Member States now provide for a shift in the burden of proof in discrimination cases, inconsistencies with the Directives’ provisions are suspected in a number of states.

Typical scenarios

The burden of proof can be shifted in cases of direct and indirect discrimination as well as claims involving instructions to discriminate. Harassment and reasonable accommodation are also covered, but it is unclear whether this rule also applies to victimisation.

The CJEU and subsequent European non-discrimination law sought to provide effective protection against discrimination and achieved this through reversing the burden of proof. This does not mean that victims do not have to convince the court that they have a case. They must first establish a prima facie case, in other words convince the court of the probability that they suffered discrimination. The burden of proof then moves to the respondent, who must show that discrimination played no part in the treatment or effect complained of. If the respondent is unable to give objective reasons for the treatment that are unrelated to discrimination, he will be liable for a breach of non-discrimination law.

The burden of proof does not shift in criminal cases and in general in cases where the authorities or courts are responsible for investigating the facts. In other words, the burden of proof must shift in civil and employment courts but not necessarily in any other proceedings. However, victims in these proceedings are also well advised to provide the basic relevant information.

1. Prima facie cases establishing a presumption of discrimination

The CJEU found a prima facie case had been established when it was shown that the pay of speech therapists was significantly lower than that of pharmacists, and that the former were almost exclusively women while the latter were predominantly men. This information was enough to shift the burden of proof (Case C-127/92 Enderby).

Statements by which an employer publicly lets it be known that it will not recruit any employees of a certain ethnic or racial origin may constitute facts of such a nature as to give rise to a presumption of a discriminatory recruitment policy. It is, thus, for that employer to adduce evidence that it has not breached the principle of equal treatment, which it can do, inter alia, by showing that the actual recruitment practice of the undertaking does not correspond to those statements (Case C-54/07 Feryn).

The Hungarian Equal Treatment Act includes the concept of the presumption of discrimination, which is based on the idea that establishing a protected ground and a disadvantage in itself creates a strong enough suspicion of discrimination for the burden of proof to be shifted. This is more advantageous for the victim than the solution applied by the Directives because in the Hungarian system the causal link between the protected ground and the disadvantage does not need to be substantiated in any way.

The test for the burden of proof to be shifted only requires that the victim substantiates, rather than proves, his/her claims. Substantiation involves a lower level of certainty: if the victim establishes facts from which it may be presumed that (i) a disadvantage was suffered and (ii) that she has a protected characteristic (real or assumed), then the burden of proof shifts.

If the case has been substantiated, the defendant has to prove:

- a) that the circumstances substantiated by the victim or the actio popularis claimant do not exist;
- or
- b) that it has observed or was not obliged to observe the requirement of equal treatment.

The Directives do not use intent in their definitions of discrimination. It is irrelevant to a finding of discrimination, which means that it need not be established by the victim. However, if a victim of discrimination initiates criminal proceedings, then the perpetrator's intent will be the focus of attention and the burden of proof does not shift.

Finding an appropriate 'comparator' may be problematic in certain situations. If a court considers a comparison inappropriate, it may find against the victim. In addition, a court may compare the victim with a group or individual who also faces discrimination. This may happen if an alleged victim of ethnic or religious discrimination is compared against another minority and not against the majority. For instance, in a Member State where 85% of the citizens are Catholic and only 5% are Jewish, Muslim and Protestant, it is likely that any victim from a minority religion should be compared to a Catholic. A court may also compare a severely disabled person to a mildly disabled person instead of a person without a disability. There may also be cases where there is no appropriate comparator against whom treatment can be measured. This may often arise in cases of multiple discrimination. The Non-discrimination Directives allow for hypothetical comparators. However, there is no need to identify a comparator in cases of harassment, victimisation, an instruction to discriminate, or a failure to provide reasonable accommodation. In some Member States discrimination can be established in comparison to an ideal minimum standard of treatment, for instance conduct required by respect for human dignity.

2. Use by defendants of the defence of justification

If the burden of proof has shifted, cogent evidence is then required to discharge the burden. In *Campbell Catering Ltd v. Aderonke Rasaq* the Irish Labour Court indicated that evidence must be substantial and persuasive in order to successfully rebut the presumption of discrimination. ‘While the Court is not bound to apply the law of evidence with the same strictness as would be found in a court of law, it can not allow hearsay evidence in rebuttal of testimony given on oath’ (Equality Tribunal 2004 EED048).

Many justifications for discriminatory behaviour are economic or market-based. However, a distinction must be made between economic excuses for direct discrimination and objectively justifiable economic justifications that accompany efforts made in good faith to achieve fair practice. For example, the CJEU has not given weight to arguments regarding the higher cost of ensuring equal pay between men and women for governments, national economies, or private enterprises (Case C-43/75 Defrenne).

With regard to sex discrimination the CJEU has established several specific possible justifications in the area of employment relations. It has indicated that an employer may justify a requirement only if it demonstrates that it is important for performing specific tasks. It has also stated that mobility cannot be used independently as an indicator or proxy for quality of work. Differences in pay based on different training can be justified by showing its importance for the performance of specific tasks. The CJEU has also suggested that pay differentials based on length of service required no particular justifications (Case C-109/88 Danfoss). It has allowed another possible justification for differential pay – the need of the employer to raise pay to attract candidates because of the state of the job market (Case C-127/92 Enderby).

Defendants may also argue that the principle of freedom of contract should override provisions promoting equality. If individuals have contractually agreed to work for lower pay or under worse conditions, then governments or other judicial authorities should not interfere. The CJEU holds that EU equal pay provisions override freedom of contract – equal pay is protected even if individual and collective agreements specify unequal compensation (Case C-43/75 Defrenne).

The European Court of Human Rights held that the right not to be discriminated against on the basis of racial or ethnic origin cannot be waived even if a parent consents to the education of a non-disabled child in a special school (DH and Other v the Czech Republic, judgment of 13 November 2007).

3. Rebutting the defence of justification

Victims need to rebut evidence produced by the defendant as part of the defence of justification. They need to ensure that the court formulates exceptions narrowly and examines the necessity, adequacy and proportionality of provisions, criteria, or practices in cases of indirect discrimination as suggested above. Victims need to make sure that defendants are called on to demonstrate that their defences of justification can answer the questions arising from the definition of exceptions under European law.

The 'three plus one' steps to establishing discrimination relying on the reversed burden of proof

3+1 STEPS	WHAT TO DO IN PRACTICE
<p>+1. The case falls under European anti-discrimination law and the reversed burden of proof applies to it.</p> <p>NOTE: The burden of proof is not reversed in criminal and some administrative cases. In general, in criminal cases discriminatory intent must be proven beyond reasonable doubt.</p>	<p>Check the Fields covered by the Non-discrimination Directives box above.</p> <p>Decide what type of proceedings you want to start.</p>
<p>1. First, the victim must establish a convincing case of discrimination that at first sight seems credible (<i>prima facie</i> case). In other words the victim must show that he or she suffered negative treatment or an adverse impact as a consequence of the protected characteristic.</p>	<p>Fill in the Basic information in a discrimination claim chart above.</p> <p>Check this information against the definitions of discrimination. In our example, the bouncer is liable for direct racial discrimination and the owner for an instruction to discriminate on the ground of race.</p> <p>What evidence is available? For instance, witnesses and video recordings.</p> <p>What evidence needs to be obtained? For instance, membership policy, operating licence, or dress code.</p> <p>Can further evidence be generated? For instance, can the victims and their friends carry out situation testing at Bar Bar? Will they testify in court if needed?</p>
<p>2. If the victim succeeds in proving a <i>prima facie</i> case of discrimination, then under the Non-discrimination Directives the burden of proof shifts to the defendant. If the burden of proof shifts, defendants must then provide evidence to justify the discriminatory action or show that the <i>prima facie</i> case is ill founded, otherwise they will be held liable for discrimination. This justification must show that the exceptions allowed under European law apply to the case.</p>	<p>Which exceptions are relevant? The case amounts to (an instruction to) direct racial discrimination. This means that the Exceptions to direct discrimination will apply (see above).</p> <p>Can the defendant(s) successfully rely on the applicable exceptions? In practice, bar owners may argue that the victims did not comply with the dress code, that the bar that night was reserved for a private party or members only, or that the victims did not behave properly: they were drunk or behaved in a disorderly manner. Whatever the defence of justification, it must remain within the limits of the applicable exceptions contained in the Non-discrimination Directives. Defendants have the duty to provide detailed evidence to support their defence, so that it seems more probable than not.</p>
<p>3. The victim must rebut the arguments raised by the defendant as part of his or her defence of justification.</p>	<p>For instance, the victim must show that none of the Exceptions to direct discrimination apply, that the video recording demonstrates that no-one else was asked about membership or shows how other customers were dressed, or that domestic law does not allow members-only bars.</p>

C. Practice of the ECtHR with respect to evidence and the burden of proof

Discrimination is neither directly manifested, nor it can be easily identified. It is difficult to prove discrimination even when unequal treatment is based on some characteristic of the individual or the group. This is so because different treatment is either not explicitly manifested or it is unnaturally linked to some factors which cover up the discrimination. It is difficult to prove discrimination because of the existence of opposing interests between the complainant and the alleged perpetrator of discrimination.

Given the difficulties which are characteristic for the process to prove discrimination, the principle of sharing the burden of proof between the two parties in the process, that is, the alleged victim and perpetrator of discrimination, is included in the ECtHR case law. According to this principle, if the alleged victim manages to prove the presumption of discrimination, i.e. to make the existence of discrimination probable, the burden of proof in such case shall be shifted to the perpetrator to prove that discrimination did not exist. The shifting of the burden of proof is of exceptional importance for the processes in which indirect discrimination is to be proved, namely, that particular rule or practice (manner) of behavior had negative disproportional effects on certain individual or group.

On the basis of all evidence, the ECtHR is the one to decide if discrimination existed and whether it can be justified. The ECtHR shall accept as valid those allegations which are:

„supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions ... [P]roof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the [ECHR]right at stake., (Nachova and Others v. Bulgaria [GC], nos. 43577/98 and 43579/98; Timishev v. Russia, nos. 55762/00 and 55974/00; D.H. and Others v. the Czech Republic [GC], no. 57325/00).

Namely, it is worth noting two things: first, the admissible evidence is decided on the basis of the national legislation, and second, the rule of shifting the burden of proof, in general, is not applied in the criminal law where the state prosecutes the perpetrators of racially induced crimes. On one hand, this is due to the different standard of proof used to establish the criminal responsibility, and also because it is unacceptable to request from the perpetrator to prove that he/she was not discriminatorily motivated. In *Nachova and Others v. Bulgaria* (2005), the Grand Chamber stated the following “*such an approach would amount to requiring the respondent Government to prove the absence of a particular subjective attitude on the part of the person concerned.*”

Therefore, it becomes clear that the affirmanti incumbit probatio principle, or the burden of proof is upon him who affirms, is not being rigorously applied in the proceedings to establish discrimination.

“In certain circumstances, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation” (D.H. and others v. the Czech Republic).

The existence of discriminatory prejudice or intent need not be proved. Next, certain rule or practice of behavior (in indirect discrimination) with the intent to result in discrimination need not be proved. It means that even in situations when a measure was adopted and applied to give positive results, and yet it generates effects which are harmful for certain group, discrimination may exist. As an illustration, in *D.H. and Others v. the Czech Republic*, the Government stated that the special schools system was aimed to help Roma children to be able to overcome the difficulties related to their poor knowledge of Czech language and the poor pre-school educational system. Nevertheless, the ECtHR found it irrelevant if that policy was targeted against Roma children. It was the negative effects on Roma that were important to be determined, given the percentage of their share in the overall population, and not the existence of intent to discriminate them against.

Evidence to prove existence of discrimination

As it has already been stated, discrimination cannot be easily proved. Often, evidence in support of discrimination either does not exist or cannot be easily collected. That is especially true about indirect discrimination, whereby one should prove that application of a rule or practice produced disproportional effect.

In *Timishev v. Russia* (more details in the section on discrimination on grounds of ethnic or racial background), the verbal order issued by the high military officer was sufficient for the ECtHR to conclude that it is a matter of discrimination based on the applicant's ethnicity.

Statistics may play significant role in support of presumption of discrimination. The role of statistics becomes even more significant in cases of indirect discrimination. In the past, the ECtHR was of the opinion that statistical data are insufficient to support the claim that a particular practice, considering its effects, may be considered as discriminatory (Hugh Jordan, cited above, § 154). As the case law evolved, also did the ECtHR attitude on this issue. In *Hoogendijk v. the Netherlands*, the ECtHR stated the following:

„where an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination.”

In *D.H and Others*, the Grand Chamber added that *„when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence.”*

It is not always possible to prove discrimination (especially indirect discrimination) through statistics. It rests upon the specific circumstances on a case by case basis. In *Oršuš and Others v. Croatia*, the applicants complained that they were discriminated against on ground of their ethnicity (given the fact that the complainants were Roma) because special classes were formed in some of the schools where the curriculum was reduced in comparison with the curriculum in the regular schools. Roma children were predominantly enrolled in those schools, which according to the applicants indicated to indirect discrimination. The Government defended its policy, saying that those students were enrolled in special classes because of their poor knowledge of Croatian language. These students, allegedly, would be enrolled at the regular schools once they reach certain level of knowledge of Croatian language. The ECtHR, contrary to *D.H. and others*, held that the available statistics is insufficient for the existence of prima facie presumption of indirect discrimination, given the fact that 44% of the students in one school were Roma, whereas 73% of them were enrolled in those specialized classes (which were mainly comprised of Roma students), whereas in another school there were 10% Roma students, of whom 36% attended teaching in specialized classes. Such inconsistent data showed the absence of general policy for enrollment of Roma students in specialized classes. Nevertheless, the fact that the criterion of poor knowledge of Croatian language, as precondition for the enrollment in the special classes, was applied only for the Roma students, therefore it served as sufficient indicator for the ECtHR to find it as matter of presumption of unequal treatment based on the applicants' ethnicity. In absence of objective justification, the ECtHR found violation of Article 14 in conjunction with Article 2 of Protocol 1 (right to education) of the ECHR.

In other cases, however, the reports from relevant international and national organizations and non-governmental organizations can serve as prima facie evidence to prove existence of discrimination. In *Opuz v. Turkey* the ECtHR established the existence of discrimination on the ground of gender, based on the reports and analyses conducted by Amnesty International and UN Committee on Elimination of Discrimination Against Women, according to which domestic violence over women was a serious problem in Turkey. Namely, in that case the ECtHR found that the Turkish state failed to take the necessary measures to protect the applicant and her mother from her husband's violence, which in the end resulted in her mother's death. The state did not take any measures although the authorities had sufficiently serious indications and information that they may have been victims of domestic violence. Furthermore, the ECtHR established that such an indifferent attitude of the state, i.e. lack of adequate protection for the applicant and her mother, resulted from the discriminatory attitude given the fact that they were women.

In other cases, discrimination can be established on the basis of witness testimony or other materials. For instance, in *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, the case concerned the murder of two Roma (who were serving the army at that point of time) by the members of the military police due to suspicion that they had committed theft of products from the military canteen. Among the numerous submitted evidence (such as reports from international organizations that there was a frequent practice in Bulgaria that police officers are absolved from prosecution when Roma people are alleged victims of inhuman treatment), the applicants invoked the testimony of one eyewitness, who immediately after the murder of the two Roma stated that the perpetrator addressed him with the following words “you damn Gypsies”. The ECtHR, considered that such statement, though a serious proof of hate speech, was insufficient to conclude beyond reasonable ground that the state was responsible for the racist motivated murder. Nevertheless, the ECtHR found that the state did not complete its procedural obligation from Article 2 of the ECHR, whereby it was obligated to conduct an efficient investigation regarding the possibility that the perpetrator of the crime was racially motivated based on the victims' ethnicity. Namely, the ECtHR found that the competent authorities did neither examine the credibility of the statement of the eyewitness, nor questioned any of the other eyewitnesses about the respective circumstance. In addition, the authorities did not take any statement from the perpetrator of the crime. Accordingly, the ECtHR stated *“...any evidence of racist verbal abuse being uttered by law enforcement agents in connection with an operation involving the use of force against persons from an ethnic or other minority is highly relevant to the question whether or not unlawful, hatred-induced violence has taken place. Where such evidence comes to light in the investigation, it must be verified and – if confirmed – a thorough examination of all the facts should be undertaken in order to uncover any possible racist motives ...”*

Similarly, with regard to Article 3 of the ECHR, in *Bekos and Koutropoulos v. Greece* (2005), one of the key evidence was the sworn written statement by one of the applicants claiming that the police officers used racist language against the applicants at the moments when they were using physical force against them.

How Can Individuals Enforce the LAW?



IV. HOW CAN INDIVIDUALS ENFORCE THE LAW?

Procedures for enforcing the right to equal treatment

Judicial procedures	Non-judicial procedures
Civil courts	Ombudsman and equality body
Labour courts	Labour inspectorate
Administrative courts	Consumer and school inspectorates
Criminal courts (public prosecution service or police)	
MEDIATION	CONCILIATION

In the country, the procedures for employment in the private and public sectors are different. In the private sector, in accordance with the Labour Law (Art. 181), the first step (in 8 days) is to inform the employer giving him/her the possibility to straight things up. If it is not done in the next 8 days, then the worker can lodge a law suit against the employer (in the next 15 days). This last deadline is directly applicable in case of dismissal and denial of access to employment due to discrimination.

Mediation is an optional instrument at the disposal of judges.

The Macedonian Anti-discrimination Law envisages three levels of legal remedies: a) administrative - procedure in front of the Commission for Protection against Discrimination, b) litigation in front of regular court (Articles 34 & 35); and c) misdemeanour procedure (Articles 42-45).

The administrative procedure is regulated in Articles 25-29; it is free for the applicant. The procedure might be resolved by an Opinion and Recommendation of the Commission in 90 days. If this Opinion is not implemented, the Commission can initiate procedure in front of the competent organ (administrative or judicial).

Similar to Macedonia, in Romania, a victim of discrimination can choose between filing a complaint with the national equality body and/or filing a civil complaint for civil damages with a court of law unless the act is criminal, in which case the Criminal Code applies. The two venues (national equality body and civil courts) are not mutually exclusive and the plaintiff can choose to use them simultaneously, which in practice creates problems for the parties, the equality body and the judiciary. Moreover, an action before the equality body does not suspend the period of prescription (time limit) for filing a civil case.

IV.1. REPRESENTATION OF VICTIMS

Useful links:

Legal standing: the practical experience of a Hungarian organisation in European Anti-discrimination Law Review 5/2007, available in English at http://www.non-discrimination.net/content/media/07lawrev5_en.pdf

Under Article 93 of the Macedonian Labour Law only the trade unions may engage in representation, based on approval of the complainant. Regarding all other judicial procedures, nobody else can act. Even the Ombudsman has to stop its own procedure once the court procedure has been initiated (the Law on Ombudsman, Article 23). In the Anti-discrimination Law (Article 39) the capacity of intervener is extended, with approval of the applicant and the judge, to all the organizations and institutions that deal with equality issues; also, action popularis is permitted (Article 41).

In all European legal systems, victims can enforce their right to equal treatment on their own or through a legal representative. If discrimination affects a group, the individual victims can team up and take action together. This has been done mainly with the assistance of trade unions in cases relating to lower pay for women. Acting on behalf of a victim or supporting her in a procedure are two different types of assistance. Acting on behalf of a victim means that non-governmental organisations or trade unions can represent the victim in proceedings. Few states allow associations to engage in proceedings 'on behalf of' victims of discrimination. A common form of support is when individual lawyers (working for an organisation) represent a victim in court upon his or her authorisation. In general, trade unions and employers' organisations can represent their members.

A. Standing

1. The standing of victims

Victims have the right to report or challenge an instance of discrimination, make submissions, seek remedies and instruct a lawyer – or in some, mainly administrative proceedings even a lay person or a relative – to represent them. In turn, victims must often bear the costs of litigation.

2. The standing of NGOs

In Germany, anti-discrimination associations may now support plaintiffs in court proceedings even if representation by a lawyer is mandatory. These associations are allowed to conduct legal matters for the plaintiff and, most importantly, give legal advice. If a plaintiff is represented by a counsel from an association, acts by the counsel are deemed to be acts by the plaintiff, unless the plaintiff specifies otherwise. These rules apply to other court proceedings as well. In disability law, associations have legal standing and representative actions are possible. They may, for example, challenge a failure by a public body to provide an environment free of barriers as specified in various legal regulations and the anti-discrimination law. They can also challenge breaches of general regulations on standard form contracts. They have similar powers in the field of consumer protection.

In Romania, CSOs with a legitimate interest in combating discrimination can appear in court as parties and may engage, either on behalf of or in support of the plaintiff, in any judicial and/or administrative discrimination proceedings based on a request or proxy issued by the victim. When the discrimination concerns a community or a group of people, the Romanian Anti-discrimination Law gives CSOs legal standing even without the approval of the alleged victims.

The Hungarian Equal Treatment Act allows 'social and interest representation organisations' as well as the Equal Treatment Authority to engage on the victim's behalf in proceedings initiated due to the alleged infringement of the principle of equal treatment and to engage in administrative procedures. The Hungarian 'social and interest representation organisations' include any social organisation or foundation whose objectives, set out in its articles of association or statutes, include the promotion of equal social opportunities of disadvantaged groups or the protection of human rights. This includes the minority self-government for a particular national and ethnic minority and trade unions for matters related to employees' material, social and cultural situation and living and working conditions. Furthermore, social and interest representation organisations, the Equal Treatment Authority and the Public Prosecutor can bring *actio popularis* claims, provided that the violation of the principle of equal treatment was based on a characteristic that is an essential feature of the individual and the violation affects a larger group of people that cannot be determined accurately.

In Italy, the government included in the 2008 budgetary law a provision introducing a class action for obtaining financial compensation for wrongs perpetrated against groups of consumers. After having been frozen for a while, this new piece of legislation entered into force, in a slightly modified form, on 1 January 2010.

In France CSOs working to combat discrimination on the grounds of ethnic origin, race or religion may be civil parties in some criminal actions. Although there is no specific provision in the Code of Administrative Justice, it is common practice to allow CSO interventions before administrative courts provided that the CSO works to achieve a goal that corresponds to the subject matter of the case. CSOs can also make submissions in civil cases and before the labour courts.

3. The standing of trade unions

In several countries, trade unions can represent their members in labour disputes, including non-discrimination in the workplace. Some of the most prominent equal pay cases under European sex discrimination law have been uncovered, financially supported or even represented by trade unions, as in Danfoss. Here, a Danish trade union acted on behalf of female members arguing that a company paid men more for the same work. The company in turn was represented by the Danish Employers' Association.

B. The role of the Equality Body

Useful links:

For comparative information on equality bodies, read:

Catalysts for change? Equality bodies according to Directive 2000/43/EC, available in English, French or German at: <http://www.non-discrimination.net/publications>

Influencing the law through legal proceedings – powers and practices of equality bodies
http://www.equineteurope.org/powers_practices_final_draft_240910_1.pdf

For information on the European Network of equality bodies, including the contact addresses of national equality bodies, visit: <http://www.equineteurope.org/>

Under Articles 16-33 of the Macedonian Anti-discrimination Law, the specialised equality body, the Commission on protection from discrimination is established and has been functioning since early 2011. The Commission on protection from discrimination is an autonomous and independent body. The Commission is composed of 7 members appointed by the Parliament with a mandate of 5 years. Members of the Commission can be Macedonian citizens with regular residence in the Republic of Macedonia, with university degree and experience in human rights. Selection is based on public competition.

The mandate of the Commission on protection from discrimination according to Article 24 is as follows:

- advice and recommendations on concrete cases of discrimination
- information on the mechanisms for protection from discrimination
- initiation of the procedure in front of the relevant state organ because of violation of the Law on prevention and protection from discrimination
- annual report in front of the Parliament
- promotion and education for equality, human rights and non-discrimination
- initiation of changes of the legislation
- cooperation with local self government
- recommendations and opinions to the government
- collecting statistical data, establishment of the data bases, research and training
- cooperation with other equality bodies and with international organisations
- adopt bylaws for its work and internal structure.

Parallel to the Commission, the Ombudsman is also in charge of investigating complaints of discrimination. In 2009 the Ombudsman Law was amended to establish a special working unit on discrimination.

According to Article 11 of the Law on Ombudsman

“Ombudsman in performing the duties of his jurisdiction takes actions and measures which are authorized by this law to protect constitutional and legal rights of citizens or protection of the principles of non-discrimination and adequate and equitable representation of citizens belonging to all communities when violated by bodies of Article 2 of this law.”

According to the Law on Ombudsman, the Ombudsman exercises its mandate in the following areas:

- Investigating, finding and sanctioning cases of discrimination;
- Monitoring cases of discrimination;
- Providing specialized assistance to victims of discrimination.
- Initiate amendment of laws and secondary legislation, for their harmonisation with ratified international agreements
- Giving opinions and recommendations to the governmental institutions
- Initiating disciplinary cases
- Initiating criminal procedure

The Ombudsman has a right to receive individual complaints, to investigate, to provide independent assistance to victims, to make recommendations and to submit independent reports in the media and in front of the Assembly, to conduct special research and investigation on specific issues.

According to Article 13 the Ombudsman can exercise its mandate upon request from an individual or *ex officio*.

When the Ombudsman concludes that there has been a violation, he/she may:

- Make recommendations on how to remove the violations;
- Propose re-trial (reopening of the procedure)
- Initiate disciplinary proceedings against official or responsible person
- Apply to the competent public prosecutor and to initiate criminal procedure⁵

(a) Advice and information

The equality bodies provide assistance to victims of discrimination in a variety of ways. All specialised bodies provide information to victims on their websites and/or in specific publications, and most provide advice on any queries. Several specialised bodies give their – usually non-binding – opinion on complaints submitted to them. Such proceedings do not preclude the victim from subsequently taking legal action before the courts with a view to obtaining a binding remedy.

Most bodies can arrange for conciliation between the parties and most can review and comment on legislative proposals and the reform of existing laws. The Dutch Equal Treatment Commission has the power to advise organisations (including government bodies) about whether their employment practices contravene non-discrimination law.

(b) Supporting individuals who want to go to court

Some specialised bodies provide assistance in the form of supporting legal action. The Irish Equality Authority may engage in judicial or other procedures in support of a claimant (before the Equality Tribunal or in civil courts, or by making representations to employers or service providers).

Support can come through financing a legal action, such as in the Coleman case, where the Commission of Equality and Human Rights helped the victim to obtain a broad interpretation of the disability ground from the CJEU.

In various countries, equality bodies have the power to litigate in their own right if this serves the public interest, and usually if the victims cannot be identified. The Belgian Centre for Equal Opportunities and Opposition to Racism has the power to take legal action in the public interest, which it used in the Feryn case (ECJ Case C-54/07). Where the alleged violation has an identifiable victim (who can be a natural or legal person), the Centre's power to act is conditional upon the consent of the victim.

(c) Intervention and friend of the court briefs

The Irish Equality Authority was granted the right before the High Court to act as an *amicus curiae* (friend of the court) in order to give evidence in relation to the Racial Equality Directive. Following a legal challenge, this right was subsequently upheld by the Irish Supreme Court (Supreme Court [2006] IESC 57). Other bodies such as trade unions or employer bodies do not have formal standing before civil courts, but in practice may support parties before an equality tribunal or labour court.

The Romanian equality body does not have a right to intervene in civil cases but the Anti-discrimination Law provides that it will be summoned in all cases. The law does not specifically mention the NCCD's particular legal standing but it is in fact viewed as an expert witness.

⁵ Art. 32, Law on Ombudsman, "Official Gazette" of RM, No.60/03

(d) Adjudication / Power to act as a court

A number of specialised bodies – e.g. those in Austria, Bulgaria, Cyprus, France, Hungary, Ireland, Lithuania, Romania and Sweden – can investigate complaints of discrimination and usually can enforce compliance with their investigations by all parties involved. The Protection against Discrimination Commission in Bulgaria has the power to impose sanctions, including fines and ‘soft’ penalties such as public apology or publication of its decision. The Hungarian Equal Treatment Authority can apply sanctions on the basis of an investigation. In Ireland, the Equality Authority may serve a ‘non-discrimination notice’ following an investigation. This notice may set out the conduct that gave rise to the notice and what steps should be taken in order to prevent further discrimination. Non-compliance with this notice may result in an order from either the High Court or Circuit Court requiring compliance.

C. Intervention

In most European countries interested third parties – equality bodies, civil society organisations or trade unions – can intervene in court proceedings to advance the interests of one party. Victims can also contact these organisations in order to seek assistance in the form of intervention on their behalf.

In Germany, any intervention can be submitted to the respective court as part of the legal argument of the respective parties. Romanian CSOs may file petitions to intervene in specific cases based on the provisions of general civil procedure. The courts will decide if their interest justifies their intervention. In Hungary, if somebody has a legally based interest in the outcome of a lawsuit between other parties, they may intervene (until the end of the first instance procedure) to assist the party whose victory is in their interest. The intention to intervene must be announced in writing or verbally at the court hearing and the intervener must indicate which party he/she/it is supporting and identify its legally based interest in that party’s victory. The court decides whether or not to allow the intervention. The court may hear the parties before delivering a decision on the intervention if it deems necessary. There is no appeal against the decision to allow intervention, whereas a refusal to allow intervention may be appealed.

D. Friends of the court (*amici curiae*)

A friend of the court brief is an intervention by a third party that is not a party to the action. This third party seeks to use the court as a platform to emphasise a point of law that might not otherwise be considered within the factual confines of the court. Usually the third party provides a written brief for the information of the court. As with third-party interventions, victims are advised to seek assistance from equality bodies, non-governmental organisations and/or trade unions about using *amici curiae*.

The Irish Equality Authority was granted the right to appear as an *amicus curiae* in two cases relating to Traveller accommodation (*Doherty and Anor v. South Dublin County Council, the Minister for the Environment, Heritage and Local Government, Ireland and the Attorney General and Lawrence v. Mayo County Council and ors*). *Amicus* briefs are relatively new in the Irish context; in this particular case both the Irish Human Rights Commission and the Equality Authority provided them. Prior to this such briefs had been entered on two occasions, one by the UNHCR and one again by the Irish Human Rights Commission. Unlike the Irish Human Rights Commission, the Equality Authority does not have a statutory right to intervene but relied on the inherent discretion of the court and sought and received permission to intervene in this case. The Irish courts require a body seeking to enter an *amicus* brief to establish proof of a legitimate interest in the case.

Though the institution of *amicus curiae* is not provided by Romanian law, some human rights CSOs have invoked the rules permitting *amicus* briefs to the European Court of Human Rights and submitted such briefs in cases of discrimination in their area of expertise. The same has been done in Hungary.

IV.2. SANCTIONS AND REMEDIES: THE ROLE OF COURTS AND ADMINISTRATIVE AUTHORITIES IN ENFORCING NON-DISCRIMINATION LAW

Useful links:

For an overview of what remedies to ask for and why, read Remedies and sanctions in EC non-discrimination law available in English, German and French at http://www.non-discrimination.net/content/media/Remedies%20and%20Sanctions%20in%20EC%20non-discrimination%20law%20_en.pdf

For a practitioners' overview of the topic provided by the European Academy of Law, visit <http://www.era-comm.eu/oldoku/remedies.htm>.

Practical tip:

There are various aspects you need to consider when starting legal action. A combination of proceedings may yield the best results.

In the country, in domestic labour and civil cases, only compensation is available. In cases of child and social protection, fines within the misdemeanour procedure are available: a) child discrimination – 500-1.000€, b) social protection – 3.000-5.000€.

In the Anti-discrimination Law the remedy depends on the procedure. The administrative procedure envisages recommendations for rectifying discrimination within 30 days. Civil cases may lead to a compensation award, while misdemeanour procedures envisage fines in the range of 400-1000€.

There are no upper limits stipulated by law. Thus, the amount of compensation fully depends on the court verdict.

A. Civil law

Remedies can be punitive or non-punitive, backward-looking or forward-looking (to adjust future behaviour), and address individual or group needs. Under civil law victims litigate in civil courts. They may seek to have the burden of proof reversed and request various sanctions including compensation. In some countries, labour courts operate independently of civil courts and procedures in these courts are in most cases preceded by arbitration or mediation. Trial court judgments are subject to appeal and judicial review of appeal judgments is often available.

The most typical sanction under civil law is compensation. Financial compensation to the victim may include compensation for past and future loss (most common), compensation for injury to feelings, damages for personal injury such as damage to mental health, or exemplary damages to punish the discriminator and set an example to others (much less common).

B. Criminal law

These sanctions may range from community service to fines and imprisonment. As a rule, criminal proceedings commence with a report from the victim to the police, who are responsible for investigating the case. The reversed burden of proof does not apply to criminal proceedings, and what is more, most countries require that a perpetrator's discriminatory intent be established beyond reasonable doubt. Cases are prosecuted in criminal courts by the public prosecutor and victims have a limited role to play – mainly testifying. If the prosecution refuses to prosecute the case, many countries allow victims to step in and take the case to court as (supplementary) private prosecutors.

C. Administrative law

Labour, consumer or school inspectorates tend to conduct administrative proceedings as do a few equality bodies – such as the Hungarian Equal Treatment Authority. Administrative bodies conduct their own investigations and the burden of proof may not apply to their proceedings. They bring decisions that may be challenged in court.

In Macedonia the specialised body can initiate administrative procedures for the fines that are stipulated in the part VII.Misdemeanour provisions (Article 42 - 45). These sanctions are administrative fines and are not awarded to the victim as compensation but go to the state budget.

D. Mediation

In Ireland mediation cases are conducted in private, and are not reported. An informal mediation service provided by the Equality Tribunal since December 2000 has facilitated a more speedy resolution of equality disputes at work, compared with the traditional, and more formal, equality investigation route. According to the Equality Tribunal, its mediation service is, on average, three times quicker than the alternative equality dispute resolution option – a formal investigation decided by an equality officer. Equality cases that have resulted in mediated agreements have been completed in just six months (from the original date of referral to the date of signing the agreement), compared with an average of 18 months in employment investigation cases (again, from the original date of referral to the date of decision). The Equality Tribunal mediation process involves dispute resolution by direct negotiation between the disputing parties. Mediation is guided by the principle of self-determination and is completely voluntary (either party may withdraw at any stage) and informal, and does not involve written submissions. Agreements are not published (unlike equality officer decisions in investigations), and the parties are also given a ‘cooling-off’ period before being asked to sign an agreement, to ensure that both sides can give informed consent on signing. Any agreement, once signed, is legally binding and enforceable. A key distinction between equality mediation and traditional industrial relations mediation (which occurs through the Labour Relations Commission), is that, whereas under industrial relations conciliation, there is an assumption that a compromise settlement will be reached somewhere in the ‘middle ground’, no such assumption is made in equality mediation. In many of the cases that were resolved, an outline agreement was reached in the first session, which is scheduled to last two hours. In general, the mediation process rarely involves more than two sessions before an agreement is formally signed.

The following examples illustrate the flexibility of remedies achieved through mediation in Ireland:

- Assurance that an employee’s visual impairment would not impede future promotion prospects;
- Appointment of a complainant to a newly created research post;
- Agreement to nominate an employee for a specific training course;
- Agreement to grant an employee a backdated promotion;
- Offer to pay an employee’s counselling fees and acknowledgement of distress caused;
- Goodwill gesture of €1 250 and a restaurant voucher to the value of €100;
- Assistance provided to an employee in applying for an educational grant;
- Apology and a €400 voucher for a hardware store;
- Access granted to a person with a disability through hotel grounds to a public beach;
- Agreement by a local authority to provide a purpose-built wheelchair-friendly bungalow;
- Apology for upset caused and a donation of €2000 to a charity;
- Apology and a year’s membership of a fitness club to a person with a disability;
- Undertaking by a financial institution to provide customers with privacy when completing sensitive forms;
- Review of a tenant’s rent and a return to the former rent structure.

E. The use of procedures and remedies in practice**Practical tip:**

When making a decision on enforcing the right to equal treatment, consider the aspects of procedures available under Macedonian law as listed in the Enforcement Chart.

Enforcement Chart

	Equality body	Mediation	Administrative proceedings	Civil proceedings	Labour court	Criminal proceedings
Suitability of role available to victim						
Time limits						
Procedural fees						
Length						
Representation mandatory?						
Representation available (NGO, trade union, other)						
Discovery of facts						
Remedy						
Costs to be paid to other party if case is lost						

ECtHR
Jurisprudence on
Discrimination in
FYRO Macedonian
Cases



V. ECtHR JURISPRUDENCE ON DISCRIMINATION IN FYRO MACEDONIAN CASES

The respect for human rights and fundamental freedoms, which are recognized by the international law and established with the Constitution, are fundamental values of the Macedonian constitutional order (Article 8 of the Constitution of the Republic of Macedonia). The Constitution also guarantees and secures the principle of equality, i.e. non-discrimination in the enjoyment of freedoms and rights. In accordance with Article 9 of the Constitution, all citizens are equal in their freedoms and rights regardless of the gender, race, color of skin, national and social background, political and religious affiliation, property and social status.

In addition to the regulation of the non-discrimination principle by the norms, the Constitution of the Republic of Macedonia also includes a fundamental legal framework regarding the judicial protection of freedoms and rights, including the principle of non-discrimination. Given the constitutional provisions, apparently the Constitution stipulates two types of judicial protection in securing human rights and freedoms: protection in the proceedings in front of the regular courts and constitutional-judicial protection in front of the Constitutional Court of the Republic of Macedonia (as stated above). Thus, according to Article 50 of the Constitution, every citizen can seek protection in front of the courts and also before the Constitutional court in a procedure based on the priority and urgency principles. In accordance with Article 5 of the Law on Courts from 2006, the courts shall protect the human and civil rights and freedoms, if that is not under the competence of the Constitutional court according to the Constitution. The Obligations Law from 2001, gives the possibility that in case of violation of freedoms and rights, the court can order the publication of judgment that verifies the committed violation, as well as possibility for the court to adjudicate a fair compensation (Articles 188 and 189).

Article 110 of the Constitution explicitly sets forth the competence of the Constitutional Court in protection of non-discrimination principle. The protection refers to prohibition of discrimination for citizens on the ground of gender, race, religious, national, social and political affiliation. The respective competence is further elaborated in the Rules of Procedure of the Constitutional Court, which prescribes the procedure, legal effects of the Court's decisions and the manner in which the Court can „restore” the violation of human rights and freedoms. According to Article 51 of the Rules of Procedure of the Constitutional Court, every citizen who considers that certain right or freedom set forth in Article 110 line 3 of the Constitution of Republic of Macedonia is violated by individual act or action, including the prohibition of discrimination, may seek protection from the Constitutional Court. If the Court finds violation of freedoms and rights under its competence, it shall annul the respective individual act or shall prohibit the action that inflicted the violation (Article 56 of the Rules of Procedure). This can be supported by the Decision of the Constitutional Court U. No.89/2009 from 10 February 2010, when the Court found the violation of the right to political action of a person whose candidacy for mayor at the local elections in 2009 was rejected by the municipal election committee. In addition to the acknowledgment of the violation, the Court also annulled the decision on which the respective violation was based. It is worth noting that when the Constitutional Court establishes the violation of a particular human right and freedom under its competence, it shall also specify the manner in which the consequences from the use of individual act or action that led to violation of the respective rights and freedoms shall be eliminated (Article 82 of the Rules of procedure of the Constitutional Court).

Indisputably, since the adoption of the Constitution in 1991, the Constitutional Court has not reached a decision that establishes the violation of the non-discrimination principle. In this context, in the last report of the European Commission against Racism and Intolerance of Council of Europe (ECRI), which was published on 15 June 2010, the following recommendations were addressed to the authorities:

„to identify the reasons why Article 9 of the Constitution ... ha(s) so far not been successfully pleaded in discrimination cases and, where applicable, take appropriate measures to eliminate any difficulties regarding reliance on these provisions in judicial proceedings”.

The legal framework for judicial protection from discrimination was previously elaborated in more details. This section is focused on the constitutional-judicial protection provided by the Constitutional Court, given the fact the Strasbourg Court considers this judicial protection as efficient in cases concerned with prohibition of discrimination. With the exception of the case *Kosteski* No.55170/00, which is the only case for which the ECtHR examined the merits of the discriminatory allegations (see above the section on discrimination on the ground of religion), for most of the cases the allegations were found as inadmissible as all the domestic legal remedies had not been exhausted. The applicants had not approached the Constitutional Court previously in order to seek protection from discrimination. The following cases can be considered for illustration: *Shjakova and others* No. 67914/01 (the applicants' children were monks at the Macedonian Orthodox Church, and the applicants were allegedly discriminated against because their beliefs differed from the beliefs of the church), *Skender* No. 62059/00 (the applicant complained because his daughter was not allowed to attend the teaching in the mother tongue- Turkish because of his place of residence); *Vranishkovski* No. 37973/05 (the applicant complained that he was discriminated against with the criminal conviction because he was distributing

religious calendars, and therefore he was discriminated on the ground of his religious beliefs); Suljmenov No. 69875/01 and Dzeladinov and others No.13252/02 (existence of allegedly racist motivation for police violence and lack of efficient investigation); Dumanovski No. 13898/02 (payment of unemployment benefits); Jakimovski No. 26657/02 (awarding tenant's right to military officers). In small number of cases, the allegations for discrimination were identified as inadmissible because they concerned rights and freedoms which are not set forth in the ECHR (Mickovski No. 68329/01, dismissal of deputy Solicitor General for political reasons) or the ECtHR, having found violation of some of the substantive provisions of the ECHR, did not separately analyze the allegations for discrimination (Veselinski No. 45658/99 and Dzidrovski No. 46447/99, right to purchase military apartments at reduced price).

The ECtHR, given the characteristics of the request to protect the rights and freedoms from Article 110 of the Constitution, developed a position that this legal remedy shall be considered as efficient and applicants should exhaust it regarding the protection from discrimination before they approach the ECtHR. Exhausting effective domestic legal remedies⁶ in relation to certain right or freedom is one of the admissibility criteria for the applications from Article 35 paragraph 1 of the ECHR (see the text below). It is so because „the Court is intended to be subsidiary to the national systems safeguarding human rights and it is appropriate that the national courts should initially have the opportunity to determine questions regarding the compatibility of domestic law with the Convention” (A, B and C v. Ireland [GC], no. 25579/05, § 142). If an application is nonetheless subsequently brought to Strasbourg, the Court should have the benefit of the views of the national courts, as being in direct and continuous contact with the vital forces of their countries (Burden v. the United Kingdom [GC], no. 13378/05, § 42). As the ECtHR stated „the rationale for the exhaustion rule is to afford the national authorities, primarily the courts, the opportunity to prevent or put right the alleged violations of the Convention. This is an important aspect of the subsidiary nature of the Convention machinery” (Selmouni v. France [GC], no. 25803/94, § 74; Kudła v. Poland [GC], no. 30210/96, § 152).

The last case from the range of cases where the ECtHR ruled about alleged discrimination is Kamceva No. 23876/08, whereby the applicant complained that she was not employed as primary school teacher for political reasons. The applicant had not submitted request for protection of rights and freedoms to the Constitutional Court, but filed an appeal for compensation of inflicted damage on the ground of discrimination in front of the regular courts in accordance with Article 181 of the Labor Relations Law from 2005 which stipulates such a legal remedy. Her claim was dismissed as unsubstantiated. The ECtHR stated that the application is inadmissible because it found that the applicant did not have status of victim. It is worth noting, however, that the ECtHR for the first time in this case raised the question about the relation between the request for protection of rights and freedoms in front of the Constitutional Court and the compensation claim on grounds of discrimination in labor disputes, i.e. whether the two legal remedies can be alternatively used or the constitutional judicial protection must always be exhausted. Apparently, it will rest on the case law to resolve this issue in future.

Conclusively, since 10 April 1997, the ECHR is constituent part of the domestic legal order and it cannot be amended by law (Article 118 of the Constitution). Given that courts adjudicate on the basis of the Constitution and all laws and international treaties which were ratified in accordance with the Constitution (Article 98 of the Constitution), apparently the courts can directly apply the ECHR in the rulings for concrete cases. Taking into account that the ECtHR case-law is providing the content of the ECHR which defines the basic safeguard principles for rights and freedoms, one can unquestionably conclude that the courts can refer to its case-law in the rationale of their judgments. This does not only refer to ECtHR's judgments in Macedonian cases, but the overall jurisprudence of the ECtHR, because besides the inter partes effect, the ECtHR's judgments also include the general legal opinions on certain matters that go beyond the limits of the respondent state and have universal meaning. The direct application of ECHR by the national courts has been proved by the Supreme Court decisions in regard with the requests for protection of the right to trial in a reasonable deadline, whereby it invokes the ECHR (it even identifies violation of Article 6 of ECHR) and the ECtHR case law.

⁶ Applicants are only obliged to exhaust domestic remedies which are available in theory and in practice at the relevant time and which they can directly institute themselves – that is to say, remedies that are accessible, capable of providing redress in respect of their complaints and offering reasonable prospects of success (*Sejdovic v. Italy* [GC], no. 56581/00, § 46; *Paksas v. Lithuania* [GC], no. 34932/04, § 75).

Useful links:

For practical information in your own language on applications to the European Court of Human Rights download an application pack from:

<http://www.echr.coe.int/ECHR/EN/Header/Applicants/Apply+to+the+Court/Application+pack/>

Admissibility criteria are explained here:

http://www.echr.coe.int/NR/rdonlyres/91AEEEEBC-B90F-4913-ABCC-E181A44B75AD/0/Practical_Guide_on_Admissibility_Criteria.pdf

Search ECtHR case law here: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

Practical tip

For practical information on procedures and guidance scroll down to page 33 in the application pack. Here the ECtHR provides information in your language about the rights it protects, the kind of cases it can deal with, the conditions for making an application, the way you should fill in the application form and the rules of procedure.

Apply to the ECtHR if you are seeking compensation ('just satisfaction') as UN treaty bodies cannot grant you compensation.

When you are looking for cases similar to yours, use key words and specify the Articles of the European Convention that you think are relevant, such as Article 14 that prohibits discrimination in relation to any other rights protected under the Convention.

1. What cases can the ECtHR deal with (admissibility criteria)?

A. Exhaustion of domestic remedies: the ECtHR will only deal with a case after all national remedies have been exhausted. The Court provides general information on what remedies are considered effective.

B. Who may complain about whom (*rationae personae*): individual or CSO applicants must be direct victims of a violation. You can only complain to the ECtHR about matters which are the responsibility of a public authority (legislature, administrative authority, or court of law). The Court cannot deal with complaints against private individuals or private organisations.

C. When to bring the complaint (*rationae temporis*): States can only be held responsible for violations that occurred after they ratified the European Convention on Human Rights and Fundamental Freedoms. All EU Member States had done so before the transposition of the Non-discrimination Directives into their national laws.

D. Six month limit: the ECtHR can only deal with an application within a period of six months from the date on which the final domestic decision was taken. After a decision of the highest competent national court or authority has been given, you have six months within which you may apply to the ECtHR, beginning from when the final court decision in the ordinary appeal process is served on you or your lawyer.

E. Where the violation took place (*rationae loci*): broadly speaking, Member States can be held liable for violations that occur on their sovereign territory.

F. What can you complain about (*rationae materiae*): the ECtHR will only examine complaints that relate to the rights contained in the European Convention on Human Rights. Non-discrimination has a special status in the Convention, so you are advised to carefully read up on the subject in this Handbook.

G. Other international procedures: an application will not be admissible if its contents are essentially the same as a complaint already made to another international mechanism, such as a United Nations treaty body mentioned below.

H. Applications must not be anonymous: give your personal details in the application. You may ask for confidentiality if the circumstances require.

I. Abuse of the right of application: an application must not be written in offensive language and must contain all the relevant information.

J. Manifestly ill-founded: an application will be declared manifestly ill-founded if at first sight it appears unfounded and if the allegations made are not supported by the material the applicant has submitted.

2. How to apply to the ECtHR

The ECtHR's official languages are English and French but if it is easier for you, you may alternatively write to the Registry in the official language of one of the States that have ratified the Convention. Application form, duly completed and signed by the applicant or his/ her representative, is indispensable to launch the proceedings before the ECtHR. If submitted by email or fax, a hard copy application form must be provided by surface mail may be made only by post. All correspondence relating to your complaint should be sent to the following address:

The Registrar
European Court of Human Rights
Council of Europe
F-67075 STRASBOURG CEDEX.
FRANCE

V.2. INVOKING EU LAW IN DOMESTIC PROCEEDINGS

Arguments based on the Non-discrimination Directives have already been used in cases before the European Court of Human Rights, such as in a case that concerned indirect discrimination against Roma children in special schools. The same arguments can be made in domestic court as well. (*D.H. and Others v the Czech Republic*, judgment of 13 November 2007, available at:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Czech%20%20Republic%20%20ostrava&sessionId=61105662&skin=hudoc-en.>)

If a key concept has not been properly formulated, and/or principles established by the ECJ are not taken into account by domestic law and the domestic court refuses to refer the case for a preliminary ruling, then the final domestic judgment may be challenged in an international forum, relying on arguments based on European law.

The rules on admissibility and adjudication of such complaints are detailed in the strategic litigation manual, quoted in the introduction to this Handbook, on pages 131-144.

Conclusions and Final Practical Tips

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VI. CONCLUSIONS AND FINAL PRACTICAL TIPS

What steps to take against discrimination? What advice to give to a client claiming to be a victim of discrimination? Legal professionals first need to ask this question: what is the victim's protected characteristic? BUT FOR their disability, age, ethnicity, race, religion or sexual orientation would they have been treated otherwise? It is important to bear in mind that protection under anti-discrimination law is due to people treated unfavourably on account of a protected ground in certain fields.

If the answer to the BUT FOR question is yes, next it may be helpful to look at the definition of the different forms of discrimination to analyse the unequal treatment. This exercise may be done in two phases. First, it may be worth finding out the following:

- What constitutes less favourable treatment? For instance: failure to recruit, denial of education, services, promotion, or lower pay. DIRECT DISCRIMINATION
- What is the provision, criterion, or practice that puts the client at a particular disadvantage? For instance: language requirements. Do people from the same protected group suffer from a similar disadvantage? INDIRECT DISCRIMINATION
- Does the conduct intimidate, degrade or humiliate the victim or does it create an offensive environment? For instance: homophobic jokes. HARASSMENT
- Does the less favourable treatment result from a complaint or proceedings against discrimination? For instance: a disabled employee who is not promoted complains and is subsequently laid off. VICTIMISATION
- Did somebody instruct the discriminator to treat the victim less favourably? AN INSTRUCTION TO DISCRIMINATE
- Does the treatment breach the requirement to make reasonable accommodations for disabled people?

The answers to these questions will point to the type of discrimination in question.

Second, it may be worth identifying a comparator – if one is needed at all:

- The Non-discrimination Directives allow for hypothetical comparators.
- There is no need to identify a comparator in cases of harassment, victimisation, an instruction to discriminate, or a failure to provide reasonable accommodation.
- In some States discrimination can be established compared to an ideal minimum standard of treatment, for instance conduct required by respect for human dignity.

The answers to the questions above will indicate the facts that need to be established in legal proceedings as well as the limits of a defence of justification. Once you have identified the type of discrimination and the best potential comparator, you may safely move on to collecting evidence, arranging it and planning to counter a defence of justification.

Establishing the facts lies at the heart of any legal proceedings, which in cases of discrimination is as a general rule accelerated through the reversal of the burden of proof. The following are outlined in this Handbook:

- what facts can support a discrimination claim (Basic information in a discrimination claim);
- how to assess these facts (The 'three plus one' steps to establishing discrimination relying on the reversed burden of proof); and
- how to collect evidence to substantiate these facts (General and specific evidence).

This Handbook also contains charts and tables to guide you through procedures and assist you in selecting the most effective and proceedings on the basis of the enforcement chart.

The Handbook provides a useful summary of sanctions that can be sought to remedy discrimination. Settlements secured through mediation show a high level of invention and variety that may be used for inspiration.

BEFORE taking any legal action it is advisable to consult a specialised equality body, a non-governmental organisation and/or a trade union. Equality bodies are the most specialised, accessible and cheapest providers of advice, assistance and more on discrimination.

Discrimination is often directed against groups or communities and also arises from unequal social structures. The Non-discrimination Directives provide the best tools to fight discrimination at the individual level. However, if victims work together and involve non-governmental organisations, it is possible to challenge structural discrimination

If and when national legislation appears vague or too complex, it is worth relying on arguments based on European non-discrimination law and ECtHR case law from the very beginning of proceedings, regardless of whether they are instituted before a court, an equality body or administrative authorities. Any claim may be referred to a court on appeal or on review from an administrative authority, inspectorate, or even an equality body. Arguments based on EU non-discrimination law may be made in Macedonian courts and have already been made for instance before the European Court of Human Rights. A prime example of these arguments can be found in *D.H. and Others v. the Czech Republic*, judgment of 13 November 2007 (application No. 57325/00 available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>).

Appendices



VII. APPENDICES

A. Area-specific handbooks in English

- Handbook on European non-discrimination law by the European Union Agency for Fundamental Rights (FRA) and the European Court of Human Rights (ECtHR). In particular, it takes into account the work done by the European Network of Legal Experts in the Non-discrimination Field:
http://www.fra.europa.eu/fraWebsite/research/projects/proj_implementationeuLaw_en.htm
- Cases, Materials and Text on National, Supranational and International Non-discrimination Law, published as a Ius Commune Casebook for the Common Law of Europe:
<http://www.casebooks.eu/nonDiscriminationLaw/about/>
- EU Anti-discrimination Law, Evelyn Ellis (2005), Oxford University Press,
• <http://fds.oup.com/www.oup.co.uk/pdf/0-19-926683-2.pdf>
- Proving Discrimination Cases – the Role of Situation Testing, Migration Policy Group, (2009),
http://www.migpolgroup.com/publications_detail.php?id=230

B. Internet sources

UN resource page: http://www.hrea.org/index.php?doc_id=975

UN disability resource page <http://www.un.org/disabilities/default.asp?id=212>

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