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(‘Racial Equality Directive’) and of Council Directive 2000/78/EC of 27
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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive')

{SWD(2014) 5 final}

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Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive')

1. INTRODUCTION

Protection from discrimination is one of the areas in which EU law closely affects the everyday life of people in the EU. The comprehensive framework provided by the EU's two anti-discrimination Directives¹ has shaped the landscape of European anti-discrimination law for over a decade now. Some Member States had hardly any legislation in this field before the transposition of the two Directives, and the Directives introduced novel elements like protection from age discrimination into the legislation of all Member States.

The anti-discrimination Directives:

- prohibit discrimination on grounds of racial or ethnic origin (Directive 2000/43/EC) and religion or belief, disability, age and sexual orientation (Directive 2000/78/EC);
- provide protection in a number of key areas of life: employment and vocational training (both Directives); education, social security and healthcare, and access to and supply of goods and services, including housing (Directive 2000/43/EC);
- prohibit various forms of discrimination: direct and indirect discrimination, harassment, instruction to discriminate and victimisation;
- require Member States to provide efficient sanctions and remedies.

The first implementation reports were adopted in 2006² and in 2008³ respectively. Given that both of the anti-discrimination Directives⁴ have to be reported on regularly, the present document is a joint report because the regulatory approach and content of most of the provisions are identical. In addition, most Member States have transposed the two Directives in a single national act. The first reports were adopted at a time when many Member States had only recently transposed the anti-discrimination Directives into national law and therefore lacked experience in applying them.

Today, all 28 Member States have transposed the Directives and gained experience in their application. The Court of Justice of the European Union (CJEU) has also developed the

¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22, and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16.

² COM(2006) 643 final, 30.10.2006, on Directive 2000/43/EC.

³ COM(2008) 225 final/2, 8.7.2008, on Directive 2000/78/EC.

⁴ Article 17 of Directive 2000/43/EC and Article 19 of Directive 2000/78/EC.

interpretation of the Directives through its case-law. This report provides an opportunity to examine the application of the Directives, to take stock of the interpretation given by the CJEU and national courts and to identify challenges ahead.⁵

In accordance with the Directives⁶, all Member States gave the Commission information contributing to this report. In addition, the Commission consulted national equality bodies⁷, the European Network of Equality Bodies (Equinet), the EU Fundamental Rights Agency, social partners⁸, civil society organisations⁹ and the European Network of Legal Experts in the Non-discrimination Field¹⁰.

2. STATE OF TRANSPOSITION AND INFRINGEMENT PROCEDURES

Both Directives have been transposed into national laws in all 28 Member States¹¹ and the conformity of all those laws with the Directives has been checked by the Commission. Infringement proceedings due to non-conformity with both Directives were launched, mainly between 2005 and 2007, against 25 Member States¹². The fact that many Member States initially had problems with transposition can be explained by the novelty of the two Directives at the time. Typical problems concerned the definitions of direct and indirect discrimination, harassment, victimisation, legal standing of interested organisations, limitations to the scope and too extensive interpretation of the derogations which are permitted under the Directives. Almost all these ‘first generation’ infringement cases have now been closed because Member States have brought their legislation into line with the Directives¹³. In one case infringement proceedings initiated by the Commission led to a decision by the CJEU finding the Member State in breach of its obligation to properly

⁵ Under Article 25 of the Treaty on the Functioning of the European Union (TFEU), the Commission reports every three years on the application of the Treaty’s provisions on ‘Non-discrimination and citizenship of the Union’, see COM(2013) 270, 8.5.2013 for the reporting period 2011-2013. The Article 25 report refers to the present report as regards non-discrimination under Article 19 TFEU.

⁶ Articles referred to in footnote 4.

⁷ The equality bodies of Belgium, Denmark, Germany, Hungary, Austria, Sweden and the United Kingdom replied separately.

⁸ European Centre of Employers and Enterprises Providing Public Services (CEEP), BusinessEurope, European Trade Union Confederation (ETUC), EUROCADRES and Union européenne de l’artisanat et des petites et moyennes entreprises (UEAPME).

⁹ European Women’s Lobby, Platform of European Social NGOs (Social Platform), European Network of Religion and Belief (ENORB), European Network against Racism (ENAR), ILGA-Europe, AGE Platform Europe, European Disability Forum (EDF), Open Society, Amnesty International and European Roma Rights Centre (ERRC). In addition, Platform for International Cooperation on Undocumented Migrants (PICUM) and European Forum of Muslim Women sent own-initiative contributions.

¹⁰ This network assists the Commission in the field of anti-discrimination law.

¹¹ Directive 2000/43/EC had to be transposed by 19 July 2003 by EU-15, by 1 May 2004 by EU-10, by 1 January 2007 by Romania and Bulgaria, and by 1 July 2013 by Croatia; Directive 2000/78/EC had to be transposed by 2 December 2003 by EU-15 and as above for the new Member States. However, Directive 2000/78/EC provided for up to three additional years to transpose age and disability provisions.

¹² There were no proceedings against Luxembourg; examination of the Bulgarian and Croatian transposition is still ongoing.

¹³ Non-conformity infringement cases against Belgium and Romania are currently pending (Belgium on both Directives, Romania on Directive 2000/78/EC).

implement Directive 2000/78/EC in relation to reasonable accommodation for disabled persons in employment¹⁴.

The Commission continues to monitor developments in the Member States and brings infringement proceedings when necessary¹⁵.

The Commission receives a number of complaints every year concerning these Directives (around 20-30 on average), but the majority are individual cases of discrimination, which are not about incorrect transposition or application of the Directives and therefore do not lead to infringement proceedings. A much larger number of complaints are dealt with at national level. While remedies for discrimination in individual cases are only available under national law and can only be claimed in national courts, it is the Commission's role to scrutinise whether a complaint reveals incorrect transposition or application of the Directives by the Member State concerned. Three complaint-based cases under Directive 2000/78/EC are currently pending in infringement proceedings¹⁶.

3. IMPLEMENTATION AND APPLICATION OF THE DIRECTIVES

Both Directives have been transposed into national law, but the review of national experiences reveal that there are still challenges to their implementation and application.

The Commission, the European Network of Equality Bodies (Equinet), the EU Fundamental Rights Agency (FRA) and individual Member States have consequently all published guidance relevant to the application of the two Directives to tackle these challenges¹⁷. In addition, the Commission provides funding for the training of judges and other legal practitioners aimed at promoting the correct application of the Directives by improving their knowledge of EU equal treatment legislation¹⁸.

3.1 Awareness of rights

¹⁴ Case C-312/11 *Commission v. Italy*, judgment of 4 July 2013.

¹⁵ This is illustrated by more recent infringement proceedings against two Member States (Hungary on Directive 2000/78/EC in 2012 and Finland on Directive 2000/43/EC in 2013). The former case is related to the lowering of the compulsory retirement age of judges, prosecutors and notaries; the latter case is related to the deficiency of competences of the national equality body under Directive 2000/43/EC. The CJEU found that Hungary had failed to comply with Directive 2000/78/EC due to the significant lowering of mandatory retirement age for judges, prosecutors and public notaries (Case C-286/12 *Commission v. Hungary*, judgment of 6 November 2012). Following the judgment, Hungary adopted Law T-9598 on 11.3.2013 to ensure compliance with the Directive and this case could be closed on 20.11.2013.

¹⁶ Two cases concern Greece and discriminatory age limits in public service, one case concerns the Czech Republic and insufficient protection from discrimination for disabled persons seeking employment.

¹⁷ The Commission's publications have been prepared by the European Network of Legal Experts in the Non-discrimination Field and are available at http://ec.europa.eu/justice/discrimination/document/index_en.htm#h2-7, Equinet reports at <http://www.equineteurope.org> and FRA reports at <http://fra.europa.eu>.

¹⁸ Financing is provided by the PROGRESS 2007-13 programme, Decision No 1672/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Community Programme for Employment and Social Solidarity — Progress, OJ L 315 of 15.11.2006. The training is currently organised by the Academy of European Law in Trier under a contract with the Commission, see <http://www.era.int>.

Both Directives¹⁹ stress the importance of dissemination of information to ensure that the persons concerned know of their rights to equal treatment. All Europeans, not only minority populations, tend to lack awareness of their rights²⁰. For example, people may not know that discrimination in employment is prohibited even at the stage of applying for a job²¹. Many Member States view such lack of awareness as an important challenge and have reported ways in which they are addressing this issue, such as through information and guidance documents, awareness-raising campaigns and information portals, including for specific target groups (minorities, young people)²². Targeting persons who are most at risk as well as those who are in a position to commit breaches, such as employers, appears to represent an effective use of resources²³.

In the area of employment, the trade unions and social partners have a key role to play in raising anti-discrimination awareness of both employees and employers²⁴. Many Member States also provide useful practical guidance on their anti-discrimination laws covering workplace situations.²⁵

3.2 Lack of equality data

The Directives do not require Member States to collect equality data²⁶. However, the collection and analysis of such data, a task which is the responsibility of the Member States, contributes to the fight against discrimination and promotes equality by providing evidence of existing discrimination, making it transparent and quantifying it. By contrast, lack of equality data makes it more difficult to assess situations and prove the existence of discrimination²⁷. This concerns, in particular, indirect discrimination where statistical evidence often plays a crucial role in proving the adverse effects of a seemingly neutral measure for a specific group. The first report on the application of Directive 2000/43/EC raised concerns that *'the scarcity of ethnic data in most Member States might hinder proper monitoring of the application of Community legislation.'* The situation is still essentially unchanged and is relevant to both

¹⁹ Article 10 of Directive 2000/43/EC and Article 12 of Directive 2000/78/EC.

²⁰ According to the EU-MIDIS survey by the Fundamental Rights Agency in 2010, only 25% of the respondents said that they were aware of anti-discrimination legislation, available at <http://fra.europa.eu/en/publications-and-resources>.

²¹ Job advertising must not contain any discriminatory requirements related, for instance, to the age or the ethnic origin of applicants. Some Member States have experimented with the use of anonymous CVs in job applications to avoid any prejudice when selecting candidates for a job interview, e.g. the German pilot project:
http://www.antidiskriminierungsstelle.de/DE/ThemenUndForschung/anonymisierte_bewerbungen/anonymisierte_bewerbungen_node.html

²² For example Bulgaria, Ireland, Italy, Poland, Romania, Slovakia and Spain. In addition, equality bodies of Austria, UK and Poland provided detailed information in this respect. Several Member States mention that EU Progress funding has been used for awareness-raising projects.

²³ This was also one of the recommendations by the FRA in its Opinion 1/2013 on the two Directives, available at: <http://fra.europa.eu/en/opinion/2013/fra-opinion-situation-equality-european-union-10-years-initial-implementation-equality>.

²⁴ Articles 11 and 12 of Directive 2000/43/EC and Articles 13 and 14 of Directive 2000/78/EC highlight the role of social partners and NGOs in promoting equal treatment.

²⁵ E.g. the UK Equality and Human Rights Commission's online guidance for employers and workers, available at: <http://www.equalityhumanrights.com/advice-and-guidance/new-equality-act-guidance/>

²⁶ Equality data refers to data gathered in relation to equality and discrimination.

²⁷ This does not concern only data related to the grounds covered by the two Directives, but also data according to sex. If Member States do not collect data according to sex, they will not be able to detect whether women rather than men are victims of certain types of discrimination.

Directives. This problem has been flagged by many respondents (national equality bodies²⁸, FRA, NGOs) and the Commission shares their concerns.

Most Member States accept statistical evidence for proving discrimination and accept also situation testing²⁹ as proof. However, many Member States do not collect equality data or collect it in a very limited way, for instance citing requirements of data protection law as a reason for not collecting data. It should be emphasised that EU law, specifically the Data Protection Directive³⁰, does not prevent the Member States from collecting data to produce statistics provided that the safeguards set out in the Directive are respected³¹. Providing practical guidance or establishing standards for the collection of equality data at national level is good practice that appears to offer at least a starting point in tackling this issue³².

3.3 Underreporting

All available information confirms low levels of reporting incidents of discrimination. This concerns both initial reporting, for instance to an equality body or the police, and pursuing a case through court proceedings. Recent data show that across all ethnic and migrant groups surveyed, 82 % of those who were discriminated against did not report their experience³³. The commonest reasons given were the belief that nothing would happen as a result of reporting, lack of knowledge on how and to whom to complain, and negative experiences due to inconvenience, bureaucracy or length of the process. Contrary to some concerns expressed prior to adoption of the Directives, there has clearly been no substantial increase in court proceedings concerning discrimination. The number of cases reported is generally low and estimated to represent only a small percentage of actual discrimination cases throughout the EU. In some Member States, the numbers may even be too low, as cases of clear discrimination are not reported and brought to court. This highlights the need to make further efforts on awareness-raising and reporting and improve access to complaints mechanisms and to justice. National equality bodies could play an important role³⁴ in helping to make complaints processes more ‘customer-friendly’ and to facilitate the reporting of discrimination for victims.

3.4 Access to justice

²⁸ See also Equinet report ‘Statistics on Discrimination and Database on Complaints. A contribution from national equality bodies’, December 2009, available at: <http://www.equineteurope.org>.

²⁹ Situation testing is a method helping to bring to light discrimination on the basis of a pair-comparison testing e.g. matched pairs test application for a job vacancy, using an identical application differing solely as regards a particular characteristic under examination (e.g. age).

³⁰ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31-50. The forthcoming reform of the EU legal framework as presented by the European Commission on the protection of personal data will not bring any change in this respect.

³¹ All references to equality data in this report should be understood as meaning anonymous data for statistical and evidence purposes excluding the identification of natural persons concerned.

³² E.g. Germany, Ireland, France, Croatia and Hungary have published surveys, reports or manuals on equality data collection.

³³ EU-MIDIS survey 2010 by the Fundamental Rights Agency, available at <http://fra.europa.eu/en/publications-and-resources>.

³⁴ See the 2012 Equinet Report Tackling the ‘Known Unknown’ How Equality Bodies Can Address Under-Reporting of Discrimination through Communications, available at: <http://www.equineteurope.org>.

Access to effective and swift justice is of fundamental importance to victims of discrimination. The barriers to access to justice include short time limits for initiating a discrimination claim, the length and cost of proceedings, including the potentially discouraging effect on victims of the ‘loser pays’ principle, and limited availability of legal aid³⁵.

Annex I to this report provides concrete guidance on how to present a discrimination claim, aiming to explain victims’ rights in straightforward language and format and giving hands-on advice on how to pursue a discrimination case.

3.5 Sanctions and remedies

The two Directives do not harmonise sanctions and remedies in respect of discrimination, but require the Member States to lay down effective, proportionate and dissuasive sanctions and to ensure that judicial procedures for the enforcement of obligations under these Directives, possibly preceded by an administrative pre-litigation procedure, are available. The initial problems which many Member States encountered in relation to the correct transposition of the rules on sanctions³⁶ have now been addressed and the sanctions provided for by law are generally appropriate. However, there are still potential grounds for concern as regards the availability of remedies in practice and whether sanctions that are imposed in concrete cases comply fully with the requirements of the Directives³⁷. The national courts appear to have a tendency to apply the lower scale of sanctions provided for by law and in terms of the level and amount of compensation awarded³⁸. In the *ACCEPT* case, the CJEU pointed out that Directive 2000/43/EC precludes national law under which sanctions are purely symbolic and that under certain conditions it would be in breach of the Directive if it is only possible to give a warning in a case of discrimination³⁹. In the light of these issues, the Commission will closely monitor the standards applied in the use of sanctions and remedies in the Member States.

3.6 Interpretation by courts

The CJEU in its case-law has clarified the interpretation of both Directives. Most cases concern the interpretation of Directive 2000/78/EC as regards discrimination on grounds of age, and in particular Article 6(1), which provides that differences of treatment based on age may be justified if there is a legitimate aim and the means used to achieve that aim are appropriate and necessary.

³⁵ These constraints have been identified in relevant studies, e.g. a 2011 ‘Comparative study on access to justice in gender equality and anti-discrimination law’ ordered by the European Commission, available at:

http://ec.europa.eu/justice/gender-equality/files/conference_sept_2011/final_report_access_to_justice_final_en.pdf and the FRA report on ‘Access to justice in cases of discrimination in the EU – Steps to further equality’ available at: <http://fra.europa.eu/en/publications-and-resources>.

³⁶ E.g. several Member States incorrectly had an upper limit for compensation in cases of discrimination.

³⁷ Studies referred to in footnote 35 as well as national reports of independent legal experts in the field of anti-discrimination, national equality bodies and Equinet.

³⁸ E.g. data collected by independent legal experts from all Member States, which has been compared and summarised in the report ‘Developing Anti-Discrimination Law in Europe’, October 2012, available at http://ec.europa.eu/justice/discrimination/document/index_en.htm#h2-7.

³⁹ Case C-81/12 *Asociatia Accept v Consiliul National pentru Combaterea Discriminariilor*, judgment of 25 March 2013. The CJEU left the assessment of whether this was the case to the national court.

Case-law concerning discrimination on the grounds of sexual orientation, disability and racial or ethnic origin is less developed because fewer cases are referred. In the cases concerning these grounds, the CJEU has dealt with basic issues such as the prohibition of an employer's general announcement to discriminate, the definition of disability, or the exclusion of same-sex partners from work-related benefits reserved for heterosexual couples. The CJEU has not yet had an opportunity to pronounce on discrimination on grounds of religion or belief.

Member States report varying levels of national case-law. In some Member States, the Directives have given rise to important case-law⁴⁰ and cases are regularly referred to the CJEU⁴¹. Other Member States report a low number of cases.⁴²

Annex II to this report provides an overview of the most important case-law delivered by the CJEU and highlights some interesting cases heard by national courts.

4. ASPECTS COMMON TO BOTH DIRECTIVES

Despite some features that are specific to individual grounds of discrimination⁴³, the structure of the two Directives and the basic concepts are similar (definitions, positive action, minimum requirements, defence of rights, burden of proof, dissemination of information, dialogue with social partners and NGOs, sanctions).

4.1 Indirect discrimination

Indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons having a particular characteristic at a particular disadvantage compared with other persons, unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The concept of indirect discrimination is complex and many Member States had initial difficulties in transposing it correctly. It is now enshrined in law, but its application in practice remains a challenge. To illustrate the problem, some Member States⁴⁴ report that concerns have been expressed about the lack of clarity or lack of understanding of the concept of indirect discrimination in national courts. Other Member States⁴⁵ point out that they do not yet have any case-law providing interpretation of indirect discrimination.⁴⁶ Annex I to this report provides examples of typical situations of indirect discrimination.

4.2 Burden of proof

⁴⁰ E.g. Germany.

⁴¹ E.g. Denmark and Germany.

⁴² E.g. Estonia reports that in the period 2007-2011 the Estonian courts only ruled on three cases concerning discrimination in employment; Finland reports that there is not much case-law concerning the Non-Discrimination Act and hardly any discrimination cases have been heard in the higher courts. Latvia reports no criminal cases during the period 2009-2012 and between 44 and 57 cases annually that are broadly related to discrimination and differential treatment. Malta replies that there is hardly any case-law.

⁴³ Such as the concept of reasonable accommodation which only applies in the area of disability.

⁴⁴ E.g. Ireland and Denmark.

⁴⁵ E.g. Estonia, Slovenia and Finland.

⁴⁶ The equality bodies in their common contribution indicated a specific need for monitoring to ensure uniform application of indirect discrimination. See Equality law in Practice – Report on the Implementation of the Race and General Framework Directives, Equinet Report, May 2013, available at: <http://www.equineteurope.org>.

A key element necessary to ensure the correct handling of discrimination claims is the shift in burden of proof before the courts or other competent authorities⁴⁷. This means that where a person claiming to be a victim of discrimination can establish facts from which it may be presumed that discrimination has occurred, it is for the respondent to prove that there has been no discrimination. Initially eight Member States had problems in correctly transposing the concept of burden of proof⁴⁸. Some Member States⁴⁹ report that the correct application of the reversed burden of proof remains a challenge and is not sufficiently well known by national courts. As an example of a way to address this problem, one Member State reports that it is considering the inclusion of the reversal of burden of proof directly in the Rules of Civil Procedure (and not only in the equal treatment legislation)⁵⁰. The Commission is promoting the correct application of this concept by providing training to national judges and legal practitioners⁵¹.

4.3 Positive action

The Directives specifically allow but do not oblige the Member States to maintain or adopt specific measures to prevent or compensate for disadvantages linked to any of the grounds covered by the Directives⁵². Positive action by definition have to be beneficial to the target groups. Almost all Member States have taken some form of positive action within the scope of the two Directives⁵³, for example in favour of persons with disabilities or the Roma⁵⁴.

4.4 Multiple discrimination

The Directives do not contain any specific provision on multiple discrimination, but both refer to the fact that ‘women are often victims of multiple discrimination’⁵⁵. However, the Directives already allow a combination of two or more grounds of discrimination to be tackled in the same situation although problems may arise from differences in the level of protection provided for different grounds under the two Directives because the scope of

⁴⁷ This only applies in civil, but not in criminal, proceedings.

⁴⁸ Czech Republic, Estonia, Italy, Cyprus, Lithuania, Hungary, Malta and Romania.

⁴⁹ Belgium, Malta and Slovakia.

⁵⁰ Slovakia.

⁵¹ See footnote 18. One of the issues specifically addressed in the training is the burden of proof in discrimination cases.

⁵² Article 5 of Directive 2000/43/EC and Article 7 of Directive 2000/78/EC. They provide that ‘With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin or religion or belief, disability, age or sexual orientation respectively.’

⁵³ Only Lithuania reported that no such measures have been adopted.

⁵⁴ As regards positive action for disabled persons, Member States report targets for public sector employers to employ them. Positive action reported for the Roma is more diverse, comprising the four key sectors of national Roma strategies (employment, housing, education and healthcare). In the Council Recommendation on effective Roma integration measures in the Member States adopted on 9 December 2013, Council document nr. 16970/13 available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/139979.pdf (OJ reference is not yet available), it is recommended that the Member States ‘with a view to promoting the full equality of Roma in practice, take effective policy measures to ensure their equal treatment and the respect of their fundamental rights, including equal access to education, employment, healthcare and housing’ (point 1.1).

⁵⁵ Recital 14 of Directive 2000/43/EC and Recital 3 of Directive 2000/78/EC. Both Directives also refer to the need to assess, in accordance with the principle of gender mainstreaming, the impact of measures taken on women and men (Article 17(2) of Directive 2000/43/EC and Article 19(2) of Directive 2000/78/EC). Many Member States claimed to have no relevant information in this respect, but Ireland, Spain, France, the Netherlands and Poland provided comprehensive information.

Directive 2000/78/EC is limited to employment matters only. The Commission has sought to close this gap with its 2008 proposal for a new Directive⁵⁶.

4.5 Discrimination by association, assumption and perception

The CJEU has already decided that, under certain circumstances, discrimination based on disability may include discrimination based on the association of a plaintiff with a person who is disabled, although the plaintiff has no disability⁵⁷. This reasoning appears to be general in nature and applicable also to the other grounds of discrimination covered by the two Directives.

As suggested by existing national case-law⁵⁸, the Commission considers that the Directives also prohibit a situation where a person is directly discriminated against on the basis of a wrong perception or assumption of protected characteristics, for example, if a candidate for a job is not selected because the employer wrongly believes he/she is of a specific ethnic origin or homosexual.

4.6 Protection for everyone in the EU

The two Directives make it clear that the prohibition of discrimination also applies to nationals of third countries, but does not cover differences of treatment based on nationality, and is without prejudice to provisions governing entry and residence⁵⁹. This is an important element of the Directives, underlining the fact that the prohibition of discrimination protects everyone in the European Union and not only EU citizens. Third-country nationals, including stateless persons⁶⁰, are often particularly vulnerable to discrimination due to their situation⁶¹. Some problems, however, do not derive directly from legislation, but from how the relevant legislation is applied on the ground. The legislation also needs to be combined with appropriate policy and financial measures.⁶² Member States report that protection from

⁵⁶ Proposal for a Directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final.

⁵⁷ Case C-303/06 *Coleman*, judgment of 17 July 2008, where the Court of Justice ruled that Directive 2000/78/EC protected a mother of a disabled child from harassment and discrimination in employment, when the problems were due to the fact that the mother needed extra time off to take care of her child.

⁵⁸ See Annex II, point 2c.

⁵⁹ Article 3(2) of both Directives, Recital 13 of Directive 2000/43/EC and Recital 12 of Directive 2000/78/EC.

⁶⁰ A 'third country national' is defined as a person who is not a citizen of the Union within the meaning of Article 20(1) TFEU, for instance in Directive 2011/98/EU.

⁶¹ Examples of Directives specifically establishing third-country nationals' rights to equal treatment compared to nationals are: Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ L 16, 23.1.2004, p. 44), as amended by Directive 2011/51/EU (OJ L 132, 19.5.2011, p.1) to also cover beneficiaries of international protection and Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third country nationals to reside and work in the territory of a Member State and on a common set of rights for third country workers legally residing in Member States (OJ L 343, 23.12.2011, p. 1). The latter makes explicit reference to Directives 2000/43/EC and 2000/78/EC in recital 29.

⁶² The Common Basic Principles on integration provide a framework at EU level for policy cooperation on the integration of third country nationals, including respect for equality and non-discrimination, which has been further developed through the Commission's Communications on integration, exchange between the Member States and consultation with relevant stakeholders. Common Basic Principles for Immigrant Integration Policy in the European Union, adopted on 19 November 2004, Doc 14615/04 and Common Agenda for Integration, COM(2005) 389 final; European Agenda for Integration, COM(2011) 455 final.

discrimination applies to everyone in their country on the grounds protected under the two Directives. Several Member States describe their integration policies for migrants and third-country nationals as preventive work against discrimination.

5. ASPECTS SPECIFIC TO THE RACIAL EQUALITY DIRECTIVE (2000/43/EC)

5.1 Prohibition of discrimination on the basis of racial or ethnic origin

Directive 2000/43/EC does not define the concepts of racial or ethnic origin. It is up to the Member States to decide whether they define these concepts in their national law⁶³. Some Member States only refer to ‘ethnic origin’ or ‘ethnicity’ and do not use the concept of ‘race’ or ‘racial origin’ at all in their national legislation. In principle, the Commission does not see any problem with this approach in view of the application of the Directive as long as it is clear that this does not imply any limitation to the scope of national legislation as compared to the Directive.

There is sometimes an overlap between racial or ethnic origin and other grounds, in particular nationality, religion and language. Directive 2000/43/EC does not cover discrimination on the basis of nationality as such (unless differentiation on the basis of nationality or language turns out to be indirect discrimination on the basis of ethnic origin) and the ground of religion is protected as such under Directive 2000/78/EC⁶⁴.

5.2 Material scope of the Directive

According to Article 3(1)(h), discrimination is prohibited in relation to ‘*access to and supply of goods and services which are available to the public, including housing*’. The Directive applies to both public and private sectors, but certain actions by Member States (e.g. the police) may entail exercise of public authority without any element of provision of ‘service’ within the meaning given to that concept in the Treaties and the case-law of the CJEU.

Another concept that sometimes raises questions is the reference to goods and services ‘available to the public’. The condition of ‘availability to the public’ would seem to exclude situations where the offer to provide a certain good or service has not been made in the public domain (e.g. by an advertisement in a newspaper or on a publicly accessible website), but only to a limited circle of family members.

5.3 Role of equality bodies

The Member States are required under the Directive to set up a body or bodies whose tasks include providing independent assistance to victims of discrimination and conducting

⁶³ The UK reports a definition of ‘race’ in Section 9(1) of the Equality Act 2010 (this is formulated as ‘*Race includes (a) colour; (b) nationality; (c) ethnic or national origins.*’) whilst the concept of ‘ethnic or national origins’ is included in the definition of ‘race’ and is not further defined. Sweden reports a definition of ‘ethnic identity’ as ‘national or ethnic origin, skin colour or other similar circumstance’ in its Discrimination Act. A few other Member States refer to interpretation given in national preparatory documents, national case-law or international conventions, in particular the International Convention on the Elimination of All Forms of Racial Discrimination, which is also mentioned in the preamble of the Directive.

⁶⁴ Equinet Report ‘Equality Law in Practice – Comparative analysis of discrimination cases in Europe’ demonstrates in a case-study assessed by national equality bodies how difficult the borderline between different grounds can be, available at <http://www.equineteurope.org>.

independent reporting and surveys, and all the Member States have done so⁶⁵. This obligation concerns only the ground of racial or ethnic origin (and sex under the gender equality Directives⁶⁶), but not the grounds of religion or belief, disability, age and sexual orientation. However, in most Member States the mandate of the national equality body extends to all these grounds⁶⁷, and in 15 Member States also to grounds beyond what is covered by the EU legislation (e.g. nationality, language, political opinion). In many Member States the equality body also has wider powers than those required by the Directive or, as regards the grounds of religion or belief, disability, age and sexual orientation, has competence beyond employment.

There are clear differences between the Member States in the competences and resources of these bodies and how they are structured. Some equality bodies have an advisory and promotional role whilst others have quasi-judicial competence. The Directive obliges the Member States to ensure that equality bodies have the powers and the resources that are necessary to effectively carry out their tasks including the crucial element of providing assistance to victims of discrimination. In view of a growing number of concerns in that respect, the Commission is currently scrutinising more widely the Member States' compliance with the requirements of this Directive (and the gender equality Directives) concerning the national equality bodies. This involves checking that each equality body has the required mandate and powers, but also that it actually effectively performs all the tasks set out in the Directive⁶⁸.

5.4 Protection for the Roma under the Directive

Directive 2000/43/EC deals with all discrimination on grounds of racial or ethnic origin in a comprehensive way. The Roma, as a particularly sizeable and vulnerable ethnic group, fall squarely within the scope of the Directive.

The Commission has already addressed problems that are directly rooted in national provisions, including by infringement proceedings when needed⁶⁹. However, Roma-specific problems seldom derive directly from legislation⁷⁰, but usually stem from how the relevant

⁶⁵ However, infringement proceedings against Belgium and Finland are pending as regards deficiencies in the competences of the national equality body or bodies, [but the issue is expected to be resolved soon in Belgium](#).

⁶⁶ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, p. 37 and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, p. 23.

⁶⁷ All apart from Denmark, Italy, Malta, Portugal, Spain and Finland. However, in Denmark, the Danish Board of Equal Treatment, which is an independent administrative complaints body, has competence over a wide range of grounds, including all grounds of Directive 2000/78/EC.

⁶⁸ Several Member States were contacted in the course of this screening with a request to provide evidence of assistance to victims of discrimination and of reporting and surveys done. So far, infringement proceedings have been launched against Finland (concerning absence of a competent equality body in the field of employment under Directive 2000/43/EC).

⁶⁹ For example, the Commission challenged a provision in Romanian legislation which appeared to allow a special category of indirect discrimination in the area of land management and planning. The provision was formulated in a neutral way but appeared to affect particularly the Roma.

⁷⁰ In determining whether there is Roma-specific discriminatory legislation or measures, it is of no relevance whether they refer expressly to Roma or use a different terminology (e.g. 'Nomads') if it is clear that the measures are targeted at Roma.

legislation⁷¹ is applied on the ground. This highlights the need to extend the Commission's scrutiny, where appropriate, to national practices that affect the implementation of the principle of equal treatment. Whilst individual incidents of discrimination have to be addressed under national law and via the national courts, the Commission monitors that the Directive is complied with systematically by the Member States in administrative practice.

The Commission recognises that legislation alone is not enough to resolve the deep-rooted social exclusion of the Roma and the prejudice they still face. Legislation needs to be combined with policy and financial measures. A key element of the drive to tackle discrimination of the Roma at EU level was the adoption of an EU Framework for National Roma Integration Strategies up to 2020.⁷² This has been followed by the Commission's annual monitoring of the national strategies developed by Member States. The four key areas of the national Roma strategies (education, employment, healthcare and housing) are all covered by the Directive. Achieving full equality in practice may in certain circumstances warrant Roma-specific positive action, in particular in the above-mentioned four key areas.

At the same time, the Commission has continued developing the legal protection further by means of its proposal for a Council Roma Recommendation, which was adopted by the Council on 9 December 2013⁷³. It promotes a wide range of specific measures in the four core areas as well as horizontal measures to improve the situation of Roma people and places particular emphasis on the need to ensure the effective practical enforcement of the Directive on the ground, notably by encouraging the Member States to take further steps to ensure that their national, regional and local administrative regulations are not discriminatory and do not result in segregation practices⁷⁴. This Recommendation will strengthen the effectiveness of protection against discrimination and promote proactive measures.

The CJEU has not yet given rulings in Roma-specific cases⁷⁵ but some interesting case-law can be found at the national level (see Annex II).

6. ASPECTS SPECIFIC TO THE EMPLOYMENT EQUALITY DIRECTIVE (2000/78/EC)

6.1 Age

At the time the Directive was adopted, the concept of age discrimination in employment and occupation was new in many Member States and required a change in the employers' approach to age-related issues. Age discrimination towards older people in employment is becoming increasingly relevant due to the demographic changes in Europe which are at the root of most of the recent age-related legislation such as the abolition of or increase in

⁷¹ Not necessarily only equal treatment legislation but also other laws that affect equal treatment in the areas covered by the Directive (e.g. social housing legislation in relation to access to housing).

⁷² COM(2011) 173 final of 5.4.2011.

⁷³ Council document nr. 16970/13 available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/139979.pdf (OJ reference of the Recommendation is not yet available).

⁷⁴ Point 2.1 of the Recommendation.

⁷⁵ Case C-394/11 *Belov*, the first Roma-specific discrimination case referred to the Court of Justice was declared 'not admissible' by the Court on 31 January 2013, since the Bulgarian Equality Body (which referred the case to the Court) was not considered to be a court or tribunal within the meaning of the Treaty.

mandatory retirement ages, disincentives for early retirement and other measures to keep older workers in the labour market.

Article 6 of the Directive provides, in certain situations, a justification for differences of treatment on grounds of age⁷⁶. However, any derogation must be objectively and reasonably justified by a legitimate aim, including employment policy, as well as labour market and vocational training objectives, and the means of achieving the aim must be appropriate and necessary. As this derogation leaves considerable flexibility to Member States, it has given rise to a substantial number of landmark decisions by the CJEU and by national courts, which have shed more light on the requirements for the admissibility of different treatment.

Due to the particular importance and practical relevance of this area, Annex III to this report provides an overview of age-related issues⁷⁷.

6.2 Disability

The CJEU has already given some landmark rulings on the ground of disability. In *Chacon Navas*⁷⁸, the CJEU defined the concept of disability and ruled that sickness as such did not fall within the concept. More recently in the *Ring and Skouboe Werge*⁷⁹ cases the CJEU, however, clarified that the concept of disability can in certain circumstances include conditions caused by incurable or curable long-term illnesses. The CJEU also integrated the concept of disability, as provided by the UN Convention on the Rights of Persons with Disabilities, in its interpretation.

The Convention is the first legally binding international human rights instrument to which the European Union has become a party⁸⁰. Consequently, the European Union is bound by the Convention within the limits of its competences⁸¹ and Directive 2000/78/EC must, as far as possible, be interpreted in a manner consistent with the Convention⁸².

Provision of reasonable accommodation for disabled persons by the employer⁸³ is one of the key elements of the Directive and the Commission has rigorously monitored its correct transposition in national laws. A number of Member States initially had problems in this respect⁸⁴. One Member State was found to be in breach of the Directive by the CJEU on

⁷⁶ Specific conditions for younger and older workers, fixing of minimum conditions of age, professional experience or seniority and fixing of maximum age for recruitment.

⁷⁷ Based on contributions from Member States, relevant stakeholders and a report published by the Commission in 2011 on 'Age and Employment', available at: http://ec.europa.eu/justice/discrimination/document/index_en.htm#h2-7.

⁷⁸ Case C-13/05 *Chacon Navas*, judgment of 11 July 2006.

⁷⁹ Joined Cases C-335/11 and C-337/11 *Ring and Skouboe Werge*, judgment of 11 April 2013.

⁸⁰ The European Union signed the Convention on 30 March 2007 and the Convention entered into force with respect to the EU on 22 January 2011. EU's first periodic report on the implementation of the UN Convention on the Rights of Persons with Disabilities is foreseen in 2014.

⁸¹ These are illustrated in Annex II to Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ L 23 of 27.1.2010, p. 35.

⁸² See paragraphs 28-32 in *Ring and Skouboe Werge* cited above in footnote 79.

⁸³ Reasonable accommodation involves a duty for the employer to take appropriate measures 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.

⁸⁴ Belgium, Estonia, Cyprus, Italy, Latvia, Lithuania, Hungary, Poland and Slovakia.

4 July 2013⁸⁵ due to failure to correctly transpose the provision by not comprehensively covering all disabled persons but all other cases have been closed by now.

6.3 Sexual orientation

The prohibition of discrimination on the ground of sexual orientation was new for nearly all Member States at the time of transposition of the Directive. The Commission had to launch infringement proceedings against a number of Member States⁸⁶ due to deficiencies in the protection for this ground. All these cases have now been closed and all Member States provide the required protection.

The CJEU has interpreted the boundaries of the ground of sexual orientation in a few landmark rulings such as *Maruko* and *Römer*⁸⁷, in which the CJEU concluded that, when national law placed persons of the same sex in a situation comparable to that of spouses, national rules denying same-sex life partners benefits which were paid to spouses came within the scope of the Directive. The recent *ACCEPT* case⁸⁸ illustrates the remaining challenges in this area and the need for constant vigilance in the enforcement of the prohibition of discrimination⁸⁹. This was a case in which the CJEU found the public announcements of the owner of a professional football club in Romania to be in breach of Directive 2000/78/EC, when he stated that he would never hire a homosexual player.

6.4 Religion or belief

The Directive prohibits discrimination on grounds of religion or belief in the field of employment and provides such protection to all persons adhering to any religion or belief. However, Article 4(2) of the Directive allows a derogation for churches and other religious or belief-based organisations in their capacity as employers. These organisations are allowed, under certain conditions, to lay down specific requirements based on their employees' religion or belief. Such requirements (called 'occupational requirements') must be genuine, legitimate and justified and must not be based on other criteria (for example an employee's sexual orientation). The Commission has monitored the consistency of national implementing laws with this derogation, which has to be interpreted narrowly since it concerns an exception. Initially, six Member States⁹⁰ had problems in correct implementation of the derogation, but all the infringement proceedings have now been closed.

⁸⁵ Italy. Case C-312/11 *Commission v. Italy*, judgment of 4 July 2013. Following the judgment, Italy has modified its legislation and the modification is currently under examination by the Commission.

⁸⁶ Czech Republic, Latvia, Poland, Slovakia, Finland and United Kingdom.

⁸⁷ Cases C-267/06 *Maruko v Versorgungsanstalt der deutschen Bühnen*, judgment of 1 April 2008 and C-147/08 *Römer v Freie und Hansestadt Hamburg*, judgment of 10 May 2011.

⁸⁸ Case C-81/12 *Asociația Accept v Consiliul National pentru Combaterea Discriminării*, judgment of 25 March 2013.

⁸⁹ See FRA's recent EU-wide survey on LGBT persons' experiences of discrimination, violence and harassment published in May 2013, available at: <http://fra.europa.eu/en/publication/2013/eu-lgbt-survey-european-union-lesbian-gay-bisexual-and-transgender-survey-results> and the 2013 Equinet perspective 'Equality bodies promoting equality & non-discrimination for LGBTI people', available at www.equineteurope.org, which aims at enhancing the work of equality bodies to promote equality for and combat against discrimination against LGBTI people.

⁹⁰ Germany, Ireland, Netherlands, Slovenia, Finland and United Kingdom.

7. CONCLUSIONS AND WAY FORWARD

By today, all the Member States have taken the necessary measures to transpose the two Directives into their respective domestic legal orders and to set up the procedures and bodies that are indispensable for the implementation of these Directives. The Member States' administrative and judicial authorities, as well as their equality bodies, are now in the front line for systematically providing full protection to every individual on the ground. The European Commission will both closely monitor implementation and support Member States' authorities in this respect. The Commission will also continue its monitoring in the context of its annual report on the application of the EU Charter of Fundamental Rights.

The main challenge now is to increase awareness of the already existing protection and to ensure better practical implementation and application of the Directives. The Commission will, together with the Member States and their equality bodies, make a concerted effort to realise the full potential of the Directives in terms of protection of the fundamental right to equal treatment in the EU. The aim of the three annexes to this report is to provide a contribution to these efforts. However, legislation alone is not enough to ensure full equality, so it needs to be combined with appropriate policy action. Funding for awareness-raising and training activities is already available under the European Union Programme for Employment and Social Solidarity (Progress), but this work needs to be further strengthened by the Commission in cooperation with Member States to ensure tangible improvements in the awareness of rights throughout the EU.

Strengthening the role of the national equality bodies as watchdogs for equality can make a crucial contribution to more effective implementation and application of the Directives. Enhancing the effectiveness of equality bodies and allowing them to reach their full potential could go a long way towards promoting equal treatment in a way that is easily accessible to everyone in the EU and faster as well as less costly than enforcement through courts for all the parties concerned (including Member States).