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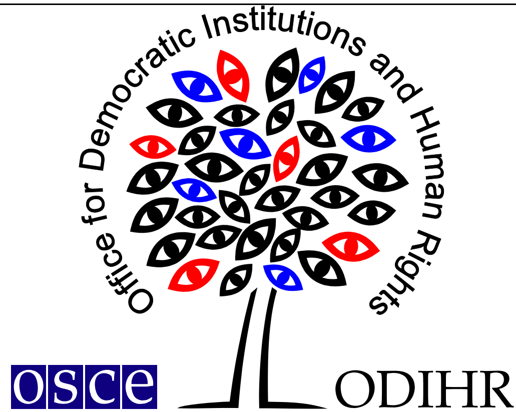
<td>
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NOTE
ON THE ANTI-DISCRIMINATION LEGISLATION AND GOOD PRACTICES IN THE OSCE REGION

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ABBREVIATIONS

CATHB	Convention against Trafficking in Human Beings
CAOD	Convention on Access to Official Documents
CEDAW	Convention on the Elimination of Discrimination Against Women
CHRB	Convention on Human Rights and Biomedicine
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECtHR	European Court of Human Rights
ENLEGEN-D	European network of legal experts on gender equality and non-discrimination
ECJ	European Court of Justice
ESC	European Social Charter
ESC(R)	European Social Charter (revised)
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
FCPNM	Framework Convention for the Protection of National Minorities
FRA	EU Agency for Fundamental Rights
[GC]	Grand Chamber (of the European Court of Human Rights)
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGO	inter-governmental organisation
ICPRAMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ILO	International Labour Organization
l.a.	last amended
NGO	non-governmental organisation
OSCE	Organization for Security and Co-operation in Europe
ODIHR	Office for Democratic Institutions and Human Rights
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations

1. INTRODUCTION

1. *On 14 June 2018 the OSCE Office for Democratic Institutions and Human Rights (ODIHR) received a request from the OSCE Programme in Dushanbe (Tajikistan) to prepare a note on standards pertaining to anti-discrimination legislation and good legislative practices in the OSCE-Region.*

2. *ODIHR accepted the request as part of its overall mandate to assist the OSCE participating States with the implementation of their human dimension commitments.*

3. *Tajikistan in the recent Universal Periodic Review (UPR) 2016 received recommendations to "[a]dopt a comprehensive anti-discrimination law, providing a definition of direct and indirect discrimination",[1] and to bring particular pieces of the national legislation or its interpretation and application in line to the relevant international instruments and standards.[2]*

2. SCOPE OF REVIEW

4. The scope of the ODIHR's Note on the Anti-Discrimination Legislation and Good Practices (hereinafter referred to as "the Note") in the OSCE-Region (hereinafter "the Region") encompasses the relevant international human rights instruments (conventions, covenants etc. and protocols thereto), national laws and good legal (including legislative, as well as judicial and administrative) practices in the Region pertaining to anti-discrimination.

5. With regard to the national sources, the Note seeks to identify and describe legal concepts and institutes capable of fulfilling the obligations emerging from binding international universal instruments which were ratified (or otherwise became binding through practice) under the auspice of the United Nations (UN), the Council of Europe (CoE), or commitments undertaken by the OSCE participating States. In addition to practices in the OSCE participating States, the Note also identifies those that are exercised in other EU - member states in this context.

6. The Note integrates, as appropriate, a gender and diversity perspective. In such a context it extends its scope to the way how legal sources regulate the related notion of equality of treatment on the grounds of sex and gender.

3. EXECUTIVE SUMMARY

7. ODIHR welcomes the willingness of the OSCE Programme in Dushanbe to seek international expertise in relation to the international obligations and standards on anti-discrimination, and hopes that this Note will provide further guidance on how the relevant legislation could be brought in line with international human rights obligations and OSCE commitments.

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[1] *Report of the Working Group on the Universal Periodic Review – Tajikistan*, A/HRC/33/11, 33rd session of the Human Rights Council, 14 July 2016, par 118.21.

[2] *Ibid*., regarding discrimination on the grounds of: sex/gender (par 115.37); race (par 118.23); religion or belief (par 118.24 and 118.45).

8. The right to anti-discrimination is a fundamental element of international human rights law, which is enshrined in a number of international human rights instruments. As a leading principle, Article 7 of the 1948 Universal Declaration of Human Rights (UDHR) provides that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." This is echoed in a number of international conventions.
9. In addition, various case law offers useful guidance on the meaning and scope of the international norms and standards. Their proper interpretation contributes to evolved understanding of the meaning and scope of the right to non-discrimination, notably in countries where case law has a prominent part in the legal system.
10. States have an obligation to adopt legislation in line with the rights and principles enshrined in the customary international law. Legation should be coherent and provide for effective legal means for protection of the right to non-discrimination and equality.
11. The comprehensive research suggests that a number of participating States comply with their international obligations and commitments, or show willingness to do so. Yet national norms vary and the interpretation of international norms and case law standards is uneven, or even problematic throughout the Region.
12. The analysis of the anti-discrimination legislation and practices in the participating States resulted in specific findings and recommendations.

4. ANALYSIS AND RECOMMENDATIONS

4.1. OVERVIEW OF LEGAL ACTS AND COMPLIANCE OF NATIONAL LAW TO INTERNATIONAL LAW

4.1.1. International legal acts

4.1.1.1. Preliminary remarks

13. The prohibition of discrimination and various aspect of the concepts of equality (equality before the law, equal treatment in the enjoyment of rights and freedoms, equal protection before courts and other State bodies; as well as special or related measures not considered to be discrimination) are: a) enshrined in international instruments (treaties and protocols thereto); b) confirmed, elaborated and developed by authoritative interpretation of international bodies and courts established under these instruments; c) recognised in non-binding acts of bodies and agencies of IGOs; or d) undertaken as commitments on a universal (UN) or regional level. Prohibition of discrimination is widely recognized as a peremptory norm (*jus cogens*), regardless of the States' formal obligations by a statutory international law.
14. Most of the treaties pertaining to discrimination and prohibition/prevention/protection thereof, as well as most of the anti-discrimination provisions in general human rights treaties prohibit discrimination on a variety of grounds, including race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. On the other hand, some treaties inherently limit the list of discrimination grounds (for example, CEDAW's focus is on ensuring non-discrimination

and equal treatment/opportunities on the grounds of sex and gender; ICERD prohibits discrimination based on "race, colour, descent, or national or ethnic origin" etc.). Some treaties and provisions cover wide areas (all or many parts of the society's spheres of life, including private sector where appropriate) and parties (persons and entities) concerned as possible victims and as possible perpetrators. On the other hand, some treaties inherently restrict the personal scope (migrant workers and members of their families are protected by ICPRAMW) or the material scope (CHRB focuses on the health sphere).

15. The international non-discrimination guarantees and anti-discrimination concepts of general and specific nature pertaining to discrimination and its particular types (direct and indirect discrimination, harassment, sexual harassment, discrimination by association, instruction to discrimination etc.) and special measures considered as permissible difference in treatment (affirmative action, reasonable accommodation for persons with disabilities, occupational requirements etc.) are either enshrined in the statutory international law and/or further elaborated and developed in the international case law, whose interpretations of various concepts boosted the development of anti-discrimination legislation and practice at a national level.

16. The treaties are intended to widen (or at least provide equal) protection as that afforded by the already existing international and national instruments. Therefore, treaties shall not be interpreted as limiting or otherwise affecting the possibility for a State Party to grant a wider measure of protection than that prescribed by laws or accepted on international level (Article 26 par of FCPNM, Article 27 of CHRB etc.).

17. A typical safeguard of existing human rights is prescribed by Article 53 of ECHR: *"Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party."* A convention may state that it does not prejudice the application of other international instruments (e.g. Article 26.2(a) of FCPNM), while a statement that a treaty does not affect national provisions in a particular sphere is sometimes subjected to the condition that these provisions are not discriminatory (Article 1 par 3 of ICERD).

18. The treaties also provide further guarantees that their implementation will not be abused for undermining the guaranteed rights (for example, Article 18 of ECHR states that *"[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."*). Some treaties explicitly extend the prohibition of abuse of rights to persons for whose particular benefit a specific treaty has been designed (for example, Article 13 par 3(d) of ICPRAMW sanctions abuse of the right to freedom of expression of migrant workers and members of their families in order to prevent, *inter alia*, racial or religious hatred that constitutes incitement to discrimination).

4.1.1.2. United Nations (UN)

19. The right to anti-discrimination is a fundamental element of international human rights law. As a leading principle, Article 7 of the 1948 Universal Declaration of Human Rights (UDHR) provides that "all are equal before the law and are entitled without any

discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

20. The International Covenant on Economic, Social and Cultural Rights[3] (ICESCR), the International Covenant on Civil and Political Rights[4] (ICCPR) and the Convention on the Rights of the Child[5] (CRC) echo the non-discrimination principles as enshrined in the UDHR. In addition, these treaties also cover other aspects in respect of equality. For example, equal rights of men and women to the enjoyment of all civil and political rights set forth in the ICCPR: (Article 3); equality before the courts and tribunals (Article 14 par 1); equal entitlement to minimum guarantees in the determination of criminal charges against him/her (Article 14 par 3); equality of rights and responsibilities of spouses (Article 23 par 4); equal suffrage (Article 25 par 1(b)); access to public service on general terms of equality (Article 25 par 1(c)); equal rights of men and women to the enjoyment of all economic, social and cultural rights set forth in the ICESCR: (Article 3); equal remuneration for work of equal value without distinction of any kind (Article 7 par a(i)); equal opportunity for promotion in employment (Article 7 par (c)); equal access to higher education (Article 13 par 2(c)); and CRC: equal opportunity of children in education (Article 28 par 1 *in initio*); equal opportunities of children for opportunities for cultural, artistic, recreational and leisure activity (Article 31 par 2).

21. The International Convention on the Elimination of All Forms of Racial Discrimination[6] (ICERD) defines racial discrimination as *"any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life"* (Article 1 par 1). The ICERD *"shall not apply to distinctions, exclusions, restrictions or preferences [...] between citizens and non-citizens"* (Article 1 par 3). "*Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."* (Article 1 par 4).[7] States Parties shall take special and concrete measures, when the circumstances so warrant, to ensure the adequate development and protection of certain racial groups or individuals belonging to them for the purpose of guaranteeing to them

[3] *UN International Covenant on Economic, Social and Cultural Rights*, adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966.

[4] *UN International Covenant on Civil and Political Rights*, adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966.

[5] *UN Convention on the Rights of the Child*, adopted by UN General Assembly Resolution 44/25 of 20 November 1989.

[6] *UN International Convention on the Elimination of All Forms of Racial Discrimination,* adopted by UN General Assembly Resolution 2106 (XX) of 21 December 1965.

[7] The Committee on the Elimination of Racial Discrimination in paragraph 2 of its *General recommendation no. 14: Definition of Racial Discrimination* (1993) clarified that *"a differentiation of treatment will not constitute discrimination, if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention."*

full and effective enjoyment of human rights and fundamental freedoms (Article 2 par 2), as well as various prohibitive and punitive measures against organisations and persons inciting racial discrimination (Articles 3 and 4). Furthermore, the ICERD guarantees equality before law in the enjoyment of a number of civil, political, economic and social rights (Article 5).

22. Article 1 of the Convention on the Elimination of Discrimination against Women[8] (CEDAW) defines *"discrimination"* as *"...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field"*. The body established under the CEDAW held that discrimination on the basis of sex (gender) includes gender-based violence.[9] Article 2 of the CEDAW invokes the States Parties' commitments, *inter alia*, to embody the principle of equality of men and women in their legislation, to adopt appropriate legislative and other (including punitive) measures prohibiting discrimination against women with an aim of its elimination and to establish and ensure effective protection of women against any acts of discrimination.[10] Measures aimed at guaranteeing exercise and enjoyment of human rights and fundamental freedoms of women on a basis of equality with men (Article 3) include special measures aimed at accelerating *de facto* equality between men and women, which shall not be considered discrimination if they are discontinued when the objectives of equality of opportunity and treatment have been achieved (Article 4). Appropriate measures should ensure that women and men enjoy on equal terms their rights and freedoms, including voting, performing a public service or function and participation in non-governmental organizations (NGOs) and associations concerned with the country's public and political life (Article 7); representation of the Government (Article 9); acquiring, changing and retaining a nationality (Article 9); education (Article 10); employment (Article 11); health care (Article 12); and other areas of economic and social life (Article 13). Women's right to equality can be impaired by various forms of violence, including domestic violence[11]; therefore, States Parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act.[12]

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[8] *UN Convention on the Elimination of Discrimination against Women*, adopted by UN General Assembly Resolution 34/180 of 18 December 1979.

[9] Committee on the Elimination of Discrimination against Women, *General recommendation no. 19: Violence against Women*, 1992, par 6: Gender violence *"includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty."* Also see par. 7 of the *General recommendation no. 19*.

[10] The *Report of the* [Human Rights Council] *Working Group on the UPR – Tajikistan* (14 July 2016, par 115.36 and par 115.43) recommended to: *"[i]mplement effectively the [CEDAW], in particular by addressing deep-rooted stereotypes regarding the roles and responsibilities of women and men in the family and in society";* and *"[a]dopt measures to eradicate gender discrimination in society, in the family and in the labour market"*.

[11] Committee on the Elimination of Discrimination against Women, *op. cit.* at footnote 9, par 23: *"Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes."*

[12] *Ibid.* par 24.a *et seq.* and Views of the Committee on the Elimination of Discrimination against Women of 6 August 2007, Communication no. 6/2005, submitted by the *Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Banu Akbak, Gülen Khan, and Melissa Özdemir* (descendants of the deceased Fatma Yildirim) *v. Austria*, par 12.1.4-6, where the Committee held that the respondent State failed to take

23. The Convention on the Rights of Persons with Disabilities[13] (CRPD) defines *"discrimination on the basis of disability"* as *"any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."* (Article 2). The CRPD obliges the States Parties to, *inter alia*, *"take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise"* (Article 4.1(e)). These measures include, *inter alia*, *"reasonable accommodation"*, which is defined as *"necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms"* (Article 2).

24. In addition, other applicable instruments are the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[14] (ICPRAMW), the Discrimination (Employment and Occupation) Convention[15] of the International Labour Organization (ILO), and the UNESCO Convention against Discrimination in Education.[16]

4.1.1.3. Organization for Security and Co-operation in Europe (OSCE)

25. The OSCE participating States undertook a number of commitments to respect and ensure human rights, standards and principles relating to equality/non-discrimination or gender equality.[17]

26. The OSCE commitments pertaining to **equality and non-discrimination** are given below:

- At the Helsinki summit (1975) the participating States expressed their commitments to "respect human rights and fundamental freedoms including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion".[18]
- InVienna (1989) the participating States committed themselves to:

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measures laid out by Articles 2 and 3 of the CEDAW to protect Mrs Yildirim's life from attacks by the threatening husband.

[13] *UN Convention on the Rights of Persons with Disabilities,* adopted by General Assembly resolution 61/106 of 13 December 2006.

[14] *UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,* adopted by the General Assembly Resolution 45/188 of 18 December 1990.

[15] *ILO Discrimination (Employment and Occupation) Convention* (no. 111), adopted by the General Conference of the International Labour Organisation on 25 June 1958.

[16] *UNESCO Convention against Discrimination in Education*, adopted by the General Conference of UNESCO on 14 December 1960.

[17] Overviews of the OSCE commitments can be found in the *OSCE Commitments relating to Gender Equality and Non-Discrimination*, a Reference Guide prepared for the OSCE Human Dimension Seminar *"Participation of Women in Public and Economic Life"*, Warsaw, 13-15 May 2003 (https://www.osce.org/odihr/19575?download=true) or in the *OSCE Human Dimension Commitments: Thematic Compilation* (third edition), OSCE, 12 November 2012 (https://www.osce.org/odihr/76894). Original texts are available at the OSCE website's section relating to the OSCE summits (https://www.osce.org/summits), Ministerial Councils (https://www.osce.org/ministerial-councils) etc.

[18] "Declaration on Principles Guiding Relations between Participating States", Helsinki summit, 1 August 1975 (Final Act), Principle VII, par 1.

- "[E]nsure human rights and fundamental freedoms to everyone within their territory and subject to their jurisdiction, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status";
- "[E]nsure that no individual exercising, expressing the intention to exercise or seeking to exercise these rights and freedoms or any member of his family, will as a consequence be discriminated against in any manner"; and
- "[T]ake effective measures to prevent and eliminate discrimination against individuals or communities on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, political, economic, social and cultural life, and to ensure the effective equality between believers and non-believers".[19]

- At Copenhagen (1990) the States solemnly declared that:
  - Equality of all persons (including those belonging to national minorities) before the law and equal protection of the law without discrimination are "among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings";
  - "[T]he law will prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground", while strictly required measures derogating from State's obligations "will not discriminate solely on the grounds of race, colour, sex, language, religion, social origin or of belonging to a minority";[20]
  - "Persons belonging to national minorities have the right to exercise fully and effectively their human rights and fundamental freedoms without any discrimination and in full equality before the law";
  - The States "will adopt, where necessary, special measures for the purpose of ensuring to persons belonging to national minorities full equality with the other citizens in the exercise and enjoyment of human rights and fundamental freedoms."[21]
- At the Paris summit (1990) the participating States affirmed that, "without discrimination, every individual" is entitled to the State's respect of a number of civil and political rights, and has the right "to enjoy his or her economic, social and cultural rights"[22] and affirmed that "without discrimination: everyone [...] has the right: to participate in free and fair elections"; to freedom and peaceful assembly"; "to own property alone or in association and to exercise individual enterprise"; and "to enjoy his economic, social and cultural rights".[23]
- The Budapest summit (1994) noted the importance of vigorous protection of "human rights and fundamental freedoms of all individuals, regardless of race, colour, sex,

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[19] "Questions Relating to Security in Europe*:* Principles", the Vienna follow-up meeting, January 1989, par 13.7, 13.8. and 16.1.

[20] *Copenhagen document*, adopted at the Copenhagen Meeting of the Conference of Human Dimension of the CSCE, 5–29 June 1990, par 5, 5.9, 25.3 and 25.4.

[21] *Ibid.*, par 31.

[22] "Human Rights, Democracy and Rule of Law", Paris summit 19–21 November 1990, par 3 and 5.

[23] "A New Era of Democracy, Peace and Unity", Paris summit, 19–21 November 1990.

language, religion, social origin or of belonging to a minority” and the participating States’ condemnation of various practices which could jeopardise these rights.[24]

- At the Lisbon summit (1996) the participating States stressed that reintegration of refugees into their places of origin must be pursued without discrimination.[25]
- At the Istanbul summit (1999) the participating States reiterated “unreservedly [their] commitment to respect human rights and fundamental freedoms and to abstain from any form of discrimination”; deplored “violence and other manifestations of racism and discrimination against minorities, including the Roma and Sinti”; committed themselves “to ensure that laws and policies fully respect the rights of Roma and Sinti and, where necessary, to promote anti-discrimination legislation to this effect” which will ensure “[i]mposition of heavier sentences for racially motivated crimes by both private individuals and public officials”; and they shall “[c]onsider ratifying the relevant international treaties as soon as possible, if they have not already done so, inter alia, the International Convention on the Elimination of All Forms of Racial Discrimination”.[26]
- The Bucharest Ministerial Council meeting (2001) called on the OSCE institutions, particularly the ODIHR, the High Commissioner on National Minorities, and the Representative on Freedom of the Media, to pay increased attention to, inter alia, countering intolerance and discrimination on the ground of racial or ethnic origin, religious, political or other opinion and to fostering respect for rule of law, democratic values, human rights and fundamental freedoms.[27]
- At Maastricht (2003) the OSCE institutions and structures were recommended to assist the participating States, at their request, in developing anti-discrimination legislation, as well as in establishing anti-discrimination bodies.[28] The Ministerial Council encouraged the participating States:
  - To collect and keep records on reliable information and statistics on hate crimes, including on forms of violent manifestations of racism, xenophobia, discrimination, and anti-Semitism; and to inform the ODIHR about existing legislation regarding crimes fuelled by intolerance and discrimination; and, where appropriate, to seek the ODIHR’s assistance in the drafting and review of such legislation[29] (ODIHR was tasked, in full co-operation with relevant UN and European bodies, to inter alia, promote best practices and disseminate lessons learned in the fight against intolerance and discrimination);[30]
  - To ensure that the anti-discrimination legislation encompasses: “Prohibition of both direct and indirect racial discrimination; [... racial segregation], Imposition of effective, proportionate and dissuasive sanctions for discriminatory acts or practices; Equal access to effective remedies (judicial, administrative, conciliation or mediation procedures”; and

[24] *Summit Declaration*, Budapest summit, 5–6 December 1994, par 7, and “Decisions: VIII. The Human Dimension”.
[25] *Summit Declaration*, Lisbon summit, 2–3 December 1996, par 10.
[26] *Summit Declaration*, Istanbul summit, 18–19 November 1999, par 2 and 31.
[27] Decision No. 5, taken at the 9th Ministerial Council meeting, Bucharest, 3–4 December 2001.
[28] *Annex to Decision No. 3/03: Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area*, adopted at the 11th Ministerial Council meeting, Maastricht, 1–2 December 2003, par 20.
[29] *Decision No. 4/03 on tolerance and non-discrimination*, taken at the 11th Ministerial Council meeting, Maastricht, 1–2 December 2003, par 6.
[30] *Ibid.*, par 7.

- To ensure that "all cases of suspected discrimination are thoroughly and objectively investigated".[31]

- At Sofia (2004) the Permanent Council tasked the ODIHR to systematically collect and disseminate information throughout the OSCE area on best practices for preventing and responding to racism, xenophobia and discrimination and, if requested, offer advice to participating States in their efforts to fight racism, xenophobia and discrimination.[32]
- The Ljubljana 2005 Ministerial Council decided that:
  - "[T]he OSCE should continue to raise awareness and develop measures to counter prejudice, intolerance and discrimination, while respecting human rights and fundamental freedoms [...] for all without distinctions as to, inter alia, race, colour, sex, language, religion or belief, political or other opinion, national or social origin, property, birth or other status"; and
  - "[T]he participating States, while implementing their commitments to promote tolerance and non-discrimination, will focus their activities in fields such as, inter alia, legislation [...] and commit to: Consider increasing their efforts to ensure that national legislation, policies and practices provide to all persons equal and effective protection of the law and prohibit acts of intolerance and discrimination, in accordance with the relevant OSCE commitments and their relevant international obligations."[33]
- At Brussels (2006) the Ministerial Council called upon the participating States to address the root causes of intolerance and discrimination by encouraging the development of comprehensive domestic education policies and strategies, as well as through increased awareness-raising measures.[34]
- At Madrid (2007) the Ministerial Council called on the participating States to protect migrants legally residing in host countries and persons belonging to national minorities, stateless persons and refugees against, inter alia, discrimination, and encouraged the establishment of national institutions or specialized bodies to combat intolerance and discrimination.[35]

27. The OSCE commitments pertaining to **equal rights of women and men** are given below:

- At Madrid (1983) the participating States stressed "the importance of ensuring equal rights of men and women"; and they agreed "to take all actions necessary to promote equally effective participation of men and women in political, economic, social and cultural life".[36]

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[31] *Annex to Decision No. 3/03: Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area*, 11th Ministerial Council meeting, Maastricht, 1–2 December 2003, par 9, 10 and 67.

[32] *Annex to Decision No. 12/04 on Tolerance and Non-discrimination*, Permanent Council *Decision No. 621: Tolerance and Fight against Racism, Xenophobia and Discrimination*, taken at the 12th Ministerial Council meeting, Sofia, 6–7 December 2004, par 2.

[33] *Decision no. 10/05 on Tolerance and Non-discrimination*, taken at the 13th Ministerial Council meeting, Ljubljana, 5–6 December 2005, par 4, 5 and 5.1.

[34] *Decision no. 13/06 on Combating Intolerance and Discrimination and Promoting Mutual Respect and Understanding*, taken at the 14th Ministerial Council meeting, Brussels, 5 December 2006, par 5.

[35] *Decision no. 10/07 on Tolerance and Non-discrimination*, taken at the 15th Ministerial Council meeting, Madrid, 30 November 2007, par 7 and 10.

[36] "Questions relating to Security in Europe: Principles", adopted at the Madrid meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, 6 September 1983, par 16.

- At Vienna (1989) the participating States confirmed "their determination to ensure equal rights of men and women" and "to take all measures necessary, including legislative measures to promote equally effective participation of men and women in political, economic, social and cultural life, They will consider the possibility of acceeding to the Convention on the Elimination of All Forms of Discrimination against Women, if they have not yet done to."[37]
- The Moscow document (1991) noted that "full and true equality between men and women is a fundamental aspect of a just and democratic society based on the rule of law, and that the society's full development and the welfare of all its members require equal opportunity for full and equal participation of men and women." In this context the participating States will:
  - Ensure that all CSCE commitments relating to the protection and promotion of human rights and fundamental freedoms are applied fully and without discrimination with regard to sex;
  - Comply with the CEDAW if they are parties; ratify or accede to the CEDAW if they failed to do so; States that have ratified or acceded to this Convention with reservations will consider withdrawing them;
  - Affirm that it is their goal to achieve not only de jure but de facto equality of opportunity between men and women and to promote effective measures to that end;
  - Establish or strengthen national machinery for the advancement of women, in order to ensure that programmes and policies are assessed for their impact on women;
  - Encourage measures effectively to ensure full economic opportunity for women, including non-discriminatory employment policies and practices, equal access to education; and training, and measures to facilitate combining employment with family responsibilities for female and male workers; and will seek to ensure that any structural adjustment policies or programmes do not have an adversely discriminatory effect on women;
  - Seek to eliminate all forms of violence against women, traffic in women and exploitation of prostitution of women including by ensuring adequate legal prohibitions against such acts;
  - Encourage and promote equal opportunity for full participation by women in all aspects of political and public life, in decision-making process and in international cooperation[38] etc.
- At Istanbul (1999) the participating States expressed their commitment to include equality between men and women into their policies, both at the level of their States and within the OSCE; and also stated that they will undertake measures to eliminate all forms of discrimination and violence against women, sexual exploitation and all forms of trafficking in human beings, by promoting the adoption or strengthening of

[37] "Questions Relating to Security in Europe: Principles", adopted at the Vienna follow-up meeting, January 1989, par 15.
[38] *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE*, Moscow, 3 October 1991, par 40-40.2 and 40.5–40.8.

legislation to hold accountable persons responsible for these acts and strengthen the protection of victims.[39]

- At Sofia (2004) a decision was taken to support the OSCE participating States in implementing relevant commitments to promoting equality between women and men; and the priorities included "[e]nsuring non-discriminatory legal and policy frameworks" and "[e]nsuring equal opportunity for participation of women in political and public life".[40] The participating States were recommended to: comply with the (CEDAW) if they are parties; consider withdrawing reservations which they have made; and consider ratifying or acceding to this Convention or ratifying the Optional Protocol to CEDAW if they have not already done so.[41]

4.1.1.4. Council of Europe (CoE)

28. Article 14 of the European Convention on Human Rights[42] (ECHR) stipulates that the *"enjoyment of the rights and freedoms set forth in this Convention should 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"*. Protocol No. 12 to the ECHR[43] contains general prohibition of discrimination in enjoyment of any rights. The non-discrimination guaranteed in both legal acts is supported by an effective judicial mechanism of the European Court of Human Rights[44] (ECtHR), whose decision-making has a binding effect for the respondent High Contracting Parties (*res judicata*), while others may decide to improve their legislation and practice under influence of ECtHR's interpretations (*res interpretata*) in order to avoid future finding(s) of violations in cases against them. The ECtHR has held that Article 14 prohibits differences based on an identifiable, objective or personal characteristic, or "status" by which individuals or groups are distinguishable from one another" (discrimination grounds), listed in this provision or identified by the ECtHR by considering the list of discrimination grounds, ending with "any ground such as" (in French "notamment"), as "an illustrative and not exhaustive" (thus open) list, and by giving a wide meaning to the words "other status" within the phrase "any other status" (in French "toute autre situation"), whose *"interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent"*.[45] The ECtHR's case law (jurisprudence) guided, among other national developments, the laws and practices regarding the rights of same-sex couples, transgender rights and the carrying out of Pride marches; and provided guidance regarding the right to non-

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[39] *Charter for European Security*, adopted at the Istanbul summit, 18–19 November 1999, par 23 and 24.
[40] *Annex to Decision No. 14/04; 2004 OSCE Action Plan for the Promotion of Gender Equality*, taken at the 12th Ministerial council meeting, Sofia, 6–7 December 2004, part V, par. 44 sub-par (b) and (d).
[41] *Ibid.*, par 42.
[42] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*, CETS no. 005, adopted on 4 November 1950.
[43] Council of Europe, *Protocol No. 12 to the ECHR*, CETS no. 177, adopted on 4 November 2000, into force as of 1 April 2005: https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/177/signatures?p_auth=0Kq9rtcm.
[44] https://hudoc.echr.coe.int/eng# (HUDOC database with, *inter alia*, the case law of ECtHR, at its website).
[45] ECtHR, *Khamtokhu and Aksenchik v. Russia* [GC], Nos. 60367/08 and 961/11, par 61, 24 January 2017.

discriminatory treatment of persons wearing religious clothing, such as garments fully covering the face (at workplaces, in educational facilities etc.).[46]

29. The European Social Charter[47] (ESC) in one of its recitals (opening paragraphs) states the consideration that *"the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin"*. The European Social Charter (revised)[48] (ESC(R)) prescribes workers' *"right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex*" (Part I, point 20 and Part II Article 20) and contains a general anti-discrimination clause ending with the phrase "other status" (Part V, Article E), similar to the clause of Article 14 of the ECHR. The State's compliance with the revised ESC is monitored by the European Committee of Social Rights.

30. The Framework Convention for the Protection of National Minorities[49] (FCPNM) guarantees to persons belonging to national minorities the rights of equality and of equal protection of the law, and prohibits any discrimination based on belonging to a national minority (Article 4 par 1).

31. The Convention on Access to Official Documents (CAOD)[50] guarantees *"the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities"* (Article 2.1).

32. The Convention against Trafficking in Human Beings[51] (CATHB) prescribes that its implementation *"in particular the enjoyment of measures to protect and promote the rights of victims, 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."* (Article 3).

33. The Convention on Human Rights and Biomedicine[52] (CHRB) obliges the States Parties to *"protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine"* (Article 1) and prohibits *"any form of discrimination against a person on grounds of his or her genetic heritage"* (Article 11).

34. The so-called Istanbul Convention[53] obliges the States Parties to condemn and prohibit discrimination against women (Article 4 par 2) and stipulates that *"its provisions, in particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority,*

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[46] Agency for Fundamental Rights of the European Union, *Fundamental Rights: challenges and achievements in 2010*, 2011, p. 82; *Fundamental Rights: challenges and achievements in 2017*, 2018, p. 65.

[47] Council of Europe, *European Social Charter,* CETS no. 035, adopted on 18 October 1961.

[48] Council of Europe, *European Social Charter (revised),* CETS no. 163, adopted on 3 May 1996.

[49] Council of Europe, *Framework Convention for the Protection of National Minorities*, CETS no. 157, adopted on 10 November 1994.

[50] Council of Europe, *Convention on Access to Official Documents*, CETS no. 205, adopted on 18 June 2009.

[51] Council of Europe, *Convention against Trafficking in Human Beings*, CETS no. 197, adopted on 16 May 2005.

[52] Council of Europe, *Convention for the Protection of Human Rights and Dignity of Human Beings with regard to the Application of Biology and Medicine*, CETS no. 064, adopted on 4 April 1997.

[53] Council of Europe, *Convention on Preventing and Combatting Violence against Women and Domestic Violence*, CETS no. 210, adopted on 11 May 2011.

property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status" (Article 4 par 3).

35. The Additional Protocol to the Convention on Cybercrime obliges each State Party to *"adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the conducts of distributing, or otherwise making available, racist and xenophobic material* [which includes any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, *discrimination* or violence] *to the public through a computer system"*.[54]

36. Findings and recommendations by the European Commission against Racism and Intolerance[55] (ECRI), although non-binding, offer valuable guidelines to the CoE Member States for the promotion and advanced protection of non-discrimination.

4.1.1.5. European Union (EU)

37. The right to non-discrimination is a fundamental principle of the European Union (formerly the European Community (EC)), enshrined in the Treaty of the European Union (TEU),[56] as well as the Treaty on the Functioning of the European Union (TFEU),[57] and the Charter of Fundamental Rights of the European Union (EU Charter).[58] In addition there are a number of EU Directives, including, the Racial Equality Directive (2000/43/EC),[59] the Employment Equality Directive (2000/78/EC),[60] the Gender (Goods and Services) Equality Directive 2004/113/EC,[61] the Gender (Employment) Equality Directive 2006/54/EC[62] and the Gender (Self-employment) Equality Directive 2010/141/EU.[63]

38. The European Court of Justice (ECJ), now the "Court of Justice" within the Court of Justice of the European Union (CJEU) interpreted the 2000 Directives[64] as *"giving specific*

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[54] Council of Europe, *Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature, committed through computer systems*, CETS no. 189, adopted on 28 January 2003, par. 3.1 and 2.1.

[55] https://www.coe.int/en/web/european-commission-against-racism-and-intolerance.

[56] *Treaty of the European Union*, consolidated version, published in *OJ* [abbreviation from the *Official Journal of the EC* (now *of EU*)] C 326, 26.10.2012, pp. 1–390.

[57] *Treaty on the Functioning of the European Union*, consolidated version, *OJ* C 202, 7.6.2016, pp. 1–388.

[58] *Charter of Fundamental Rights of the European Union*, initially published in *OJ* C 364, 18.12.2000, pp. 1–22; binding after entry in force of the 2009 Lisbon Treaty in December 2009.

[59] *Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, *OJ* L 189, 19.7.2000, pp. 22–26.

[60] *Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation*, *OJ* L 303, 27.11.2000, pp. 16–22.

[61] *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, pp. 37–43.

[62] *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, pp. 23–26.

[63] *Directive 2010/141/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ* L 180, 15.7.2010, pp. 1–6.

[64] "Preliminary rulings" of (E)CJ on the question of interpretation or validity of EU law, raised before a national court or tribunal and submitted to CJEU (earlier to ECJ) under Article 267 of the TFEU, ensure uniform interpretation and

expression to a fundamental norm of the EU legal order, namely the general principle of equal treatment".[65] Its case law, which was particularly developed regarding discrimination on grounds of age, and permissible differences of treatment based on age, and to a lesser extent on the grounds of sexual orientation, disability and racial or ethnic origin (dealing with basic issues such the prohibition of discriminatory announcement of employment opportunities to the detriment of racial and ethnic minorities or women, the definition of disability, or the exclusion of same sex partners from work-related benefits reserved for heterosexual couples) had a considerable impact accross Europe, resulting in legislative reforms and encouraging the expansion of judicial protection against discrimination.[66]

4.1.2. National legal acts

4.1.2.1. Preliminary remarks

39. *"Every treaty in force is binding upon the parties*[67] *to it and must be performed by them in good faith."*[68] Moreover, *"[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"*.[69] The ECHR does not have to be incorporated as such in the national legislation, but its guarantees (standards) must be applied in judicial proceedings regardless of whether they are invoked by a party to the proceedings.[70] After exhausting the effective national remedies, the party can file an application before the ECtHR.[71]

40. Five UN treaties (ICCPR, ICESCR, CRC, ICERD and CEDAW) are binding for all States. The ECHR is binding for all Member States of CoE, but Protocol No. 12 to ECHR is not obligatory for more than a third of them, thus compromising the

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application of the EU law in every EU Member States. The interpretation of secondary legislation (EU Directives) relies on the EU primary law (EU Treaties and Charter).

[65] *The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC*, Office for Official Publications of the European Union, Luxembourg 2012, p. 5.

[66] European Commission, *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')*, Report from the Commission to the European Parliament and Council (hereinafter referred to as *Report on Directives 2000/43/EC and 2000/78/EC*), 2014, pp. 7 and 9.

[67] Denoting the States obliged by treaties in force varies: States Parties (UN treaties and some CoE treaties, such as FCPNM), Member States (EU Directives), High Contracting Parties (ECHR) etc. States from the OSCE Region are denoted as "participating States" (they endorse the OSCE commitments and pledge to properly implement them).

[68] *Vienna Convention on the Law of Treaties*, adopted on 23 May 1969, Article 26 (*"Pacta sund servanda"*).

[69] *Vienna Convention on the Law of Treaties*, Article 31 (*General rule of interpretation*), par 1.

[70] *Handbook on European Non-Discrimination Law* (on the basis of contributions by Dr. Magdalena Jankowska-Gilberg and Dr. Dagmara Rajska), European Union Agency for Fundamental Rights and Council of Europe, 2018, p. 16.

[71] Findings of violations in proceedings before the ECtHR are often followed by individual measures taken by respondent States (redress to the applicant(s) in particular case(s) under Article 41 of ECHR) and general measures (including changes of particular pieces of the legislation in order to bring them in line with the standards under ECHR).

comprehensiveness of protection against discrimination on the European level.[72] The OSCE participating States are recommended to consider ratifying or acceding to the relevant international instruments[73] if they have not done so, without reservations; or by withdrawing the previously stated reservations.[74] ODIHR reminds that declaratory acceptance of the OSCE commitments[75] should be coupled with their effective implementation.[76]

41. International norms usually have primacy over national acts/laws, which should be regulated, preferably by the Constitution[77] and confirmed by case law.[78] The relevance of international standards may be emphasized, too.[79]

42. The national legislation should be coherent in itself and consistent with the treaties pertaining to discrimination/inequality and protection thereof. Therefore, (drafters and) legislators should base their (drafts) acts/laws on the relevant international law, taking into account the international case law[80] (including analytical overviews of the core findings of human rights bodies or a court working in the frame of a particular IGO,[81] or comparative overviews of the case law of different bodies/courts[82]).

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[72] In the case *M.Q. v. the French Republic* (No. 383664) Conseil d'État (the Council of State, a governmental body acting, *inter alia*, as a supreme judicial body in administrative matters) on 11 May 2015 held that the applicant cannot rely on Protocol No. 12 to the ECHR because it was not ratified by France; while Article 14 of the ECHR was inapplicable because it protects against discrimination only in respect of rights guaranteed by the ECHR and the right of acquisition or maintaining a nationality is not among these rights.

[73] https://treaties.un.org (United Nations Treaty Collection); https://www.coe.int/en/web/conventions (Council of Europe Treaty Office); https://eur-lex.europa.eu/homepage.html (Access to European Union Law).

[74] See the recommendations in par 31 of the Istanbul *Summit Declaration*, 19 November 1999, and par 42 of the *Annex to Decision No. 14/04; 2004 OSCE Action Plan for the Promotion of Gender Equality*, Ministerial council meeting, Sofia, 6–7 December 2004.

[75] See OSCE commitments at https://www.osce.org/mc/87211.

[76] With the principle of effectiveness in mind, the OSCE Parliamentary Assembly in its *Resolution on a Call for OSCE Action to Address Violence and Discrimination* (Tbilisi, 1–5 July 2016), *"[e]mphasizing that the OSCE participating States have adopted a comprehensive framework to prevent and respond to prejudice and discrimination, which includes commitments in the fields of, inter alia, tolerance and non-discrimination"*, called and encouraged the Participating States to take various and decisive steps to combat discrimination and other practices.

[77] For example, Article 118 of the Constitution of the former Yugoslav Republic of Macedonia states that: *"Treaties ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law".* Direct applicability of the ratified treaties and their priority over national legal acts is also prescribed by Article 10 of the Constitution of Tajikistan and constitutions of some other countries endorsing the monistic concept for the relationship between domestic and international law.

[78] The Maltese Civil Court (Constitutional jurisdiction) in *Marie Therese Cuschieri v. Attorney General*, (25/2016/LSO, 28 March 2017, http://fra.europa.eu/en/caselaw-reference/malta-civil-court-constitutional-jurisdiction-522016lso) referred to the relevant non-discrimination instruments (including CEDAW), established breaches of Articles 8 and 14 of the ECHR and confirmed the legal standing of the EU Charter as a law in the Maltese legal order equivalent to that of EU treaties, in spite of its finding that the EU Charter was inapplicable for the sole reason that purely domestic (not EU) law was applied in the instant case.

[79] Article 8, indents 1 and 11 of the former Yugoslav Republic of Macedonia's Constitution states: "Fundamental values of the constitutional order of the Republic of Macedonia are: fundamental freedoms and rights of a human and citizen recognized by the international law and established by the Constitution" (indent 1); and "respect for the generally accepted norms of the international law" (indent 11).

[80] https://www.ohchr.org/EN/HRBodies/Pages/CaseLaw.aspx (UN Treaty bodies case law, at the OHCHR website); https://hudoc.echr.coe.int/eng# (HUDOC database with, *inter alia*, judgments and decisions of ECtHR, at its website), https://curia.europa.eu/jcms/jcms/j_6/en (CJEU case law, at its website).

[81] *The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC* (written by Colm O'Cinneide, supervised by Christa Tobler), European Union, 2012;

43. Legislators can consult the anti-discrimination model legislation developed by the UN[83] and various models and guidelines issued by other inter-governmental organisations[84] (even those outside the reach of the participating States, if the respective model suggests good legislative solutions[85]), or by coalitions of independent experts.[86]

44. The process of drafting should be based on the *principles of transparency* (informing the public as much as possible about the contents of draft laws/amendments[87]) and *inclusiveness* (involving non-governmental and inter-governmental entities in the drafting process by means of debates, public calls for comments, proposals and recommendations[88]). Participants in a drafting process and legislators can also benefit of further transparency, including publication of anti-discrimination case law of domestic bodies and courts, in order to learn lessons from deficiencies in previous implementation of anti-discrimination legislation.[89]

45. Acts/laws should provide a good basis for respect, promotion and protection of the right/principle of non-discrimination by complying with the negative obligation not to

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Intersectional discrimination in EU gender equality and non-discrimination law (written by Sandra Friedman), European Union, 2016.

[82] *Handbook on European Non-Discrimination Law*, 2018 edition (cited above); *The Prohibition of Discrimination under European Human Rights Law: Relevance for the EU non-discrimination directives – an update* (written by Olivier de Schutter), European Communities, 2011.

[83] *Model National Legislation for the Guidance of Governments in the Enactment of Further Legislation against Racial Discrimination* (hereinafter: "UN Model legislation"), Third Decade to Combat Racism and Racial Discrimination (1993–2003), prepared by the UN Secretary-General on the basis of analysis of the provisions against racial discrimination adopted in 42 countries, available at: https://www.un.org/ruleoflaw/files/Discrimination962en.pdf.

[84] OSCE, *Making Laws Work for Women and Men: A Practical Guide to Gender-Sensitive Legislation*, 4 July 2017.

[85] Caribbean Community, *CARICOM Model Anti-Discrimination Bill (Final draft)*, 25 October 2012, available at: https://pancap.org/pc/pcc/media/pancap_document/Model-Anti-Discrimination-Legislation-FINAL-DRAFT.pdf6.

[86] The *Declaration of Principles on Equality* was adopted by 128 human rights experts at a 2008 London conference organized by the Equal Rights Trust (ERT). The Declaration (http://www.equalrightstrust.org/content/declaration-principles-equality) is based on concepts and jurisprudence developed in international, regional and national legal contexts, and it intends to broaden the consensus and to generate interest and debate, with an aim of assisting the efforts of, *inter alios*, legislators involved in combating discrimination and promoting equality. It was endorsed by the Parliamentary Assembly of the Council of Europe in its Recommendation 1986 (2011) *The Declaration and Principles of Equality and activities of the Council of Europe*, 25 November 2011.

[87] A good practice demonstrating transparency is online publication of a draft act/law with explanation of its suitability to achieve the aims pursued and its compliance with the international norms and standards. For example, the former Yugoslav Republic of Macedonia's draft Law on Prevention and Protection against Discrimination (LPPD) of April 2018 is published online at the "Unique National Electronic Registry of Legal Acts" (www.ener.gov.mk), but explanatory memorandum is lacking.

[88] The "Report on the Assessment of the Impact of the Legislation" relating to the former Yugoslav Republic of Macedonia's draft LPPD of 2018 refers to the involvement of domestic authorities, non-governmental and inter-governmental organisations in preparing the 2017 draft LPPD, regarding which the OSCE/ODIHR submitted its *Comments* (Opinion Nr. NDISCR-MKD/317/2017, Warsaw 21 February 2018). The OSCE guide *Making Laws Work for Women and Men* describes the competences of parliamentary gender equality bodies (in co-operation with civil society representatives) to analyse the gender impact of existing laws and to issue recommendations with a view of preventing gender-based discrimination (*ibid.*, pp. 41–43 and 45).

[89] *A comparative analysis of gender equality law in Europe 2017* (European Union, 2018) at p. 88 concluded that practical effectiveness of the legal framework on gender equality is weak, partly owing to non-transparent work of anti-discrimination bodies/court, as in some States their "case law is not published or [is] very poor accessible".

violate this right/principle, by taking measures to combat discrimination in specific spheres[90] and by variety of special measures aiming to ensuring adequate advancement of an individual or group of individuals.[91] Achieving this task presupposes the creation and efficient work of (functionally and financially) independent protection mechanisms (administrative bodies and courts), and sufficient awareness, commitment and ability to work towards the goal of achieving a substantial equality.

4.1.2.2. Overview of national legal acts

4.1.2.2.1. Constitutions

46. Constitutions of the participating States[92] guarantee *everyone*'s equality before law (and courts)[93], prohibition (protection against) discrimination (in enjoyment of rights),[94] and (promotion of) equality between women and men.[95] ODIHR upholds the ECRI's recommendation that *"the Constitution should enshrine the principle of equal treatment, the commitment of the State to promote equality as well as the right of individuals to be free from discrimination on grounds such as race, colour, language, religion, nationality or national or ethnic origin"*,[96] noting that other grounds should also feature in constitutional provisions.

47. The Constitutions of some OSCE participating States[97], member States of the European Economic Area (EEA)[98] and EU candidate countries[99] virtually cover the material scope of the international obligations. A recent comparative study showed that *"[c]onstitutional provisions are generally either not directly applicable or they have vertical effect only in litigation involving the state as the respondent"*, and *"are deemed to be applicable in horizontal relations* [among private persons and entities] *in Bulgaria, Cyprus, Denmark, Estonia, Greece, Iceland, Liechtenstein, Luxembourg, the Netherlands, Norway, Serbia, Slovenia, Spain and Turkey"*, while *"[h]orizontal direct effect remains theoretical or*

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[90] *Cf.*, *mutatis mutandis*, par 7 of the *UN Model legislation*.

[91] *Cf.*, *mutatis mutandis*, par 6 in conjunction with par 2 of the *UN Model legislation*.

[92] The United Kingdom does not have a written single constitutional act.

[93] Art. 28 ARM; Art. 22 BLR; Art. 10.2 BEL; Art. 6.2. BUL; Art. 28.1 CYP; Art. 12 EST; Art. 12 FIN; Art. 14.1 KAZ; Art. 91.1 LAT; Art. 16.2 MDA; Art. 14.1 MON; Art. 8.1 MNE; Art. 1 NED; Art. 32 POL; Art. 16.1 ROM; Art. 19.1 RUS; Art. 21.1 SER; Art. 14.2 SLO; Art. 14 SPA; Art. 8.1 SWI; Art. 17 TAJ; Art. 10.1 TUR; Art. 28 TM; Art. 24.1 UKR; Art. 18.1 UZB etc.

[94] Art. 29 ARM; Art. 11 BEL; Art. 6.2 BUL; Art. 28.1 & 28.2 CYP; Art. 12 EST; Art. 12 FIN; Art. 14.2 KAZ; Art. 91.2 LAT; Art. 111 LUX; Art. 45.2 MAL; Art. 14.2 MON; Art. 32 POL; Art. 19.2 RUS; Art. 21.2 & 21.3 SER; Art. 12.2 SVK; Art. 14.1 SLO; Art. 14 SPA; Art. 8.2 & 8.4 SWI; Art. 17 TAJ; Art. 10.2 TUR; Art. 28 TM; Art. 24.2 UKR, Art. 18.1 UZB etc.

[95] Art. 30.1 ARM; Art. 10.3 BEL; Art. 31 LIE; Art. 19.3 RUS; Art. 15 SER; Art. 8.3 SWI; Art. 10.2 TUR; Art. 29.1 TM; Art. 24.3 UKR; Art. 46.1 UZB etc.

[96] European Commission on Racism and Intolerance, *ECRI General policy recommendation No. 7 on National legislation to combat racism and racial discrimination*, adopted on 13 December 2002, par 2.

[97] Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK (the last State in 2016 decided to leave the EU).

[98] Iceland, Liechtenstein and Norway (the EU anti-discrimination directives are not generally binding for these countries, because the EEA agreement only provides obligations to them relating to the internal market).

[99] The former Yugoslav Republic of Macedonia, Montenegro, Serbia, Turkey and Albania.

largely debatable in a minority of countries (for instance, Belgium, Croatia, the former Yugoslav Republic of Macedonia, Montenegro, Poland and Portugal)".[100]

48. In some Constitutions the list of prohibited grounds is more restrictive in comparison to the lists of grounds stipulated by the treaties. For example, Article 17 of the Constitution of Tajikistan lacks grounds such as disability, age, sexual orientation and gender identity, which could jeopardise anti-discrimination efforts in a situation of incomplete compliance of the remaining national legislation to some segments of the international anti-discrimination law (such as Article 2 of the CERD).[101] Restrictive constitutional provisions create an inherent risk of impeding the development of a comprehensive anti-discrimination legislation; therefore, ODIHR encourages and welcomes further improvements of certain national constitutions in line with the international law.

4.1.2.2.2. Legislation

49. The anti-discrimination legislation has been improved in recent few decades under influence of international law. The list of participating States whose general laws deal with non-discrimination issues includes, *inter alios*, Azerbeijan, Belarus, Latvia, Russian Federation, Switzerland, Turkmenistan and Tajikistan.[102]

50. Anti-discrimination and/or equality legislation exist in most of the OSCE participating States: Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Estonia, Finland, Georgia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldavia, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom, United States etc.

51. Explicit prohibition of discrimination on the basis of gender does not automatically ensure equal opportunities for women and men to participate in all social, political and economic activities on an equal footing.[103] Therefore, adoption of gender equality legislation or provisions in another (general) act/law is a good practice observed by all EU Member States except Latvia, and by all candidate countries: *"In some countries, equal treatment between men and women is part of a broader Anti-Discrimination Act which also relates to other grounds (e.g., Czech Republic, Hungary, Ireland, Poland, Romania, Slovakia, Slovenia, Sweden and the United Kingdom). Other countries have both an Anti-Discrimination Act (which sometimes also includes a prohibition of sex discrimination) and a Gender Equality Act (e.g. Belgium, Bulgaria, Croatia, Denmark, Finland Greece,*

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[100] ENLEGEN-D, *A comparative analysis of non-discrimination law in Europe 2017*, p. 10. The analysis encompasses 35 States: 28 EU Member States, 3 EEA Member States and 4 candidate countries (Albania is not among the candidate countries featuring in the analysis).

[101] ODIHR, Note on the *Anti-discrimination Legislation and Practice in Tajikistan*, 2018.

[102] In Tajikistan discrimination is prohibited by Art. 140 (incrimination of harassment) of the *Criminal Code*, *Labour Code*, *Family Code*, *Health Code*, *Law on the Protection of the Rights of the Child*, *Criminal Procedure Code*, *Civil Procedure Code*, *Code on Administrative Offences* and *Economic Procedure Code*), and it is implied by Article 143 of the *Criminal Code*, which prohibits violation or restriction of rights and freedoms on a dozen of grounds.

[103] OSCE, *Making Laws Work for Women and Men: A Practical Guide to Gender-Sensitive Legislation*, 4 July 2017.

Lithuania, Montenegro, the Netherlands, Romania and Serbia)".[104] In spite of absence of anti-discrimination acts/laws, there are gender equality acts/laws in Iceland and Tajikistan,[105] which was advised by the UN Human Rights Council in 2016 to *"reinforce the legal framework for the prevention of discrimination and violence against women".*[106]

4.1.2.3. Compliance with international obligations and commitments

4.1.2.3.1. Scope of anti-discrimination laws

52. The scope of an anti-discrimination act/law should be explicitly stipulated.[107] The personal scope (persons and entities protected, and those prohibited to discriminate) and material scope (areas of application of the law) can be covered by a single provision[108] or by separate provisions. ODIHR considers that participating States can make a legitimate choice among the two above options insofar they comply with their international obligations and commitments. If the legislation is comprehensive (designed to protect against any type of discrimination in any sphere), it should be consistent with all international instruments to which the State is a Party.
53. While a general human rights instrument can prohibit discrimination in the enjoyment of "the rights recognized therein" (ICCPR and ICESCR), or of "the rights and freedoms set forth in" it (ECHR), the scope of rights deserving protection against discrimination is narrower where specific anti-discrimination instruments are concerned (for example, Article 3 par 1 of the Employment Equality Directive restricts the areas of implementation to various aspects of employment, such as access to employment, occupation, vocational guidance and training, membership of professional organisations etc.); but directives must not be used as a pretext for absolving particular States from their obligations under other international or domestic legal acts which provide wider protection.
54. Applicability of an anti-discrimination law to all entities and persons is an approach advocated by the European Commission against Racism and Intolerance (ECRI),[109] which is a reasonable choice in the light of the serious character of racial and related discrimination. However, where it comes to codifying the anti-discrimination provisions into a single act, ODIHR notes that prohibition of discrimination in *any* sphere of life by *any* person or institution against groups or individuals based on *any* group characteristic might be too ambitious a task for some States without long tradition in combatting discrimination and with limited institutional knowledge and funds. Thus, it is worthwhile

[104] *A comparative analysis of gender equality law in Europe 2017*, EU 2018.
[105] Tajikistan: *Law on State Guarantees of Equal Rights for Men and Women and Equal Opportunities in the Exercise of Such Rights* of 2005.
[106] *Report of the Working Group on the Universal Periodic Review – Tajikistan*, Human Rights Council, 14 July 2016, par 118.22 at p. 23.
[107] *Cf. ODIHR Opinion on the Law on Prohibition of Discrimination of Montenegro*, Warsaw, 27 March 2013, Opinion-Nr. NDISCR-MNE/226/2013, par. 10, "Key recommendations", point A.
[108] Anti-discrimination laws of: Croatia (Art. 8 "Scope"); Norway (Art. 3 "Scope"); Czech Republic (Art. 1 "Subject matter") etc.
[109] European Commission on Racism and Intolerance, *ECRI General policy recommendation No. 7 on National legislation to combat racism and racial discrimination*, adopted on 13 December 2002, par 7: *"The law should provide that the prohibition of discrimination applies to all public authorities as well as to all natural or legal persons ...".*

reiterating its recommendation *"that the scope of the law prohibits discrimination in specific areas of public, as opposed to private life; and that it also focus on specific protected categories"*.[110] On the other hand, ODIHR echoes the Venice Commission, which warns on another extreme legislative practice of excessive reduction of the areas of implementation, which *"would be impossible to reconcile with European [...] standards"*.[111]

4.1.2.3.2. Definition of discrimination

55. Some jurisdictions, notably those based on case law (such as Canada) opted for an "open model" of defining the notion of discrimination in general terms and leaving it up to the courts to determine what constitutes discrimination. On the other hand, in the "closed" model "the prohibited discrimination is carefully and precisely defined, leaving less discretion to the courts.[112]

56. Discrimination is commonly defined in the international law and in many jurisdictions, as well as in the international and national jurisprudences as a different treatment without objective and reasonable justification lacking a legitimate aim, necessity and proportionality. For example, dealing with allegation of discriminatory exemption of juvenile and elderly (above 65 years old) or female offenders from life imprisonment, the ECtHR noted the efforts of the respondent State to pursue the legitimate aim of special penitentiary treatment of vulnerable groups and, having regard to the wide margin of appreciation, the ECtHR was satisfied *"that there was a reasonable relationship of proportionality between the means employed and the legitimate aim pursued"*. Therefore, the impugned exemptions did not constitute a prohibited difference in treatment for the purposes of Article 14 taken in conjunction with Article 5, and *"there has been no violation [...], whether in respect of the difference in treatment on account of age, or in respect of the difference in treatment on account of sex*".[113]

57. Proper knowledge of fundamental concepts is vital for adopting a proper terminology. For example, equality, mentioned as a principle in the ILO Discrimination (Employment and Occupation) Convention, is a wider notion than non-discrimination,[114] and does not necessarily have the same meaning as the ostensibly similar concept of "equal treatment" under the EU directives.

58. ODIHR recommends that the terms with possibly ambiguous meaning should be explained in glossary provisions or at least clarified by a consistent case law.[115] Legislators should rely on the definitions of particular notions and concepts pertinent to

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[110] *ODIHR Comments on the Draft Law of the Republic of Moldova on Preventing and Combating Discrimination*, Opinion-Nr. NDISCR–MDA/117/2008 (TND), Warsaw, 11 September 2008, p. 6.

[111] *Cf.*, *mutatis mutandis*, Venice Commission's *2008 Opinion on the Draft Law on Prevention from and Protection against Discrimination of the former Yugoslav Republic of Macedonia*, Opinion No. 486/2008, 19 December 2008.

[112] Dr. Belinda Smith, *Models of Anti-Discrimination Laws – Does Canada offer any lessons for the reform of Australia's laws?*, a Paper presented at Law and Society Association of Australia and New Zealand Conference, 1–12 December 2008.

[113] *Khamtokhu and Aksenchik v. Russia* [GC], cited above, par. 77–88.

[114] *Declaration on Principles of Equality* (p. 6): "The right to non-discrimination is a free-standing, fundamental right, subsumed in the right to equality".

[115] For example, the US case law helped to define the notion of a "colour" (see the sub-section "4.1.2.3.3.a. Race, colour and ethnicity").

specific types of discrimination in the introductory provisions of the respective treaties.[116] Due attention should also be given to clarifications of the existing definitions or meanings thereof, as developed by the UN treaty bodies[117] or in the international jurisprudence.[118]

59. Existence of various types of discrimination should be reflected in the general definition of discrimination, so that it prohibits conducts taken with "purpose *or effect* of" violating a person's right or personal dignity, thus essentially covering both direct and indirect discrimination.[119] The definitions of these two types of discrimination should be precisely delineated and consistent with definition(s) of discrimination in other act(s)/law(s), if any.[120] Other types of discrimination should also be included (such as harassment, victimization etc.[121]). There should be separate provisions for various types of discrimination.[122]

a. Direct discrimination

60. The main EU Directives (adopted in 2000) define direct discrimination as a less favourable treatment of one person than another is, has been or would be treated in a comparable situation, on several discrimination grounds (the Employment Equality Directive), or on the grounds of racial or ethnic origin (the Racial Equality Directive).

61. Out of 35 states encompassed with a 2017 analysis only Iceland and Liechtenstein failed to properly transpose the directive's definition. The remaining States included in their acts/laws a definition of discrimination (though some of them with inadequate justification for the difference in treatment) with four essential elements: less favourable treatment; comparison of persons with different characteristics in a similar situation; a comparator from the past (e.g. a previous employer) or a hypothetical comparator; and a statement that direct discrimination cannot be justified.[123] Some of the core elements feature in the ECtHR's basic definition of discrimination as *"difference in the treatment of persons in analogous, or relevantly similar, situations."*[124]

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[116] For example, CRPD in its Article 2 defines "communication", "language", "reasonable accommodation" and "universal design" (see the section 4.1.1.2).

[117] The Committee on the Elimination of Racial Discrimination in par 1 of its *General recommendation no. 14: Definition of Discrimination* (1993) clarified that the words "based on" do not bear any meaning different from "on the grounds of".

[118] See the CJEU's interpretation of the notion of "discrimination by association" in the sub-section 4.1.2.3.2.e.

[119] *Cf. ODIHR Opinion on the Draft Law on Amendments to the Law on Prohibition of Discrimination of Montenegro*, Warsaw, 31 July 2013, Opinion-Nr. NDISCR-MNE/234/2013, par. 12, "Key recommendations", point B.

[120] *Cf. ODIHR Opinion on the Draft Law of the Republic of Moldova on Preventing and Combatting Discrimination*, Warsaw, 11 September 2008, Opinion-Nr. NDISCR-MDA/117/2008, p. 6.

[121] For comparison, *The Law of the Republic of Tajikistan on State Guarantees of Equal Rights for Men and Women and Equal Opportunities in the Exercise of Such Rights* (2005) accepted the CEDAW's definition of discrimination, but failed to prohibit and protect against harassment.

[122] *Cf., mutatis mutandis, ODIHR Opinion on the Draft Law on Amendments to the Law on Prohibition of Discrimination of Montenenegro*, 31 July 2013, par. 12, "Key recommendations", point C.2.

[123] *A Comparative analysis of non-discrimination law in Europe 2017*, EU, 2017, pp. 43 and 44.

[124] ECtHR, *D.H. and Others v. the Czech Republic*, No. 57325/00, 13 November 2007, par 175.

62. Traces of the EU definition can be found in a provision of Ukrainian draft law, which defines direct discrimination as *"decisions, actions or inactions which result in instances whereby an individual and/or group of persons are treated less favourably based on certain attributes than other persons in a similar situation."*[125] This definition instead of the word "grounds" uses the word "attributes", but without the adjective "discrimination"; and it fails to address situations of direct discrimination in past where such discrimination has occurred, or is threatened to occur in future.

63. The ODIHR considers the EU definition of direct discrimination to be adequate. Therefore, it advises the participating States to adopt a definition which would include at least the aforementioned elements of this definition.

b. Indirect discrimination

64. International law's definition of "discrimination" implied a possibility for "indirect discrimination",[126] which was elaborated in USA racial equality cases under the 1964 Civil Rights Act[127] and onwards, inspiring similar concepts in European common law jurisdictions (UK 1975 and 1976 acts). ECJ recognized the concept of "indirect discrimination" in a case relating to the principle of equal pay for men and women under Article 119 of the EEC Treaty,[128] and EU embraced this concept at the turn of the Millennium.[129] EU Directives specify that an apparently neutral[130] provision, criterion or practice constitutes indirect discrimination if it can put persons having a particular characteristic at a particular disadvantage compared with other persons and if it is not objectively justified by a legitimate aim and the means of achieving that aim are not appropriate and necessary.

65. In 34 states the legislative bodies adopted a definition of indirect discrimination, but Turkey failed to include sexual orientation as a protected ground (characteristic) and Liechtenstein prohibited indirect discrimination only on the ground of disability.[131] The wording of the national definitions varied and it was occasionally inadequate, which prompted the following conclusion: *"The positive change of clarifying that indirect discrimination by association*

[125] Equal Rights Trust, *Law of Ukraine on "Principles of Preventing and Combating Discrimination in Ukraine"*, 2013, p. 13.

[126] See the phrase "with [...] effect of" in the definitions of discrimination quoted in Section 4.1.1 above.

[127] The USA Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (March 8, 1971) established that the electric power company's 1955 employment requirement of high school diplomas for higher paid jobs did not pertain to ability to perform the jobs, and so were discriminating against black people who lacked such diploma more than white people.

[128] The ECJ in *J. P. Jenkins v. Kingsgate (Clothing Production) Ltd.* (C-96/80, 31.3.1981) held that a *"difference in pay between full-time workers and part-time workers does not amount to discrimination prohibited by Article 119 of the [EEC] Treaty unless it is in reality merely an indirect way of reducing the pay of part-time workers on the ground that that group of workers is composed exclusively or predominantly of women."*

[129] Jule Mulder, "Some thoughts on European and national non-discrimination law and Brexit", posted on May 30, 2016 at https://legalresearch.blogs.bris.ac.uk/2016/05/some-thoughts-on-european-and-national-non-discrimination-law-and-brexit/.

[130] "Apparently neutral" relates to a provision, criterion or practice which is *ostensibly* worded or applied in a neutral manner (*"CHEZ Razpredelenie Bulgaria" AD v. Komisia za zashtita ot diskriminatsia*, TC-83/14, 16 July 2015, par 109 indent 2).

[131] *A Comparative analysis of non-discrimination law in Europe 2017*, EU, 2017, p. 47.

is prohibited is somewhat overshadowed by the unclear language of the new provision, which may impact on its effectiveness."[132]

66. In the *Achbita* case the CJEU ruled that the apparently neutral prohibition for employees regarding wearing visible political, philosophical or religious signs particularly affected adherents of particular religion to the extent of indirectly discriminating them.[133] The Belgian Court of Cassation accepted the findings of CJEU and ordered a retrial of the *Achbita* case, establishing that the lower court failed to properly test the neutrality in the light of Belgium anti-discrimination law.[134] The application of the complex concept of indirect discrimination remained a challenge in some participating States (Ireland and Denmark) owing to the lack of clarity or lack of understanding of the concept by national courts, while some other participating States (Estonia, Slovenia and Finland) lacked case-law providing interpretation of indirect discrimination.[135] The UK Fees Order stipulating different court fees for uncomplicated, specified claims in labour disputes, labelled as a 'type A' (total GBP 390) and all other claims covering unfair dismissal, equal pay and discrimination claims, labelled as a 'type B' (total GBP 1,200) indirectly discriminated under the Equality Act 2010 because a higher proportion of women brought claims under type B and the difference of court fees was a disproportionate means of achieving the stated aims of the Fees Order.[136]

67. ODIHR highlights the clarity of definitions of indirect discrimination in the international law, which include "apparent" (ostensible) neutrality of a provision, criterion or practice, its failure to serve a legitimate aim and particular disadvantage of a person concerned. The participating States are encouraged to benefit of these good legislative solutions and the related practices of other participating States.

c. Harassment

68. The EU gender equality legislation served well to develop the concept of "harassment" which in the anti-discrimination directives is defined as an unwanted conduct related to a protected characteristic of a person with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. This relatively new development *"is based more on the importance of singling out this particularly harmful form of discriminatory treatment, rather than a shift in conceptual thinking."*[137] The conduct can amount to harassment if it is offending to a member of a certain group (e.g. the use of the degrading terms regarding skin colour or sexual orientation, particularly in front of others at a public place).

69. A little more than handful of national definitions in some States failed to specifically require the conduct to be "unwanted". Some other definitions describe the conduct with a different adjective ("hostile" and "degrading" in Spain), fail to ensure the purposive character of the conducts (Sweden); restrict the area of implementation to certain areas, or on certain ground

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[132] *Ibid.*, p. 48.

[133] CJEU, *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, C-157/15, 14 March 2017.

[134] Belgium, Court of Cassation, No. S.12.0062.N, 9 October 2017.

[135] European Commission, *Report on Directives 2000/43/EC and 2000/78/EC*, 2014, p. 8.

[136] United Kingdom, Supreme Court, *R. (on the application of UNISON) v. Lord Chancellor*, 2015/0233, 26 July 2017.

[137] *Handbook of European non-discrimination law*, FRA & CoE, 2018, pp. 31–32.

(disability in the Liechtenstein's legislation); or fail to prohibit harassment on certain ground (sexual orientation in Turkey) or any relevant ground (Iceland).[138]

70. National practices regarding harassment sanctioned harassment perpetrated by: a mayor's racist speech against Roma as a group (not only against individual Roma, as the wording of the relevant provision *prima facie* suggests);[139] discussing the sexual orientation of a church employee at a parish meeting;[140] bullying and subsequent dismissal of a teacher perceived to have a homosexual orientation;[141] racism and transphobic behaviour against a transsexual student and the teacher that supported her;[142] etc.

71. Thus, it may be beneficial for the participating States to take the wording of EU directives (even merely as a guiding light for those which are not obliged to transpose the EU law) and to either avoid or remedy the existing imperfections of the national definition and overall design of the concepts of harassment by taking all measures, including awareness raising and other preventive measures and by imposition of sanctions against the perpetrators.

d. Victimisation

72. According to Article 9 of the Racial Equality Directive and Article 11 of the Employment Equality Directive, *"Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from 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."*

73. The directives extend the protection against victimisation potentially to anyone who could receive adverse treatment "as a reaction to a complaint or to proceedings", yet as of 2017 major inconsistencies with the victimisation concept existed in respect of: a) reducing the concept's personal scope (in Belgium and Romania the protection against victimisation is limited to victims filing a complaint of discrimination and any witness in the procedure; while in Estonia, Norway and Poland the protection includes other persons as well);[143] and b) reducing the concept's material scope in Germany, Lithuania, Spain, and Turkey (where protection was restricted to the employment field). For years earlier European equality bodies revealed similar inconsistencies in the national laws and their interpretation, also noting that development of comprehensive coverage of many aspects of the social life is prevented by the restrictive material scope of Article 11 of the Employment Equality Directive, where the principle of equal treatment is only extended to employment and vocational training.[144]

[138] *A Comparative analysis of non-discrimination law in Europe 2017*, EU, 2017, p. 51.
[139] Hungary, Equal Treatment Authority, EBH/549/2016, 8 November 2016; Curia (Supreme Court), no. Kfv.III.37.848/2014/6, a judgment delivered on 29 October 2014.
[140] Norway, Equality Tribunal, No 29/2013, 29 November 2013.
[141] Hungary, a decision of the Equal Treatment Authority, referred to in the Flash News "Harassment of teacher in school based on sexual orientation", submitted by the expert András Kádár on 14 January 2014.
[142] Theodoris Athanasiois (an expert from the European network of legal experts in the non-discrimination field), Flash News "Escalating racism and transphobic behaviour against transsexual student and the teacher that supported her", 6 December 2013.
[143] *A Comparative analysis of non-discrimination law in Europe 2017*, EU 2017, p. 100.
[144] Equinet, *Equality Law in Practice: Report on the Implementation of the Race and General Framework Directives*, June 2013, p. 12.

74. Jurisprudential practice on a national level included the finding of the Milan Court of Appeals regarding victimisation by politicians against two Italian citizens who were not victims themselves of initial discrimination (perpetrated by dissemination of racist posters against foreigners) in relation to which they protested by filing an action before a Tribunal of Milan and were publicly ridiculed (victimised) after the rejection of the action by the Tribunal. This ruling recognized that protection should be granted to third parties who have not legal standing to file action, but who suffered disadvantages for their activity aimed to protect other persons from discrimination.[145] Curiously, the Turin Court of Appeals in February 2016 dismissed the claims of two other persons belonging to the same group as the two persons mentioned above, which highlights *"the need of a common understanding of key concepts of anti-discrimination law"*.[146] Furthermore, there was no (but could have been made) progress in terms of providing protection against post-employment victimisation in the UK, perpetrated by providing unfavourable references to the Employment Agency relating to a person dismissed on the ground of retirement who then unsuccessfully claimed to have been a victim of discrimination on the ground of age. The second instance tribunal held that the victimisation claim must fail despite the fact that it was satisfied that the poor reference had been given because of his legal claim, but recognised that the gap in the statutory scheme was probably accidental and did not accept that it had the power to fill the statutory *lacunae*.[147]

75. The definition and scope of protection against victimisation are defined by some international obligations and standards. The judiciary of the participating States could benefit of the good practices of international bodies and landmark findings and conclusions of the courts in other countries.

e. Discrimination by association

76. A person without a protected characteristic who is treated less favourably in comparison with other persons owing to his or her association with a person who has such characteristic is discriminated by association. In spite of the lack of explicit statutory definition of such discrimination, the CJEU in the *Coleman* case ruled that *"[w]here an employer treats an employee who is not him[her-]self disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a)"* of the Directive 2000/78/EC.[148] The CJEU interpreted Article 2 par 2(b) of the Directive 2000/43/EC as a provision which gives a legal basis for establishing an indirect discrimination by association if an impugned measure does not amount to direct discrimination within the meaning of Article 2 par 2(a) of this Directive.[149] National courts also recognized discrimination by association, though

[145] Italy, Court of Appeals of Milan, *Valeria Rho et. al. v. the Municipality of Varalo et. al.*, No. 787/17, 23 February 2017.
[146] Chiara Favilli, "Victimisation by politicians of non-discrimination defenders", 28 July 2017, https://www.equalitylaw.eu.
[147] United Kingdom, Employment Appeals Tribunal, *Rowstock Ltd & Anor v. Jessemey*, Appeal No. UKEAT/0112/12/DM, 5 March 2013.
[148] CJEU, *S. Coleman v. Attridge Law and Steve Law*, C-303/06, judgment of 17 July 2008, operative provisions.
[149] The case *"CHEZ Razpredelenie Bulgaria" AD v. Komisia za zashtita ot diskriminatsia* (TC-83/14, 16 July 2015) was referred to the CJEU by a Bulgarian court dealing with a lawsuit filed by a person of a Bulgarian ethnic origin who claimed to be a victim of discrimination committed by placing electricity meters on pylons forming part of the overhead

sometimes with varied characterization of discrimination as direct or indirect in similar cases, even in different instances of the same proceedings.[150] Relying on the existing law, the European Commission considered that the Employment Equality Directive also prohibits a situation where a person is directly discriminated against on the basis of a wrong perception or assumption of protected characteristics, for example, such as assumption or perception that a person applying for a job is a homosexual or a member of an ethnic minority.[151] The above extended meaning already existed in the Croatian Anti-discrimination Act, whose Article 1 par 3 considers that *"[p]lacing of a person in a less favourable position based on misconception of the existence on the grounds referred to in paragraph 1 shall also be [...] deemed to be discrimination."*

77. The phrase "association with" in Article 14 of the ECHR gives a clear legal basis for considering whether the impugned activities were based on a victim's actual or presumed association or affiliation with another person who actually or presumably possesses a particular status or protected characteristic. A case from national case law includes a Polish case where a shop security guard was dismissed from his position after his superiors had seen him on TV while taking part of a pride parade. The Warsaw District Court ruled that the sexual orientation (a protected characteristic) of the employee as the ground for dismissal was taking part in an event linked to the LGBT community, and thus discrimination by association had occurred.[152] The term "association" has been interpreted widely, for instance in a case of a Romanian mother based in Hungary (married to a Hungarian national who was the father of the child), who was denied maternity benefits as this was only granted to Hungarian citizens. The father could not receive the benefits either as they were only granted to mothers. The ECtHR found that the father had been discriminated against on the basis of fatherhood rather than sex, as adoptive male parents or guardians would be eligible for benefits. The children also lodged a complaint as they felt discriminated on the basis of the status of their father. The ECtHR accepted the arguments.[153]

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electricity supply network at height of 6 or 7 meters above the ground (a measure taken by an electro-distribution company to prevent tampering with electricity meters and of unlawful connection) in the settlement "Gizdova Mahala" predominantly resided by Romani population (with which she identified herself), but not in other settlements. The amendment to the Bulgarian Law for Protection against Discrimination of December 2016 attempted to clarify that less favourable treatment is not restricted to rights provided for under law.

[150] The Supreme Court of Denmark in the case *Hørsholm Kommune v. FOA on behalf of the applicant* (HR-151/2015, 27 April 2016) held that dismissal of a mother who took a 14-months leave to take care about her child suffering of the Asperger syndrome was motivated by the length of her absence (not by the child's disability) and did not amount to direct discrimination. The Court held that the issue of indirect discrimination by association with a person with disabilities was not clear and settled by the CJEU case law and it did not consider it decisive to the case in question to the extent of requesting a preliminary ruling from the CJEU (*News Report* by Pia Justesen, 25 May 2016, www.equalitylaw.eu). Discrimination by association was established in Poland on ground of discriminatory associating a shop security guard who has participated in an equality parade with members of a sexual minority (*XY and Polish Association for Antidiscrimination Law (PTPA) on behalf of XY v. Company Z*, VI C 402/13, judgment of the Warsaw Central District Court of 9 July 2014); and indirect discrimination of a journalist whose Facebook support to a petition for legalisation of civil partnership of people of both different and same sexes resulted in termination of his oral contract to lead/run a radio concert that was organised by a representative of a religious entity which strongly opposed the same sex partnerships (*YZ v. Roman Catholic Diocese of S.*, no. 75/17, judgment of the District Court in S. of 22 March 2017).

[151] European Commission, *Report on Directives 2000/43/EC and 2000/78/EC*, 2014, p. 10.

[152] Poland, District Court in Warsaw (court of the second instance), V Ca 3611/14, 18 November 2015.

[153] ECtHR, *Weller v. Hungary*, No. 44399/05, 31 March 2009, par 33 and 37–39.

78. Recognition of discrimination by association by CJEU may provide useful guidance for improvement of acts/laws as well as jurisprudence in EU and EEA Member States, and in candidate countries, noting that other participating States could also benefit of accepting this good practice.

4.1.2.3.3. Discrimination grounds

79. Depending on the manner of establishing the discrimination grounds in the respective legal systems, there are three models of determination of discrimination grounds: the *closed* model, in which discrimination is prohibited on precisely prescribed grounds, the list of which can be extended only by further statutory changes (Austria, Belgium, Czech Republic, Denmark, France, Germany, Estonia, Ireland, Italy, Liechtenstein, Luxembourg, Norway, Poland, Portugal, United Kingdom etc.); the *open* model, in which the list of discrimination grounds is supplemented by a formulation "and other ground or status" or "status such as" etc., and this list can possibly and exceptionally be extended by courts (Bulgaria, Croatia, Cyprus, Estonia, Finland, Greece, Hungary, Iceland, Latvia, Lithuania, Malta, Montenegro, Netherlands, Romania, Serbia, Slovakia, Slovenia, Spain, the former Yugoslav Republic of Macedonia, Turkey etc.); and a *general prohibition* model based on a general protection of equality, in which courts have a substantial authority to establish the discrimination grounds[154] (USA, Canada[155]). For comparison, on an international level the open model is applied in the UDHR and the general human rights treaties (such as ICCPR, ICESCR, CRC, ECHR, ESC (revised) and EU Charter), while the closed model is applied in the anti-discrimination treaties (ICERD, CEDAW and CRPD) and the EU directives.

80. The general prohibition model is inherently linked to the development of the case law, whose application and impact is, however, modest or small in a number of participating States. The closed model "ties hands" of the judiciary and ostensibly requires a comprehensive list of discrimination grounds in order to ensure that no important ground is left out. The open model fits well with the overarching legislative approach. Therefore, the judiciary should be authorised by law and willing in practice to occasionally supplement the list of discrimination grounds.

81. In spite of the variety and wealth of discrimination grounds in the respective legislation of the participating States,[156] the respective national acts/laws can include the grounds from relevant treaties and interpretations thereof, or grounds not included in treaties. On the other hand, a very long list of discrimination grounds *"may be potentially self-destructive of the*

[154] Biljana Kotevska, *Guide on Discrimination Grounds*, OSCE Mission to Skopje, 2013, p. 8.

[155] The Canadian Supreme Court in *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, February 2, 1989 held that Article 15 of the Canadian Charter of Human Rights, which explicitly prohibits discrimination only on grounds of "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability", also protects individuals and groups from discrimination on grounds which are not named (nationality) but which are analogous to those named (national origin). By virtue of such interpretation, the Canadian Charter's provision was found to be applicable in the case of the British plaintiff complaining that the inability of performing a lawyer's profession owing to lack of a Canadian nationality amounted to discrimination.

[156] Table overview of the protected grounds can be found in *A comparative analysis of non-discrimination law in Europe 2017*, EU, 2017 at pp. 4–6.

effectiveness"[157] of a legal act and *"could inundate the existing judicial and/or administrative systems with apparently unmeritorious* [unfounded] *cases and complaints"*.[158]

a. Race, colour and ethnicity

82. Race is a protected characteristic under UN instruments (ICESCR, ICCPR, CRC, ICERD, ICPRAMW, ILO Discrimination (Employment and Occupation) Convention, UNESCO Convention against Discrimination in Education etc.), CoE instruments (ECHR and Protocol No. 12 thereto, ESC and revised ESC, Istanbul Convention, Convention against Trafficking in Human Beings etc.), while the EU law (TFEU, Racial Equality Directive, Directive concerning the status of long term residents etc.) refers to "racial or ethnic origin".

83. In spite of the definition of "racial discrimination" in Article 1 of the ICERD, this convention does not define the notion of "race" as such. The notion of "racial or ethnic origin" is not defined by the Racial Equality Directive 2000/43/EC. Thus, participating States have a latitude of deciding whether and how to define these concepts in national legislation. The US law defines the term *"racial group"* as *"a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent"*.[159]

84. The CJEU had no doubts that the notion of "ethnic origin" includes Roma[160] and held that the concept of 'discrimination on the grounds of ethnic origin' for the purpose of Articles 1 and 2 par 1 of the Directive 2000/43 must be interpreted as being intended to apply in circumstances of impact of the impugned measure over people who themselves lack such ethnic origin[161] (discrimination by association). In an attempt to delineate between the occasionally overlapping concepts of "ethnicity" and "race", the ECtHR clarified that *"[w]hereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds."*[162] This definition of race touches upon a sensitive matter and is not scientifically proven, but as the definition is widely used, it is included in this Note.

85. The concept of "racial or ethnic origin" was transposed with a different terminology in various EU Member States, some of which avoided to use the above phrase or parts thereof owing to, *inter alia*, concerns that the terms "racial origin" or "race" could result in perception that human rights depend on this ground.[163] The European Commission did not object to the national use of the ostensibly restrictive terms "ethnic origin", "ethnicity" or *"ethnic identity"* (defined in the Swedish Anti-Discrimination act as *"national or ethnic*

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[157] ODIHR, *Comments on the Draft Anti-Discrimination Law of the former Yugoslav Republic of Macedonia* (19 December 2008), par 13.

[158] Op. cit. footnote 88 (ODIHR 2018 *Comments*), par 28; Venice Commission, *Opinion on the Draft Law on Protection against Discrimination of the former Yugoslav Republic of Macedonia* (19 December 2008), par 41.

[159] „Racial group", at https://definitions.uslegal.com (referring to 18 USCS § 1093).

[160] CJEU, *"CHEZ Razpredelenie Bulgaria" AD v. Komisia za zashtita ot diskriminatsia*, T C-83/14, 16 July 2015, par. 46 (referring to the ECtHR judgments in *Nachova and Others v. Bulgaria* [GC], Nos. 43577/98 and 43579/98, ECHR 2005-VII and *Sejdić and Finci v. Bosnia and Herzegovina* [GC], Nos. 27996/06 and 34836/06, par 43 to 45 and 50, ECHR 2009.

[161] CJEU, *"CHEZ Razpredelenie Bulgaria"* case, cited above, par 60.

[162] ECtHR, *Timishev v. Russia*, Nos. 55762/00 and 55974/00, par 55, 13 December 2005.

[163] *A comparative analysis of non-discrimination law in Europe 2017*, EU, 2017, pp. 14–15.

origin, skin colour or other similar circumstance"), or encompassing the ethnic origin without defining it within a national law's concept of *"race"* (the latter, according to the UK Equality Act 2010, "*includes (a) colour; (b) nationality; (c) ethnic or national origins*"), as long as they are not strictly interpreted to imply any limitation to the scope of national legislation as compared to the Racial Equality Directive.[164] With reference to few potentially overlapping grounds, the European Commission noted that the *"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/EC."*[165]

86. The difference between the ostensibly similar concepts of "race" and "colour" was elaborated, *inter alia*, in the case law of the US courts, which established that discrimination can occur between two people of the same "race" based on the "colour" (appearance of the skin[166]), which is defined as pigmentation of the skin.[167] The USA lengthy history of racial discrimination in various aspects of life including education, employment, housing, public accommodations and other areas inherently caused extensive case law, including: finding that racially restrictive obligations in property deeds are unenforceable;[168] prohibition of racial segregation in public education,[169] in inter-state and intra-state transportation facilities[170] and in sale or rental of property;[171] declaration that state laws prohibiting inter-racial marriages are not constitutional;[172] etc.

87. Racial or ethnic origin is closely connected to religion. Therefore, the case law in some States recognized the possibility for discrimination against certain racial or ethnic groups which are known for their specific religion, such as Jews, Muslims, Sikhs, or castes.[173]

88. Thus, national definitions should not be restrictive, because this could decrease the degree of protection offered by the EU Racial Equality Directive,[174] or national efforts to combat racial discrimination in all spheres of public (political, economic, social, cultural etc.) life, as required by the ICERD,[175] could be frustrated.

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[164] European Commission, *Report on Directives 2000/43/EC and 2000/78/EC*, 2014, p. 11.

[165] *Ibid.*

[166] Michigan State University (Office of Institutional Equity), *Anti-Discrimination Policy User's Manual*, last updated June 1, 2018, https://oie.msu.edu/_assets/documents/ADPUserManual_updated06.01.18.pdf, p. 10, referring to the case *Santiago v. Stryker Corp* (District Court Puerto Rico, 10 FSupp2d 93, 96 (DPR 1998), 25 June 1998) in which a dark-skinned Puerto Rican citizen replaced by light-skinned Puerto Rican citizen could establish *prima facie* case of colour discrimination.

[167] The above clarification of the meaning of "colour" by US courts (in their case law) and the Equal Employment Opportunity Commission (in *EEOC Compliance Manual on Race and Color Discrimination*) were not matched by definition of "colour" as a protected category in the Civil Rights Act of 1964 (Title VII).

[168] USA, Supreme Court, *Shelley v. Kraemer*, 334 US 1 (1948), May 3, 1948.

[169] USA, Supreme Court, *Brown v. Board of Education of Topeka*, 347 US 483 (1964), December 9, 1952.

[170] USA, Supreme Court, *Bailey v. Patterson*, 369 US 31 (1962), February 26, 1962.

[171] USA, Supreme Court, *Jones v. Mayer Co*, 392 US 409 (1968), June 17, 1968.

[172] USA, Supreme Court, *Loving v. Virginia*, 388 US 1 (1967), June 12, 1967.

[173] *A comparative analysis of non-discrimination law in Europe 2017*, EU, 2017, p. 15.

[174] A similar view is expressed by Rossen Grozev in "A Landmark Judgment of the Court of Justice of the EU – New Conceptual Contributions to the Legal Combat against Discrimination", *The Equal Rights Review*, vol. fifteen (2015), p. 170.

[175] The Committee on the Elimination of Racial Discrimination in its *Concluding Observations on the combined ninth to eleventh periodic reports of Tajikistan* under ICERD of 21 March 2016 (CERD/C/TJK/CO/9-11, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/056/91/PDF/G1605691.pdf?OpenElement) noted the

b) Religion or belief

89. "Religion" is a protected characteristic (discrimination ground) in UN instruments (ICESCR, ICCPR, CRC, ICPRAMW, ILO Discrimination (Employment and Occupation) Convention, UNESCO Convention against Discrimination in Education etc.), CoE instruments (ECHR and Protocol No. 12 thereto, ESC and revised ESC, Istanbul Convention, Convention against Trafficking in Human Beings etc.) and EU law (TFEU, EU Charter, Employment Equality Directive, Directive concerning the status of long term residents etc.). The most important regional provisions designed to deal with discrimination on the grounds of religion or belief are Article 21 in conjunction with Article 10 of the EU Charter, Article 14 in conjunction with Article 9 of ECHR and Article 1 of Protocol No. 12 to the ECHR. The ECHR's scope is significantly wider than the EU law.[176] This ground features in the anti-discrimination legislation of many participating States.

90. There is no comprehensive definition of a "religion or belief" in a binding document on an international level.[177]. The Venice Commission noted that *"[b]road consensus has emerged within the OSCE region on the contours of the right of freedom of religion or belief as formulated in the applicable international human rights instruments",* which guarantee that *"[e]veryone has the right to freedom of thought, conscience and religion"*, including an internal freedom *(forum internum)* which *"is absolute and cannot be subjected to limitations of any kind"*, unlike the manifestations of religion or belief.[178] The concept of "belief" refers to a "conviction" which can be of religious or non-religious (philosophical) nature.[179]

91. The CJEU and the ECtHR did not extensively consider what constitutes a 'religion' or 'belief'.[180] The latter court clarified that these concepts protect "atheists, agnostics, sceptics and the unconcerned", those who hold or do not hold religious beliefs and those who practice or do not practice a religion, and that the notions of "religion or belief" do not necessarily relate to practicing religion or belief in formal faith institutions.[181]

92. Some national laws define "discrimination on the ground of religion or belief",[182] but generally refrain from defining the concept of "religion of belief" as such.[183] Clarification

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lack of criminalization of incitement to racial discrimination and of acts of racially motivated violence (par 7) and urged Tajikistan to *"amend or enact legislation so as to include an overarching definition of racial discrimination in line with the Convention."*

[176] *Handbook on European Non-Discrimination Law*, FRA & CoE, 2018, p. 111.

[177] *A comparative analysis of non-discrimination law in Europe 2017*, EU, 2017, p. 8.

[178] European Commission for Democracy through Law (Venice Commission), with involvement of ODIHR Panel of Experts on Religion or Belief, *Guidelines for legislative reviews of laws affecting religion or belief*, CDL(2004)061, Strasbourg, 11 June 2004, p. 7.

[179] The term "conviction" is used in Article 2 of Protocol No. 1 ("Right to education"), which is in principle *lex specialis* in relation to Article 9 of ECHR (*Osmanoğlu and Kocabaş v. Switzerland*, No. 29086/12, 10 January 2017, par 35).

[180] *Handbook on European Non-Discrimination Law*, FRA & CoE, 2018, p. 111.

[181] *Ibid.*, p. 112; with reference to the ECtHR judgments in *Moscow Branch of the Salvation Army v. Russia,* No. 72881/01, 5 October 2006, par 57-58; *Metropolitan Church of Bessarabia and Others v. Moldova*, No. 45701/99, 13 December 2001, par 114; and *Hasan and Chaush v. Bulgaria* [GC], No. 30985/96, 26 October 2000, par 60 and 62.

[182] For example, Article 17 of the Montenegrin Law on the Prohibition of Discrimination, in addition to listing *"any unequal treatment, differentiation, or placing in an unequal position of a person on the basis of religion or personal belief*", also includes *"affiliation or non-affiliation to a religious community"* in its definition of discrimination on the basis of religion of personal belief.

of this concept was made by court rulings in Austria, Belgium, France, Ireland, the Netherlands, the United Kingdom[184] and Germany (whose Constitutional Court has developed extensive case law).[185]

93. The exercise of the right to freedom of religion or belief was often interfered with measures taken by States in response to wearing of religious clothing, such as niqab (a full-face veil leaving an opening only for the eyes), burqa (a full-body covering including a mesh over the face), hijab (headscarf) or religious symbols (Christian cross etc.). The measures have a legitimate aim to preserve public order and prevent the rights of others, to promote inclusiveness ("living together" principle) and thus to prevent ghettoization, to preserve the neutrality of civil servants, judges and public prosecutors etc. Such measures were not considered by the ECtHR to be in breach of the prohibition of discrimination in conjunction with the rights to respect for private and family life and/or to the freedom of thought, conscience and religion, if they were necessary and proportionate to a truly legitimate aim pursued in a particular case.[186] In pursuance of the legitimate aim of preservation of neutrality and secularism within schools and the rights of others (adolescents at age when they are impressionable) to non-interference in their own religious beliefs, as well as protection the interests of the education system, the ECtHR held that it was necessary to prohibit wearing of headscarves by girls in school,[187] or by teachers on duty.[188]

94. The CJEU established in the *Achbita* case that prohibition of wearing visible religious symbols arising from an internal rule of a private undertaking may amount only to indirect (but not) direct discrimination in the meaning of Article 2 of the Racial Equality Directive *"if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in*

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[183] The Danish Act on the Prohibition of Discrimination in the Labour Market associates the notion of "religion" with formally approved or recognised religions, but in practice it is not necessary to demonstrate membership in a formally recognised religious community for being eligible to benefit of legal protection.

[184] The Explanatory Notes to the UK Equality Act 2010 on religion or belief advise that the definition of discrimination on the ground of religion or belief is broad in line with Article 9 of the ECHR, that *"a religion must have a clear structure and belief system such as Protestants and Catholics within Christianity",* and that "*a philosophical belief [...] must be genuinely held; be a belief and not an opinion on viewpoint based on the present state of information available; be a belief as to a weighty and substantial aspect of human life and behavior; attain a certain level of cogency, seriousness, cohesion and importance; and be worthy of respect in a democratic society, compatible with human dignity and not in conflict with the fundamental rights of others"*. The Note included the Baha'i faith, Buddhism, Christianity, Hindiusm, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism as religions for the purposes of this provision and excluded cults involved in illegal activities.

[185] *A comparative analysis of non-discrimination law in Europe 2017*, EU, 2017, p. 16 (referring to the national law and case law referred to in the above footnotes).

[186] ECtHR, *Belcacemi and Oussar v. Belgium*, No. 37798, 11 July 2017; *S.A.S. v. France*, No. 43835/11, 1 July 2014; *Dakir v. Belgium*, No. 4619/12, 11 July 2017. In a concurring opinion to the latter judgment (par 13), judge Spano, joined by judge Karakaş, admitted that *"some restrictions on a person's individual rights are a natural precondition for the harmonious co-existence of a group of human beings in a democratic society"*, however, noting *"that Governments are not free to base their attempts at restricting Convention rights on any aim whatsoever. The legitimacy of an aim must be based on objective, identifiable factors that are directly conducive to alleviating certain harms that flow from the exercise of the human right that is restricted. It follows that public animus and intolerance towards a particular group of persons can never justifiably restrict Convention rights."*

[187] ECtHR, *Köse and Others v. Turkey* (dec.), No. 26625/02, 24 January 2006.

[188] ECtHR, *Dahlab v. Switzerland* (dec.), No. 42393/98, 15 February 2001.

its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary, which it is for the referring court to ascertain”.[189] The judgment in the *Achbita* case was criticised *“for the lack of emphasis or weight which it places on the value of a diverse, tolerant and plural society and on the individual’s right to manifest his or her religion”* because *“[i]t is likely to impact heavily on visible groups, and those where intersectional discrimination is already problematic”*, leaving employees “*wondering how safe their employment might be, and employers wondering where the boundary lines safely may be drawn”*.[190] Ambiguities were not fully cleared with the ruling in the *Bougnaoui* case, in which the CJEU held that *“the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision”*.[191] The FRA advised that the *“EU Member States should ensure that fundamental rights and freedoms are safeguarded when considering any restrictions on symbols or garments associated with religion”* and reiterated that *“[a]ny legislative or administrative proposal that risks limiting the freedom to manifest one’s religion or belief should embed fundamental rights considerations and respect for the principles of legality, necessity and proportionality.”*[192]

95. Laws prohibiting full face religious clothing were enacted in Austria (8.6.2017, in force from 1.10.2017) and Germany (2017). The Latvian Parliament’s legal office opposed the intended enacting of a similar law (after adoption of a bill by the Latvian Cabinet of Ministers), expressing concerns that the proposed restrictions of the right of wearing veil in almost all public places might not be proportionate and consistent to the ECHR.[193] In Germany a general ban of religious clothing and symbols was held to be contrary to the rights to religion and equality; the wearing of a garment was considered tolerable in one case by reason of being a common practice and necessary consequence of a pluralistic society, while in another case the religious rules on concealment of body by burkini (a swimsuit designed to respect Islamic traditions) did not justify attempt for being excused from swimming lessons.[194] The Turkish regulation concerning the attire of personnel working at public institutions[195] provided a legal basis for prohibition of wearing Islamic headscarves in the public sector, but in 2014 a lower court’s ban preventing a lawyer to wear her headscarf at a the courtroom was considered as a violation of the right to non-discrimination on the ground of religious belief.[196]

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[189] See the *Achbita* case in sub-section 4.1.2.3.2.b above.

[190] Schona Jolly (QC and head of Cloisters Human Rights Practice Group), “Achbita and Bougnaoui: A strange kind of equality”, Cloisters.com (https://www.cloisters.com/blogs/achbita-bougnaoui-a-strange-kind-of-equality), 14 March 2017.

[191] CJEU, *Asma Bougnaoui, Association de défense des droits de l’homme (ADDH) v. Micropole SA, formerly Micropole Univers SA*, C-188/15, 14 March 2017.

[192] FRA, “FRA Opinion 3.3” in *Fundamental rights report* 2018 (covering 2017) at p. 65.

[193] Latvia, Saeima Juridiskais birojs, *Opinion Concerning the Draft Law on the Restriction of Face Covering to the Saeima Human Rights and Public Affairs Commission*, 2017.

[194] *A comparative analysis of non-discrimination law in Europe 2017*, EU, 2017, p. 19; referring to the judgments of the German Constitutional Court 1 BvR 47/10 of 27 January 2016, 1 BvR 354/11 of 18 October 2016 and 1 BvR 3237/13 of 8 November 2016.

[195] Turkey, *Official Gazette* No. 17848, 25 October 1982.

[196] Turkey, Constitutional Court, application of *Tugba Arslan*, No. 2014/256, 25 June 2014 (quoted at p. 20 of *A comparative analysis of non-discrimination law in Europe 2017*, EU, 2017).

96. Another contentious issue is refusal of adherents of certain religions or convictions to work in particular days and time of the week, such as from sundown Friday to sundown Saturday in a case of a Seventh-Day Adventist. The Canadian Supreme Court held that the apparently neutral employment rule that all employees must work Friday evenings and Saturdays on a rotation basis had a discriminatory effect on the plaintiff because of her religion, but the employer neither took measures to fulfil the duty of accommodating the employee, neither explained whether and why accommodating her would have created an undue hardship for the employer.[197]

97. The absolute character of internal freedom of religion or belief should be emphasized, either in legislation and rationales/explanatory memorandums thereof, or by such understanding of this concept in the national case laws. Furthermore, the participating States should embrace good legislative practices which ensure safeguard for the right to freedom of religion or belief by subjecting any restriction of this right to a most careful scrutiny of fulfilment of legality, legitimacy and necessity (including proportionality) and by providing proper reasons for (rationale of) any measure interfering with the right, in line with the relevant international case law and taking into account best practices in the Region.

c) Disability

98. Disability is specifically mentioned as a discrimination ground in UN instruments (CRC and CRPD), CoE Istanbul Convention and EU law (TFEU, EU Charter and Employment Equality Directive). The CRPD was ratified by the EU on 23 December 2010.

99. Article 1 par 2 of the CRPD makes plain that *"[p]ersons with disability include those with long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."*

100. Relying on CRPD, CJEU held that *"sickness cannot as such be regarded as a ground in addition to those in relation to which Directive 2000/78/EC prohibits discrimination"*.[198] However, *"obesity of a worker constitutes a 'disability' within the meaning of that directive where it entails a limitation resulting in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers",* and Articles 2(1) and 3(1)(c) of Directive 2000/78/EC preclude *"dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post."*[199] In practical terms this entails that, after the

[197] Canada, Supreme Court, *Ontario (Human Rights Comm.) and O'Malley v. Simpsons-Sears Ltd.* (1985), 7 C.H.R.R. D/3102 (S.C.C.), December 17, 1985.

[198] CJEU (Grand Chamber), *Sonia Chacón Navas v. Eurest Colectividades SA,* C-13/05, 11 July 2016, par 43 and 57.

[199] CJEU, FOA, acting on behalf of *Karsten Kaltoft v.* Kommunernes Landsforening, acting on behalf of the *Municipality of Billund*, C-354/13, 18 December 2014, par 51. Referring to this ruling, the Belgian Labour Tribunal of Liège on 20 June 2016 established that perceived obesity amounts to "disability".

accommodations have been provided, a person must be competent, capable and available to perform the essential functions of this post.

101. National definitions of disability, which "often stem from the context of social security legislation rather than anti-discrimination law", were *a priori* in line with the definition provided by the CJEU, though with some discrepancies in Cyprus, Poland and Slovakia and without making reference to the interaction with various barriers, focusing only on the limitations and impairments of the person concerned (Austria, Bulgaria, Cyprus, the Czech Republic, Estonia, Latvia, Liechtenstein, Norway, Romania, Sweden and the United Kingdom).[200] The definition of "disability" in Bulgaria is wider because it does not require actual hindering of a professional life (similarly in Sweden, Iceland and Norway), while Estonia, Hungary, Lithuania and Malta extend the scope to all aspects of social life.[201] Although the German Social Code's definition of "disability" differs from Article 1 of the UN CRPD and the case law of the CJEU, its interpretation extended it from a working life to inclusion in a society.[202] Failure of defining "disability" could be coped with referral to the international instruments (CRPD), in spite of the small likelihood of their direct application.[203]

102. Thus, it may be useful for participating States to take into account the wording of the CRPD (the EU/EEA/candidate States to rely on the Employment Equality Directive as well), and the interpretations of the Committee on the Rights of Persons with Disabilities (as well the CJEU's case law).

d) Age

103. Discrimination on the ground of "age" is explicitly prohibited in recent UN instruments CRPD and ICPRAMW, CoE Istanbul Convention and TFEU, EU Charter, Employment Equality Directive (which prohibits direct and indirect discrimination, harassment or instruction to discriminate on the ground of age) and Directive concerning the status of long term residents.

104. The objective concept of "age" is defined by the Swedish Discrimination Act as a "length of life to date" and includes all ages.[204]

105. EU Member States have considerable flexibility to choose and apply measures aimed at implementing economic and social policies, which are necessary and proportionate to the aim pursued. Discrimination was established because of a different (other than normal) retirement age depending on the gender of the applicant asking support for early retirement from farming and on the number of children raised by a female applicant;[205] or because of refusal of a Health Insurance Fund to conclude a contract with a doctor who already was 55 years old under assumption that doctors above the age of 55 would

[200] *A comparative analysis of non-discrimination law in Europe 2017*, EU, 2017, pp. 21 and 22.
[201] *Ibid.,* p. 22.
[202] Germany, Federal Labour Court, 6 AZR 190/12, 19 December 2013.
[203] *A comparative analysis of non-discrimination law in Europe 2017*, EU, 2017, p. 21, referring to the situation in the former Yugoslav Republic of Macedonia regarding the absence of definition of "disability" in the 2010 Law on Prevention and Protection against Discrimination, as well as the varied definitions in the Serbian legislation.
[204] *Ibid.,* p. 34.
[205] CJEU, *Blanka Soukupová v. Ministerstvo zemědělství*, C-401/11, 11 April 2013.

artificially increase the quantity of their work and at the same time decrease the quality thereof.[206] Other provisions on age in the Employment Equality Directive are included in Article 6 ("Justification of differences of treatment on grounds of age").[207]

e) Nationality or national origin

106. "Nationality" is a discrimination ground explicitly protected under ICPRAMW and TFEU. The prohibition of discrimination under the Racial Equality Directive should also apply to nationals of third countries (Recital 13), but it does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned. (Article 3 par 2).

107. "Nationality" is defined as a "legal bond between a person and a State".[208] "National origin" in the United Kingdom may refer to a person's former nationality.[209] In some countries, for instance Slovakia, nationality is overlapping with ethnicity.[210]

108. Different treatment on the ground of nationality should be exceptional and well-justified, in line with the standards established under the international law. Relying on the CJEU's ruling that the ban on admitting non-residents to Dutch coffee shops in Maastricht (a town close to the German and Belgian border) selling cannabis to its customers was proportionate to the legitimate aim of reducing the problems caused by drugs tourism (disturbance of public order and public nuisance),[211] the Supreme Court did not accept the claim of a prosecuted coffee shop owner that the prohibition of sale of drugs to various people from outside the Netherlands contravened Article 21 of the EU Charter.[212] With reference to the legal standing of the CJEU that the definition of the conditions for the acquisition and loss of nationality fall within national competences and that such measure should nevertheless be consonant to the EU law,[213] the withdrawal of French nationality to a person also holding a Moroccan nationality after final conviction for involvement in terrorism was held to be compatible with the EU Charter's guarantee of equality before the law (Article 20) and prohibition of any discrimination based on nationality (Article 21), because neither the Charter, nor Article 3 of Protocol No. 4 to the ECHR (which prohibits the States to expel their own nationals) preclude a possibility of depriving a person from nationality.[214]

109. In spite of the possibility under the EU law to restrict the rights of third country nationals, the ECHR requires from the High Contracting Parties (including all EU Member States) to guarantee the rights enshrined in this Convention to all persons under its jurisdiction and the ECtHR has maintained a balance between the State's entitlement to decide which

[206] Austria, Supreme Court, *Dr. H. L. v. Oberösterreichische Gebietskrankenkasse*, Nr. 60b246/10k, 18 July 2011.
[207] See the law and case law in sub-section 4.1.2.3.4.d below.
[208] Article 2(a) of the CoE Convention on Nationality, CETS no. 166, signed on 6 November 1997.
[209] *Handbook on European Non-Discrimination Law*, FRA & CoE, 2018, p. 107.
[210] European Commission, *Data Collection in the Field of Ethnicity*, 2017, p. 12.
[211] CJEU, *Marc Michel Josemans v. Burgemeester van Maastricht*, C-137/09, 16 December 2010.
[212] Netherlands, Supreme Court, *Accused v. Public Prosecutor*, 14/02392, 29 September 2015.
[213] CJEU, *Janko Rottman v. FreiStaat Bayern*, C-135/08, 2 March 2010.
[214] France, Council of State, *M.Q. v. the French Republic*, No. 383664, 11 May 2015.

benefits to provide to nationals solely and the necessity of avoiding discrimination against those who do not hold nationality of the said State, notably those with strong factual bonds to the State.[215] Thus, ECtHR established discrimination in situations of discriminatory treatment of foreign nationals with residence permit *vis-à-vis* nationals of the host State in respect of calculation of pension,[216] access to disability benefit,[217] or unemployment benefit;[218] refusal to provide a legal aid to a Congolese national in the process of renewal of her residence permit who wanted to establish paternity of her child holding a Belgian citizenship, where funding for legal aid was available only to nationals from CoE states in pursuance of establishing the right to residence;[219] refusal of pension entitlement to a mother whose married child failed to re-gain nationality after revocation of nationality was discriminatorily motivated on the grounds of national origin;[220] etc. The differentiation between Moroccan nationals threatened with deportation after their criminal convictions, on one hand, and Belgian nationals and nationals of EU Member States, on the other hand, did not amount to discrimination on the ground of nationality because Belgian nationals may not be expelled by virtue of the guarantee enshrined in Article 3 of Protocol no. 4 to the ECHR and nationals of EU Member States possess EU citizenship as well.[221]

f) Sex and gender identity

110. The ground of "sex" features in most of the anti-discrimination provisions of general human rights instruments or in specific anti-discrimination instruments, including those from the UN system (ICESCR, ICCPR, CRC, ICPRAMW, ILO Discrimination (Employment and Occupation) Convention, UNESCO Convention against Discrimination in Education etc.), CoE instruments (ECHR and Protocol No. 12 thereto, ESC and revised ESC, Istanbul Convention, Convention against Trafficking in Human Beings etc.) and EU law (TFEU, EU Charter). Most of the participating States have included the "sex" ground in the respective legislation, which does not necessarily mean that the protection from discrimination on this ground is effective and comprehensive throughout the Region.

111. The ground of "sex" is self-explanatory, relating to the natural characteristic of being a man or a woman. This ground in the EU region encompasses discrimination against an individual who has undergone or will undergo gender reassignment.[222] *"Gender"* (at least for the purposes of the Istanbul Convention) *"shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men"* (Article 3(c)).

[215] *Handbook on European Non-Discrimination Law*, FRA and CoE, 2018, p. 108.
[216] ECtHR, *Andreeva v. Latvia* [GC], No. 55707/07, 18 February 2009.
[217] ECtHR, *Koua Poirrez v. France*, No. 40892/98, 30 September 2003.
[218] ECtHR, *Gaygusuz v. Austria*, No. 17371/90, 16 September 1996.
[219] ECtHR, *Anakomba Yula v. Belgium*, No. 455413/07, 10 March 2009.
[220] ECtHR, *Zeïbek v. Greece*, No. 46368/06, 9 July 2009.
[221] ECtHR, *C. v. Belgium*, No. 21794/93, 7 August 1996; and *Moustaquim v. Belgium*, No. 12313/86, 18 February 1991 (these and the other descriptions of the case law in this paragraph are taken from the *Handbook on European Non-Discrimination Law*, FRA and CoE, 2018, pp. 108–110).
[222] CJEU, *P. v. S. and Cornwall County Council*, C-13/94, 13 April 1996.

112. The EU efforts to create an integrated economical area and a labour market without competitive distortions[223] based on sex, as well as the foundation of the whole integration on fundamental democratic values such as equality between sexes necessitated decisive legislative and judicial action. The CJEU (ECJ) held that the right to non-discrimination on the ground of sex is violated by unequal pay of women and men for the same work;[224] refusal to employ a female candidate considered to be unsuitable for the job merely based on the possible adverse consequences of employing a pregnant woman;[225] refusal to allow a person born as a man who has undergone gender reassignment to benefit of the UK provision entitling women to receive their State pension five years earlier (at the age of 60) than men;[226] exclusion of a survivor of a legally recognised same-sex civil union (life partnership) to benefit of occupational pension scheme available to survivors of opposite-sex marriages in a comparable situation;[227] etc. On the other hand, the CJEU was keen of recognizing legitimacy and necessity of measures aimed at implementation of policies in the spheres of employment,[228] social security[229] and related areas.

113. The ECtHR often reiterated that *"very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of sex as compatible with the Convention"*.[230] It observed the development of the national laws in the sphere of equality before sexes and progressively increased the protection against discrimination in the exercise of the right to a fair trial (after earlier extension of the material scope of Article 6 of the ECHR to social insurance and related disputes) in a case involving refusal to grant full disability pension on the ground of "assumption based on experience of everyday life" that the applicant suffering a serious illness would have given up her job after birth (like other married women) and resume it only later, even if her health had not degraded;[231] or the right to respect for family life under Article 8 of the ECHR, discriminatorily affected by the legal obligation of a woman to take her husband's surname upon marriage, even in combination with her maiden surname;[232] or by inability of a male applicant to add his wife's surname to his own surname (a wife was allowed to add her husband's surname to her own surname).[233] On the other hand, the ECtHR recognized wide discretion ("margin of appreciation") to the High Contracting Parties in respect of pursuing the implementation of their fiscal and social policy, finding, for example, that different retirement ages (thus eligibility for pension as well) for women and men did not unjustly interfered with the right to property under Article 1 of Protocol No. 1 to the ECHR.[234] The ECtHR's case law prompted improvement of the national

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[223] *Handbook on European Non-Discrimination Law*, FRA and CoE, 2018, p. 90.
[224] ECJ, *Defrenne v. Societe anonyme belge de naviation aerienne SABENA,* C-43/75, 8 April 1976.
[225] ECJ, *Dekker v. Stichting VJV*, C-177/88, 8 November 1990.
[226] CJEU, *Richards v. Secretary of State for Work and Pensions*, C-423/04, 27 April 2006.
[227] CJEU, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, C-267/06, 1 April 2008.
[228] CJEU, *Schornbus v. Van Hessen*, C-79/99, 7 December 2000.
[229] CJEU, *Megner and Scheffel v. Innungskrankenkasse vorderpfaltz*, C-444/93, 14 December 1995.
[230] ECtHR, *Karlheinz Schmidt v. Germany*, No. 135890/88, 18 July 1994, Series A 291-B, par 24; with reference to the judgments in *Schuler-Zgraggen v. Switzerland*, No. 14518/89, 24 June 1993, Series A no. 263, par 67; and *Burghartz v. Switzerland*, No. 16213/90, 22 February 1994, Series A no. 280-B, par 27.
[231] ECtHR, *Schuler-Zgraggen v. Switzerland*, cited above, par 46 and 67.
[232] ECtHR, *Ünal Tekeli v. Turkey*, No. 29865/96, 16 November 2004.
[233] ECtHR, *Burghartz v. Switzerland*, cited above.
[234] ECtHR, *Stek and Others v. the United Kingdom*, Nos. 65731/01 and 65900/01, 12 April 2006, par 66: "[...] the difference in State pensionable age between men and women in the United Kingdom was originally intended to

legislation and practice, at least (but not only) in respondent States.[235] An analysis of the ECtHR's case law in a joint publication of the EU Agency for Fundamental Rights and Council of Europe included conclusion that the ECtHR *"has determined that gender identity, like sexual orientation, forms part of the sphere of an individual's private life and should therefore be free from government interference"*, but *"the ECtHR has yet to deliver a decision on whether gender identity is covered as protected ground under Article 14, and has yet to indicate whether this would only encompass 'transsexuals', or whether it would interpret gender identity more widely"*.[236]

114. The European case law included findings that the tradition of transferring a father's surname to a child or adopted child does not justify preferential treatment of a child's father or adoptive father over a child's mother or adoptive mother, who could not challenge the legal presumption that in event of disagreement the father's right to transfer his surname to the child prevails (which prompted the preparatory work on a Civil Code's provision aiming to establish the equality between men and women in the process of transmission of the family name);[237] declaration that the requirement of indicating the civil status in civil acts, such as a sales contract, was required only for a woman (an unmarried or a married woman or a widow) and thus it breached the right to non-discrimination under Article 14 of the ECHR in conjunction with the right to respect for a private life under Article 8 of the ECHR, as well as Article 45 of the Maltese Constitution;[238] declaration that different retirement ages for women and men are not in line with the Constitution;[239] etc. The USA Supreme Court ruled that employment discrimination based on sex stereotypes is recognized as unlawful sexual discrimination under the Civil Rights Act of 1964;[240] that a sexually harassed person may file a claim of "hostile environment" as sex discrimination under the Civil Rights Act;[241] and that an employer may be liable for sexual discrimination caused by a supervisor, depending on the reasonableness of the employer's conduct and the plaintiff victim's conduct.[242]

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correct the disadvantaged economic position of women and continued to be reasonably and objectively justified on this ground until such time as social and economic changes removed the need for special treatment for women. The respondent State's decisions as to the precise timing and means of putting right the inequality were not so manifestly unreasonable as to exceed the wide margin of appreciation allowed it in such a field [...]."

[235] Measures for implementation of the Karlheinz Schmidt judgment included prompt discontinuation of the requirement that only males have to pay contribution in lieu of performing a fire-fighting duty and the decision of the German Constitutional Court of 24 January 1995 declaring the discriminatory provisions null and void (Committee of Ministers' Resolution DH (96) 100 of 22 March 1996). Following the Burghartz judgment, the Committee of Ministers in its Resolution DH (94) 61 of 21 September 1994 noted the amendments of 1 July 1994 to the national legislation enabling a mail fiancé to take over the surname of his to-be-bride (the applicant in this case opted for the surname Schneider Burghartz). The follow up to the Schuler-Zgraggen case involved awarding a disability pension with a retroactive effect to Mrs Schuler-Zgraggen by a decision of 24 March 1994 and change of the case law of the Federal Insurance Court as of 22 August 1992 (Resolution DH (95) 95 of 7 June 1995).

[236] *Handbook on European Non-Discrimination Law*, FRA and CoE, 2018, p. 90.

[237] Belgium, Constitutional Court, *The Institute for the Equality for Women and a private individual (anonymous) v. Council of Ministers*, 2/2016, 14 January 2016.

[238] Malta, Civil Court (Constitutional jurisdiction), *Marie Therese Cuschieri v. Attorney General*, 25/2016/LSO, 28 March 2017. The Court found that the case dealt with matters that fall into national competence, but not within the competences and duties of the European Union and thus it considered Article 21 of the EU Charter inapplicable.

[239] The former Yugoslav Republic of Macedonia, Constitutional Court, U.br. 114/2014, 29 June 2016.

[240] USA, Supreme Court, *Price Waterhouse v. Hopkins*, 490 US 228 (19), May 1, 1989.

[241] USA, Supreme Court, *Meritor Savings Bank v. Vinson*, 477 US 57 (1986), March 25, 1986.

[242] USA, Supreme Court, *Faragher v. City of Boka Raton*, 524 US 775 (1998), June 26, 1998.

g) Sexual orientation

115. Discrimination on the ground of "sexual orientation" was recently prohibited in an explicit manner by the CoE Istanbul Convention and a part of the EU law (TFEU, EU Charter, Employment Equality Directive and Directive concerning the status of long term residents). In spite of the absence of explicit prohibition of discrimination on the ground of sexual orientation in some prominent international instruments, sexual orientation was considered in the international case law to be a protected characteristic.[243]

116. This novelty of international human rights law caused controversies and was not received with enthusiasm by the authorities and population of many participating States, where *"the wider political climate remains unfriendly or openly hostile to lesbian, gay and bisexual people (e.g. the former Yugoslav Republic of Macedonia, Poland and Lithuania)"*.[244] On the other hand, some EU Member States prohibited discrimination on the ground of sexual orientation in areas covered by the Racial Equality Directive and Victims' Rights Directive, regardless of absence of specific legal obligation to include such provisions in their laws.[245]

117. The notion of *"sexual orientation"* refers to *"each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with individuals"*.[246] The list of national (some of which tautological) definitions of: "sexual orientation" or referrals to related terms, which includes "innate delegitimizing sexual orientation choice",[247] "heterosexual, homosexual and bisexual orientation" (the law in Bulgaria, similar acts/laws in Austria, Ireland, Sweden and the United Kingdom, the Belgian 2013 Inter-federal plan to fight homophobic and transphobic violence etc.); "sexual identity" (in addition to "sexual orientation" in the German case law and the French law), "gender identity" and "gender expression" (Malta), "transgender identity or expression" (in addition to "sexual orientation" in the Swedish law), "gender identity" of transgender persons and "gender characteristics" of intersex persons (Greece).[248] There is no explicit referral to "sexual orientation" as a protected characteristic in Turkish law, former Yugoslav Republic of Macedonia's laws, and Liechtenstein's laws.[249] Sexual orientation is not listed as a discrimination ground in the legislation of Russia, but entitlement to protection from discrimination on the ground of sexual orientation was nevertheless acknowledged in the Russian jurisprudence.[250]

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[243] ECtHR, *Smith and Grady v. the United Kingdom,* Nos. 33985/96 and 33986/96, 27 September 1999.
[244] *A comparative analysis of non-discrimination law in Europe 2017*, EU, 2017, p. 34.
[245] FRA, *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity, 2010 update*, Comparative legal analysis, 2010 (referred to in the FRA 2010 report, p. 82). *Cf.* Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, preamble pars (10) and (56).
[246] *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, 2007.
[247] Bulgaria, Supreme Administrative Court, decision No. 9647 of 7 July 2014.
[248] *A comparative analysis of non-discrimination law in Europe 2017,* EU, 2017, p. 33.
[249] *Ibid*., p. 34.
[250] Constitutional Court of the Russian Federation, No. 24-П, 23 September 2014 (quoted at p. 11 of Equal Rights Trust's publication *Equality and Non-Discrimination in Russia: Best practice guide for lawyers*, 2017).

118. The ECtHR noted that *"[d]ifferences in treatment based on sexual orientation require particularly serious reasons by way of justification"*[251] and that *"[t]he Contracting States enjoy a wide margin of appreciation as to the way in which this is achieved within the domestic legal order"*,[252] but proper balance must be struck between the competing rights and interests in pursuance of a legitimate aim. The CJEU highlighted the importance of the proportionality principle in reviewing allegations of discrimination on the ground of sexual orientation.[253] In a landmark case the dismissal of a Turkish football referee due to his sexual orientation was considered as a violation of the constitutional prohibition of discrimination.[254]

119. It should be noted that international human rights bodies and courts developed a solid case law, which tends to extend the boundaries of protection from discrimination on the ground of sexual orientation, in spite of opposition by many countries and their restrictive legislative solutions. The said case law should guide the national efforts to improve their legislation and practice, which should provide protection from discrimination on the ground of sexual orientation in *all* areas of life.

h) Other grounds

120. International obligations of the States do not prevent them to supply their laws with discrimination grounds which are not explicitly listed in the treaties, even if some of them by way of interpretation can be inferred from associated, general grounds, or can be subsumed in the phrases "any other status" or "any other grounds". The drafters of the non-binding Declaration on the Principles of Equality proposed the following test for establishing whether and which new characteristics/grounds should be admitted among those enjoying protection: *"Discrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above."*[255] It is fairly obvious that this general formula could be understood quite differently in the light of the circumstances of particular participating States. ODIHR recommends a wide interpretation of such legal provision to enhance the protection of fundamental rights of persons under the jurisdiction of participating States.

121. During 2016 various EU Member States introduced in their legislation new grounds such as a socially precarious situation and vulnerability due to a person's economic situation (France), sexual orientation, gender identity and gender expression (Slovenia), chronic disease, family or social status, sexual orientation, gender identity and sex characteristics

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[251] ECtHR, *Eweida and Others v. the United Kingdom*, Nos. 48420/10, 36516/10 and 51671/10, 15 January 2013, par 105; with reference to *Karner v. Austria*, No. 40016/98, par 37, 24 July 2003, ECHR 2003-IX; *Smith and Grady*, cited above, § 90; and *Schalk and Kopf v. Austria*, No. 30141/04, par 97, 24 October 2010, ECHR 2010.
[252] ECtHR, *Eweida and Others*, cited above, par 105, with reference to *Schalk and Kopf*, cited above, par 99–108.
[253] The CJEU in *Geoffrey Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes and Établissement français du sang* (C-582/13, 1 October 2015) advised the Strasbourg tribunal to establish whether the legal criterion of deferral from blood donation by homosexual men is justified by scientific researches showing that sexual behaviour of those persons puts them at a high risk of acquiring severe infectious diseases.
[254] Turkey, 20th Civil Court of First Instance in Istanbul, Decision No. 2010/399 of 29 December 2015.
[255] Equal Rights Trust, *Law of Ukraine on "Principles of Preventing and Combating Discrimination in Ukraine"*, Legal Analysis, 2013, p. 11.

in the fields of labour and employment; and the grounds of colour, descent and national origin in the field of labour and employment, social protection, education and provision of goods and services.[256]

122. With a view of fulfilling the international obligations and ever-growing concerns of discrimination on various grounds and the need of achieving effective protection thereof, participating States are recommended to consider the possibility of recognizing new discrimination grounds (or at least inferring them by way of interpretation from the wording of their existing legislation):
- pregnancy and maternity (protected characteristics under Article 4 par 1(a) of the Gender Equality (Goods and Services) Directive and Article 2 par 2(c) of the Gender Equality (Employment) Directive;
- genetic heritage (a ground established by the CoE Convention on Human Rights and Biomedicine); etc.[257]

i) Multiple grounds

123. The concept of multiple discrimination (on more than one ground) is mentioned without being defined in the two 2000 EU directives,[258] and this allows tackling a combination of two or more grounds of discrimination in the same situation. This and the related concept of inter-sectional discrimination particularly affect minorities or persons with disabilities, which was noted by various treaty bodies (the UN Committee on the Rights of Persons with Disabilities, the UN Committee on the Elimination of Discrimination against Women and the UN Committee on Economic, Social and Cultural Rights) and the UN Human Rights Council.[259] Most of these bodies recommended explicit prohibition of multiple and inter-sectional discrimination and also called for adoption of specific measures to address multiple and inter-sectional discrimination faced by women and girls with disabilities.[260]

124. Until the end of 2016 explicit legal provisions on multiple discrimination existed in less than half of the EU Member States (including Austria, Bulgaria, Croatia, Greece, Germany, Liechtenstein, Romania, Slovenia), thus further development of legislative and practical protection against multiple discrimination was encouraged by the FRA.[261] This concept also featured in legislation of EU candidate countries (the former Yugoslav Republic of Macedonia, Montenegro, Serbia and Turkey) and other participating States (USA, Canada). However, practices of multiple discrimination were not always fully visible in overall because of the lack of disaggregated data on multiple discrimination.[262]

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[256] FRA report: *Fundamental rights report 2017* (covering 2016), 2017, p. 64.
[257] Recommendations to supplement a national legislation by adding these and other discrimination grounds can be found in: ERT, *op. cit.* at footnote 255, pp. 5–9.
[258] Recital 14 of the Racial Equality Directive 2000/43/EC and Recital 3 of the Employment Equality Directive 2000/78/EC.
[259] Human Rights Council, Resolution 32.4. Elimination of discrimination against women, 30 June 2016.
[260] UN Committee on the Rights of Persons with Disabilities: General comment No. 3 (2016), Article 6: Women and girls with disabilities, par 18 and FRA report: *Fundamental rights report 2017* (covering 2016), 2017, p. 68.
[261] The 2017 FRA opinion (no. 2.4 at p. 70 of the FRA report: *Fundamental rights report 2017* (covering 2016)) invited the Member States to *"acknowledge multiple and intersectional discrimination when developing and implementing legal and policy instruments to combat discrimination, foster equal treatment and promote inclusion"*.
[262] For example, see: CEDAW, Concluding observations on the Czech Republic, 2006.

125. Noting the importance of proper monitoring of discrimination on more than one ground, participating States may introduce provisions in their acts/laws or by-laws and/or to establish procedures pertaining to collection of disaggregated data on multiple discrimination, as prerequisite for taking special and other proactive measure against such discrimination.

4.1.2.3.4. Different treatment not considered as discrimination

a. Affirmative action

126. Article 5 of the Racial Equality Directive and Article 7 of the Employment Equality Directive provide for positive (affirmative) action, by stipulating 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 to religion or belief, disability, age or sexual orientation, respectively. This means that the EU law allows a possibility of adopting such (positive) measures and does not impose obligation to the Member States to take such measures. Even though a failure of taking positive measure in a certain area does not necessarily contravene the EU law, the Member States should nevertheless have in mind the necessity of complying with the principle of equality, which is a general principle of EU law and thus directly applicable.

127. Typical contexts in which this measure is applied include deep-rooted prejudices and stereotypes on the role and capacities of women in working life,[263] long-term discrimination and marginalization in many spheres of life of ethnic and/or racial minorities[264] (such as Roma[265]), hindered access of persons with disabilities to employment opportunities, etc. Until 2016 many participating States have taken positive action within the scope of the two Directives, often by taking measures in favour of Roma,[266] including quotas for adequate representation of pupils and students belonging to minorities in educational institutions[267] and representation of Roma as employees in the public sector, or measures for employment of persons with disabilities.[268] Since April 2011 (after

[263] The CJEU in the case *Hellmut Marschall v. Land Nordrhein-westfalen* (C-409/95, 11 November 1997) observed the likelihood of promoting a male candidate rather than a female candidate even if the latter is equally qualified for certain post and concluded that priority given to equally qualified women in the interest of restoring the balance is not contrary to Community law if there is objective assessment of all candidates and males are not excluded.

[264] An early example of this good practice is the President Kennedy's Executive Order 10925 (1961) which first called for "affirmative action" (http://www.eeoc.gov/abouteeoc/35th/thelaw/eo-10925.html).

[265] In the *Recommendation on effective Roma integration measures in the Member States* nr. 16970/13 of 9 December 2013, *OJ* L 378, pp. 1–7 the Council of the European Union 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."*.

[266] European Commission, *Report on Directives 2000/43/EC and 2000/78/EC*, 2016, p. 9.

[267] The noteworthy finding of the Györ Court of Appeal that the Györ's public elementary school's failure to implement desegregation measures for dealing with the passive maintenance of a spontaneously segregated educational arrangement had amounted to a violation of the principle of equal treatment (judgment of October 2011 in a case instigated upon a lawsuit by the Chance for Children Foundation) was repealed by the Supreme Court of Hungary, which argued that such obligation would risk the maintenance of the school and would violate the parents' right of choice of an educational institution for their children (Pfv.IV.20.068/2012/3.szám, judgment of 16 May 2012).

[268] The Netherlands, *Quota Act*, in force from 1 May 2015; and the *Participation Act*, in force from 1 January 2015.

adoption of the 2010 Equality Act) all public authorities in Britain are under positive obligation, *inter alia*, *"to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it"*.[269]

b. Reasonable accommodation and measures to achieve equality for persons with disabilities

128. The duty to provide reasonable accommodation for persons with disabilities is interlinked with the right to accessibility (Article 9 of CRPD). The right to accessibility is often defined as a precondition for exercise of all other rights and should be ensured to all persons with disabilities in general.[270] The right to reasonable accommodation is an individual right which should be provided in addition to accessibility measures and these can often be the same measure depending on the situation, as for instance sign language interpretation can be an accessibility measure in terms of accessing public information and an accommodation to be able to follow a conference. The right to accessibility is an unconditional right and States cannot use austerity measures as an excuse to avoid ensuring gradual accessibility for persons with disabilities.[271] Additionally, reasonable accommodation imposes obligations for making necessary and appropriate modifications and justifications not imposing undue (disproportionate) burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms (Article 2 of the CRPD), or to enable persons with disability to have access to, participate in, or advance in employment, or to undergo training (Article 5 of the Employment Equality Directive). It should also be noted that when the ECtHR has ruled that when a request for accommodation is submitted, the relevant institution should engage in a dialogue with the person(s) concerned to accommodate effectively.[272]

129. In approximating their laws to the EU law, a number of Member States and candidate countries initially had problems regarding the transposition, and even now, in spite of the presence of national provisions generally approximated with the EU provisions in vast majority of these countries (except in Iceland and Liechtenstein), problems exist in respect of restrictiveness of the definition (Turkey), narrower scope of the duty than the duty under the Directive (France), lack of explicit wording imposing a general duty on employers (Germany), failure to encompass job seekers (Malta), failure of elaborating how the duty of providing reasonable accommodation should be fulfilled (e.g. Lithuania), lack of sufficient or of any guidance regarding the manner of assessing the disproportionality of burden (Croatia, the former Yugoslav Republic of Macedonia and Latvia)[273] etc. On the other hand, some countries provided extensive guidance for the application of the principle of reasonable accommodation (the United Kingdom); some others went beyond the provisions of the Employment Equality Directive by extending the duty outside employment to a number of rights (Belgium and Cyprus), or to additional spheres such as education and access to goods and services (the

[269] *A Comparative analysis of non-discrimination law in Europe 2017*, EU, 2017, p. 81.
[270] United Nations Committee on the Rights of Persons with Disabilities, General Comment No. 2 (2014), par 14. See also European Parliament Resolution of 23 November 2016 on sign languages and professional sign language interpreters (2016/2952(RSP)) on the relationship between accessibility and accommodation.
[271] United Nations Committee on the Rights of Persons with Disabilities, General Comment No. 2 (2014), par 25.
[272] ECtHR, *Enver Sahin v. Turkey*, No. 23065/12, 30 January 2018.
[273] *A Comparative analysis of non-discrimination law in Europe 2017*, EU, 2017, pp. 24–25.

Netherlands).[274] Various States differently approached to characterisation of the failure of providing a reasonable accommodation as indirect discrimination (Austria, the Czech Republic and Denmark), violation of the principle of equality of treatment (Slovakia), prohibited form of making a distinction (the Netherlands), specific forms of discrimination (Belgium and the United Kingdom), or new forms, such as "inadequate accessibility" (Sweden).[275] Legal gaps, such as absence of legal duty on employers to provide individualised reasonable accommodation for job seekers or employees with disabilities in countries which are obliged by the binding provisions of the CRPD, in absence of compulsory legal effect of the Employment Equality Directive in their legal system (such as Montenegro)[276] should be dealt with by attempts to directly implement the international norms.

130. The jurisprudence of the CJEU had considerable impact in harmonisation and improvement of national laws. Following the instigation of infringement proceedings by the European Commission against Italy before the CJEU on account of its failure to properly transpose Article 5 of the Employment Equality Directive, only days before the CJEU's ruling of 4 July 2013, Italy included a provision on reasonable accommodation in its Legislative Decree 216/2003 stating the duty of applying it without any additional burden, albeit without defining the notion of reasonable accommodation and without guidance how to implement the duty.[277] Following the judgments in the *Ring* and *Skouboe* cases,[278] the Danish court established that the employer should have adapted the work place with a height-adjustable desk and reduction of the working hours,[279] but upon extraordinary appeal in the latter case the ruling was overturned on account of the employer's lack of knowledge (no medical document presented) that the illness discussed in e-mail communication with the employee had caused a disability.[280] Further impact on national laws can be expected by taking into account recommendations of other international bodies, notably the Committee on the Rights of the Persons with Disabilities.[281]

c. Genuine and determining occupational requirements

131. Article 4 of the Racial Equality Directive stipulates that *"[n]otwithstanding Article 1(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin 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*

[274] *Ibid*., p. 24.
[275] *Ibid*., p. 28.
[276] *Ibid*., p. 24.
[277] *Ibid*., p. 25.
[278] CJEU, HK Danmark, acting on behalf of *Jette Ring v. Dansk almennyttigt Boligselskab*, C-335/11; HK Danmark, acting on behalf of *Lone Skouboe Werge v.* Dansk Arbejdsgiverforening acting on behalf of *Pro Display A/S,* C-337/11, both rulings of 11 April 2013.
[279] Denmark, Maritime and Commercial Court, judgments No. F-13-06 and No. F-19-06 of 31 January 2014.
[280] Denmark, Supreme Court, *Skouboe* case, judgment No. 25/2014 of 23 June 2015.
[281] The Committee on the Rights of Persons with Disabilities in its *Concluding observations on the initial report of Serbia* (CRPD/C/SRB/CIO/1, 23 May 2016, par 53) noted the insufficiency of the legislative guarantees for reasonable accommodation in the workplace and recommended Serbia to review its legislation (quoted from: *A comparative analysis of non-discrimination law in Europe 2017*, EU, 2017, p. 26).

requirement is proportionate." Recital 23 of the Employment Equality Directive stipulates that *"[i]n very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement"*. Article 4 par 2 of this directive entitles Member States to rely on religion/belief-based ethos of churches and other organisations for justification of a difference of treatment based on a person's religion or belief where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement. The Article 4(2) exception features in the legislation of most of the EU/EEA/candidate states and in the preparatory works of the Norway law, but it is not explicitly included in the legislation of Finland, France, Iceland, Liechtenstein, Montenegro, Portugal, Romania, Serbia and Sweden.[282]

132. In interpreting the Employment Equality Directive upon request for preliminary ruling submitted by a national court dealing with the *Bougnaoui* case, the CJEU held that customers' dislike of an employee's wearing of headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that Directive; therefore, prohibition and/or sanction(s) against an employee wishing to wear or wearing a headscarf at workplace is a discriminatory measure.[283] On 22 November 2017 the French Court of Cassation ordered a retrial of the *Bougnaoui* case after finding that the prohibition of wearing of a veil in the above context of contact with clients of a private company amounts to an unjustified and disproportionate restriction of religious freedom.[284] National jurisdictions held that veiling the face by niqab heavily impairs the communication with the society, clients, colleagues and employer, thus the requirement not to wear niqab at work was deemed to constitute genuine and determining occupational requirement.[285]

d. Different objectively and reasonably justified treatment on ground of age

133. Article 6 par 1 of the Employment Equality Directive stipulates that differences of treatment on grounds of age *"shall not constitute discrimination if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary"*. The differences of treatment can include setting special conditions on access to employment or maintenance thereof (such as mandatory retirement age or measures to keep elderly persons in the labour market), dismissal and remuneration conditions for elderly people (such as disincentives for early retirement) or for young people, special conditions for persons with caring responsibilities in order to promote their vocational integration or ensure their protection etc.

[282] *A comparative analysis of non-discrimination law in Europe 2017*, EU, 2017, p. 16.
[283] See the *Bougnaoui* case in sub-section 4.1.2.3.3.b above.
[284] FRA, *Fundamental rights report 2018* (covering 2017), 2018, pp. 56–57.
[285] Austria, Supreme Court in *U. v. M.*, decision Nr. 9ObA117/15v of 25 May 2016; referring to the ECtHR's judgment in *S.A.S. v. France*, No. 43835/11, 1 July 2014.

134. In its extensive case law under the above provision,[286] the CJEU held that the principle of non-discrimination, enshrined in Article 21 of the EU Charter and given specific expression by the Employment Equality Directive, must be interpreted as not precluding national legislation under which an end-of-contract payment is not payable (in addition to an employee's salary) on the expiry of a fixed-term employment contract to a young person for a period during his school holidays or university vacation,[287] or to a dismissed person who reached the legal retirement age and was entitled to a state pension.[288] The CJEU also held that the aim of ensuring equal chances in acquiring the right to receive full retirement pension was pursued by necessary and appropriate means of stipulating that civil servants have to contribute to their pension scheme only once they are above the age of 18.[289] On the other hand, budgetary considerations alone do not constitute a legitimate aim justifying different treatment of employees by failing to take periods of service before the age of 18 when calculating advancement to the next salary level; therefore this practice amounted to discrimination under Article 6.1 of the Equal Employment Directive.[290]

135. National rulings included recognition that a legitimate aim was pursued by appropriate and necessary means in an event of applying seniority as a criterion for promotion of all employees in the same position in the same way;[291] by setting mandatory retirement age for diplomatic officials,[292] public officials,[293] or a member of the Unemployment Insurance Fund,[294] by setting maximum age of 30 for public employment in Civil Guard (military forces with police duties),[295] by increasing the retirement age from 65 to 67 years for employees of the French electricity and gas industry.[296] On the other hand, there was no objectively and reasonably pursued legitimate aim by setting the age limit for pilots at 60,[297] and ski instructors at 62.[298] The importance of providing proper justification for difference of treatment was highlighted by a ruling reverting the case to a lower instance court, which has failed to take a closer look into the concrete overall concept of the company regarding its restructuring measures to define whether the dismissal of a 62-years-old radio journalist, who was pensioned with reduced rates until the retirement age of 65 and received ordinary severance payment of about 330,000 Euros, fitted into the company's concept and how the dismissal could possibly be justified.[299]

[286] See FRA, *Fundamental rights report 2016* (covering 2015), 2016, pp. 64–66.
[287] CJEU, *O v. Bio Philippe Auguste SARLS*, C-432/14, 1 October 2015.
[288] CJEU, *Ingeniørforeningen i Danmark v. Tekniq*, C-515/13, 26 February 2015.
[289] CJEU, *Georg Felber v. Bundesministerium für Unterricht, Kunst und Kultur*, C-529/13, 21 January 2015.
[290] CJEU, *ÖBB Personenverkehr AG v. Gotthard Starjakob*, C-417/13, 28 January 2015.
[291] Cyprus, Supreme Court, *Harrys Christodoulidou v. Republic of Cyprus' Public Service Committee*, No. 12/10, 3 April 2015.
[292] Greece, Athens Administrative Court of Appeals, No. 541/2015, 2 March 2015.
[293] Latvia, Administrative Regional Court, No. A420313114, 25 May 2015.
[294] Denmark, Danish High Court, U.2015.1303H, 19 January 2015.
[295] Spain, Supreme Court, 627/2017, 5 April 2017. The Court observed that the Directive 2000/78/EC does not apply to the armed forces and did not accept the appeal against the Decision 375 of the High Court of Justice of Madrid, relying on sufficient case law to uphold a position that the different treatment on ground of age was justifiable.
[296] France, Council of State, *Mrs A., an agent of the Electricity Transmission network v. the French Republic*, No. 352393, 13 March 2015.
[297] France, Council of State, No. 371623, 6 May 2015.
[298] France, Cassation Court, No. 13-27.142, 17 March 2015.
[299] Austria, Supreme Court, 9ObA113/12a, 25 June 2013.

136. Article 6 par 2 of the Employment Equality Directive stipulates that, *"[n]otwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex."*

137. The CJEU observed that Article 6(2) exception to the principle of non-discrimination (enshrined in Article 2 of this Directive) must be interpreted restrictively and that it applies only to occupational social security schemes that cover the risks of old age and invalidity.[300] According to the CJEU, the principle of non-discrimination does not preclude an occupational pension scheme under which an employer pays, as part of pay, pension contributions which increase with age, provided that the difference in treatment on ground of age that arises therefrom is appropriate and necessary to achieve a legitimate aim, which is for the national court to establish.[301]

138. The complex area of employment requires precise definition of legitimate aims in the respective acts/laws and careful weighting so that the pursuance of those aim does not involve means which are inappropriate or are unnecessary. National developments in this dynamic social area could benefit of studying and applying the case law of the CJEU, also taking into account the case law of ECtHR.

4.1.2.3.5. Procedural issues

a. Effectiveness of protection

139. Access to effective and swift justice is of fundamental importance to victims of discrimination. The barriers for 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 aid;[302] therefore, it is important to ensure effective protection mechanism with proactive involvement of human rights institutions[303] and other stakeholders. Procedural provisions should be based on the premises of equality and effectiveness of protection,[304] should be "effective", in line with the OSCE commitments;[305] thus inclusion of this adjective in acts/laws would emphasize the commitment to achieve a *substantive* equality and non-discrimination.[306]

140. Any anti-discrimination law should be able to offer realistic prospects of achieving its aims by ensuring, *inter alia*, the following prerequisites for its effective implementation:

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[300] CJEU, *Dansk Jurist-og Økonomforbund*, C-546/11, 26 September 2013, par 41 and 43.
[301] CJEU, HK Danmark, acting on behalf of *Glennie Kristensen v. Experian A/S*, C-476/11, 26 September 2013.
[302] European Commission, *Report on Directives 2000/43/EC and 2000/78/EC*, 2014, p. 7.
[303] Nina Althoff and Sera Choi, *Combating Discrimination: How a National Human Rights Institution can Strengthen Civil Society Organisations: An Example of Good Practice*, German Institute of Human Rights, January 2013.
[304] See paragraph 5 of the UN Model legislation.
[305] See the 1990 OSCE Copenhagen Document and the Decision no. 10/05 (Ljubljana, 2005), described in section 4.1.1.3.
[306] FRA report, *Fundamental rights: challenges and achievements in 2013*, 2014, p. 131.

a) There should be effective means for pursuing anti-discrimination claims, including user-friendly procedures, which should be easily accessible to the alleged victims (by decreasing or abolishing the financial burden for conducting proceedings, aimed at discontinuation of discrimination and/or at achieving a success in proceedings for damages; by appropriately regulating the burden of proof; and by providing guarantees against further discrimination or even against retaliation (victimisation);
b) The public authorities should have a functional and financial independence[307] and their spheres of competences should be delineated in a way ensuring not only successful resolution of a dispute over competence (positive or negative), but also their effective co-operation in the anti-discrimination sphere;
c) Non-governmental and public interest organizations should be allowed to join the proceedings on their own or at least as third parties;
d) The Act/Law should include the possibility of fines for all cases of discrimination based on all grounds mentioned therein.[308] Compensation should be adequate to the damage sustained, both regarding non-pecuniary and pecuniary damages.

b. Burden of proof

141. Recital 21 of the Racial Equality Directive and recital 31 of the Employment Equality Directive Race stipulate that "*[t]he rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought."* The latter recital in the second sentence says that*"is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation."* Article 8 of the Racial Equality Directive and Article 10 of the Employment Equality Directive prescribe that *"States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."* (paragraph 1). This paragraph: *"shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs"* (paragraph 2); *"shall not apply to criminal procedures"* (paragraph 3); shall apply (together with paragraphs 1 and 2) to any proceedings instigated by associations, organisations or other legal entities with a legitimate interest in ensuring compliance with the provisions of this Directive (paragraph 4); and need not be applied *"to proceedings in which it is for the court or competent body to investigate the facts of the case"* (paragraph 5).

[307] ODIHR in its *Opinion on the Draft Anti-Discrimination Law of "the former Yugoslav Republic of Macedonia"* (19 December 2008, p. 3) stated that *"the law must be capable of full and meaningful implementation. Achieving this requires legislation which is concrete, with a clear appreciation of the social context and the financial consequences to the implementing state."*

[308] *Cf. OSCE/ODIHR Opinion on the Draft Law on Amendments to the Law on Prohibition of Discrimination of Montenegro*, Warsaw, 31 July 2013, Opinion-Nr. NDISCR-MNE/234/2013, par. 12, "Key recommendations", point B.

142. Initially eight Member States had problems in correctly transposing the concept of burden of proof, but even in 2017 some Member States reported that the correct application of the reversed burden of proof remains a challenge and is not sufficiently well-known by national courts.[309]

c. Sanctions and remedies

143. Sanctions for discrimination should be effective, proportionate and dissuasive[310] and should ensure the availability of judicial procedures for protection of persons claiming to have been discriminated.[311] Sanctions for racial discrimination should also include the payment of compensation for both material and moral damage to the victims.[312] An act/law (criminal law or provision of criminal law nature in another law) should penalise and provide effective, proportionate and dissuasive (as well as ancillary or alternative) sanctions for intentional public incitement to discrimination against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin; and for intentional (purposive) racial discrimination in the exercise of one's public office or occupation; as well as for intentionally instigating, aiding, abetting or attempting to commit any of the above criminal offences.[313] The law should provide that, for all criminal offences not specified above, racist motivation constitutes an aggravating circumstance[314] and States should prescribe responsibility of legal persons for any of the aforementioned conducts.[315] States should criminalise distributing, or otherwise making available, racist and xenophobic material to the public through a computer system where such conduct is made intentionally and without right, but they may decide not to attach criminal liability to the above conduct where the racist and xenophobic material advocates, promotes or incites discrimination that is not associated with hatred or violence, provided that other effective remedies are available.[316]

144. In 2017 the European Commission noted that *"there are still potential grounds for concern as regards the availability of remedies in practice and whether sanctions that are imposed in concrete cases fully comply with the requirements of the directives"* and advised that standards for sanctioning should not be unreasonably low or symbolic.[317] While "[t]he national courts appear to have tendency *"to apply the lower scale of sanctions provided for by law and in terms of the level and amount of compensation awarded"*, the CJEU stressed *"that the Directive 2000/43/EC precludes national law*

[309] European Commission, *Report on Directives 2000/43/EC and 2000/78/EC*, 2014, p. 9.
[310] Recital 26 and Article 15 of the EU Directive 2000/43/EC; Recital 35 and Article 17 of the EU Directive 2000/78/EC; *Annex to Decision No. 3/03: Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area*, 11th OSCE Ministerial Council meeting, Maastricht, 1–2 December 2003, par 9.
[311] Article 7 of the EU Directive 2000/43/EC; Article 9 of the EU Directive 2000/78/EC; *Annex to Decision No. 3/03: Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area,* par 9 *in fine*.
[312] European Commission on Racism and Intolerance, *ECRI General policy recommendation No. 7 on National legislation to combat racism and racial discrimination*, adopted on 13 December 2002, par 12.
[313] Ibid., par 18.a, 18.h, 20 and 23.
[314] *Ibid.*, par 21.
[315] *Ibid.*, par 22.
[316] Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature, committed through computer systems, par. 3.2 referring to par 2.1.
[317] European Commission, *Report on Directives 2000/43/EC and 2000/78/EC*, 2014, p. 7.

*under which the sanctions are purely symbolical 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 o*f [racial] *discrimination."*[318]

145. ODIHR highlights the utmost importance of providing effective protection against any discrimination with any suitable means (including criminal law measures against racial discrimination). The participating States should properly design and enforce anti-discrimination instruments and mechanisms and must take adequate measures guaranteeing their effective implementation, including shift of the burden of proof (except in criminal proceedings) and effective, proportionate and dissuasive sanctions.

4.1.2.4. Concluding remarks

146. The Note devotes considerable space to the substantive concepts of anti-discrimination laws, however, also briefly highlighting the importance of existence of viable opportunities for defence of the guaranteed rights to non-discrimination and equality. ODIHR research was structured on the mutual comparison of the Constitutions and other pieces of legislation of the OSCE participating States and their compliance (individual or overall) with the relevant international obligations and standards.

147. The OSCE participating States expressed their commitments to ensure non-discrimination and equality in law and in practice, by embracing the norms and/or standards developed by this and other IGOs. Most of them have ratified or acceded to the major UN and CoE treaties, while the EU Member States (and the candidate countries to a certain extent) have transposed the vast majority of the EU law into the respective national legislation. The research has shown that incorporation, transposition or other adoption of the relevant international norms, coupled with effective mechanisms of external supervision and control, have resulted in some enhancement of the legal protection against various types of discrimination (direct or indirect; harassment, victimisation and discrimination by association), on grounds such as racial or ethnic origin, religion or belief, age, disability, sex, sexual orientation, nationality. Factors contributing to the progress involved the binding character of the CJEU's preliminary rulings (for the EU Member States) and the ECtHR's judgments, whose execution is supervised by the CoE Council of Ministers (of relevance for most, except a handful of participating States) and the European Commission (supervising the candidate countries' progress).

[318] *Asociatia Accept v. Consiliul National pentru Combaterea Discriminarii*, C-81/12, 25 March 2013 (the quote is taken from the European Commission's *Report on Directives 2000/43/EC and 2000/78/EC*, 2014, p. 7 *in fine*).

APPENDICES

I) LAW

A) International law

UN instruments

- Convention on the Elimination of Discrimination against Women (CEDAW), 1979
- Convention on the Rights of Persons with Disabilities (CRPD), 2006
- Convention on the Rights of the Child (CRC), 1989
- ILO Discrimination (Employment and Occupation) Convention (no. 111), 1958
- International Covenant on Civil and Political Rights (ICCPR), 1966
- International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1965
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990
- UNESCO Convention against the Discrimination in Education, 1960
- Universal Declaration of Human Rights (UDHR), 1948
- Vienna Convention on the Law of Treaties, 1969

CoE instruments

- Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature, committed through computer systems, 2003
- Convention against Trafficking in Human Beings, 2005
- Convention for the Protection of Human Rights and Dignity of Human Beings with regard to the Application of Biology and Medicine, 1997
- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), 1950
- Convention on Access to Official Documents, 2009
- Convention on Nationality, 1997
- Convention on Preventing and Combatting Violence against Women and Domestic Violence (Istanbul Convention), 2011
- European Social Charter, 1961
- European Social Charter (revised), 1996
- Framework Convention for the Protection of National Minorities, 1998
- Protocol No. 12 to the European Convention on Human Rights, 2000

EU instruments

- Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 2000
- Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, 2000

- Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, 2000
- Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, 2004
- Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, 2006
- Directive 2010/141/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, 2010
- Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 2012
- EU Charter on Fundamental Rights, 2000 (2009)
- Treaty of the European Union (consolidated version, 2012)
- Treaty on the Functioning of the European Union (consolidated version, 2016)

OSCE documents

- 1975, Helsinki, "Declaration on Principles Guiding Relations between Participating States"
- 1983, Madrid, "Questions relating to Security in Europe"
- 1989, Vienna, "Questions Relating to Security in Europe",
- 1990, Paris, "Human Rights, Democracy and Rule of Law"; "A New Era of Democracy, Peace and Unity"
- 1990, Copenhagen, Copenhagen document, 1990
- 1991, Moscow, Document of the Meeting of the Conference on the Human Dimension of the CSCE
- 1994, Budapest, Summit Declaration
- 1996, Lisbon, Summit Declaration
- 1999, Istanbul, Summit Declaration; Charter for European Security
- 2001, Bucharest, Decision No. 5
- 2003, Maastricht, Annex to Decision No. 3/03: Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area; Decision No. 4/03 on Tolerance and Non-discrimination
- 2004, Sofia, Annex to Decision No. 12/04 on Tolerance and Non-discrimination: Decision No. 621: Tolerance and Fight against Racism, Xenophobia and Discrimination; Annex to Decision No. 14/04: 2004 OSCE Action Plan for the Promotion of Gender Equality
- 2005, Madrid, Decision No. 10/05 on Tolerance and Non-discrimination
- 2006, Brussels, Decision no. 13/06 on Combating Intolerance and Discrimination and Promoting Mutual Respect and Understanding
- 2007, Ljubljana, Decision No. 10/07 on Tolerance and Non-discrimination
- 2016, Tbilisi, OSCE Parliamentary Assembly's Resolution on a Call for OSCE Action to Address Violence and Discrimination

B) National law

Constitutions of the OSCE Participating States

Anti-Discrimination laws, or general laws with ***anti-discriminatory provisions***[319]

Country	*Act/Law*
Albania	Law No. 10 221 on Protection against Discrimination, 4.2.2010
Austria	Equal Treatment Act, 23.6.2004, l.a. (hereinafter "l.a.") 2011; Federal Equal Treatment Act, 2004, l.a. 2012; Federal Disability Act, 10.8.2005, l.a. 2014; Federal Constitutional Act on Elimination of racial discrimination, 1973, l.a. 2014; Act on the Employment of People with Disabilities, 10.8.2005, l.a. 2016; Act on the Equal Treatment Commission and the Equal Treatment Office, 23.6.2004, l.a. 2013; and regional acts
Azerbeijan	Labour Code, 1.2.1999; Family Code, 28.12.1999; Civil Procedure Code, 28.12.199l; Criminal Procedure Code, 14.7.2000; Code of Administrative Procedure, 11.7.2000; Migration Code, 2.7.2013
Belarus	Law No. 10 221 on Protection from Discrimination, 4.2.2010
Belgium	General Anti-Discrimination Federal Act (initially: Act on the Fight against Combating Certain Forms of Discrimination, 9.6.2007), l.a.17.8.2013; Racial Equality Federal Act (initially: Federal Act Criminalising Certain Acts inspired by Racism or Xenophobia, 30.7.1981), l.a. 2007; and regional acts
Bosnia and Herzegovina	Law on Prohibition of Discrimination, 1.12.2009
Bulgaria	Law on Protection against Discrimination, 16.9.2003, l.a. 2016; Law on Integration of Persons with Disabilities, 2.9.2004, l.a. 2015
Canada	Canadian Human Rights Act, 1998, l.a. 2014; Canadian Multiculturalism Act, 1985, l.a. 2014; Employment Equity Act, 1995, l.a. 2014
Croatia	Anti-discrimination Act of 9.7.2008, l.a. 2012
Cyprus	Equal Treatment (Racial or Ethnic Origin) Law No. 59, 2004; l.a. 2006 Law on Persons with Disabilities of 21.7.2000; l.a. 2015 Law on Equal Treatment in Employment and Occupation, 2004, l.a. 2009
Czech Republic	Act on Equal Treatment and on the Legal Means of Protection Against Discrimination and on Amendment to Some Laws (Anti-Discrimination Act), 23.4.2009, l.a. 2014
Denmark	Act on Prohibition of Discrimination due to Race etc. (Act 289), 9.6.1971, l.a. 2000; Act on Prohibition of Discrimination in the Labour Market etc., 24.5.1996, l.a. 2016; Act on Ethnic Equal Treatment, 28.5.2003, l.a. 2013
Estonia	Equal Treatment Act, 11.12.2008, l.a. 2014; Chancellor of Justice Act, 25.2.1999, l.a. 2015
Finland	Non-Discrimination and Equality Act, 30.12.2014;

[319] The table was derived from the table in *A comparative Analysis of non-discrimination law in Europe 2017*, the information available at www.legislationline.org and from other online sources.

	Non-Discrimination and Equality Tribunal Act, 30.12.2014; Non-Discrimination Ombudsman Act, 30.12.2014
former Yugoslav Republic of Macedonia	Law on Prevention and Protection against Discrimination, 13.4.2010
France	Law No. 2001-1066 relating to the fight against discrimination, 16.11.2001, l.a. 2016; Law No. 2008-496 relating to the adaptation of National Law to Community Law in matters of discrimination, 27.5.2008, l.a. 2016; Law No. 2005-102 for equal opportunities and integration of disabled persons of November 2005, l.a. 2014
Georgia	Law on Prevention of All Forms of Discrimination, 2.5.2014
Germany	General Act on Equal Treatment, 14.8.2006, l.a. 2013; Equal Opportunities for Disabled People Act, 27.4.2002, l.a. 2016
Greece	Act 927/19 on Punishing Actions or Activities Aiming at Racial Discrimination, 22.6.1979, l.a. 2014; Law 4443/2016 'On transposition of Directive 43/2000/EC on the application of the principle of equal treatment irrespective of racial and ethnic origin, and the transposition of Directive 78/2000/EC on the configuration of the general framework of equal treatment in employment and work', 2.2.2016
Hungary	Act CXXV on Equal Treatment and Promotion of Equal Opportunities, 28.12.2003, l.a. 2016
Iceland	Act No. 59/1992 on the Affairs of Persons with Disabilities, 2.6.1992, l.a. 2016
Ireland	Equal Status Acts, 26.4.2000, l.a. 2015; Employment Equality Acts,18.6.1998, l.a. 2015
Italy	Legislative Decree No. 215/2003 implementing Directive 2000/43/EC, 9.7.2003; Legislative Decree No. 216/2003 implementing Directive 2000/78/EC, 9.7.2003; Act No. 67/2006, Provisions on the Judicial Protection of Persons with Disabilities who are Victims of Discrimination, 1.3.2006
Latvia	Law on Prohibition of Discrimination against Natural Persons - Economic Operators, 19.12.2012; Labour Law, 20.6.2001, l.a. 2016
Liechtenstein	Act on Equality of People with Disabilities, 25.10.2006, l.a. 2016
Lithuania	Law No. IX-1826 on Equal Treatment, 18.11.2003
Luxembourg	Law Implementing the Principle of Equal Treatment, 28.11.2006, l.a. 2016 Law on Disabled Persons, 12.9.2003, l.a. 2016; and provisions in other laws, l.a. 2016
Malta	Employment and Industrial Relations Act, 2.12.2002, l.a. 2016 Equal Treatment in Employment Regulations, 5.11.2004, l.a. 2014; Equal Opportunities (Persons with Disabilities) Act, 10.2.2000, l.a. 2016
Moldova	Law on Equality nr. 121, 5.5.2012
Montenegro	Law on Prohibition Against Discrimination, April 2014; Law on Prohibition of Discrimination of Persons with Disabilities, 2015
Netherlands	General Equal Treatment Act, 2.3.1994, l.a. 2015; Disability Discrimination Act, 3.4.2003, l.a. 2016; Age Discrimination Act, 17.12.2003, l.a. 2014
Norway	Anti-discrimination Act on Prohibition of Discrimination based on Ethnicity,

	Religion, etc., 21.6.2013, l.a. 2015; Working Environment Act, 12.6.2005, l.a. 2014; Anti-discrimination and Accessibility Act on Prohibition against Discrimination on the basis of Disability, 21.6.2013, l.a. 2014; Sexual Orientation Anti-Discrimination Act, 21.6.2013, l.a. 2014
Poland	Act on the Implementation of Certain Regulations of European Union Regarding Equal Treatment of 3.12.2012, l.a. 2016
Portugal	Law No. 93/2017 Establishing the Legal Regime of Prevention, Prohibition and Fight against Discrimination on the Ground of Race/Ethnic Origin, Nationality, Ancestry and Territory of Origin, 16.10.2017 Law 18/2004 transposing the Council Directives 2000/43 of 29 June 2000 into Portuguese Law, and Establishing the Principle of Equality of Treatment between Persons Irrespective of Racial or Ethnic Origin, and a Legal Framework to Combat Discrimination on the Grounds of Racial or Ethnic origin, 11.5.2004, l.a. 2005 Law No. 7/2009 – Labour Code, 2009, l.a. 2016
Romania	Law on Prevention and Sanctioning of All Forms of Discrimination, 16.1.2002; Ordinance (GO) No. 137/2000 Regarding the Prevention and the Punishment of All Forms of Discrimination, 31.8.2000, l.a. 2013; Law No. 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap, 6.12.2006, l.a. 2012
Russia	Law on Education No. 3266-1, 10.7.1992; Criminal Code No. 63-FZ, 13.6.1996; Labour Code No. 197-FZ, 30.12.2001; Federal Law "on the Social Protection of Disabled People in the Russian Federation" No. 323-FZ, 21.11.2011
Serbia	Act Prohibiting Discrimination, 26.3.2009; Law on the Prevention of Discrimination against Persons with Disabilities,17.4.2006, l.a. 2016; and other laws
Slovakia	Act No. 365/2004 on Equal Treatment in Certain Areas and Protection Against Discrimination, and on Amending and Supplementing Certain Other Laws as Amended (Anti-discrimination Act), 20.5.2004, l.a. 2015
Slovenia	Protection against Discrimination Act, 21.4.2016; Employment Relationship Act, 5.3.2013; Act on Equal Opportunities of People with Disabilities, 16.11.2010, l.a. 2014; Act Implementing the Principle of Equal Treatment, 12.10.2007
Spain	General Law on the Rights of Persons with Disabilities and their Social Inclusion, 29.11.2013; Law No. 62/2003 on Fiscal, Administrative and Social Measures of 30.12.2003, l.a. 2014
Sweden	Discrimination Act, 5.6.2008, l.a. 2016
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