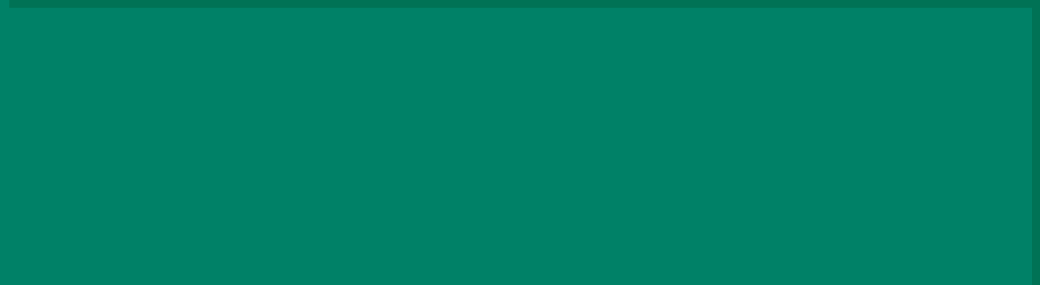


# Dynamic Interpretation

## European Anti-Discrimination Law in Practice V



# Dynamic Interpretation European Anti-Discrimination Law in Practice V

Case Studies 2010

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# Preface

Equinet's Working Group on Dynamic Interpretation consists of legal experts working for national equality bodies and focuses on how European and national equality legislation is interpreted. This work is intended to further the goal of achieving enhanced and harmonised protection from discrimination across all the EU Member States.

One aspect of the Group's work is to use real-life cases analysing how the Directives and national legislation are applied in practice. This methodology permits a comparison of the different national legal solutions to the cases which achieves a number of objectives: identifying patterns in the way in which Directives have been implemented and applied in national laws; identifying potential gaps in protection or areas requiring legal clarification in the Directives; and identifying potential and existing legislative gaps in national legal systems.

In 2010, the working group members decided to focus on four cases: one relating to discrimination on grounds of gender identity in the provision of goods, facilities and services, another relating to discrimination on grounds of Roma origin in the housing sector and two cases relating to discrimination experienced by volunteers in the field of employment<sup>1</sup>. The reason for the selection of the case studies was to link the discussions to and benefit Equinet's work on these fields and grounds of discrimination and to focus on some particularly vulnerable groups in society. In particular, the analyses of the Roma and the gender identity cases were deemed to be a valuable input to Equinet's special initiatives in 2010 on Roma and on Trans people. The analysis of the two volunteer cases can be seen as a contribution from Equinet to the European Year of Volunteering 2011 and at the same time it marks the first concentrated attempt of the working group to provide valuable assistance and information about the different national laws and contexts to an Equinet Member conducting strategic litigation and seeking a preliminary ruling at the Court of Justice of the European Union.

The summary of the findings for each case contains a number of conclusions and Lessons Learned which we hope will be of practical value for equality bodies, national governments, the European institutions and other stakeholders in their work on European anti-discrimination law.

It is to be noted that the conclusions are based only on the work of staff members of fifteen equality bodies and not of all the members of Equinet. As a result the conclusions may not represent the definitive position either in an individual Member State or on the effect of the Directives. In addition, the conclusions do not necessarily represent the position or opinion of the equality bodies either that have been involved in preparing this report or the other equality bodies that are members of Equinet.

On behalf of the Equinet network, we would like to thank all of those who devoted their time, energy and expertise and contributed to this report.

Peter Reading  
Working Group Moderator

Tamás Kádár  
Policy Officer, EQUINET

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<sup>1</sup> Members of the working group (WG) were asked to respond to several questions prepared by the WG Moderator and Equinet Policy Officer. The Group met on 28th May 2010 in Helsinki and 22nd September 2010 in Athens to review their inputs and determine the final shape of the report. The information contained in this report reflects the state of affairs on 22nd December 2010.

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# Chapter 1

## Analysis of the application of the Framework Directive 2000/78/EC to volunteers

### Cases

There are two cases within Britain that the Equality and Human Rights Commission is intervening in which both involve the issue of whether volunteers are within the scope of protection provided by the Framework Directive 2000/78/EC. The Commission is seeking a reference to the Court of Justice of the European Union (CJEU) in both cases and that is agreed, the Commission will seek the joining of the two cases in the CJEU. The references will seek to determine the issue of whether volunteers are protected in any way under the Directive, and if so how.

#### **First case: Masih v Awaz FM**

This case is currently at the Employment Tribunal (ET). The ET referred the case to the CJEU (although the questions for referral have not yet been agreed). The Equality and Human Rights Commission applied for and was granted leave to intervene after the ET decided to make a reference to the CJEU. The referral to the CJEU has been appealed to the Employment Appeal Tribunal (EAT).

Awaz is a community radio station that serves the Asian community of Glasgow. Mr Masih was a volunteer and was co-presenting a weekly programme with a Christian theme on Saturday mornings. Mr Masih is a Christian Minister of the Church of Scotland and presented regularly on this show. Mr Masih was not paid for his services nor did he receive any kind of remuneration or otherwise. He was entitled to claim expenses but did not do so. Mr Masih's volunteer status was terminated after an on air discussion with his co-host and guest about a prominent Muslim speaker. Complaints from the Glasgow Muslim community were not about what Mr Masih said but what the contributor to the show said. Awaz brought a claim in an Employment Tribunal for unfair dismissal discrimination on grounds of religion or belief.

The tribunal did not find that Mr Masih was an employee within the meaning of the Employment Rights Act 1996. However, the tribunal determined that the key point was whether Mr Masih's activities for Awaz FM fell within the wording "employment and occupation" provisions in the Framework Directive.

It took the view that the scope of this wording was wider than that of employment or being a worker. The tribunal did not feel able to interpret the Employment Equality (Religion or Belief) Regulations 2003 and agreed that the matter should be referred to the CJEU. As a matter of fact the tribunal found that the functions carried out by Mr Masih would be those carried out by a person in some form of employment relationship had it been a non community radio station, that there was an economic value ascribed to the services in the respondent's formal accounting procedures and that there was agreement (although not contractually binding) which had all the hallmarks of what you would expect to find in an employment relationship.

#### **Second case: X v Mid Sussex CAB**

This case involves a volunteer for a Citizens Advice Bureau (CAB) who gave advice on welfare law. She was required to attend the office at set times and had a range of duties including writing appeals, submissions, case notes, specialist research, letters and giving legal advice. She went on to take proceedings for alleged disability discrimination on grounds of her HIV status.

#### Employment Tribunal

The Employment Tribunal dismissed her claim and she appealed to the EAT.



There were three grounds for appeal raised at the EAT concerning whether X came within the protection of the Disability Discrimination Act. The issue of interest for the Commission is whether the position amounted to an occupation for the purposes of the Directive. The EAT ruled that it did not because the wording in the Directive means some form of work activity, either by a self-employed person or by an office holder, so that anything done by a volunteer could not be included. As a result they refused permission to appeal on this ground.

#### Court of Appeal

However, X appealed further to the Court of Appeal in relation to this refusal of leave to appeal the decision that volunteering could not amount to an occupation within the meaning of the Directive. The Court of Appeal disagreed with the EAT. It considered that although she was not paid she had a position of Specialist Adviser for Welfare Rights, she undertook a range of duties and she had a considerable autonomy in her advice work. In addition, her work was of significant importance to the CAB and was not merely marginal. It noted that she was expected to attend at certain times. The Court of Appeal considered that it was an arguable point which should be fully argued at the EAT. As a result it remitted the hearing of all the grounds of appeal to be heard before the EAT.

The Court of Appeal was of the view that in order to determine this point it was important to understand properly what is included in the term occupation within the Directive. X argues that those activities which are of a sufficiently significant or important part of an organisation's functions so as not to be merely marginal such as following a hobby or lending occasional provision of assistance be an accurate test.

#### Employment Appeal Tribunal

In summary, the EAT's decision focused round the issue of whether the Framework Directive 2000/78 allows protection against discrimination for volunteers on the basis there should be equal treatment not only in employment and self employment, but also to someone who has an "occupation".

The EAT held that:

- There was not EU case suggesting that occupation is intended to cover unpaid employment;
- The European definition of worker consistently includes the existence of mutual rights and duties (not applicable where there is no contract) and remuneration (not applicable in relation to voluntary workers).

As a result the EAT held that volunteers are not protected by the Framework Directive.

#### Appeal to the Court of Appeal

X has appealed to the Court of Appeal. The appeal centres around the restrictive approach in defining occupation taken by the EAT. The hearing was in October 2010 and judgment is awaited.

The Appellant argued that the fundamental principles of EU law, to provide protection against discrimination and the underlying principles of the Directive to combat discrimination so as to achieve equal treatment, mean that the broadest approach to defining occupation should be taken. The fact that there is little by way of EU case law regarding the definition of occupation is not determinative when taking these principles into account (which it is argued national courts must do). Restricting the definition of occupation does not sit well within these principles. Particularly as voluntary work is often the only way to gain paid employment for disabled people, a restrictive approach would marginalise them.

Once this is accepted in principle the result can be achieved by taking a purposive approach (as was the case in **Coleman**) and including occupation within the definition of employment in the Disability Discrimination Act 1995 (DDA). It should be noted that the definition of employment in the DDA also includes people who provide services personally under a contract. Therefore this approach does not equate to volunteers gaining employment rights. Protection against discrimination is distinct, for example contractors are included within the

definition of employment for the purposes of discrimination legislation but they do not gain employment rights as a result. Occupation could be sub defined as to whom then falls into that group. The definition used by the Appellant remains the same as at the EAT hearing (detailed above). It is not proposed that those following a hobby or volunteering on a piecemeal or irregular basis would be covered.

It was argued that should the purposive approach not be followed, it is open to the Court to follow the **Mangold** approach whereby national legislation which stands in the way of protection by the Directive is set aside to the extent that volunteers (as defined by occupation) would be protected. This will result in amendments to national legislation.

## Questions

### **(A) Volunteers and Legal Status**

1. Is there a legal status of employee in domestic law? How is it defined?
2. Is there a legal status of worker in domestic law? How is it defined?
3. Is there a separately defined legal status of volunteer or unpaid worker? If there is more than one type of legal status which applies to volunteers or unpaid workers, please list all of them. How is it/are they defined?
4. If not, is there any other legal status which would or might cover any or all volunteer or unpaid workers? If there is more than one type of legal status which would or might cover volunteers or unpaid workers, please list all of them. How is it/are they defined?
5. Please summarise the legal consequences of each legal status listed above in answer to questions 1 – 4. Please address the entitlement to employment rights and protection from discrimination.
6. If any or all unpaid or volunteer workers are not covered by a legal status, do they have any other protection in domestic legislation or case law in relation to employment rights and/or discrimination?
7. What is the rationale for any difference in protection between employees/workers and volunteers/unpaid workers?

### **(B) Research and Statistics**

8. Are you aware of any research, statistics or information about the prevalence of volunteers in your Member State? It would be useful to know whether there is any information about whether volunteering is more prevalent in any particular demographic, for instance is there a greater concentration in any particular age group, in any particular minority group/s, more men than women, a greater relative proportion of disabled people volunteer than non disabled etc.
9. Are you aware of any research, statistics or information about the extent to which volunteering provides access to employment/paid work (and whether this is more the case for any particular demographic where volunteering is more prevalent).

## Legislation

***Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation***

*Recital 4*

*The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the*

*United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.*

#### *Recital 8*

*The Employment Guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999 stress the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability. They also emphasise the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force.*

#### *Recital 9*

*Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.*

#### *Recital 11*

*Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.*

#### *Recital 12*

*To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries but 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 their access to employment and occupation.*

#### *Recital 23*

*In 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, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.*

#### *Article 1*

*The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.*

#### *Article 3*

*1. within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:*

*(a) Conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;*

*(b) Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;*

*(c) Employment and working conditions, including dismissals and pay;*

*(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.*

### **International Covenant on Economic, Social and Cultural Rights**

#### *Article 2*

*2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

#### *Article 6*

*1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

*2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.*

### **International Covenant on Civil and Political Rights**

#### *Article 26*

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

### **Convention No. 111 of the International Labour Organisation, the Convention concerning Discrimination in Respect of Employment and Occupation**

*Article 1.3 makes clear that the terms “employment” and “occupation” include access to vocational training, access to employment and to particular occupations, and terms and*

*conditions of employment. Further the scope of that Convention is expressed to extend to equality of opportunity in relation to access to employment. The prohibition on discrimination in that provision is a prohibition on anything which has the effect of nullifying or impairing such equality of opportunity.*

### **Convention for the Protection of Human Rights and Fundamental Freedoms**

#### *Article 14*

*The enjoyment of the rights and freedoms set forth in this Convention 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.*

### **Community Charter of the Fundamental Social Rights of Workers**

*Recital 6 makes clear that the principles of the Community Charter of the Fundamental Social Rights of Workers form the basis for the Directive.*

#### *Article 4*

*Every individual shall be free to choose and engage in an occupation according to the regulations governing each occupation.*

#### *Article 26*

*All disabled persons, whatever the origin and nature of their disablement, must be entitled to additional concrete measures aimed at improving their social and professional integration. Recital 6 of the Employment Framework Directive makes clear therefore that the Directive is aimed at the “need to take appropriate action for the social and economic integration of elderly and disabled people”.*

## **Summary of issues and findings**

The extent to which volunteers are or may be protected from discrimination under the Equality Directives is a complex and important issue which has yet to be fully considered by most Member States and has not been considered by the Court of Justice of the European Union (CJEU). The issues relate to whether or not the provisions pertaining to discrimination in employment, access to employment, self employment or occupation in the Framework Directive 2000/78/EC, the Race Directive 2000/43/EC, and the Recast Gender Directive 2006/54/EC do or may encompass protection for volunteers in any way. It also relates to whether or not the provisions relating to discrimination in the provision of services in the Race Directive and Gender Goods and Services Directive 2004/113/EC do or may encompass protection for volunteers in any way.

In Britain, the Equality and Human Rights Commission (EHRC) is intervening in two cases which both involve the issue of whether volunteers are within the scope of protection provided by the Framework Directive 2000/78/EC. The Commission is seeking a reference to the CJEU to determine the issues in the Court of Appeal case of *X v Mid Sussex CAB* which was heard in October 2010. It is also important to note that the UK government intervened in the hearing to argue that volunteers are not protected by the Framework Directive. The judgment in the

Court of Appeal case was handed down on 26 January 2010 and the court found that the position of the appellant as a volunteer with the CAB was not within the scope of protection provided by the Framework Directive or the domestic disability discrimination legislation. The court also decided that it was not necessary to make a reference to the CJEU as in its view the Framework Directive clearly does not provide any protection from discrimination for volunteers. The appellant is seeking leave to appeal to the Supreme Court and the EHRC is seeking internal approval to apply to intervene in the Supreme Court if leave to appeal is granted.

The evidence of the answers of the Equality Bodies in the Dynamic Interpretation Working Group was provided to the Court. This was the first occasion in which the views of Equinet member Equality Bodies have been used in national strategic litigation relating to the Equality Directives.

The issue is also important as volunteering can provide an important means by which protected groups either enter or maintain their participation in employment and the social and economic sectors of society. The European Union has designated 2011 as the European Year of Volunteering and has four main objectives: lowering obstacles to volunteering in the EU; empowering volunteer organisations and improve the quality of volunteering; rewarding and recognise volunteering activities; raising awareness of the value and importance of volunteering. The issue of whether volunteers are protected from discrimination can make an important contribution to the year as discrimination would inhibit the ability of volunteers to contribute to society.

## **(A) Volunteers and Legal Status**

### **1. Is there a legal status of employee in domestic law? How is it defined?**

Employment is one of the fields in which the Framework Directive provides protection from discrimination. There were divergent positions as to whether the Member States domestic law defined employment and the status of being an employee.

Answers were provided by the Equality Bodies of fourteen Member States with two answers being provided in relation to Denmark (from the Danish Institute of Human Rights and the Equal Treatment Board). In a majority of Member States (ten of the fourteen) there is a definition of employee or similar position in the relevant Labour law or equality legislation. In the other Member States the elements of the status of employee have been developed and defined by relevant case law.

Despite differences in the foundation of the status of an employee, there are generally common elements to their definition which are:

- A written or verbal contract between the employer and employee for the employee to provide services to the employer;
- In exchange for the services the employer provides payment to the employee;
- The employer has authority and control over the way in which the employee provides services.

As a result in most Member States a volunteer could not come within the scope of the definition of an employee and the employment relationship. This is usually the case as a volunteer would not satisfy the criteria of being paid for their services. It is also possible, depending on the particular circumstances of the case, that the volunteers would not satisfy the other key criteria described above.

### **Conclusion:**

**In most Member States volunteers would not satisfy the legislative or case law criteria for being an employee and therefore would not be able to make a claim of discrimination in employment.**

## **2. Is there a legal status of worker in domestic law? How is it defined?**

In twelve of the fourteen Member States for which the Equality Bodies provided answers there is currently no separate definition of a worker. The exceptions to this are Belgium and Britain. In Belgium the definition of a worker is very similar to the definition of an employee. In Britain the definition of a worker is wider than the definition of an employee and includes persons working under a variety of contracts including temporary contracts.

In the Member States for which there is no definition of a worker, most indicated that the concept of a worker is often closely associated with and overlaps with the concept of an employee. As a result in most Member States a volunteer would not be likely to be considered to be a worker.

### **Conclusion:**

**In most Member States there is no separate definition of a worker and the criteria of being a worker is often similar to the criteria for being an employee. As a result it is unlikely that volunteers would be considered as workers.**

## **3. Is there a separately defined legal status of volunteer or unpaid worker? If there is more than one type of legal status which applies to volunteers or unpaid workers, please list all of them. How is it/are they defined?**

There are divergent positions in the Member States as to whether volunteers have any separately defined status in legislation, and if so what that definition and status is.

In nine of the fourteen Member States there is no clear definition in legislation of a volunteer. However there are some informal criteria that have been developed. For example the Danish Institute for Human Rights referred to its National Volunteer Centre which provides the following criteria:

- Voluntary activity without any legal or physical coercion;
- Unpaid activity except for the reimbursement of expenses;
- Carried out for persons other than the volunteer, family and relatives of the volunteer.
- This distinguishes the activity from ordinary domestic activities, self help groups and informal care for families;
- Formally organised: spontaneous and irregular assistance (for example helping someone crossing the road) would not be characterised as volunteering.

The position can be contrasted with five of the Member States as there are formal legislative definitions, or categories and concepts of volunteers.

For example in France there are two concepts of volunteers: *benevolat* and *volontariat*. A *benevolat* refers to the free engagement of individuals for non-remunerated purposes outside the framework of the family, professional or legal relations and obligations. A *volontariat* is closer to the notion of voluntary service and is a more formal type of volunteering for a specific period and some form of professional training is usually involved. Examples include volunteering related to the end of military service and activities relating to promoting active citizenship.

In countries such as Belgium, the Czech Republic and Hungary there is specific legislation relating to volunteers in different sectors of society but often the elements of such status are similar in criteria to the ones described above, for example the positions are unpaid and not merely activities for family members. In Slovakia volunteers are defined by age as well as they must be at least 15 but be a maximum of 30 years old.

### **Conclusion:**

**There are differences in Member States as to whether volunteers are defined with a specific legal status. However common characteristics of volunteer status whether defined in law or otherwise are that they consist of activities which are:**

- **Voluntary activity without any legal or physical coercion;**

- Unpaid activity except for the reimbursement of expenses;
- Carried out for persons other than the volunteer, family and relatives of the volunteer. This distinguishes the activity from ordinary domestic activities, self help groups and informal care for families;
- Formally organised: spontaneous and irregular assistance (for example helping someone to cross the road) would not be characterised as volunteering.

**4. If not, is there any other legal status which would or might cover any or all volunteer or unpaid workers? If there is more than one type of legal status which would or might cover volunteers or unpaid workers, please list all of them. How is it/are they defined?**

In those countries where there is no defined legal status, most Equality Bodies indicated that volunteers do not have another form of status. The exceptions to this usually related to issues of insurance and health and safety issues in the workplace. For example in Austria, the General Social Insurance Act requires that volunteers are insured in case of accidents. In Denmark, the Danish Institute for Human Rights indicated that volunteers may be protected from accidents under the Industrial Injury Act. However, whether a volunteer fell under the Act needs to be decided on a case by case basis. The DIHR also made reference to a decision of the National Social Appeals Board that decided that a man who worked as a volunteer collector for the Danish Cancer Society was within the scope of the Industrial Injury Act as the collection was similar to paid work.

**Conclusion:**

**Within those Member States where there is no separately defined legal status of volunteers, several Member States indicated that volunteers may nevertheless have status and some rights relating to health and safety issues such as when an accident occurs.**

**5. Please summarise the legal consequences of each legal status listed above in answer to questions 1 – 4. Please address the entitlement to employment rights and protection from discrimination.**

In relation to the issue of whether volunteers are in any way protected by the Framework Directive and domestic equality legislation in the Member States a number of different views expressed. Several of the Equality Bodies' provided answers which indicated that their interpretation of the issue is that volunteers are protected from discrimination under both the Framework Directive and domestic equality legislation. A number of other answers indicated that it is possible that volunteers may be protected from discrimination under the Directive and their domestic equality legislation. Finally, several Equality Bodies indicated that in their view the Framework Directive and domestic equality legislation does not provide protection from discrimination in relation to volunteers. These three categories of answers are examined in turn below.

**i) Volunteers are protected from discrimination**

Seven Equality Bodies in different Member States indicated that volunteers are protected in some way from discrimination on the basis of the Framework Directive and/or the domestic equality legislation: France, Belgium, Austria, Denmark, Finland, Netherlands and Norway.

In France, the French Equality Body High Authority against Discrimination and for Equality (HALDE) has considered three cases on whether or not volunteers (benevoles) are protected from discrimination. It indicated that the scope of the directive which covers "the conditions for access to employment, to self employment or to occupation" has been implemented into the domestic equality law to include non-salaried work. The HALDE referred to a case where the exclusion of a candidate for a talent show was discriminatory and held that the role on the talent show amounted to a genuine occupation. In France therefore, it is clear that volunteers



are protected from discrimination in their domestic law and that they have interpreted the Directive to include protection from discrimination for volunteers.

In Belgium the preparatory Bill documents of the equality legislation expressly mention that voluntary activities are covered by the equality legislation.

In the Netherlands, the Dutch Equal Treatment Commission indicated that it was intended by both government and the parliament to include volunteers in the domestic equality legislation, and any other labour relations, as long as it meets the criteria that the labour is conducted under the responsibility/authority of an employer/organisation.

The Equal Treatment Act and related equality legislation do not mention explicitly that volunteers are protected, but this is mentioned explicitly in the parliamentary memorandum of the government regarding the draft legislation and in the parliamentary debate.

Several Equality Bodies indicated that volunteers that were trainees would be protected from discrimination. In Austria it was indicated that the Equality legislation includes retraining outside of an employment relationship and that volunteers fulfilling the definition of a volunteer under their Aliens Employment Act are likely to be protected from discrimination. The Danish Institute for Human Rights and the Finish Ombudsman for Minorities also indicated that volunteers, in the context of vocational training, would be protected.

Finally the Norwegian Equality and Anti-Discrimination Ombudsman indicated that volunteers would be protected in their domestic equality legislation as protection was not limited to the characteristics of race and so on, but included "other status". Their discrimination law applies a human rights concept to the scope of protection from discrimination.

#### **ii) Volunteers may be protected from discrimination**

Three Equality Bodies indicated that the Directive and the domestic equality legislation may protect volunteers but that the issue had not been tested in the courts: Hungary, Slovakia and Greece.

Hungarian equality legislation covers employment relationships and "other relationships aimed at work", volunteering may fall within this definition. In Greece, the domestic courts have interpreted the term "occupation" to include volunteers in some cases so it was considered that volunteers may be protected. In Slovakia the equality legislation is not exhaustive in its list regarding the scope of protection of the directive and as a result the Slovak National Centre for Human Rights indicated that it is possible that volunteers may be protected.

#### **iii) Volunteers are not protected from discrimination**

In five Member States it has either been held by courts or it was believed that volunteers would not be protected from discrimination under the Directive and domestic equality legislation.

In Britain, the Court of Appeal in the *X v Mid Sussex CAB* case recently handed down its judgment and it held that a disabled volunteer that worked at a Citizens Advice Bureau was not protected from disability discrimination under the domestic equality legislation or the Framework Directive. In relation to the Directive it held that the term "occupation" does not encompass volunteers and that a volunteer would not fall within the category of vocational training. It also held that if the EU had intended for volunteers to be covered by the directive they would have done so expressly. The appellant is likely to seek leave to appeal the decision to the highest court, the Supreme Court. The Court of Appeal also refused to make a reference to the CJEU as it believed that the Directive was clear in not providing protection for volunteers.

The answers from the Equality Bodies in Cyprus, Sweden, the Czech Republic and the Danish Equal Treatment Board all indicated that they did not believe that their domestic equality legislation protected volunteers.

**Lessons learned:**

- The evidence from the Equality Bodies indicates that in a number of Member States the Directive has or may be interpreted to include protection for volunteers;
- The Court of Appeal in *X v Mid Sussex CAB* did not analyse the issues concerning the scope of protection provided by the Directive in sufficient detail and did not fully consider the way in which the scope of the Directive has been interpreted in certain Member States where volunteers are protected from discrimination: France, Belgium and the Netherlands.
- If leave to appeal is granted in *X v Mid Sussex CAB* and the Equality and Human Rights Commission (EHRC) intervenes more detailed evidence will be provided by Equinet on other Member States where volunteers have protection on the manner in which the Directive was interpreted and implemented.
- If leave to appeal is granted in *X v Mid Sussex CAB* the EHRC will make an application for a reference to the CJEU to determine the issue given that Member States have interpreted the scope of the Directive regarding protection for volunteers differently and therefore the scope of protection provided by the Directive is not clear.

**6. If any or all unpaid or volunteer workers are not covered by a legal status, do they have any other protection in domestic legislation or case law in relation to employment rights and/or discrimination?**

See answers 4 and 5 above.

**7. What is the rationale for any difference in protection between employees/workers and volunteers/unpaid workers?**

Most of the Equality Bodies that answered this question indicated that the rationale for differences in protection between employees and volunteers is that there is a different type of relationship between an employer and employee as between an organisation and a volunteer. The types of reasons included:

- The fact that there is a mutual obligation between an employer and employee (the payment of money in exchange for the provision of services);
- The fact that an employer can direct an employee what to do;
- The fact that a volunteer does not have obligations should mean they do not have the same rights as an employee.

The answer from the Czech Republic Equality Body was different. It stated that there did not appear to be a reasonable justification for treating volunteers any differently in terms of protection from discrimination. Non-discrimination and to be treated with dignity is a human right and it should not matter whether someone is paid or not.

**(B) Research and Statistics**

**8. Are you aware of any research, statistics or information about the prevalence of volunteers in your Member State? It would be useful to know whether there is any information about whether volunteering is more prevalent in any particular demographic, for instance is there a greater concentration in any particular age group, in any particular minority group/s, more men than women, a greater relative proportion of disabled people volunteer than non disabled etc.**

Nine of the Equality Bodies provided statistics on the level and distribution of volunteering in their respective Member States. These statistics indicated quite a wide range of results from which it is difficult to draw conclusions however,

- Generally there was a wide distribution of age groups who volunteer but more were of a young age, under 30 and less from the over 70 years category. In Slovakia 70% of the volunteers are younger than 30;
- Some statistics indicated that men volunteer more than women (Denmark and France) whereas in Cyprus the distribution was almost equal. In Slovakia more women volunteer than men.

**9. Are you aware of any research, statistics or information about the extent to which volunteering provides access to employment/paid work (and whether this is more the case for any particular demographic where volunteering is more prevalent).**

Several of the answers of the Equality Bodies highlighted the extent to which volunteering can provide access to employment and an agent for social cohesion.

The Equality and Human Rights Commission indicated that in Britain there has been research done by the Institute for Volunteering Research which highlighted the role of volunteering in helping individuals become more employable.

The answer of the High Authority against Discrimination and for Equality (HALDE) in France highlighted the opinions of the EU Committee of the Regions and the Resolution of the European Parliament on the role of volunteering to the economic and social cohesion of the EU. They play a key role as agents of social inclusion by engaging with the socially excluded. This applies to the integration of migrants, people with disabilities and older people in society.

# Chapter 2

## Case study on Racial Discrimination

### Case

This case concerns discrimination against a woman of Roma origin in the provision of municipal housing.

The case was against both the municipality and against a municipality-owned joint-stock property-company, who owned the buildings in question. Although the municipality had outsourced the housing services, they were still responsible for how the housing services/decisions were carried out. The municipality had a working group where both the company and the municipality were represented. The working group decided on who will be offered free apartments. In the working group a Roma person participated, but the Roma person was not employed or hired by the city (Roma contact person). The working group had been established in order to deal with local problems between Roma persons and Roma families.

Applicants for housing of Roma origin were asked to sign an agreement that their application would be shared with the Roma contact person of the city municipality. The procedure was that the contact person would check with Roma people already living in the city whether the applicant could move there or not. The municipality said they use the Roma contact person to be able to take into consideration the wishes of the Roma applicants and in order to avoid trouble/violence between Roma. The process has been agreed with the local Roma themselves. Roma applicants were offered apartments in buildings, where there were no Roma living before, but in some cases Roma applicants were not given permission to move to the municipality or offered any apartment.

The local Roma through the Roma contact person can refuse to give permission to a Roma person to move to the municipality on any ground, and if that was done the standard practice of the municipality was that the accommodation would not be offered to the applicant. These grounds could include for example that they do not want troublemakers to move to the area to spoil the reputation of all Roma; they do not accept the applicant, because they do not follow the Roma culture in a way that they think is correct, or to prevent violence between the Roma groups.

The present case concerned a Roma woman who was married with a non-Roma person. The woman had been living in apartments by the municipality/company since February 2002 with her grown-up daughter and the man had later moved into their 2 room apartment. In May 2009 the couple applied for an apartment for themselves in a building where no Roma people were living. The man had moved out from the 2 room apartment, where the three persons had been living, because of tense relations between him and the grown-up daughter. Due to this the man was homeless. In August 2009 the couple was offered an apartment, but the applicant said they cannot take the apartment because there was a Roma man living in the neighbouring building (owned by a different company). The Roma woman also said the condition of the apartment was not acceptable. In November 2009 a new apartment (without any Roma neighbours) was offered to the couple and they moved in on 29 November 2009.

According to the national constitution, the Roma and other groups have the right to maintain and develop their own culture and language. In addition there is a constitutional right of freedom of movement within the country and to choose their place of residence, and that public authorities shall guarantee the observance of basic human rights and liberties.

The national Equality Body brought a claim of discrimination in its own name against the city municipality and against the company.

## Questions

Consider the case in the context of your national legislation and jurisprudence, or describe how the case would be considered by the competent authority in your country. In particular, consider the following specific questions:

1. Does this case fall within the scope of any anti-discrimination legislation in your country, and the Race Directive 2000/43/EC?

In your answer please consider whether there needs to be a complainant to be within the scope of the Race Directive and the ECJ decision in Feryn C-54/07.

2. Which court, tribunal, equality body or organisation would be competent?

3. Is there direct or indirect discrimination on the ground of race/ethnic origin under your national legislation?

4. If you find the case leads to direct or indirect discrimination on grounds of either race or ethnic origin is there an objective justification or exception? If yes, please, provide information on this kind of justification or exception stipulated in your national legislation.

In your answer please consider and answer the following:

- is there a right for Roma and other ethnic groups to their own culture and language in your country, a right to freedom of movement and if so do these rights conflict in any way with prohibition against racial discrimination?

- can the cultural practices within a racial or ethnic group be lawful justification for discrimination within your country and within the scope of the Race Directive 2000/43/EC;

- is it possible for a person or persons to consent to racial discrimination such that the discrimination will be justified. Please consider the decision of the European Court of Human Rights in DH v Czech Republic Application No.57325/00 and Orsus and Others v Croatia Application No 15766/03.

5. Is there any other form of discrimination established in this case? For example: instructions to discriminate?

6. If there is no justification or exception, what could be the sanctions or remedies under your national legislation? If any, what would be the level of compensation awarded?

## Legislation

***Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin***

*Article 2*

*1. for the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.*

*2. for the purposes of paragraph 1:*

*(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;*

*(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.*

*3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating*

or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

4. An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.

#### Article 3

1. within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(h) Access to and supply of goods and services which are available to the public, including housing.

## Summary of issues and findings

The case relates to discrimination against Roma in the provision of government social housing. There are several key issues raised by the case:

- whether or not it is necessary for there to be a complainant in order for the relevant equality body to determine whether there was unlawful racial discrimination;
- Whether the obligation on Member States to protect the rights of Roma to their own culture may create a conflict with the obligation on Member States to prevent racial discrimination;
- Whether cultural differences within an ethnic minority may justify racial discrimination; and
- Whether the prohibition on racial discrimination can be waived.

The answers provided by the Equality Bodies indicate that although ethnic minorities generally do have recognised rights to their own culture often within the context of the Council of Europe Framework Convention for the Protection of National Minorities, this right will be exercisable only to the extent that it does not infringe the prohibition on racial discrimination. The prohibition on direct racial discrimination cannot be waived generally or within ethnic minorities on grounds of cultural differences.

### **1. Does this case fall within the scope of any anti-discrimination legislation in your country and the Race Directive 2000/43/EC?**

**In your answer please consider whether there needs to be a complainant to be within the scope of the Race Directive and the ECJ decision in Feryn C-54/07**

Answers were provided by 15 Equality Bodies from 14 Member States: Denmark, Norway, Slovakia, Sweden, France, Netherlands, Austria, Cyprus, Finland, Belgium, Czech Republic, Greece, Hungary and Britain. In the case of Denmark, answers were provided by both the Danish Institute for Human Rights and the Board of Equal Treatment.

Fourteen of the answers indicated that the case was within the scope of the Race Directive and the domestic legislation implementing the Directive. In particular, all Equality Bodies considered that the case was within both the concept of discrimination based on "racial or ethnic origin", and the scope of the Directive which prohibits discrimination in the access to and supply of goods and services which are available to the public, including housing. Several answers (the Danish Institute of Human Rights and the Finish Ombudsman for Minorities) also indicated that a claim of racial discrimination could also be brought under criminal law, although the burden of proof would be higher than in a civil discrimination claim.

The answer of the Dutch Equal Treatment Commission, however, indicated that a distinction has to be made between the acts of the municipality and the acts of the private housing company. As the Dutch Equal Treatment Act applies to the commercial supply of goods and services, it covers both the activities of public and private actors on the housing market. However, in The Netherlands, municipalities as a rule don't own any houses that they rent out to citizens: they only give rules that govern the distribution of houses by private housing

corporations. These rules are laid down in legislation: acts of legislation by (local) government do not fall within the scope of article 7 of the Equal Treatment Act, that governs the supply of goods and services, among which housing.

Alternatively, it was indicated that it could be argued that the government housing regulation was a form of social protection under article 3(1)(e) of the Race Directive. This is in line with earlier decisions of the Dutch Equal Treatment Commission in which it has decided that municipal housing policies fall under social protection and can therefore be scrutinised by the Commission.

In relation to the issue of the absence of a complainant this is dealt with below in relation to the question on which body is competent.

### **Conclusions:**

**The facts of the case are within the scope of the Race Directive and the domestic legislation implementing the Directive.**

### **Lessons Learned:**

**The answer of the Dutch Equal Treatment Commission pointed to the fact that, in practice, the provision relating to housing in the Dutch Equal Treatment Act implementing the Race Directive only applies to private organisations since municipalities do not appear in the housing market as house owners. As a result, the housing provision of the domestic legislation would not apply to the municipality but instead would apply to the property company.**

**Alternatively, based on one of the ETC's previous decision relating to housing, it was indicated that an argument could be made that the government housing policy was a form of social protection under article 3(1)(e) of the Race Directive.**

## **2. Which court, tribunal, equality body or organisation would be competent?**

Which body is competent to consider the complaint is dependent on the powers of the Equality bodies and their relationship with courts and tribunals. In Equality Bodies that are Ombudsmen or similar structures, the Equality Bodies have the power to issue decisions which are often non-binding. In addition, courts or tribunals could determine the complaint and issue binding decisions.

In a number of the jurisdictions Equality Bodies can themselves bring proceedings in front of the courts or tribunals: for example the Equality and Human Rights Commission using its powers of judicial review or the Hungarian Equal Treatment Authority.

In relation to the absence of a complainant, fourteen of the answers indicated that this would not prevent their Equality Body from taking action in relation to the issue. Depending on their powers this could range from issuing a legally binding or non-binding decision to commencing legal proceedings themselves. These answers indicated that the ECJ decision in Feryn C-54/07 established an important principle; the absence of a complainant does not prevent a claim of racial discrimination being brought, so long as there is discrimination or a risk of discrimination established. This highlights the intention of the equality directives in preventing discrimination through policies that directly permit differences in treatment.

The answer of the Danish Board of Equal Treatment stated that its jurisdiction is limited to cases where there is a complaint from an alleged victim of discrimination. However the answer of the Danish Institute of Human Rights stated that the Board may have jurisdiction where there was a risk of discrimination, even though the person who filed the complaint had not suffered discrimination themselves. Reference was made to the 2009 decision of the Board of Equal Treatment which found that a defendant's statement in a newspaper article, that she preferred female applicants as sales personnel when she had to fill available positions, gave such a clear statement on the defendant's unwillingness to hire men that there

was a presumption of direct discrimination. The complainant in the case had not applied for a job at the workplace, which was a car dealership.<sup>2</sup>

Similarly, the Swedish Equality Ombudsman indicated that under its domestic equality legislation, it can only bring a claim on behalf of an individual who consents to this and there is no possibility of bringing a claim where discrimination has or risks occurring in the future, but no actual complainant exist.

This appears to indicate that there is a gap in the scope of powers of several Equality Bodies such that they require a complaint to be made by a person alleging discrimination. This may make it more difficult for Equality Bodies to address all forms of discrimination and take strategic action.

#### **Conclusion:**

**The decision in Feryn C-54/07 has established the principle that where their national legislation permits, Equality Bodies can take action in discrimination claims by using their relevant powers irrespective of whether a complainant alleging to have suffered discrimination makes a complaint.**

#### **Lessons Learned:**

**Considering the implications of Feryn C-54/07 could prove useful for Equality Bodies in terms of how their powers can be used where no complainant alleging to have suffered discrimination exists**

**Feryn could allow the Danish Board of Equal Treatment to review its policies for considering complaints of discrimination including whether a complaint from an alleged victim of discrimination is required**

**In light of the Feryn decision the Swedish Equality Ombudsman could consider making representations to the Swedish government to extend its powers to be able to bring claims where a policy is discriminatory or likely to discriminate but no complainant exists.**

### **3. Is there direct or indirect discrimination on the ground of race/ethnic origin under your national legislation?**

All of the answers indicated that this would be a case of direct racial discrimination and not a case of indirect racial discrimination.

Direct racial discrimination occurred as Roma applicants were treated less favourably than non-Roma applicants for social housing in comparable situations. The less favourable treatment was that they were subjected to a procedure whereby the Roma contact person would check with other Roma living in the area whether they had any objections to the Roma persons moving there. In some cases this led to the applicant being denied permission to move to the municipality or offered an apartment.

The answer of the Dutch Equal Treatment Commission indicated that in relation to a possible claim of discrimination in social protection, public bodies would generally be given a larger margin of appreciation in the formulation of its policies legislated for by the government. However, when a policy refers directly to race or ethnicity it would be very likely that racial discrimination would be established.

All answers indicated that this could not be a case of indirect discrimination as the policy was not neutral. Clearly it was targeted directly at Roma people.

#### **Conclusion:**

**The facts established direct racial discrimination but not indirect racial discrimination.**

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<sup>2</sup> Decision No. 12/2009 from the Board of Equal Treatment



**4. If you find the case leads to direct or indirect discrimination on grounds of either race or ethnic origin is there an objective justification or exception? If yes, please, provide information on this kind of justification or exception stipulated in your national legislation.**

**In your answer please consider and answer the following:**

- Is there a right for Roma and other ethnic groups to their own culture and language in your country, a right to freedom of movement and if so do these rights conflict in any way with prohibition against racial discrimination?**
- Can the cultural practices within a racial or ethnic group be lawful justification for discrimination within your country and within the scope of the Race Directive 2000/43/EC?**
- Is it possible for a person or persons to consent to racial discrimination such that the discrimination will be justified? Please consider the decision of the European Court of Human Rights in *DH v Czech Republic* Application No. 57325/00 and *Orsus and Others v Croatia* Application No 15766/03?**

All of the answers indicated that in their domestic law there was either no justification possible for direct racial discrimination, or that the relevant exceptions did not apply. The two possible exceptions are genuine occupational requirements (Article 4 of the Race Directive) relating to employment situations, and positive action (Article 5 of the Race Directive).

The answers dealing with genuine occupational requirements and positive action indicated that these scenarios did not apply to the facts. In relation to genuine occupational requirements, it was not relevant as this was not a situation of employment. In relation to positive action, positive action could be lawful in situations relating to housing, for example by providing translation services for a social housing area tailored for a particular racial group whose first language was different to that of the member states official languages. In other words, the positive action would need to be in order to prevent or compensate for disadvantage linked to racial or ethnic origin. The policy in this case was not relating to compensate for disadvantage but rather to prevent conflict between different Roma groups.

#### Relationship between right of Roma to own culture, language and freedom of movement and racial discrimination

Many of the answers provided by equality bodies indicated that their Member State had ratified the Council of Europe Convention for the Protection of National Minorities and that Roma would be considered a national minority. An exception to this was France that has not ratified the Convention. In several countries although the Convention has been signed and ratified, Roma would not be considered a national minority: in Denmark, Netherlands, Cyprus and Greece.

Some answers indicated that Roma's right to their culture would otherwise be protected under the Member State's Constitution or Federal legislation: for example Austria, and Hungary. In Hungary the Minority Act of 1993 on the Rights of National and Ethnic Minorities declares the right to a national or ethnic identity as a fundamental human right.

Most answers indicated that freedom of movement of persons within a Member State applies to all persons, subject to restrictions that may be permitted relating to citizenship, residence or work permits. This right is protected by Optional Protocol 4 of the European Convention of Human Rights and national legislation implementing the ECHR such as national Constitutions. The right to freedom of movement would apply equally to the Roma in the case as it is presumed that they are nationals of the country.

The answer of the French Equality Body (HALDE) indicated that in France there is currently an issue relating to freedom of movement of Roma travellers as they are required to have a travel permit. Failure to have such as permit can result in the individual either being sentenced to imprisonment or a fine. The HALDE in two decisions deemed that such a travel restriction constituted a breach of article 2 of Additional Protocol 4 of the European Convention on Human Rights on the right to freedom of movement combined with a breach of article 14 relating to discrimination in the enjoyment of rights.

The policy of the municipality in being able to restrict particular Roma from moving to the municipality is likely to constitute an interference with their right of freedom of movement which is protected in the Member States. The right to freedom of movement can be restricted under article 2(3) of Protocol 4 but only where it is a proportionate means of achieving a legitimate aim. This could be for reasons of national security, public safety, maintenance of public order, the prevention of crime, the protection of health or morals or for the protection of the rights and freedoms of others. In this case it is unlikely that the policy satisfied any of those criteria. The aim of preventing crime is unlikely to be satisfied as other alternative policies could be used which do not result in restricting freedom of movement. As a result, it is likely that the policy would breach article 2 of Protocol 4 and article 14 of the ECHR.

**Conclusions:**

- **In a majority of the Member States the Roma have a right to their culture protected either under the Council of Europe Convention on the Protection of National Minorities, under their Constitution or other Federal legislation**
- **It is likely that the municipality policy would breach article 2 of Protocol 4 and article 14 of the ECHR.**

Possibility of consent to racial discrimination

All of the answers indicated that it is not possible to consent to direct racial discrimination. Cultural practices relating to an ethnic group are able to be promoted and protected in the Member States but only so far as they do not breach the racial discrimination provisions.

In this case although the policy had been agreed in writing with the Roma in the municipality, this does not constitute a justification to the racial discrimination. Even if it was a case of indirect racial discrimination, the fact that there was consent to the discrimination would not constitute a legitimate aim or otherwise be a ground demonstrating proportionality.

Reference was made in a number of the answers to the landmark decision of the European Court of Human Rights in *DH v Czech Republic*. In that case, Roma had signed an agreement to transfer their children to special schools. It was held that unlawful racial discrimination cannot be waived or otherwise be made lawful by the agreement to that discrimination.

**Conclusion:**

- It is not possible to consent to racial discrimination or for unlawful discrimination to be waived. Cultural practices of an ethnic group cannot be used to justify what would otherwise be unlawful racial discrimination.**

**5. Is there any other form of discrimination established in this case? For example: instructions to discriminate?**

Most of the answers indicated that they did not think there was sufficient evidence to prove that there had been instructions to discriminate either from the municipality to the Roma contact person or from the municipality to the property company. However the reasons for this varied considerably.

In relation to the relationship between the municipality and the contact person, for example in the Netherlands, it is not possible for the Dutch Equal Treatment Commission to give decisions on instructions to discriminate to be established between a legal person such as a company and an individual. It can only give decisions on instructions established between legal persons.

The Danish Institute for Human Rights stated that in the Danish equality law, the person giving the instructions has an actual authority to give the instructions and as the Roma contact person was not employed by the municipality it would not be possible to establish instructions to discriminate.

The diversity in responses indicates that the provisions relating to instructions to discriminate in the Race and other equality Directives may not be sufficiently clear in defining what the criteria for establishing instructions to discriminate are.

Two of the Equality Bodies (the Office for the Ombudsman for Minorities in Finland and the Hungarian Equal Treatment Authority) indicated that the facts may also establish discrimination by association against the non-Roma husband of the Roma woman seeking accommodation. On the basis of the decision in Coleman C-303/06 which established that direct discrimination and harassment by association with a disabled person was unlawful disability discrimination under the Employment Directive 2000/78/EC, it is likely that the husband of the Roma woman was also directly discriminated against.

#### **Conclusions:**

- **Most Equality Bodies thought there was insufficient evidence to establish instructions to discriminate from the municipality to the Roma contact person or the property company;**
- **Two Equality Bodies thought that racial discrimination by association of the husband of the Roma woman would be established.**

#### **Lessons Learned:**

**An issue with the clarity of the provisions relating to instructions to discriminate has been identified in a number of the responses received; the European Commission could usefully consider whether the provisions need to be better defined in the Equality Directives.**

#### **6. If there is no justification or exception, what could be the sanctions or remedies under your national legislation? If any, what would be the level of compensation awarded?**

The nature of the possible remedies varied depending on the powers of the Equality Bodies and the courts and tribunals in each Member State. They included pecuniary damages; a requirement to refrain from the discrimination; a requirement to apologise and a requirement to change the policy.

The answer of the Czech Equality Body indicated that there is an issue in their national law as to whether or not Czech courts can award damages where no complainant has suffered discrimination. It may be that where a discrimination case arises the national courts will interpret national legislation in line with EU case law and Feryn such that it would still award damages but the issue has yet to be determined.

Feryn held that "Article 15 of the Directive 2000/43/EC requires that rules on sanctions applicable to breaches of national provisions adopted in order to transpose that directive must be effective, proportionate and dissuasive, even where there is no identifiable victim"

Member States and their courts and tribunals should therefore ensure that the powers of the courts and tribunals are sufficient to provide appropriate sanctions where there is no victim.

A number of Equality Bodies indicated that there was an apparent lack of case law relating to discrimination in the provision of housing in comparison to employment situations and that generally the amount of damages would be lower than employment situations given there was no loss of earnings. The amount the courts or tribunals could award as damages varied considerably.

#### **Lessons Learned:**

**In accordance with the ECJ decision in the case of Feryn, Member States and their courts and tribunals should ensure that the powers of their courts and tribunals permit appropriate sanctions are where there is no victim.**

## Chapter 3

# Case Study on Gender Identity Discrimination

## Case

The complainants are male to female transsexuals waiting for breast surgery. In their country, every citizen is obliged to have a basic health insurance. They have basic health insurance and supplementary health insurance.

Both the basic and the supplementary health insurances are private contracts, concluded with a private health insurer. The health insurance company however is bound to public law insofar as the basic health insurance is concerned: public law regulates what must be covered by the basic health insurance and at what cost. The health insurance company cannot add or remove any treatments to/from the basic health insurance. The supplementary insurance scheme is different in that the health insurance company is free to choose what reimbursements they offer under such a scheme.

In the policy conditions of the basic health insurance it is provided that the medical care to be reimbursed includes – as far as relevant - treatments of a plastic-surgical nature, if these are necessary for the correction of primary sexual characteristics of established transsexualism. The policy conditions also provide that the insured has no right to reimbursement of the costs of treatments of a plastic-surgical nature if they concern (inter alia) the surgical placement of an artificial breast implant, unless a part of the breast or the whole breast was removed. Nor is there a right to reimbursement of the costs of the surgical removal of an artificial breast implant without medical necessity.

The complainants claim that the health insurance company does not reimburse the breast augmentation operation for male to female transsexuals under its basic health insurance scheme while it does reimburse costs of breast removal for female to male transsexuals. The complainants argue that the two operations can be compared, as they both involve a correction of the breast size.

They argue that the basic insurance contract is indirectly discriminatory on the ground of sex because the policy conditions which say that there shall be no reimbursement to cover the cost of breast implants applies to men and women equally, but male to female transsexual people are placed at a particular disadvantage compared to female to male transsexuals.

The insurance company argues that in the national legislation on health insurances, it is stated that the costs of breast augmentation surgery can be covered by the basic health insurance (that is a basic insurance that all health insurance companies are obliged to offer) only if the operation follows a breast amputation. The insurance companies are required to comply with the legislation in this respect.

The complainants also claim that the health insurance company discriminated them on the ground of sex by refusing to pay for the placing of artificial breast implants under the supplementary health insurance scheme. There is currently no provision in that scheme that covers the costs of operations on secondary sex characteristics. They argued that the health insurance company should take up such a provision in the supplementary health insurance.

The insurance company has decided not to mitigate the alleged indirect discrimination in the basic health insurance by offering an additional scheme for the reimbursement of the costs for breast augmentation surgery of transsexuals.

The complainants brought a claim of discrimination against the health insurance company to the national Equality Body.

## Questions

1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation? Is there express or implicit protection against gender reassignment discrimination in your national legislation?

2. Alternatively, would this case fall within the scope of the 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?

In your answer please consider whether the Council Directive provides protection from discrimination arising from the gender identity or reassignment of a person.

3. According to your national legislation and the Council Directive would gender reassignment be treated as a service?

4. Which court, tribunal, equality body or organisation would be competent?

5. Is there direct or/and indirect discrimination against the complainants on the ground of gender or/and gender identity? Who are the appropriate comparators in this case?

6. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception?

In your answer please consider what the impact is of having national health insurance legislation which sets out the minimum scope of insurance that must be offered but does not provide a maximum scope to that insurance.

7. If there is no justification or exception, what would be the sanctions or remedies under your national legislation?

8. Is it possible for your organisation to challenge the national legislation regarding health insurance schemes in front of the court/constitutional court?

9. Would this case (also) fall under the scope of the proposed Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in the access to and supply of goods and services and/or under your national equality legislation relating to equal treatment on the ground of disability?

## Legislation

### **Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services**

*Joint Council and Commission statement re Article 3 at the 2606<sup>th</sup> meeting of the Council of the European Union (preparatory works)*

*Concerning Article 3 and its application to transsexuals, the Council and Commission recall the jurisprudence of the Court of Justice in case C-13/94 P v S and Cornwall County Council, where the Court held that the right not to be discriminated against on grounds of sex cannot be confined simply to discrimination based on the fact that a person is of one or other sex, and may include discrimination arising from the gender reassignment of a person.*

*Recital 11*

*Such legislation should prohibit discrimination based on sex in the access to and supply of goods and services. Goods should be taken to be those within the meaning of the provisions of the Treaty establishing the European Community relating to the free movement of goods. Services should be taken to be those within the meaning of Article 50 of that Treaty.*

*Article 2*

*For the purposes of this Directive, the following definitions shall apply:*

- (a) *Direct discrimination: where one person is treated less favourably, on grounds of sex, than another is, has been or would be treated in a comparable situation;*
- (b) *indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary;*
- (c) *harassment: where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment;*
- (d) *sexual harassment: where any form of unwanted physical, verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.*

#### Article 3

1. *Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.*

#### **Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation**

#### Article 2

- 1. *for the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination on any of the grounds referred to in Article 1.*
- 2. *for the purposes of paragraph 1:*
  - (a) *direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;*
  - (b) *indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.*
- 4. *An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.*
- 5. *Denial of reasonable accommodation in a particular case as provided for by Article 4 (1)(b) of the present Directive as regards persons with disabilities shall be deemed to be discrimination within the meaning of paragraph 1.*

#### Article 3

- 1. *Within the limits of the powers conferred upon the Community, the prohibition of discrimination shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:*
    - (a) *Social protection, including social security and healthcare;*
    - (b) *Social advantages;*
    - (c) *Education;*
    - (d) *Access to and supply of goods and other services which are available to the public, including housing.*
- Subparagraph (d) shall apply to individuals only insofar as they are performing a professional or commercial activity.*

#### Article 4

- 1. *In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities:*

a) *The measures necessary to enable persons with disabilities to have effective non-discriminatory access to social protection, social advantages, health care, education and access to and supply of goods and services which are available to the public, including housing and transport, shall be provided by anticipation, including through appropriate modifications or adjustments. Such measures should not impose a disproportionate burden, nor require fundamental alteration of the social protection, social advantages, health care, education, or goods and services in question or require the provision of alternatives thereto.*

b) *Notwithstanding the obligation to ensure effective non-discriminatory access and where needed in a particular case, reasonable accommodation shall be provided unless this would impose a disproportionate burden.*

2. *For the purposes of assessing whether measures necessary to comply with paragraph 1 would impose a disproportionate burden, account shall be taken, in particular, of the size and resources of the organisation, its nature, the estimated cost, the life cycle of the goods and services, and the possible benefits of increased access for persons with disabilities. The burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the equal treatment policy of the Member State concerned.*

## Summary of Issues and Findings

The case relates to discrimination on the basis of gender reassignment in the provision of goods and services. There are several key issues raised by the case:

- Whether protection against gender reassignment discrimination is included in domestic legislation
- Whether the claimants would be able to pursue such a claim under the domestic equalities legislation
- The type of discrimination and the appropriate pool for comparison
- Whether cases can be pursued on combined grounds before the CJEU or under the domestic legislation
- Whether a claim can be brought on the basis of disability discrimination in the provision of services, including a claim for failure to make a reasonable adjustment.

### **1. Is there express or implicit protection against gender reassignment discrimination in your national legislation? Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

Answers were provided by 13 Member States: Austria, Cyprus, Czech Republic, Denmark, Finland, France, Greece, Hungary, Netherlands, Norway, Slovakia, Sweden and UK. Although discrimination arising from gender reassignment is only expressly prohibited in two of the countries who responded to the Equinet questionnaire (Sweden, UK), a further 10 Respondents reported that there is implicit protection in their equalities legislation because gender reassignment discrimination is deemed to fall within sex discrimination due to the case of *P v S*, Case C-13/94 (1996) IRLR 347. Within that basic position, however, there is some variation in the scope of protection afforded to transsexual people depending on which Member State they happen to live in: for example, in Austria, discrimination arising from gender reassignment covers discrimination on grounds of gender reassignment and gender identity; in Cyprus discrimination on grounds of 'sexual identification' is deemed to fall within sex discrimination. The position in Hungary was not included in that country's report.

As required by Article 16 of the Gender Goods and Services Directive<sup>3</sup>, the European Commission is in the process of producing a report on the implementation of the Directive for

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<sup>3</sup> Member States shall communicate all available information concerning the application of this Directive to the Commission, by 21 December 2009 and every five years thereafter. The Commission shall draw up a summary report, which shall include a review of the current practices of Member States in relation to Article 5 with regard to the use of sex as a factor in the calculation of premiums and benefits. It shall submit this report to the European Parliament and to the Council no later than 21 December 2010. Where appropriate, the Commission shall accompany its report with proposals to modify the Directive.

the European Parliament and where appropriate it is required to propose modifications to the Directive<sup>4</sup>.

**Lessons Learned:**

**Issues pertaining to legal certainty and transparency were ascertained in the majority of responses provided by the sample; to ensure equal protection across all Member States, thus facilitating the freedom of movement of EU Citizens, the European Commission could usefully give consideration to a recommendation made by Equinet to include an express prohibition on discrimination arising from gender reassignment or gender identity and expression in the Directive.**

11 out of 12 of the Respondents reported that the case would fall within the scope of their country's anti discrimination legislation. However in Sweden although the anti-discrimination legislation applies to services there is an exemption for insurance services. The Directive has probably been transposed incorrectly in this regard in Sweden as the exemption applies to *all* insurance services, whereas the Directive only aimed at differences in individual's premiums and benefits if the use of sex is a determining factor.

**Lessons Learned:**

**On the basis of the directive there appears to be an issue as to whether national legislation complies in Sweden; In accordance with Article 16 of the directive this practice could be considered by the EC during its review of the current practices of Member States as part of its summary report on the Directive for the European Parliament and European Council,**

**2. Alternatively, would this case fall within the scope of the 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?**

**In your answer please consider whether the Council Directive provides protection from discrimination arising from the gender identity or reassignment of a person.**

12 of the Respondents<sup>5</sup> were of the opinion that Directive 2004/113/EC prohibited discrimination arising from gender reassignment because of the case of P v S. Indeed it was noted that the Gender Recast Directive makes clear in Recital 3 that the principal of equal treatment between men and women applies to discrimination arising from the gender reassignment of a person.

**Conclusion:**

**The case falls within the scope of the Gender Goods and Services Directive.**

**3. According to your national legislation and the Council Directive would gender reassignment be treated as a service?**

All responses stated that gender reassignment would be considered as a service and would therefore fall within the scope of the Directive. Art 3 of the Directive provides that 'Within the limits conferred upon the Community, this Directive shall apply to all persons who provide goods and services, which are available to the public ... As regards both the public and private sectors, including public bodies'. Further, Recital 11 of the Directive provides that 'Services should be taken to be those within the meaning of Article 50' of the Treaty of Rome, i.e. commercial services provided for remuneration. Healthcare is considered to be a service as it is paid for via insurance premiums, in accordance with settled case law. Further healthcare is cited as an example in Recital 12.

However, Austria reported that if the gender reassignment was financed entirely through social security it would not be covered by the Directive. Further, although private insurance is

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<sup>4</sup> The Commission's report shall take into account the viewpoints of relevant stakeholders.

It is understood that the Report will be submitted to the European Parliament in March 2011.

<sup>5</sup> N.B. the French report which did not address this issue



covered by anti-discrimination law in France, it is reported that gender reassignment surgery would be regarded as a matter of public healthcare and therefore not a matter of access to services, and would therefore fall outside equality legislation. These approaches do not appear to be consistent with Art 3 of the Directive, Article 57 Lisbon Treaty and the case of Geraets-Smits.

#### **Lessons Learned:**

**Questions were raised as to whether the national legislation of Austria and France complies with these provisions; The positions of Austria and France could be taken into consideration in the section of the EC's summary report, in reviewing the implementation of the Gender Goods and Services Directive.**

#### **4. Which court, tribunal, equality body or organisation would be competent?**

In some Member States who responded the case against the insurance company could be heard by a body established to deal with complaints under equality legislation. Generally these bodies cannot award damages but can deliver non-binding decisions and make recommendations. Additionally, civil courts also have jurisdiction and can make binding decisions/award damages in such discrimination claims. In other states only the civil courts are competent to decide the case.

It is also possible to challenge the *legislation* which set out the basic insurance provisions to test whether it is consistent with EU equality law (see Czech Republic and UK reports).

In some Member States (Czech Republic, Hungary) it is also possible to challenge the constitutionality of a particular law.

#### **5. Is there direct or/and indirect discrimination against the complainants on the ground of gender or/and gender identity? Who are the appropriate comparators in this case?**

Most respondents<sup>6</sup> were of the opinion that the provision which only permitted breast removal to be covered by the basic insurance policy scheme potentially amounted to indirect sex discrimination. That is, an apparently neutral provision was applied which put persons of one sex (i.e. natal males who were transsexual) at a particular disadvantage compared with natal females.

The responses for Hungary and Sweden opined that this case raises issues of direct discrimination as male to female transsexuals were treated less favourably than female to male transsexuals.

Slovakia, Sweden and the UK also noted that the legislative provision setting out that only breast removal may be covered in basic health insurance was also potentially indirectly discriminatory.

Most respondents reported that this would be treated as an indirect sex discrimination case, comparing the treatment of male to female transsexual people with female to male transsexual people. As far as Equinet is aware, indirect discrimination on the basis of a combination of factors has not yet been tested by the Court of European Justice. In order to establish that there was particular disadvantage, the facts of this case would require a court to consider the impact of the provision not on men and women as a whole and not on those intending to undergo gender reassignment and those without that intention, *but to consider those factors combined*. Otherwise it appears the claimant's case would fail: they could not show that men were being treated less favourably as they would not be able to establish that men generally were put at a particular disadvantage by the provision to only allow breast removal under the basic insurance scheme. Nor would they be able to show that people intending to undergo gender reassignment were put at a substantial disadvantage, as natal

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<sup>6</sup> France did not answer this question – as noted above, gender reassignment surgery would not be deemed to be a service (and therefore covered by the Directive), but as a matter of public healthcare.

females were not disadvantaged by this rule. It is not clear, then, that protection would be afforded under the Directive where there is a combination of factors as in this case. UK discrimination on the basis of gender reassignment is a stand alone provision separate from the prohibition on sex discrimination. It is reported that this case could be pursued as a sex and gender reassignment case combined, based on domestic case law.<sup>7</sup>

**Conclusion:**

**Most of the answers indicated that this was a case of indirect discrimination on the combined grounds of sex and gender reassignment.**

**Lessons Learned:**

**A modification of the gender goods and services directive to include of a provision relating to discrimination on the basis of combined characteristics and a separate provision in the Articles expressly prohibiting gender reassignment discrimination could protect Cases like this one and ensure standard practice across Member States.**

**6. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception?**

**In your answer please consider what the impact is of having national health insurance legislation which sets out the minimum scope of insurance that must be offered but does not provide a maximum scope to that insurance.**

Article 2(b) of the Directive provides that indirect discrimination may be objectively justified where there is a legitimate aim and the means of achieving that aim are appropriate and necessary.

A number of respondents were of the view that the insurers would rely on the fact that the basic insurance policy was prescribed by legislation as a defence and the court would consider whether the domestic legislation could be read compatibly with the EU law. A domestic legislative measure which applies to an activity covered by EC law that is in breach of the principle of equality must be disapplied to ensure primacy is given to EC law<sup>8</sup>.

Therefore, the courts could consider whether the law which requires basic insurance to cover only breast removal was indirectly discriminatory against transsexual men; and if so, whether it was objectively justified. We do not have details of the reasons why the provision was framed in this restrictive way. However, one may assume that cost may be a reason why the basic insurance policy only covered breast removal. However, the ECJ case of Erika Steinicke v Bundesanstalt für Arbeit C-77/02 found that although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against one of the sexes.

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<sup>7</sup> There is no express provision prohibiting indirect discrimination on combined grounds in UK domestic legislation. However, the case of De Bique v MOD established that the provision in the Sex Discrimination Act which required that the comparison of persons of different sexes must be such that the relevant circumstances in one case are the same or not materially different in the other. This meant that the Employment Appeal Tribunal considered the effect of a provision on men and women of Vincentian national origin and British national origin, i.e. a combination of race and sex. It must be noted however that De Bique does not sit well with existing case law, as the Court of Appeal found in the case of Bahl v Law Society that complaints of discrimination experienced because of a number of characteristics must be considered separately.

<sup>8</sup> Under EU law, national courts have an obligation to interpret domestic law consistently with an EU Directive, so far as it is possible to do so, in accordance with the ECJ finding of Marleasing SA v La commercial internacional de alimentacion C-106-/89 [1992] 1 CMLR 305. Where it is not possible to do so, it is an established principle that the domestic law should be disapplied where the Respondent is a public authority. In this case the insurance company is arguably an emanation of the state in respect of the basic insurance and therefore the claimants could ask the court to give the Directive direct effect and disapply the domestic legislation. Alternatively, the claimants could argue that the court should disapply the domestic legislation which is inconsistent with a the general principle of EU law of equal treatment, even in a claim against a private employer - see Kucukdeveci v Swedex GmbH and Co; Mangold v Helm [2006] IRLR 143, ECJ, paras 77 - 8; Simmenthal [1978] ECR 629, para 21

**Conclusion:**

**Although the content of the basic insurance policy was prescribed in national law, if this national law is found to be in breach of EU law, the national court must disapply it to ensure the supremacy of EU law.**

**7. If there is no justification or exception, what would be the sanctions or remedies under your national legislation?**

A number of respondents said that compensation would be payable to the complainant. In Slovakia the complainant may ask the court to require the discriminator to refrain from the discriminatory and where possible rectify the discrimination or provide 'adequate satisfaction'. Where 'adequate satisfaction' is not possible, the complainant may also see financial compensation. In the Netherlands, the courts could impose a fine, or remedies such as restitution or voidance of a decision. The Anti-Discrimination Tribunal/Board in Norway can issue legally binding decisions and fines can be imposed for non compliance. Criminal sanctions were possible in Finland and France (imprisonment/fine).

**8. Is it possible for your organisation to challenge the national legislation regarding health insurance schemes in front of the court/constitutional court?**

While the equality body in the UK is empowered to challenge discriminatory legislation in its own name, a number of equality bodies could not. However, individuals affected by the discriminatory law would be able to challenge it. The question of whether or not the Norwegian equality body could make such a challenge in its own name has not yet been tested, although it could act as amicus curiae in a case brought by someone directly affected by a discriminatory law.

**9. Would this case (also) fall under the scope of the proposed Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in the access to and supply of goods and services and/or under your national equality legislation relating to equal treatment on the ground of disability?**

Disability is dealt with by the Ombud for Disability in Austria, not the Ombud for Equal Treatment, the Austrian and Finnish respondents report that they are not aware of any jurisprudence relating to transgender and disability. The Dutch respondents was of the opinion that in theory it would be possible to bring a disability claim as a transsexual person but noted that this would be unlikely to occur, however, as some transsexual people do not perceive themselves as having a disability. Norway and Slovakia also noted that it would be controversial amongst the transsexual communities to adopt that approach. Both Holland and Finland reported that they did not have protection on grounds of disability in the field of services in any event and therefore framing the case in this way would not assist the claimants in those countries.

In the UK it is possible for a transsexual person to pursue a claim for disability discrimination where they meet the definition of being disabled (i.e. they have a physical or mental impairment which has a substantial and long term adverse impact on their ability to carry out day to day activities). Gender dysphoria is recognised by the World Health Organisation as a medical condition. Discrimination because of disability in the provision of services is also prohibited and, furthermore, service providers are required to make reasonable adjustments where a policy makes it impossible for a disabled person to make use of a service. A court would therefore need to decide whether in this case whether or not was reasonable for the insurers to refuse to provide an additional scheme for the reimbursement of the cost of breast augmentation surgery for Trans women.

**Conclusion:**

A number of the answers indicated that there is currently no protection on grounds of disability outside the field of employment.

**Lessons Learned:**

Currently there is no protection at EU level and in several Member States against discrimination on grounds of disability<sup>9</sup> in the provision of services. It has been argued that this creates a hierarchy with only certain protected characteristics<sup>10</sup> having protection outside employment. This also leads to a variation a protection across Member States which inhibits freedom of movement.

It is important to secure agreement on the Proposed Goods and Services Directive covering these remaining grounds as soon as possible in order to provide better and harmonised protection against discrimination at EU level.

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<sup>9</sup> Nor on the grounds of sexual orientation, religion or belief and age

<sup>10</sup> Sex, gender reassignment and race

## Annex 1

# Country Responses to the Case Study on Volunteering

## Austria

### ***Answers provided by the Ombud for Equal Treatment***

#### **(A) Volunteers and Legal Status**

**(i)** Definition employee: § 1151 ABGB (Austrian Civil Code): A contract of employment is generated when somebody binds himself to provide services to another person for a certain time. (Non official translation)

Another definition is given in § 36 ArbVG (Arbeitsverfassungsgesetz). This law regulates the rights of a company's workforce. (Non official translation)

The definition defines employees as persons employed by a company or business including all apprentices and people who fulfil their work duty in their own homes regardless of their age.

No employees in the sense of this law are:

1. Persons who are legally representing the employer
2. Leading employees who have significant influence in managing the company or business
3. People who are in occupation mainly for purposes of their education, treatment, healing or re-integration, if they are not working on basis of a working contract
4. People who are working on basis of imprisonment or any form of legal detainment
5. People whose occupation is based on religious, charitable or social motivation, if they are not working on basis of a working contract
6. People who are working short-time for purposes of training

**(ii)** In the German version of the Directive 2000/78/EC the termini "occupation" is translated with the word "Beruf". "Beruf" is not defined in Austrian Law and does not refer to a factual occupation but to profession in general.

**(iii)** The Aliens Employment Act defines in § 3, volunteers as persons,

- Occupied solely for the purpose of extending and applying knowledge for the acquisition of skills for the practice
- Without a duty to work and remuneration title
- Working for no longer then three month in the calendar year.

**(iv)** According to § 8 General Social Insurance Act, volunteers have to be insured at the public accidental insurance.

The Austrian Federal Equal Treatment Act prohibits discrimination on grounds of sex, ethnic origin, religion or belief, age or sexual orientation with regard to retraining outside of an employment relationship.

The legal literature argues that retraining outside of an employment relationship also include volunteering without further defining which volunteer activities are meant by this provision.

Since there is no further case law with regard to this activity it solely can be assumed, that volunteers fulfilling the definition of volunteers in the Aliens Employment Act are covered by the Austrian Federal Equal Treatment Act.

(v) The regulations in the Aliens Employment Act define the status of volunteers. Persons fulfilling this definition have to be insured at the public accidental insurance and it can be assumed that they are also covered by the Federal Equal Treatment Act. Hence under the Austrian Federal Equal Treatment Act Volunteers may claim for compensation when they are discriminated against during their volunteer activity because of their sex of ethnic origin, religion or belief, age or sexual orientation.

(vi) -

(vii) According to the provision of the Aliens Employment Act Volunteers, volunteers do not have an obligation to work, no right for remuneration and are occupied solely for the purpose of extending and applying knowledge for the acquisition of skills for the practice for no longer than three month in the calendar year. On the other hand side employees/workers do have a legal obligation to work and a right for remuneration. These differences show the different nature of the work relation of workers/employees and volunteers.

## **(B) Research and Statistics**

(viii) -

(ix) -

## **Belgium**

### ***Answers provided by the Centre for Equal Opportunities and Opposition to Racism***

#### **(A) Volunteers and Legal Status**

(i) The legal status of employee has defined under our Employment Act<sup>11</sup> According to this provision, an employee is any person who is paid to do an intellectual work under the authority of an employer.

(ii) The legal status of worker has defined in our Employment Act<sup>12</sup>. According to this provision, a worker is any person who is paid to carry out a manual work under the authority of an employer

(iii) The status of volunteers is defined under our Volunteer Act<sup>13</sup>. This volunteer activity is performed without being paid in benefit of an organisation outside the volunteer's private sphere (family, friends). The voluntary activity takes place outside an employment, service or statutory contract. The organisation must take out an insurance contract in order to cover any damage during the voluntary activity.

(iv) -

(v) Belgian preparatory bill documents have expressly mentioned the voluntary activity as an occupation which is covered by our equality legislation.<sup>14</sup>

<sup>11</sup> art. 3 of Employment Act of 3 July 1978, [www.ejustice.just.fgov.be](http://www.ejustice.just.fgov.be)

<sup>12</sup> art 2 act of Employment Act of 3 July 1978, [www.ejustice.just.fgov.be](http://www.ejustice.just.fgov.be)

<sup>13</sup> Volunteer act of 3 July 2005, MB 29.08.05 amended MB, 11 Augustus 2006, <http://www.socialsecurity.fgov.be/fr/specifieke-info/vrijwilligers/wet/index.htm>

<sup>14</sup> *Le champ d'application ne vise pas seulement le travail salarié, mais également le travail indépendant et le bénévolat. La branche d'activité dans laquelle le travail est réalisé n'est pas pertinente. Dans tous les secteurs de la vie professionnelle, l'avant-projet pourra donc être appliqué.* (translation in Dutch: *Het toepassingsgebied viseert niet alleen arbeid in loondienst maar ook zelfstandige arbeid en vrijwilligerswerk. De activiteitstak waarin de arbeid wordt uitgevoerd is irrelevant. In alle sectoren van het professionele leven vindt het voorontwerp bijgevolg principieel toepassing.* (projet de loi tendant à lutter contre certaines formes de discrimination; DOC 51 2722/001 CHAMBRE DES REPRÉSENTANTS DE BELGIQUE, DOC 51 2722/001; 5e S E S S I O N D E L A 51e L É G I S L A T U R E; 2006 2007; 26 octobre 2006;C, p.39) [www.lachambre.be](http://www.lachambre.be)

(vi) Certain situations could not fall in the scope of our Volunteer Act, for example in the absence of specific insurance for volunteers as provided legally. In this case, such situations could be covered by our anti-discrimination legislation which protects the access to cultural, economic, political and social activities available to the public<sup>15</sup>.

(vii) -

### **(B) Research and Statistics**

(viii) In Belgium, more than one in ten wage earners with other words (1.6 million of volunteers in May 2008) work in the voluntary sector (excluding teaching)<sup>16</sup>. 23 % of persons aged more than 75 years work as volunteer and these figures are growing<sup>17</sup>. Minority group data is sensitive and protected by the privacy law<sup>18</sup>. Moreover, it still remains controversial concerning racial or ethnic origin data because it could be breach the anti-racism legislation.

(ix) -

## Cyprus

### ***Answers provided by the Office of the Commissioner for Administration (Ombudsman)***

#### **(A) Volunteers and Legal Status**

(i) There is not a single definition of “employee” in domestic labour law. However, relevant case law has determined some basic characteristics of what constitutes “employment relationship” and remuneration is one of them.

(ii) There is no separate legal definition between “employee and “worker”.

(iii) No.

(iv) There is no other legal status which specifically/explicitly covers volunteers or unpaid workers.

(v) Not Applicable.

(vi) No, they didn't have any explicit protection.

(vii) Not Applicable.

#### **(B) Research and Statistics**

(viii) Within the framework of a Study on Volunteering in the European Union - published in 2008 and managed by the DG for Education and Culture of the European Commission – a country report was drafted for Cyprus.

(<http://ec.europa.eu/citizenship/eyv2011/doc/National%20report%20CY.pdf>)

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<sup>15</sup> art 5,8° Anti-discrimination Act of 10 May 2010

<sup>16</sup> *Associations in Belgium: a quantitative and qualitative analysis of the sector*, King Baudouin Foundation, University of Liège (Centre for Social Economy) and Catholic University of Louvain (Hoger Instituut van de Arbeid) [www.cbs.nl](http://www.cbs.nl).

<sup>17</sup> [www.cbs.nl/nl-NL/menu/home/default.htm](http://www.cbs.nl/nl-NL/menu/home/default.htm)

<sup>18</sup> Act of 08.12.92, <http://www.privacycommission.be/fr/legislation/national/#N10096>

In the Report, extensive reference is made to a 2008 Survey carried out by the “*Volunteer Network Project*”, which found the following:

- a) 19% of the people sampled had actively volunteered in the previous 12 months
- b) Over 1 in 4 of the active volunteers (43%), have been volunteers for more than 10 years.
- c) Gender is not a decisive factor in volunteering with an equal split by gender) between volunteers and non-volunteers, i.e. 49% male and 51% female for both groups.
- d) Half of all volunteers came from the age groups between 35 and 54 and non volunteers heavily concentrated among younger people under 35 years old. More specifically, the results of the Survey were the following:

| Age bands | Volunteers |
|-----------|------------|
| 16-24     | 14%        |
| 25-34     | 15%        |
| 35-44     | 28%        |
| 45-54     | 24%        |
| 55-64     | 14%        |
| 65+       | 6%         |

In Cyprus an Organisation has been established (since 1973) which coordinates voluntary organisations and promotes the development of relevant policy and cooperation with governmental authorities. This organisation is called the Pancyprian Volunteerism Coordinative Council (PVCC) (<http://www.volunteerism-cc.org.cy>) and is like an umbrella membership organisation for voluntary organisations. Currently, more than 350 voluntary organisations are members of the PVCC, both at national and local level.

(ix) No. We are not aware.

## Czech Republic

### ***Answers provided by the Office of the Public Defender of Rights***

#### **(A) Volunteers and Legal Status**

(i) A legal status of employee is defined by the Act No. 262/2006 Coll., Labour Code, as amended (hereinafter referred to as “Labour Code”). An individual acquires capacity to have rights and duties as employee by achieving 15 years of age. Such a person can independently act as a participant within labour relationships. Protection of employees is ensured specially by above mentioned Labour Code. Protection against discrimination of employees is enacted by the Act No. 198/2009 Coll., on equal treatment and on the legal means of protection against discrimination and on amendment to some laws (hereinafter referred to as “Anti-discrimination Act”). It sets forth also the right to employment without discrimination.

(ii) Although Czech legal order operates with term “worker” in several statutes, it does not contain particular definition a legal status of worker.

(iii) Legal status of volunteer is laid down by the Act No. 198/2002 Coll., on Volunteer Services, as amended (hereinafter referred to as “Volunteer Service Act”). According to the Sec. 3 par. 1: “*Volunteer can be a natural person*”

- a) *over 15 years of age if volunteer services are performed on the territory of the Czech Republic;*



*b) Over 18 years of age if volunteer services are performed abroad, who has freely decided to render volunteer services on the basis of his/her skills, knowledge and qualities.”*

The Volunteer Service Act sets special conditions of voluntary service which is encouraged and protected by the state. Protection of volunteer covers only volunteers as defined by this Act. It means that state does not hinder voluntary activity outside scope of Volunteer Service Act; nevertheless, it does not grant particular protection to people who perform such an activity and doesn't recognise them as volunteers in terms of other legal acts.

**(iv)** There is no other legal status which would protect unpaid or voluntary workers except that contained in Voluntary Service Act.

**(v)** Protection granted to every individual in respect to the right to employment, is regulated by the Act No. 435/2004 Coll., on Employment, as amended (hereinafter referred to as "Employment Act"). This protection is in further details specified by the Anti-Discrimination Act. The right to employment is in Sec. 10 defined as *"The right to work is the right of the person who wishes to and is able to work and is applying for work, to work in a labour law relation (hereinafter referred to as "employment"), to the brokering of employment and to the provision of other services under the conditions set forth in this Act."* According to the Sec. 1 a) of the Labour Act, labour law relations are relations between employer and employee arising in connection with performance of dependent work. Sec. 2 par. 4 of the Labour Code sets out, that "dependant work" means exclusively personal performance of work by an employee for his employer within the relationship of the employer's superiority and his employee's subordination, for a wage, salary or other remuneration paid for work done within working hours at the employer's workplace. Thus, working relationships that fall within the scope of the Employment Act as well as Labour Act are those, where one works for another for remuneration; there is kind of equivalency between an employee and his employer.

Every employee is protected from discrimination already when exercising his/her right to employment during applying for a job. Consequently everyone shall be treated equally irrespectively to his/her racial or ethnic origin, nationality, citizenship, social origin, birth, language, state of health, age, religion or faith, property, marital status or duties to one's family, political or other opinions, membership of and activities in political parties or movements, trade unions or employer organisations in respect to access to employment.

Protection within labour contract is regulated by the Labour Act which ensures every employee (of a particular employer) the right to be treated equally in terms of working conditions, work remuneration, vocational training and opportunities for career advancement (sec. 16 par. 1). Discrimination in labour relationships prohibits sec. 1 par. 1 of the Anti-Discrimination Act.

Volunteer Service Act provides every volunteer recognised by this Act with the general right to equal treatment during selection among the volunteers (sec. 7 par. 6). Equal access to voluntary service should be therefore granted by this provision. Neither Volunteer Service Act nor other legislation (e.g. Anti-Discrimination Act) does cover pursuance of a voluntary service and its termination. Volunteers already working on basis of volunteer contract are not specifically protected from unfair or unequal treatment within Czech legal order. However, Volunteer Service Act stipulates that regarding *"the agreement on working hours, breaks, conditions for leave and security at work, appropriate employment regulations shall be used and during the stipulation of the pocket-money amount, regulations on travel subsistence*

*shall be used accordingly*<sup>19</sup>. Consequently, it could be argued that such analogy for voluntary service was set forth by the legislator in order to protect unpaid workers in similar extent as the employees. There is consequently no reason to exclude volunteers from protection against discrimination.

**(vi)** The only legislation which can be regarding discrimination of volunteers taken into consideration beside the Volunteer Service Act is general legislation guarantying the right to protection of human personality contained in the Civil Code (Act No. 40/1964 Coll., Civil Code, as amended; hereinafter referred to as “Civil Code”). Before the Anti-Discrimination Act was introduced, the right to equal treatment was considered to be part of the right to personality protection. So that, if there is a matter left uncovered by the anti-discrimination law, it would be possible to apply above mentioned provisions.<sup>20</sup>

**(vii)** Regarding protection against discrimination, I do not see any rational basis for difference between employees/workers and volunteers/unpaid workers. The right to equal treatment irrespective to race, ethnic origin, disability, age, religion or faith etc. is question of protecting dignity of a human being. It therefore should not be important if a work is paid or not. Especially long-term voluntary service is similar to labour relationship to such extent, that I cannot find a reason to distinguish between people working without wage and employees.

## **(B) Research and Statistics**

**(viii)** -

**(ix)** As far as Czech Ombudsman is informed, there is no available research dealing with voluntarism in the Czech Republic.

## Denmark

### ***Answers provided by the Danish Board of Equal Treatment***

First of all we wish to reiterate that the mandate of the Board is limited to the assessment concrete cases that are submitted to the Board.

The answers provided below are therefore merely based on informal opinions from the Secretariat, and should not be seen as opinions from the Chairpersons and members of the Board. In order for the Board to address these issues we would need a concrete complaint from an alleged victim.

#### **Definition of employee and worker**

To our knowledge there is not one, common definition of these types of labour. You may find varying definitions, depending on the legislation in use. An example could be the “Employers’ and Salaried Employees’ Legal Relationship Act” which covers one part of the labour market (Funktionærloven). For the purpose of this act, the term “salaried employee” shall mean:

*(a) Shop assistants and office workers employed in buying and selling activities, in office work or equivalent warehouse operations,*

*(b) Persons whose work takes the form of technical or clinical services (except handicraft work or factory work) and other assistants, who carry out comparable work functions,*

<sup>19</sup> Sec. 5 par. 5 of the Volunteer Service Act

<sup>20</sup> Sec. 11 of the Civil Code: “An individual shall have the right to protection of his or her personhood, in particular of his or her life and health, civic honour and human dignity as well as of its privacy, name and expressions of personal nature.”

*(c) Persons whose work is wholly or mainly to manage or supervise the work of other persons on behalf of the employer,*

*(d) Persons whose work is mainly of the type specified in (a) and (b).*

*(2) This Act only applies in cases where the person concerned is employed by the employer for at least 15 hours a week on average and occupies a position in which he works under the instructions of the employer.*

*(3) The provisions of this Act shall not apply to civil servants or civil servants on probation in the state sector, the primary school system, the Danish National Church, or the local authorities, to salaried employees covered by the Seamen's Act of 7 June 1952, or to apprentices, covered by the Apprenticeship Act. However, the provisions laid down in sections 10 to 14 shall apply to salaried employees covered by the Seamen's Act.*

*2. - (1) The employment contract between the employer.*

In general, most people in Denmark work in accordance with the rules set out in the bilateral agreements that are concluded between trade unions (overenskomster).

### **Legal status of volunteer/unpaid worker**

To our knowledge the legal status of a volunteer or unpaid worker may be included in some parts of the legislation that serves to protect employees. This could for instance be in the case of recognition of an industrial injury or within the field of providing a safe working environment.

To our knowledge there is no legal status covering all volunteers or unpaid workers.

To our knowledge volunteers and unpaid workers would not be covered by the Danish Act that implements directive 2000/78/EC. The Board would need to take a decision on this when processing a concrete case.

### **Legal consequences**

Again, this is not within the scope of the Board, and should therefore be seen merely as an informal answer.

In case a volunteer or unpaid worker experiences an industrial injury and this is indeed recognised as an injury, this person may be awarded compensation.

An example related to industrial injury related to a person who voluntarily participated in the collection of funds for the National Cancer Association. This person was considered covered by the legislation. In the decision making process importance was attached to the fact that work carried out could be compared to paid work, and also that the work done primarily happened in the interest of the Cancer Association.

Another case related to a person who also did volunteer work for a large Danish humanitarian non-governmental organisation (NGO). This person visited elderly persons who were very often lonely. This person was not considered covered by the legislation and no compensation could be awarded. Importance was attached to the fact that this person made himself/herself available on a voluntary, unpaid aid as a support and encouragement for the person in need of a visit. The activity was merely considered a social, humanitarian activity that could not be compared with actual "work".

In case of issues related to the working environment, a so-called "consultancy notice" may be issued. This is a notice ordering an enterprise to seek advice from an authorised health and safety consultant with a view to solving one or more of its health and safety problems. The employer may also be awarded a fine.

### **Statistics**

We are not aware of any statistics within this area.

## **Answers provided by the Danish Institute for Human Rights**

### **A. Volunteers and Legal Status**

(i) -

(ii) In Danish legislation there is no universal definition of an employee or a worker. The word often used in legislation is “salary earner” and the concept of a salary earner is not entirely congruent in the act on vacation<sup>21</sup>, the act on salaried employees<sup>22</sup> and the act on occupational injury insurance<sup>23</sup>.

Thus in Denmark the demarcation of who is a salary earner varies in regard to which set of rules a person wishes to apply. However there is some common idea on who is a salary earner in a contract of service and one of the guidelines is the arranging of the financial settlement, especially the measuring and nature of the payment.<sup>24</sup>

The act on prohibition against differential treatment in the labour market<sup>25</sup> mentions in section 2, subsection 1 that an employer must not discriminate *salary earners* [lønmodtager] or *applicants* [ansøgere] to available positions. From section 3, subsection 1 it follows that an employer must not discriminate *employees* [ansatte].

In section 1, subsection 2 in the act on the employer’s duty to inform the salary earner about the terms of the employment<sup>26</sup> a salary earner is defined as a person who receives payment for his personal work in a contract of service. This act implements Council Directive 91/533/EEC of 14 October 1991 on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship and the act uses the concept “salary earner” and not “employee”.

In a case from the Eastern High Court from 2005<sup>27</sup> a person (A) filed a lawsuit against an institution claiming that he was entitled to a contract of employment in connection to his work at production workshop. A was staying at an institution for persons with special social problems where he was working in one of the institution’s four production workshops. A was paid a very small amount – a so-called working award – which was 11.87 DKR per. hour which is app. 1.6 EUR. He received the working award next to his cash assistance. The working award was taxable and fell under the scope of the rules on labour market contribution since the award is seen as payment of accomplished work outside of employment. There was fixed working hours in the production workshops.

The Eastern High Court found that A’s stay at the institution had primarily been a residential accommodation, while occupation was not the purpose of the stay. The occupation that was offered had not been oriented towards supporting future business opportunities, but had the character of a social pedagogical offer. Wages paid beside cash assistance was seen as equal to the size of pocket money. The authorities which an employer has in an actual employment were not the same in this situation since A could not be terminated if he did not turn up for work. The production that was created was purchased by a regular buyer, but there was no agreement on a fixed quantity which was to be purchased. According to the director of the institution the production was unprofitable and loss-making which supported the notion that the occupation had a different aim than job-oriented. The Eastern High Court concluded that there was neither an employment nor a contract of service. The institution was therefore not required to give (A) a contract of employment.

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<sup>21</sup> Consolidated act no. 407 on vacation of 28 May 2004 [Lovbekendtgørelse 2004-05-28 nr. 407 *Ferielov*].

<sup>22</sup> Consolidated act no. 81 on salaried employees of 3 February 2009 [Lovbekendtgørelse 2009-02-03 nr. 81 *om retsforholdet mellem arbejdsgivere og funktionærer*].

<sup>23</sup> Consolidated act no. 848 on industrial injury of 7 September 2009 [Lovbekendtgørelse 2009-09-07 nr. 848 *om arbejdsskadesikring*].

<sup>24</sup> Ole Hasselbach, *Lærebog i Ansættelsesret og Personalejura*, 2. udgave, Djøf, p. 26.

<sup>25</sup> Consolidated act no. 1349 on prohibition against differential treatment of 16 December 2008 [Lovbekendtgørelse 2008-12-16 nr. 1349 *om forbud mod forskelsbehandling på arbejdsmarkedet mv*].

<sup>26</sup> Consolidated Act no. 240 of 17 March 2010 on the employers duty to inform the salary earner about the terms of the employment [Lovbekendtgørelse nr. 240 af 17. marts 2010 *om arbejdsgiverens pligt til at underrette lønmodtageren om vilkårene for ansættelsesforholdet*].

<sup>27</sup> U.2005.1429/2Ø.

**(iii)** In Denmark there is no separately defined legal status of volunteer or unpaid worker.

The National Volunteer Centre in Denmark<sup>28</sup> however operates with a definition of the concept of a volunteer. According to this it is a person who undertakes a voluntary activity and a volunteering activity is the activity or act carried out by a volunteer. Volunteering activities refer to activities that are:

- Voluntary or non-obligatory, i.e. undertaken freely without physical force, legal coercion or financial pressure and no threats of financial or social sanctions (for instance of being cut off from social security benefits or a social network) if you no longer wish to continue the work.
- Unpaid. However, this does not preclude reimbursement for expenses the volunteer has incurred into while carrying out the activities, such as travelling and telephone expenses. Or that the person receives a symbolic amount for the voluntary work.
- Carried out for persons other than the volunteer's own family and relatives. This distinguishes voluntary work from ordinary domestic activities and the informal care of family members.
- For the benefit of other people than the volunteer and his or her family. The value that the work has for others makes it voluntary work. This precludes participation in i.e. self-help groups or sport clubs as voluntary work.
- Formally organised - mostly in an association, but this need not be the case. Ordinary helpfulness or spontaneous acts such as helping an elderly person to cross a street etc. can not be characterised as volunteering activities.

**(iv)** As a starting point there is no other legal status which would cover any or all volunteer or unpaid workers. However parallels might be drawn between volunteers and trainees however it may be far fetched.

In a specific case<sup>29</sup> a young Muslim girl, who attended school in the 9<sup>th</sup> grade, was planning to be a trainee for one week at a department store. This agreement entered into by the department store and the school. The purpose of being a trainee for a week is to give the students the opportunity to explore the education and working conditions at the working place and/or working area in which they have chosen to spend the week. The work is unpaid. The young girl in this case was wearing a headscarf due to her religious belief. When she turned up for her first day of work as a trainee at the department store she was send away. The reason for this was that the store would not allow her – or any other employees for that matter - to wear anything on her head. The Eastern High Court found that the expulsion of the trainee was indirect discrimination and referred to the Act on Prohibition against Differential Treatment in the Labour Market.

This case illustrates that a trainee was protected by the prohibition against discrimination found in the act on prohibition against differential treatment in the labour market. It follows from the court's remarks that it considered the purpose of the act as well as the travaux preparatoires which advocate for a wide interpretation of the scope of the law in order for the event which was laid before the court to fall under the scope of the act. However reference was made to section 3, subsection 1 and 2 of the act which covers vocational training, vocational guidance, re-education, advanced educational [erhvervsmæssig videreuddannelse] as well as any one who runs a business for vocational guidance and occupation and any one who assigns occupation.<sup>30</sup>

Even though neither the intern nor the volunteer is being paid for the work they do and therefore to this extent are comparable it is very unlikely that a volunteer who volunteers "just"

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<sup>28</sup> <http://www.frivillighed.dk/Webnodes/English/296>

<sup>29</sup> U.2000.2350 Ø.

<sup>30</sup> Section 3, subsection 1 and 2 of the act on differential treatment in the labour market is to some extent equivalent to article 3 (1) (b) of the directive 2000/78/EC on establishing a general framework for equal treatment in employment and occupation. However section 3, subsection 1 and 2 of the act was part of the original act from 1996. Thus the provisions are not an implementation of the directive but they are in conformity with the directive.

to volunteer will fall under the scope of either section 3, subsection 1 or 2 of the act on prohibition against differential treatment on the labour market.

An interesting element to this problematic is that it seems that a volunteer *can be* covered by the industrial injury act.<sup>31</sup> It follows from section 2, subsection 1 that the work can be paid or unpaid, it can be permanent, temporary or it can be transient. However whether an unpaid person falls under the scope of the act can only be decided on a case by case basis and according to the concrete circumstances of each particular case where the nature and the scope of the work is examined. In a case from the National Social Appeals Board<sup>32</sup> a man who volunteered as a collector for the Danish Cancer Society was found to fall under the scope of the industrial injury act. The Board emphasised that it could be assumed that some sort of engagement<sup>33</sup> [antagelsesforhold] between the man as a collector and the Danish Cancer Society had been established during the collection. Furthermore the Board emphasised that the collection was comparable with work since the collection mainly took place in the interest of the Danish Cancer Society.

The industrial injury act does of course not protect against discrimination.

Furthermore volunteers seem to be covered by the act on working environment.<sup>34</sup> It follows from section 1 (1) that the act aims to create a safe and healthy working environment and from section 2, subsection 1 follows that the act covers work for an employer. Unpaid work for an employer is thus covered.<sup>35</sup> It follows from administrative order no. 559 on the execution of work of 17 June 2006 section 9a that it must be ensured that the work does not involve any risk physical or mental deterioration in health due to either bullying or sexual harassment. The definition of bullying or sexual harassment does however not cover discrimination but there is protection of volunteers who are *harassed* at the place where they volunteer.

**(v)** As stated in the above there is no universal definition of an employee or a worker in Danish legislation. Neither is there a separately defined legal status of volunteer or unpaid worker.

However employees, salary earners or applicants to available positions are all protected from discrimination under the act on prohibition against differential treatment in the labour market or the act on equal treatment of men and women in occupation<sup>36</sup> as well as other acts on equal treatment between men and women.

There is no known case law on whether a volunteer would fall under the scope of the differential treatment act.

**(vi)** See under question (iv) for answer.

**(vii)** I have not been able to find information on this in either the travaux préparatoires to the legislation mentioned in the above or in screened case law.

## **(B) Research and Statistics**

**(viii)** The recent mapping of the Danish voluntary work is from 2004 and it shows that 35 per cent of Danes do volunteer work which comes to app. 1.5 million volunteers in total.<sup>37</sup>

According to The National Volunteer Centre<sup>38</sup> men are doing more volunteer work than women, when all volunteer work is taken into account. Among the men who participated in the

<sup>31</sup> Consolidated act no. 848 on industrial injury of 7 September 2009 [Lovbekendtgørelse 2009-09-07 nr. 848 om arbejdsskadesikring].

<sup>32</sup> Case no. 130-09 from the Board of Social Appeals.

<sup>33</sup> The Danish word "antagelsesforhold" is difficult to translate. It is in all probability deliberate that this word has been used and not the word "ansættelsesforhold" which would be translated into the word "employment".

<sup>34</sup> Consolidated act no. 268 on working environment of 18 March 2003 [Lovbekendtgørelse 2005-03-18 nr. 268 om arbejdsmiljø].

<sup>35</sup> Confirmed by an employee at the Danish Working Authority.

<sup>36</sup> Consolidated act no. 734 on equal treatment on men and women in occupation etc. of 28 June 2006 [Lovbekendtgørelse 2006-06-28 nr. 734 om ligebehandling af mænd og kvinder med hensyn til beskæftigelse mv.].

<sup>37</sup> <http://www.frivillighed.dk/Webnodes/FAQ+-+fakta%2C+tal+og+begreber/21087>.

<sup>38</sup> <http://www.frivillighed.dk/Webnodes/FAQ+-+fakta%2C+tal+og+begreber/21087>.

survey on volunteers<sup>39</sup> 38% was volunteers, while 32% of the women who participated in the survey were volunteers.

People over the age of 65 are the age group where least people volunteer while the age group where most volunteer is between 30 and 49 years. However within the social area persons over the age of 65 are just as active as volunteers from the other age groups.<sup>40</sup>

**(ix)** I am not aware of such research, statistics or information.

## Finland

### ***Answers provided by the Office of the Ombudsman for Minorities***

#### **A. A Volunteers and Legal Status**

##### **(i-ii)**

Section 1 of the Contracts of Employment Act (55/2001) defines the scope of application of the act as follows:

This Act applies to contracts (employment contract) entered into by an employee, or jointly by several employees as a team, agreeing personally to perform work for an employer under the employer's direction and supervision in return for pay or some other remuneration.

This Act applies regardless of the absence of any agreement on remuneration, if the facts indicate that the work was not intended to be performed without remuneration. Application of the Act is not prevented merely by the fact that the work is performed at the employee's home or in a place chosen by the employee, or by the fact that the work is performed using the employee's implements or machinery.

Section 2 of the act lists the derogations from the scope of application as follows:

This Act does not apply to:

- 1) Employment relations or service obligations subject to public law;
- 2) Ordinary hobby activities;
- 3) Such contracts on work to be performed which are governed by separate provisions by law.

There is separate legislation concerning state office and municipal office (304/2003 and 750/1994). The definition of 'office' does not include voluntary work.

The Act on Equality between Men and Women (609/1986) defines 'employee' and 'employer', but volunteers are not covered by the definition of an employee.

The scope of application of the Non-Discrimination Act (21/2004) implementing the Framework and the Race Directives covers among other areas "recruitment conditions, employment and working conditions, personnel training and promotion". In the Non-Discrimination Act 'employment' has a broader meaning than it has in the Contracts of Employment Act or in the acts on public office. According to the preparatory work of the Non-Discrimination Act, the act also covers work that is done without a contract of employment or without public office. In the preparatory works it is specifically mentioned, that this means that for example the decisions on choosing trainees are not to be made on discriminatory grounds.

**(iii)** No.

**(iv)** No.

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<sup>39</sup> In 2006, Denmark concluded a three-year long research project "Frivillighedsundersøgelsen" which was the Danish part of the Johns Hopkins Comparative Non profit Sector Project.

<sup>40</sup> <http://www.frivillighed.dk/Webnodes/FAQ+-+fakta%2C+tal+og+begreber/21087>.

(v) Some of the legal consequences of an employment contract are put down in Chapter 2 and 3 of the Contracts of Employment Act. Chapter 2, Section 1, on the general obligations of the employer:

The employer shall in all respects work to improve employer/employee relations and relations among the employees. The employer shall ensure that employees are able to carry out their work even when the enterprise's operations, the work to be carried out or the work methods are changed or developed. The employer shall strive to further the employees' opportunities to develop themselves according to their abilities so that they can advance in their careers.

Regulations on equal treatment and the prohibition of discrimination are laid down in Section 2:

- The employer shall not exercise any unjustified discrimination against employees on the basis of age, health, disability, national or ethnic origin, nationality, sexual orientation, language, religion, opinion, belief, family ties, trade union activity, political activity or any other comparable circumstance. Provisions on the prohibition of discrimination based on gender are laid down in the Act on Equality between Women and Men (609/1986). The definition of discrimination, prohibition on sanctions and burden of proof in cases concerning discrimination are laid down in the Non-Discrimination Act (21/2004). (23/2004)
- Without proper and justified cause less favourable employment terms than those applicable to other employment relationships must not be applied to fixed-term and part-time employment relationships merely because of the duration of the employment contract or working hours.
- The employer must otherwise, too, treat employees equally unless there is an acceptable cause for derogation deriving from the duties and position of the employees.
- The employer must observe the prohibition of discrimination laid down in paragraph 1 also when recruiting employees.

Further, the employer is bound by obligations related to occupational safety and health, by an obligation to give information on principal terms of work, by rules on minimum pay and by rules on pay during illness etc.

The general obligations by an employee are laid down in Section 1 of Chapter 3:

Employees shall perform their work carefully, observing the instructions concerning performance issued by the employer within its competence. In their activities, employees shall avoid everything that conflicts with the actions reasonably required of employees in their position.

Further, there are rules on occupational safety and health that the employees must observe as well as rules on competing activities, on business and trade secrets, on agreements of non-competition etc.

The acts on state/municipal office both include prohibitions to discriminate. In both acts a reference is also made to the Non-Discrimination Act (for example regarding the definition of discrimination). Also, both acts include rules according to which the authority has to give the holder of public office the benefits and rights that follow from the public office. The holder of public office has to perform his/her duties properly and without delay. The holder of public office has to follow the instructions related to the supervision of work. Further, there are rules related to the neutrality of the holder of public office, on giving information on the health conditions of the public office holder etc.

The general scope of application of the Occupational Safety and Health Act (738/2002) does not cover only persons that are parties of an employment contract or hold a public office, but is the following:

### **Section 2 – General scope of application**

(1) This Act applies to work carried out under the terms of an employment contract and to work carried out in an employment relationship in the public sector or in comparable service relation subject to public law.



- (2) This Act does not apply to ordinary hobby activities or professional sports activities.
- (3) This Act imposes obligations on employers and employees as parties to the legal relationship referred to in subsection 1 in the manner provided below.
- (4) In addition to the provisions of this Act, the provisions of other applicable statutes regarding occupational safety and health in certain kinds of work activities shall be observed.

### **Section 3 – Application of the Act to leased labour**

- (1) Anyone who has labour employed by someone else (leased labour) under their direction is required during the work to observe the provisions of this Act regarding employers.
- (2) Before starting the work, the recipient of labour shall define the occupational qualifications required for the leased labour and the specific features of the work with adequate precision and communicate these circumstances to the employer of the leased employees. The employer shall inform the employees of these circumstances and especially ensure that the leased employees have adequate occupational skills and experience and that they are fit for the work concerned.
- (3) The recipient of labour shall especially take care of orienting the employees into the work and the working conditions of the workplace, to the occupational safety and health procedures and, when necessary, to the arrangements for cooperation and information on occupational safety and health and for occupational health care.
- (4) Further provisions on the obligations of the recipient of labour and the employer of leased employees referred to in subsections 2 and 3 may be given by Government decree.

### **Section 4 – Other work within the scope of application**

A. In addition to what is referred to in section 2, this Act applies to:

- (1) Work done by apprentices and students in connection with education;
- (2) Work done by persons involved in employment measures;
- (3) Work associated with rehabilitation and rehabilitative work experience;
- (4) Work done by persons serving a court sentence;
- (5) Work or work activities done by persons undergoing treatment or kept in a place for treatment or a comparable institution;
- (6) Work done by conscripts and women in voluntary military service with the restrictions laid down in section 6;
- (7) Work done by persons in non-military national service;
- (8) Work done by persons belonging to a contractual fire brigade while voluntarily participating in rescue services; and
- (9) Other work as separately provided by statute.

B. The organisers of the work or other activities referred to in subsection 1 shall, in the work or activities under their direction, comply with the provisions of this Act regarding employers. Consequently, the provisions of this Act regarding employees shall be applied to persons performing the work or participating in the activities. If students or apprentices mentioned in section 1(1) carry out work or practical training associated with their studies, or get acquainted with working life in a workplace outside the educational institution, the provisions on leased labour laid down in section 3 shall be applied to the obligations of the educational institution and the recipient of labour.

The act includes, among other things, regulation on how to act in case harassment occurs:

### **Section 28 – Harassment**

If harassment or other inappropriate treatment of an employee occurs at work and causes hazards or risks to the employee's health, the employer, after becoming aware of the matter, shall by available means take measures for remedying this situation.

The Act on Occupational Safety and Health Enforcement and Cooperation on Occupational Safety and Health at Workplaces (44/2006) provides for a procedure to be followed by occupational safety and health authorities in monitoring compliance with provisions on occupational safety and health and for cooperation on occupational safety and health between employers and employees at workplaces. The provisions concerning employers and workplaces in Chapters 2 and 3 also apply, where appropriate, to other persons under the supervision of occupational safety and health authorities. The objective of the Act is to secure compliance with occupational safety and health provisions and to improve the work environment and working conditions by means of enforcement carried out by occupational safety and health authorities and cooperation between employers and employees.

**(vi)** Yes, Please see answer i-ii regarding the scope of application of the Non-Discrimination Act and answer v on the application of the Occupational Safety and Health Act, Section 4, on, among others, apprentices and students.

Also, the prohibition to discriminate in Section 6 of the Constitution covers everyone:

- Everyone is equal before the law.
- No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person.
- Children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development.
- Equality of the sexes is promoted in societal activity and working life, especially in the determination of pay and the other terms of employment, as provided in more detail by an Act.

Section 18 of the Constitution concerns the right to work and the freedom to engage in commercial activity:

- Everyone has the right, as provided by an Act, to earn his or her livelihood by the employment, occupation or commercial activity of his or her choice. The public authorities shall take responsibility for the protection of the labour force.
- The public authorities shall promote employment and work towards guaranteeing for everyone the right to work.
- Provisions on the right to receive training that promotes employability are laid down by an Act.
- No one shall be dismissed from employment without a lawful reason.

All legislation should be interpreted in a human rights/Constitution friendly manner.

**(vii)** I believe the basic difference is that if you have no obligations, you have no rights. However, some unpaid workers are covered by occupational safety and health regulations as well as by the prohibition to discriminate as laid down, for example, in the Non-Discrimination Act.

### **(B) Research and Statistics**

Please see the study 'Social Capital in Finland -Statistical Review', edited by Laura Iisakka, Helsinki 2006, from page 45 ([tilastokeskus.fi/tup/julkaisut/isbn\\_950-467-602-2\\_en.html](http://tilastokeskus.fi/tup/julkaisut/isbn_950-467-602-2_en.html)), and 'Study on Volunteering in the European Union 2008, Country Report Finland' ([ec.europa.eu/citizenship/news/news1015\\_en.htm](http://ec.europa.eu/citizenship/news/news1015_en.htm)).

## France

## **Answers provided by the HALDE**

### **(A) Volunteers and Legal Status**

(i) The French Labour Code gives no legal definition of the employee. This definition results from case-law.

According to well-established case law, the essential feature of an employment relationship is that a person performs services for and under the direction of another person in return for which he/she receives remuneration.

(ii) At first view, this notion is larger than the above-mentioned one relating to employees. It covers not only employees of the private sector but also civil servants, whether temporary or permanent (defined as a public authority trustee who fulfils missions of public interest).

(iii) The terms *bénévolat* and *volontariat* are both used in France to describe voluntary activities or volunteering.

*Bénévolat* refers to the free engagement of the individual citizen for non-remunerated purposes, outside the framework of family, school, professional or legal relations and obligations.

*Volontariat* is closer to the notion of voluntary service. It is the engagement of the citizen of a more formal nature (for example, through the structures of a non-profit organisation). It has a specific duration and some form of professional training is usually involved. This status entitles to certain indemnities and advantages during the period of their engagement, social protection etc. In this context, only certain forms of *volontariat* are recognised and covered by French legislation on volunteering.

#### ***Bénévolat***

There is no legal definition of *bénévolat*. In its opinion dated February 24<sup>th</sup>, 1993, the Economic and Social Committee (*Conseil Economique et Social*) defined *bénévoles* as persons who freely commits to have a non salaried activity for others outside his/her working and familial time<sup>41</sup>. This definition is however not binding.

The key principle at the core of *bénévolat* is the absence of remuneration. This is one of the main differences with *volontariat*. However, according to a number of voluntary organisations the introduction of the possible remuneration of volunteers with managerial positions, the concept of *bénévolat* and its distinction from paid work has been blurred.

#### ***Volontariat***

There are several types of *volontariat*, or voluntary services, and almost every type has its own specific legal definition. Overall, it refers to an engagement for several months in the service of the community, for a mission of general interest, with indemnities and covered by social security. It is based on a contract.

Some forms of *volontariat* are directly related to the end of military service. Other types have their origin in policies promoting active citizenship. Since 2006 *volontaires* can also be hosted by voluntary organisations or carry out missions in local communities.

#### **(iv) The legal framework for “*Bénévoles*”**

In France there is no legal status for *bénévoles*. There is no general legal framework, but only scattered provisions granting rights to volunteers in view of their activities or main status (currently employed, unemployed, retired).

For example, hours worked can be accumulated to allow employees days off to engage in voluntary activities within non-profit associations<sup>42</sup>. Some specific provisions also allow

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<sup>41</sup> "Est *bénévole* toute personne qui s'engage librement pour mener une action non salariée en direction d'autrui, en dehors de son temps professionnel et familial".

<sup>42</sup> Article 15, paragraph V of Law no. 2000-37 of January 19, 2000 on the reduction of working time

employees to participate in training associated with their volunteering<sup>43</sup>. Moreover, according to specific conditions, time spent in volunteering can be taken into account to get an accreditation for work experience that can count towards a qualification (“*validation des acquis de l’expérience*”)<sup>44</sup>.

**Legal framework concerning each of the measures on “volontariat”**

“Volontariat” used to be regulated in a number of distinct legal provisions. Each law provided for the conditions of this specific type of volunteering, the associations or organisations concerned, which individuals can be volunteers and the conditions of their duties.

- Law no. 2006-586 of 23 May 2006 on **volunteering in associations** (*volontariat associatif*) and educational activities (repealed);
- Law no. 2000-242 of 14 March 2000 on **civil volunteering** (*volontariats civils*) established by Article L 111-2 of the National Service Code (volunteering for social cohesion, international volunteering in the administration);
- Order of 24 March 2004 on the conditions for **international volunteering in companies** (*volontariat international en entreprise, VIE*);
- Article L 121-19 of the Code for Social Action and Families and Decree No 2006-838 of 12 July 2006 on **voluntary civil service** (*service civil volontaire*) a specific measure for young volunteers aged between 18 and 25;
- Law no. 2005-159 of 23 February 2005 on **international solidarity volunteering** (*volontariat de solidarité internationale*);
- Order no 2005-883 of 2 August 2005 on the **volunteering in the field of social integration** (*volontariat pour l’insertion*);
- Law no. 96-370 of 3 May 1996 on the development of **volunteering of firemen**.

The status of *volontaire* was recently reformed so as to harmonise it and simplify its various modalities under one single status. The Law no. 2010-241 of March 10, 2010 unifies some of the different previous forms of existing volontariat under the name of “civic service”. This Law came into force on 1<sup>st</sup> July, 2010.

The civic service is defined as:

- a voluntary engagement for a continuous period extending from 6 to 12 months contributing to priority missions of general interest for the Nation, subject to further State indemnities and open to people aged between 16 and 25; or
- a voluntary engagement for a continuous period extending from 6 to 24 months open to people aged over 25 and working for specific registered legal entities, or
- different other forms of volunteering: international volunteering in the public service; European **Voluntary** Service as referred to in Decision no. 1031/2000/EC of the European Parliament and of the Council of 13 April 2000 and Decision no 1719/2006/EC of the European Parliament and of the Council of 15 November 2006 establishing the “Youth in Action” programme for the period 2007 to 2013 and international solidarity volunteering covered by Law no. 2005-159).

Certain volunteering activities are open only to nationals, EU and EEE nationals or to people living regularly on the French territory since a certain period of time.

Other forms of “volontariat” not qualified as civic service remain into force such as volunteering in the field of social integration (*volontariat pour l’insertion*) or volunteering of firemen.

(v) -

(vi) First of all, the distinction between *bénévoles* and employees is not always clear and it has already occurred that courts and tribunals had to reconsider a contract of *bénévolat* as an

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<sup>43</sup> Article L. 6311-1 of Labour Code

<sup>44</sup> Article L. 335-5 of Education Code

employment contract which is thus subjected to the provisions of Labour law, including all relevant provisions prohibiting discrimination<sup>45</sup>.

Civic service volunteering is based on a contract concluded in writing that organises collaboration between a person and an organisation but excluding any hierarchical relationship. This contract does not fall within the competence of the Labour Code provisions (article L. 120-7 of the National Service Code). Such status entitles to an indemnity to be paid monthly. Its amount and the conditions of its payment are to be provided by the civic service contract (article L. 120-18 of the same Code).

*Volontaires* are covered in case of illness, maternity or inability under the general regime of social security (articles L. 120-5 to 29 of the National Service Code).

The French Anti-Discrimination and Equal Opportunities Commission (HALDE) has considered in three different cases that *bénévoles* were covered by the 2000/78 EC Directive and also the implementing national legislation.

In its decision 2007-117 of 14 May 2007, the HALDE decided that veiled mothers were allowed to be amongst the accompanying parents on public school field trips<sup>46</sup>.

As volunteers, accompanying parents may not be recognised as public civil servants and thus are not required to take on the rights and responsibilities that go along with this status such as the respect of the principle of State neutrality. Rather, volunteer status entails only coverage for the damages undergone by a person who, without being a public civil servant, takes part in a public service mission.

When deciding this case, HALDE concluded that Directive 2000/78 EC covered "the conditions for access to employment, to self-employment or to occupation". It considered that by this phrase, the European legislator had intended to prohibit all kinds of discrimination based on religion or belief, in relation to access to non-salaried work (literal translation of the French version of the Directive, i.e. "travail non salarié" = self-employment work) or non-paid or volunteer activities ("travail non rémunéré ou volontaire"). HALDE based its interpretation on the preparatory documents of the draft Directive and in particular the amendment of article 3 of the EC Directive Proposal in the European Parliament report (21 Sept. 2000, A5-0264/2000) and in the Commission revised Proposal (OJ n° C 62 E/125, 27 Feb. 2001).

Following this decision, the Minister of Education confirmed that all school parents should be offered the option of accompanying public school field trips, without any form of discrimination and asked that the heads of the school districts ensure that department-wide regulations and internal rules and regulations in schools not include any discriminatory clauses.

In its Decision no. 2008-14 of 14 January 2008, HALDE dealt with a claim lodged by an association of Gays which was refused certification from the local educational authorities to organise in public schools information sessions for pupils on discrimination based on sexual orientation and homophobia.

HALDE concluded that discrimination had occurred in this case referring to specific activities of *bénévoles*. They presented observations before the Appeal administrative Court. In its judgement dated February 14, 2008, the Court enjoined the local educational authorities to reconsider their decision but on another legal basis than discrimination and, therefore, without determining whether article 2 of 2000/78 Directive applied to this case.

In its Decision no. 2009-24 of 2 February 2009, HALDE had to decide whether the exclusion of candidates of 34 year of age and more from a TV programme (equivalent to "Britain's got talent") was discriminatory<sup>47</sup>.

For the purpose of this case, HALDE considered new provisions implementing the 2000/78 EC Directive into French legislation in the Law no 2008-496 of 27 May 2008 which provides

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<sup>45</sup> Court of Cassation, Social Chamber, 29 January 2002 *Red Cross* (Bull. No. 38); Court of Cassation, Social Chamber, 9 May 2001 *Emmaüs* (Bull. No. 155)

<sup>46</sup> [http://www.halde.fr/IMG/pdf/Deliberation\\_principe\\_de\\_laicite\\_6\\_juin\\_2007.pdf](http://www.halde.fr/IMG/pdf/Deliberation_principe_de_laicite_6_juin_2007.pdf)

<sup>47</sup> <http://www.halde.fr/IMG/alexandrie/4380.PDF>

that “any direct or indirect discrimination based on age is prohibited in relation to occupation, including self-employment or non-salaried work” (“travail indépendant ou non salarié”).

HALDE decided that the content and the duration of the performance required from the candidates of this TV show, and also the potential job opportunity it may represent, was sufficient to qualify it as a genuine occupation, this notion being broadly construed for the purpose of the implementing national legislation.

**(vii)** The main rationale is that the volunteer does not perform services for and under the direction of another person (no subordinate relationship) and/or does not receive remuneration in return.

Concerning the specific situation of members of religious congregations, a recent judgment from the highest judicial Court (Court of Cassation) also provided that the religious engagement prevents the existence of an employment contract only for the activities performed on the behalf and in order to provide support to a congregation or a religious association legally established<sup>48</sup>.

## **B Research and Statistics**

**(viii)** It is important to distinguish *bénévolat* in the context of an association (formal volunteering), and informal *bénévolat* (also referred to as ‘*bénévolat de proximité*’) which is carried out outside an organisation. This second type of *bénévolat* is not analysed or measured. Only *bénévoles* active in a declared association are taken into account (formal volunteering) in official figures.

According to the CPCA, (*Conférence permanente des coordinations associatives*) the big majority of *bénévoles* (10 out of 12 million) are active in voluntary organisations.

In France, over the period 2000-2008 *bénévoles* are estimated to be 14 million<sup>49</sup>. According to the **National** Institute for **Statistics** and Economic Studies (INSEE) there were 12 million *bénévoles* in 2004, compared to 7.9 million in 1990<sup>50</sup>. However, as there is no legal definition of *bénévoles*, it is very difficult to precisely quantify them. Only *bénévoles* who are active within an association are taken into account in the figures published on volunteering. Moreover, figures provided by INSEE also have to be considered with caution, as they include any person declaring that they helped an association either punctually or regularly in the previous year. If we only take into account the ‘regular’ *bénévoles* (belonging to an association, and dedicating a minimum two hours per week on average to this association) then this figure are reduced to three million people.

The number of *volontaires* is even more difficult to estimate as there is no data recording all types of *volontaires* in France. For example, volunteer firemen represent the majority of *volontaires* (about 200,000). Volunteer firemen make up 85% of the civil firemen in France<sup>51</sup>. The number of young *volontaires* was estimated to be approximately 70,000 in 2008.

### **Gender**

In terms of gender, 55% of *bénévoles* are male (30% of men and 22% of women are *bénévoles*). The fact that men are over-represented among volunteers is partly explained by the fact that the area that attracts most volunteers in France is sport and leisure and the participation rate in sports is higher among men.

### **Age**

*Bénévoles* are involved at all ages (although less frequently as from 70 years).

<sup>48</sup> Court of Cassation, Social Chamber, 20 January 2010, N° 08-42207

<sup>49</sup> Study on Volunteering in the European Union, Country Report France, 2009; <http://ec.europa.eu/citizenship/eyv2011/doc/National%20report%20FR.pdf>

<sup>50</sup> Febvre M. et Muller L., « *La vie associative en 2002. 12 millions de bénévoles* », *Insee Première*, n° 946, février 2004 ; [http://www.insee.fr/fr/ffc/docs\\_ffc/IP946.pdf](http://www.insee.fr/fr/ffc/docs_ffc/IP946.pdf)

<sup>51</sup> Halba B, *Bénévolat et volontariat en France et dans le monde*, 2003

| Age Group | Percentage of <i>bénévoles</i> |
|-----------|--------------------------------|
| 15–24     | 25%                            |
| 25–29     | 24%                            |
| 30-39     | 29%                            |
| 40-49     | 29%                            |
| 50-59     | 28%                            |
| 60-69     | 29%                            |
| 70-79     | 19%                            |
| 80+       | 7%                             |

It is generally considered that the system of early retirement pension entitlements (*'préretraite'*) has had a positive effect on the participation of older people in voluntary activities.

(ix) The Committee of the Regions has stressed the benefits of volunteering in terms of the employability of persons through participation in voluntary service schemes, and underlined the role of volunteering in providing new and innovative responses to emerging social issues, since it operates as a test bed in delivering new services and job opportunities<sup>52</sup>.

Similarly, a Resolution of the European Parliament of March 2008<sup>53</sup> recognised the contribution that volunteering makes to the economic and social cohesion of the EU, in particular to social integration at local level. Volunteers are key agents of social inclusion through their engagement for the socially excluded or those at risk of social exclusion. This applies in particular to the integration of migrants but also to the inclusion of people with disabilities and older people within our societies.

It appears, however, that in the majority of EU countries, employed individuals are the most active volunteers<sup>54</sup>.

## Greece

### **Answers provided by the Greek Ombudsman**

#### **(A) Volunteers and Legal Status**

(i) In Greek legal order there is a status of employee which has been shaped through the jurisprudence of the Greek courts. The criteria which according to the Greek Courts define whether or not somebody can be considered as an employee are the following:

- a) The place of employment [whether or not the employee is obliged to work in a working place which belongs or being hired by the employer].
- b) The binding or non-binding character of the instructions of the employer towards the employee regarding the time of permanence in the working place and the exercise of employees' duties.
- c) The control of the employer over the employee regarding the implementation of his/her instructions. These three criteria correspond to the notion of dependence which is crucial for the definition of employment.
- d) The fee of the employer.

<sup>52</sup> Opinion of the Committee of the Regions on 'The contribution of volunteering to Economic and Social Cohesion': <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:105:0011:0015:EN:PDF>

<sup>53</sup> EP Resolution 10 March 2008, A6-0070/2008 on the role of volunteering in contributing to economic and social cohesion <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2008-0070+0+DOC+XML+V0//EN>

<sup>54</sup> GHK, Volunteering in the European Union, Final report, Feb. 2010, <http://ec.europa.eu/citizenship/eyv2011/doc/Volunteering%20in%20the%20EU%20Final%20Report.pdf> ; Employed individuals most active volunteers : Cyprus, Denmark, Estonia, Finland, France, Germany, Ireland, Italy, Romania, Slovakia, Sweden, United Kingdom ; Students/pupils the most active group : Austria, Czech Republic, Poland, Slovenia, Spain; Unemployed or other non-working population more active than employed : Belgium, Hungary, the Netherlands. No information : Bulgaria, Greece, Latvia, Luxembourg, Malta, Portugal.

**(ii)** There is not a clearly defined concept of worker in the Greek legal order. Yet, there are some cases in which the Greek courts recognised the status of a worker to somebody despite the fulfilment of the above mentioned criteria which define the concept of employee. The Greek courts has recognised that even the member of a union who works for the union itself, can be characterised as employee if there is a daily presence for certain hours at the office of the union, his or her presence is necessary for the good functioning of the union and her/his absence from the place where she/he exercises the duties is not free but dependant on permission by somebody else. Also somebody who works out of sympathy for somebody else is considered as an employee if he/she acts under the supervision and instruction of him/her. We can conclude then that the way that the two parts characterise their professional relation is indifferent for the Greek courts when there is a relation between the two parts which implies some form of dependence.

**(iii)** No there is no separately defined legal status of the volunteers in the Greek law. Still there is no court decision regarding the volunteers and legal theory is against recognising volunteers as employees based on the voluntary character of the offered services, which contradicts the main characteristic of employment, meaning the pursuit of individual profit and dependence from the employer. According to the dominant view in Greek legal theory, the legal foundation of voluntary work is solidarity and not any kind of fee for the volunteers' services.

**(iv)** Following the interpretation of the Greek courts regarding the concept of worker some volunteer cases, those which involve the daily presence of the volunteer in a working place for set times would fulfil the criteria for their characterisation as individuals who fall within the range of the term "occupation" and thus they could claim protection under labour and social security law.

**(v)** The two clauses are used alternatively. Yet according to the jurisprudence of the Greek courts the crucial aspects for defining the term employee is a) dependency and b) fee. Relying on these aspects the Greek courts has recognised that even the member of a union who works for the union itself, can be characterised as employee if there is a daily presence for certain hours at the office of the union, his or her presence is necessary for the good functioning of the union and her/his absence from the place where she/he exercises the duties is not free but dependant on permission by somebody else. Still there is no court decision regarding the volunteers and legal theory is against recognising volunteers as employees based on the voluntary character of the offered services, which contradicts the main characteristic of employment, meaning the pursuit of individual profit and dependence. Yet since a) some categories of voluntarily offered work can be included within the range of the term occupation according to the criteria of the jurisprudence of the Greek courts, b) there is not a common EU's definition on occupation but the national legislation is dominant in this field and c) the range of directive's application extend to occupation too, such volunteers could according to my view be covered by the directive in the Greek legal order.

**(vi)** Their protection in relation to discrimination could be relied on the principle of equality as it is defined in the Greek Constitution and the jurisprudence of the Greek courts. According to the Greek courts same from a factual and legal point of view cases, should be treated in a non discriminatory manner. If the volunteers involved can prove that their treatment is discriminatory then they could claim protection under the above-mentioned principle.

**(vii)** The rationale for the differentiation in treatment between volunteers and other kind of workers is that the legal foundation of voluntary work is solidarity and not any kind of fee for the volunteers' services. Volunteers' services are offered voluntary and without any expectation of fee, thus it does not fulfil the preconditions which are necessary to recognise somebody as dependant upon somebody else's instructions about the way of fulfilling certain duties.



## **B) Research and Statistics**

**(viii)** A non-official survey of 2003 estimated the number of NGOs in Greece at 230. There is a federation of voluntary organisations with 120 members yet the accurate number of people who offer voluntary work does not exist. According to this survey the people who participate on a voluntary basis in Greece are between 25-35 years old and most of them are students.

**(ix)** -

## **Hungary**

### ***Answers provided by the Equal Treatment Authority***

#### **(A) Volunteers and Legal Status**

**(i)** Employment relationship is defined by the Act XXII of 1992 on Labour code. According to Art 141 of the Labour code, employees shall be entitled to a wage from the employer on the basis of employment and any agreement to the contrary shall be considered null and void. Therefore, in Hungarian labour law, the term “employee” shall only cover paid workers. Art 71 of the Labour code defines employees as subjects of employment relationships. The labour code does not define employment relationships, but it specifies the content and specific features of such relationships.

There is a directive adopted by the ministry of finance and ministry of agriculture on whether a particular relationship shall be regarded as employment relationship or other, civil law relationship (7001/2005. (MK 170.) FMM-PMM együttes irányelv). This directive serves rather as a guideline since it is not an act of law. According to the directive, there are primary and secondary features of the employment relationship. Wage, as the value of the work is a secondary feature, and as such, it is not sufficient per se to declare a relationship employment.

**(ii)** There is no legal status for worker.

**(iii)** The Act LXXXVIII of 2005 on Public interest volunteer activities (Volunteer Act) was adopted to create a new legal relationship for volunteer activities. The volunteer act only covers volunteer activities that are provided for certain natural and legal persons and business organisations without legal personality in Hungary, or for a host organisation by Hungarian citizen outside Hungary. Public interest volunteer activity is a work performed at the host organisation without remuneration. The act specifies which organisations shall be regarded as host organisations (local government, governmental agency, public benefit organisation, church legal entity, social, child welfare or child protection service, healthcare service provider, public education institution, public cultural institution, etc.). It is very important to see that the act does not cover all unpaid work, it shall not apply to volunteer activities provided for family members or if the activity is stipulated by law or based on final decision of court.

The commentary of the act however underlines that volunteer activities not provided for the host organisations specified by the act are not illegal and may be conducted in other civil law relationship. The main difference is that allowances (e.g. transportation, accommodation or food provided to the volunteer that are necessary to perform the public interest volunteer activity) received by the public interest volunteers are tax free.

**(iv)** -

**(v)** The rights and obligations of employees are defined by the Labour code that protects employees against discrimination. The Volunteer act in contrary to the Labour code does not specifies in detail all the obligations and rights of the parties of a volunteer legal relationship. The volunteer act provides volunteers some guaranties similar to the Labour code, especially in case of volunteers under 18: it specifies the maximum amount of time spent on volunteer

activities per day /week for volunteers under 16/18, and defines the minimum resting time of volunteers under 18 years.

Another important guarantee, that the parties shall conclude the volunteer contract in writing in the following circumstances: if it is made for an indefinite time or at least 10 days, the volunteer is provided allowances, or if the volunteer is utilised in construction work requiring a building permit, if the public interest volunteer activity is performed abroad, or if the volunteer is a citizen of a state which is not a state party of the Agreement on the European Economic Area, if the right of either parties to immediate termination is restricted, or if it is requested by the volunteer.

The Volunteer act further specifies the obligations of the host organisation: the host organisation is obliged to provide safe and non-hazardous working conditions, adequate rest time, information about and guidance for public interest volunteer activity, and opportunity to acquire skills and knowledge, continuous and professional supervision of the public interest volunteer activity in the case of volunteers under 18 years of age or adult volunteers with a restricted legal capacity. The host organisation shall provide for transportation, food and accommodation necessary to perform the public interest volunteer activity if it is performed abroad, or by a non-Hungarian citizen volunteer without a residence in Hungary and shall provide for conclusion of insurance contract.

The host organisation is liable for damages caused by the volunteer to a third party in connection with the volunteer legal relationship. If such damage was caused by imputable conduct of the volunteer, the host organisation may demand damages from the volunteer unless otherwise stipulated in the volunteer contract. Volunteers shall be registered, as the host organisation shall notify in advance the ministry responsible for the development of governmental social and civil relations about utilising [“employing”] a volunteer.

It can therefore be concluded that public interest volunteers receive some of those guarantees that employees are granted, mostly those that are safeguarding the working conditions. The volunteer act does not refer in any ways to the Labour code or to the rights or obligations of the parties of an employment relationship. Art 15 of the Volunteer act however stipulates that unless otherwise provided the Act, concerning the conclusion, invalidity, modification, completion, expiry or breach of volunteer contract, exercising rights and performing obligations arising out of a volunteer legal relationship, as well as regarding liability and compensation for damages, provisions of the Civil Code shall apply.

The Hungarian Act on Equal treatment covers employment relationships and other relationships aimed at work. The Act on Equal treatment defines the latter as: work-from-home relationship, relationship created pursuant to a contract for work, membership in a professional group and elements of the cooperative membership and partnership activities under economic and civil law involving personal contribution and aimed at work. The Act on equal treatment was adopted in 2003, two years before the Volunteer Act. Therefore, it can be one reason why the Equal treatment act that covers almost all kind of legal relationships aimed at work does not mention volunteering. The definition of “other relationships aimed at work” may include volunteer activities, as a civil law relationship aimed at work, but so far this question has not come up yet in practice.

**(vi)** The Hungarian Civil Code protects the inherent rights of persons. Anyone, whose inherent rights has been violated may demand a court the following: declaration of the occurrence of the infringement, demand to have the infringement discontinued and the perpetrator restrained from further infringement; demand that the perpetrator make restitution in a statement or by some other suitable means and, if necessary, that the perpetrator, at his own expense, make an appropriate public disclosure for restitution; demand the termination of the injurious situation and the restoration of the previous state by and at the expense of the perpetrator and, furthermore, to have the effects of the infringement nullified or deprived of their injurious nature; file charges for punitive damages in accordance with the liability regulations under civil law.

Discrimination against private persons on the grounds of gender, race, ancestry, national origin, or religion; violation of the freedom of conscience; any unlawful restriction of personal

freedom; injury to body or health; contempt for or insult to the honour, integrity, or human dignity of private persons shall be deemed as violations of inherent rights. Therefore anyone, whose inherent rights have been violated - including someone who has been discriminated against, may initiate a judicial proceeding at a civil court.

Volunteers who are not covered by the volunteer act may therefore turn to a civil court if they were discriminated.

**(vii)** Employment relationship is covered by the Labour code. Since remuneration is a fundamental feature of employment under the Hungarian labour law, volunteers were not covered by this act and could only conduct their activities under other civil law relationships. The Volunteer Act offered more rights for public interest volunteers and rendered tax free certain allowances to be paid for them free from tax. The Act clearly states which allowances shall not be considered remunerations.

## **(B) Research and Statistics**

**(viii)** -

**(ix)** -

# The Netherlands

## ***Answers provided by the Equal Treatment Commission***

### **(A) Volunteers and Legal Status**

**(i)** No there is not.

The Dutch civil law only defines a labour contract (article 7:610 BW). In this definition it is stated that a labour contract is the contract by which the one party, the employee, commits himself to do work in the service of the other party, the employer, in return of a wage, for a certain period of time.

The chapter of the Civil Code dedicated to labour contracts, does state the rights and duties of both employer and employee (articles 7:610 – 7:691 BW), among which are some rights and duties in the sphere of equal treatment. However, these articles are limited to equal treatment on the ground of sex and equal treatment for employees that work part-time/fulltime and for employees that have a fixed-term contract/permanent contract.

There is also a chapter in the Civil Code dedicated to work as a self-employed, in commission of a client. This gives a different legal status than employees have. Furthermore, civil servants fall under a different set of legal provisions, laid down in administrative legislation.

Next to this civil legislation concerning labour relations, there is the Equality legislation, covering both discrimination in the field of labour and (for most grounds) in the field of goods and services. The Equality legislation is not strictly civil or administrative legislation, but 'something in between'.

The Equality legislation does not give a legal status of employees either. Article 5 of the Equal Treatment Act, which deals with discrimination in labour relations, only says that it is forbidden to discriminate on one of the anti-discrimination grounds listed in this Act, in the recruitment of personnel, the entering into of ending of a labour relation etc. Article 6 of the ETA concerns the access to and the possibility to carry out and to develop within a profession.

The parliamentary discussion of the Equal Treatment Act provides a background for understanding what labour relations fall under article 5 of the Act and which ones do not. The explanatory memorandum to the Equal Treatment Act refers to the Equal Treatment (men and women) Act, which dates back to 1980.

It is understood that all forms of labour relations, whether concluded under private or administrative law (civil servants) fall under the protection of the ETA, including not just civil

and administrative labour contracts and professions, but also all other forms of labour which involve the participation in the labour process in a similar manner.

The determinative factor is whether work is carried out under the authority of an employer or volunteer organisation etc. Therefore, also internships and voluntary work can fall under the protection of the Equal Treatment Act, if it involves work that resembles 'paid' work = fixed working hours/accountable to an executive, an executive tells the person what work to do etc. Freelance work can also fall under the protection of the ETA if it meets the criteria of 'work under the authority of the employer', but it is less likely to fall under the ETA than regular volunteer work and internships.

This line of reasoning is also followed in some of the decisions of the ETC.

**(ii)** The Dutch law does not differentiate between workers and employees.

**(iii)** No there is not, in neither in Equality law nor in Civil law. There is only a regulation governing the reimbursement of costs. However, several labour laws, such as the law on Labour Conditions/Health and Safety at the workplace, also apply to volunteers. This law also includes the duty for employers to protect workers from discrimination at work by prevention and (restorative) action, including complaints procedures.

**(iv)** See above: no legal statuses attached to workers/employees, but to the types of contract.

**(v)** See above.

**(vi)** See above.

**(vii)** There is none, if the volunteer/unpaid worker conducts labour under the authority of the employer/volunteer organisation.

## **(B) Research and Statistics**

**(viii)** No information, but would be interesting to show indirect discrimination.

**(ix)** No information, but would be interesting to know.

## Norway

### ***Answers provided by the Equality and Anti-Discrimination Ombud***

Please note that the need for differentiating between employee/worker and volunteer is not very pressing as regards protection against discrimination on the basis of race, religion, sex and disabilities as our discrimination legislation on these grounds covers all sectors of society. An interesting issue is the fact that if an employer has unpaid workers/volunteers the fact that they are unpaid could be discriminatory in itself if they perform work tasks for the employer in lieu of ordinary workers (typically young people needing work experience, disabled persons etc.). Also, employment of unpaid labour could be illegal according to agreements with labour unions, depending on the employment in question.

#### **(A) Volunteers and Legal Status**

**(i)** An employee has a legal status under Norwegian law. The definition is not rigid, but lists several elements to consider in the overall assessment of the status of the person in question. The key elements are

- Supervision/instruction from the employer
- Duty to work
- Working contract

- Payment (money or in kind)
- The employer is responsible towards third parties for the work performance of the person in question
- The relationship between the parties is relatively stable and can be terminated within certain time limits.

**(ii)** The term “worker” is not legally defined in Norwegian law.

**(iii)** A volunteer or unpaid worker has no specific defined legal status. Normally one would conclude from the definition of “employee” that a person is a volunteer/unpaid worker if he or she does not meet the criteria for employees.

**(iv)** As far as we are aware, there is no other legal status which would cover volunteers or unpaid workers.

**(v)** An *employee* is protected from discrimination on the basis of sex, religion, ethnicity, national origin, skin colour, religion, language, disabilities, sexual orientation, political viewpoint and membership in labour unions. All provisions in the Working Environment Act apply.

What kind of employment rights the volunteer /unpaid worker might have would have to be determined from the contract between the parties. However, volunteers/unpaid workers are protected, like all other citizens, from discrimination based on sex, religion, ethnicity, national origin, skin colour, religion, language and disabilities. If the volunteer/unpaid worker performs tasks for the employer, so that one could say that he or she “works” for the employer, the employer is probably (the question has not been brought before the courts yet) responsible for providing a proper and secure working environment for him or her. It has not been determined whether one could include protection from discrimination into this certain provision in the Working Environment Act.

**(vi)** Since volunteers/unpaid workers do not have a separate legal status they would depend on the general legal protection from discrimination provided to all citizens, with the same limitations. However, the relationship between the “employer” and the volunteer/unpaid worker would be relevant in the assessment of the situation, the impact of the alleged discrimination, consequences for the person being discriminated against etc.

As mentioned under (v) the “employer” would probably be responsible for providing a secure and proper working environment for the volunteer/unpaid worker.

**(vii)** The rationale for the difference in protection between employees/workers and volunteers/unpaid workers is probably to limit the responsibility of the employer. The protection against discrimination in working life has come as an accessory to other responsibilities the employer has towards his/hers employees. This responsibility stems from the contractual viewpoint that the employee offers his/her work force and accepts protection and compensation from the employer in return, with a balance of duties and obligations. If the duties are none, or very limited, the rationale is that the employer has very limited obligations.

## **(B) Research and Statistics**

In a report from 2009 statistics show that 48% of Norwegians do volunteer work. Volunteer work is more common among “successful people”, that is people with good health, higher education and high level of employment. The age group 25-66 years provides more volunteer work than others. Fewer young men than young women do volunteer work, but in other age

groups men have a slightly higher participation. Immigrants do less volunteer work than other groups. However, this does not apply for the children of immigrants. They volunteer at the same level as other youths. Persons on disability pensions volunteer less than others.

Researchers claim that the volunteer sector reproduces the social differences one can see in other parts of society. Volunteer work can be very helpful in providing access to paid employment, and can help you maintain such employment in providing experience, qualifications, network and contacts in addition to increase the quality of life. Marginalised groups do not take part in the volunteer sector and thus become even more marginalised.

*Extra information:*

Participation in volunteer work by country – percentage of the population:

| Country            | Percentage of Population who volunteer | Year |
|--------------------|--|------|
| Norway             | 48%                                    | 2009 |
| Sweden             | 48%                                    | 2009 |
| Iceland            | 40%                                    | 2005 |
| UK - Great Britain | 39%                                    | 2005 |
| Denmark            | 35%                                    | 2004 |
| Australia          | 32%                                    | 2007 |
| New Zealand        | 31%                                    | 2004 |
| Czech Republic     | 30%                                    | 2009 |
| Netherlands        | 30%                                    | 2002 |
| USA                | 27%                                    | 2009 |
| Canada             | 27%                                    | 2000 |
| France             | 25%                                    | 2002 |

Sources: Volunteering in the United States, 2009; Dekker & Kuhry 2007; Hrafnisdóttir 2006; Koch-Nielsen et al.2005; Pospíšilová 2009; Statistics New Zealand 2007; Svedberg et al. 2010)

## Slovakia

### ***Answers provided by the Slovak National Centre for Human Rights***

(i) The term “employee” is defined in Art.11 of the Labour Code (Act No. 311/2001 Coll. as amended by later regulations). According to this article an employee shall be a natural person who in labour-law relations and, if stipulated by special regulation also in similar labour relations, performs dependent work for the employer.

The definition of dependant work can be found in Art. 1 par. 2 and 3 that state:

(2) Dependent work, which is carried out in a relationship where the employer is the superior and the employee is subordinate, is defined solely as work carried out personally as an employee for an employer, according to the employer's instructions, in the employer's name, for a wage or remuneration, during working time, at the expenses of the employer, using the employer's means of production and with the employer's liability, and also consisting mainly of certain repeated activities.

(3) Dependent work may be carried out only in an employment relationship, a similar labour relation or in exceptional cases defined herein in another form of labour-law relation. Dependent work shall not be business activity or another earning activity based on a contractual civil-law relation or a contractual commercial-law relation according to special regulations.

(ii) Slovak legislation does not contain a legal definition of the term “worker”. This term is sometimes used as a synonym for the term “employee” although in general language term “worker” sometimes covers also category of self-employees. Slovak wording of Labour code uses term working/labour contracts for formal written contracts between the employer and the employee establishing an employment relationship.

(iii) Act no. 282/2008 Coll. on youth work support regulates youth volunteering and in Art. 11 defines young volunteer: *“Young volunteer can be a citizen of the Slovak Republic, a citizen of other European Union’s member state or a citizen of a state, which is not a European Union’s member state, at least 15 years old and maximum 30 years old and they are morally irreproachable persons.”*

Voluntary service is defines by this act as a community service executed by a volunteer within the frame of youth work on the ground of a written agreement with a legal person, whose activity object is youth work.

With regard to adult volunteering, Slovak legislation lacks clear definition of this term as well as basic legal framework. Term volunteering services is used in Act no. 5/2004 Coll. on employment services and for the purpose of this act volunteering service is a form of activation for job seeker by performing voluntary work in order to gain experience necessary for the job market. Job seekers carry out volunteering service in the range of 20 hours per week but maximum for the period of 6 months. The Act specifies also what kind of activities can be carried out as volunteering services (providing help to unemployed people, immigrants, persons with disability, drug addicts, help with organisation of public beneficial activities, sport events, charitable activities, protection and maintenance of cultural heritage, help during natural disasters, ecological disaster etc.). Job seekers receive contribution (equivalent to minimum living cost determined by the guidelines of the Ministry of Labour, Social Affairs and Family and currently it represents € 185, 38<sup>55</sup>) so it is questionable if this activity can still be considered as volunteering (which is supposed to be based on personal motivation).

(iv) -

(v) Act no. 282/2008 Coll. on youth work support regulates obligations of legal persons that are securing voluntary service. A legal person is obliged:

- a.) to secure all things necessary for voluntary service execution,
- b.) to secure the volunteer’s health insurance, in case it results from the voluntary service agreement,
- c.) to conclude a valid contract on insurance of one’s responsibility for damages caused by execution of one’s activity,
- d.) to instruct the volunteer on health and safety protection at the execution of voluntary service,
- e.) to produce a written confirmation to the volunteer on duration and content of the voluntary service,
- f.) to produce a written evaluation to the volunteer on execution of the voluntary service,
- g.) to provide volunteer, who is not a citizen of the Slovak Republic, with the basic knowledge of the official state language of the Slovak Republic and basic education of the Slovak Republic’s history.

Prohibition of discrimination is stated in art. 3 of the act: *“The rights stipulated in this act are guaranteed equally to young people, young leaders, youth leaders, youth workers and other experts working with youth in accordance with the principle of equal treatment in education*

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<sup>55</sup> Measure of the Ministry of Labour, Social Affairs and Family of the Slovak Republic no. 300/2010 Coll.

*appointed by a special act<sup>56</sup>. In accordance with the principle of equal treatment the discrimination on the ground of age, sex, sexual orientation, marital or family status, race, colour of skin, disability, language, political affiliation or other conviction, belonging to a national minority, religion or belief, union trade activity, national or social origin, property, lineage or any other status is also prohibited.”*

Act no. 5/2004 Coll. on employment services regulates in Art. 14 right of access to employment. The right of access to employment is the right of the citizen, wishing and able to work and seeking employment, to services assisting him/her in

- a) Seeking out a suitable employment,
- b) Receiving education and preparation for the labour market required for his/her assertion in the labour market.

A citizen has the right of access to employment without any restrictions, in compliance with the principle of equal treatment in labour law relations and similar legal relations, provided for under a special regulation<sup>57</sup>. In compliance with the principle of equal treatment, discrimination is prohibited also on the grounds of marital status and family status, colour of skin, language, political or other conviction, trade union activity, national or social group affiliation, disability, age, property, lineage or other status.

According to Art. 6 of the Anti-discrimination Act the principle of equal treatment in employment relations, similar legal relations and related legal relations shall apply only with regard to the rights of natural persons provided for under separate legal provisions regulating in particular:

- a) Access to employment, occupation, other gainful activities or functions (hereinafter "employment"), including recruitment requirements and conditions and the manner of carrying out the process of selection for employment,
- b) Performance of employment and the conditions of performing the work in employment including remuneration, promotions and dismissal,
- c) Access to vocational training, continuing vocational training and participation in programs of active labour market measures including access to counselling for employment selection and change of employment,
- d) Membership and participation in organisations of employees and employers and in organisations associating persons of a certain profession including the benefits provided by the organisations to their members.

The list is not exhaustive (using the word "in particular") so the protection provided by the Anti-discrimination Act can be broader but as there is no case law on this matter it is difficult to say if the case in question falls within the protection against discrimination provided by the Act.

**(vi)** Act no. 124/2006 Coll. on Occupational Safety and Health Protection laying down the general principles of prevention and the basic conditions for the purposes of ensuring occupational safety and health protection, and for avoiding risks and factors causing occupational accidents, occupational diseases and other damage to health from work applies not only to employers and employees but also to organisers of voluntary general beneficiary activities and natural persons performing work in accordance with instructions of organisers of voluntary activities (among others).

**(vii)** Difference in protection between employees and volunteers is caused by the absence of basic legal framework concerning volunteering.

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<sup>56</sup> Act no. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination, and on amending and supplementing certain other laws as amended (Anti-discrimination Act)

<sup>57</sup> Act no. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination, and on amending and supplementing certain other laws as amended (Anti-discrimination Act)



## **(B) Research and Statistics**

(viii) Useful information on volunteering in Slovakia can be found in National report/Slovakia<sup>58</sup> prepared in order to provide information on situation in Slovakia for a Study on volunteering in Europe. Another study on volunteering in Slovakia was conducted within the European Volunteer Centre's Facts and Figures research and it is called Volunteering in Slovakia, Facts and Figures<sup>59</sup>.

According to information presented in above mentioned studies 13% of the total population participated in volunteering in 2004. The results of a 2003 survey showed that the gender structure of volunteers was as follows: 52% women, 41% men and 7% of surveyed volunteers did not specify their gender. Young people below the age of 30 represent about 70% of the volunteers in Slovakia, whilst 30% is comprised of middle aged or older people. Concerning the geographical spread of volunteering (by region), the survey by the CARDO organisation (based on questionnaires sent to the network of volunteer engaging organisations) showed that 29 organisations were dispersed throughout the major counties ("Kraj") of Slovakia.

The table below shows the number of organisations in each county that responded to survey:

| <b>County</b> | <b>No. Organisations</b> |
|---------------|--------------------------|
| Bratislavský  | 18                       |
| Nitriansky    | 2                        |
| Trenčiansky   | 2                        |
| Žilinský      | 1                        |
| Prešovský     | 3                        |

(ix) No.

## **Sweden**

### ***Answers provided by the Equality Ombudsman***

#### **Volunteers and legal status**

(i) There is no definition of the term employee in Swedish labour law. In Sweden the meaning of the term is determined by drawing on case-law, preparatory documents to legislation and the legal literature. Legal material that applies to several different laws can be of assistance; this applies to laws like the Employment Protection Act, the Employment (Co-determination in the Workplace) Act, the Annual Leave Act, the Wage Guarantee Act and the Tort Liability Act, etc. Ultimately the interpretation of the term employee is based on the purpose of the Act and the regulation concerned. Thus the term 'employee' does not have the same meaning in all Swedish civil law legislation. Case-law about the term employee has also developed through the interpretation of collective agreements by the Labour Court. It is not clear that all collective agreements have to be interpreted in the same way or that the term employee means the same things in collective agreements and laws.

The Swedish literature lists the following factors that are held to be characteristic of an employee relationship:

The relationship is based on a contract.

- The point of the contract is that one party has to perform work on behalf of the other party.
- The party who has undertaken to perform work undertakes to perform the work personally or, alternatively, he or she is expected to take part in the work along with assistants.

<sup>58</sup> Slovak National report is available on <http://ec.europa.eu/citizenship/eyv2011/doc/National%20report%20SK.pdf>

<sup>59</sup> Report available on <http://www.cev.be/data/File/Facts%20and%20Figures%20SK.pdf>

- The contract relates to work of the kind allocated by the other party.
- The party ordering the work has some control over when, where and how the work is carried out.
- The party ordering the work provides machinery, raw materials and other capital inputs.
- The payment made is related either to time or to time and the exertion involved in work
- The contract has a certain intensity, i.e. the work relationship is of some duration and is not an insignificant secondary occupation in relation to a main job for another employer.

**(ii)** There is no equivalent of the term 'worker' in Swedish law. The term basically has a political meaning in Swedish (cf. workers and capital).

**(iii)** There is no separate legal status that covers voluntary workers. However, trainees are protected in the discrimination legislation, in addition to employees.

**(iv)** See the reply under question 1.

**(v)** The term employee in Swedish discrimination legislation follows the term employee in Swedish labour legislation; see the reply under question 1. The legal consequence of someone being defined as an employee under one of the labour laws is that he or she acquires rights and obligations that follow from the legislation concerned.

**(vi)** See the reply under 1. If a person is not covered by the term employee under any labour legislation or collective agreement, that person does not have any protection from discrimination or any rights that follow from an employment relationship.

## **B Research and statistics**

**(vii)** According to an overview produced by the researchers Agneta Stark and Robert Hamrén '*Frivilligarbetets kön. Kvinnor, män och frivilligt arbete*' (*The gender of voluntary work. Women, men and voluntary work*), Sweden is one of the countries in Europe with the highest proportion of voluntary work. Distinctive features of the voluntary sector in Sweden are that it is dominated by organisations belonging to the culture and recreation sphere, by sports organisations and by trade union movements, while other countries have a higher representation of social work. According to the overview, existing research is a patchwork of individual studies carried out by researchers. As regards how women and men contribute to voluntary work, there are many indications that men contribute more leadership work than women, and that they more often take part in decision-making at a high level. Women contribute more than men in collecting money and also do more practical work at lower levels in voluntary organisations.

There is no uniform definition of voluntary work, according to the overview. In general, voluntary work usually refers to "unpaid work that is freely chosen by the individual is carried out in connection with some organisation and does not solely benefit the active individual personally".

Two reports from government inquiries *Frivilligt socialt arbete (SOU 1993:82)* (*Voluntary social work*) and *Civilsamhället (SOU 1999:84)* (*Civil society*) present surveys and studies of the involvement of Swedish citizens in voluntary and community organisations in the 1990s. According to these surveys, the higher the education a person has, the more likely it is for that person to be involved in some form of voluntary work. People in metropolitan regions are less active in voluntary work than other people. Immigrants are less active in voluntary work than other people. People whose parents were active in associations are themselves more active than other people in the work of associations. Women devote much more time than men to organisations with a social orientation. To a great extent immigrant men do work in humanitarian organisations, immigrant associations and in Christian communities.

Unfortunately, no statistics about voluntary work have been published by Statistics Sweden, which is Sweden's statistics agency.

(viii) See the reply under question 7.

## United Kingdom – Great Britain

### **Answers Provided by the Equality and Human Rights Commission**

#### **(A) Volunteers & Legal Status:**

(i) In s.230 (1) of the Employment Rights Act 1996, (ERA 1996) "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. In this Act, a "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

In s 83 of the Equality 2010 defines "employment" employment under a contract of employment, a contract of apprenticeship or a contract personally to do work".

(ii) "Workers" are defined more widely than employees and are different from the genuinely self-employed. The status of a worker includes individuals working under a variety of contracts. Employees are workers, but employees have different employment rights and responsibilities than workers.

In s.230 (3), ERA 1996, "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under) -

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

(iii) For now, it would appear that there is a separately defined legal status of a volunteer or unpaid work as volunteers do not seem to have the rights of an ordinary employee or worker. These include the right to a minimum wage, holiday, sick pay and other statutory rights. This may also have been the case on account of the statutory definitions accorded to a "volunteer".

For example, the **Job Seeker's Allowance Regulations 1996**, say that "*voluntary work*" means work for an organisation the activities of which are carried on otherwise than for profit, or work other than for a member of the claimant's family<sup>60</sup>

The **Police Act 1997 (Criminal Records) Regulations 2002**<sup>61</sup> offers a short definition of a "volunteer" as "a person engaged in an activity which involves spending time, unpaid (except for expenses) doing something which aims to benefit some third party other than or in addition to a close relative".

The United Nations used a long and detailed definition in the **International Year of Volunteers**<sup>62</sup> but the three defining characteristics were that activity should not be undertaken primarily for financial reward; the activity should be undertaken voluntarily, according to the individual's own free will and third, the activity should of benefit to someone other than the volunteer, or to society at large.

<sup>60</sup> Statutory Instrument 1996 No. 207, Regulation 4

<sup>61</sup> Statutory Instrument 2002 No. 233 Regulation 2.

<sup>62</sup> United Nations Volunteers Report, February 2001.

As in the Council Directive 2000/78/EC<sup>63</sup>, establishing a framework for equal treatment in employment and occupation, the Commission will argue that some types of volunteering are conditions for access to employment or occupation.

The issue as to whether the legal status of a “volunteer” or unpaid worker is separately defined is the question at issue in the Commission’s intervention in the present cases of **X v Mid-Sussex Citizen’s Advice bureau & Challis and Masih v Awaz FM**, for which the appellants argue that the type of activity in which the Appellant was engaged was “employment” or “occupation” and in which the Commission is currently seeking a clarification from the European Court of Justice (ECJ) on the proper interpretation of the concepts.

The Commission submits there is a strong link between volunteering and accessing paid work and that the link between volunteering and employment raises immediately the question of whether it should be seen as a condition of access to occupation or employment and the proper scope of the concepts of employment and occupation in the context of the Directive.

The Commission recognises that the concept of volunteering covers a multitude of activities. At least four legal concepts may cover volunteering in one or more ways:

- (a) By the concept of access to employment or occupation;
- (b) By the concept of employment or under that of occupation;
- (c) By the concept of vocational training;
- (d) Using the concept of services.

In the Commission’s view the types of volunteering that are covered by the concepts of “employment” and “occupation” in the Directive are not clear.

In this particular case the Commission takes the view that even if the Court of Appeal disagrees with this approach, it should consider nonetheless whether a volunteer who is not working under a contract of employment (or a contract is intended to be protected by the Directive, and hence what interpretation to give national law.

The Commission further argues that some types of volunteering are conditions for access to employment or occupation. These will be covered under the Directive by Article 3(1) (a).

The Commission suggests therefore that it is very important that the Court of Appeal be assisted in establishing the precise scope of the concepts which are available to give protection to a volunteer experiencing discrimination or harassment in that capacity.

Domestically, a decision on the scope of the Directive will affect the appropriate vehicle by which discrimination may be challenged by a volunteer. Thus, if volunteering is seen as a species of service which is provided to the volunteers, then it will not be covered under the Directive but likely to be governed by anti-discrimination legislation in draft at the European level on goods and services.<sup>64</sup>

Similarly, in the UK if the Court of Appeal concludes that the Directive-based national legislation does not cover volunteers, volunteers seeking a remedy against discrimination will need to seek a remedy in the County Courts under the provisions of the Disability Discrimination Act 1995, (now immersed into the Equality Act 2010). In the case of age discrimination, volunteers would be left without any domestic remedy (as there is not as yet any protection against age discrimination in the field of service provision).

The Commission therefore takes the view that the interpretation of the Directive and hence national law must be such as to recognise the differences between

- (a) Those forms of volunteering which are disguised employment;
- (b) Those which are conditions of access to employment and occupation;
- (c) Those, which, due to their content, are species of vocational training;
- (d) those that constitute the receipt of a service by the organisation for which the volunteer gives up his or her time and effort; and

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<sup>63</sup> 2000/78/EC-Framework Directive on equal treatment in employment and occupation

<sup>64</sup> COM (2008) 426 final, Proposal for a Directive on equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in areas other than employment and occupation.

(e) volunteering which falls into none of the above due to its lack of regularity, lack of structure or due to a number of other factors.

**(iv)** Though there is no one piece of legislation that refers explicitly to volunteers in the UK, there is no other legal status which would or might cover volunteers or unpaid workers. Only general areas of law that apply to all UK citizens as individuals cover volunteers. Employment legislation affords employees limited opportunities to enforce their right to fair and equal treatment-volunteers do not have equivalent legally enforceable rights. Without the protection or financial investment arising out of a contract of employment volunteers are unable to challenge discrimination or be afforded the means or mechanisms to do so. Nevertheless, it is good practice in the UK to extend such rights and staff policies to volunteers, however there is no legal obligation to do so.

**(v)** There are three main types of employment status in the UK: employee, worker, self-employed and, by case law, volunteers. Each type of employment status has different legal rights. One's employment status determines one's rights at work. For example, an employee or worker will enjoy many statutory rights such as the right to claim unfair dismissal, parental rights and the right to a redundancy payment that a self-employed person will not be entitled to. This legal status is important to protect the rights offered to employees regarding minimum wage, overtime payment protection and workers compensation regulations.

#### **Employees:**

All employees are workers, but as an employee, there is a wider range of employment rights and responsibilities to and from the employer. Employees work under a contract of employment (also known as a contract of service). This is normally a written contract but doesn't have to be, it could also be verbal or implied or a mix of all three.

Employee rights include all the rights workers have, plus the right to:

- a minimum statement of employment terms;
- statutory sick pay
- minimum notice periods if employment is ending
- not to be unfairly dismissed
- maternity, paternity and adoption leave and pay
- request flexible working
- time off for emergencies
- statutory redundancy pay

Some of these rights require a minimum length of continuous service with the employer before one qualifies for them.

#### **Discrimination:**

The employment provisions of the Equality Act 2010 (which now incorporates the employment provisions of the Race Relations Act 1976, the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995) are intended to ensure that employees are not unfairly discriminated against on the grounds of race, sex or disability. Age and sexual orientation are not yet covered. The employment provisions of these acts only apply to employees or other people working under a contract. They would not normally apply to volunteers.

As a service provider, the Disability Discrimination Act imposed on organisations a duty to make reasonable adjustments in the provision of goods and services.

#### **Volunteers:**

Most volunteers do not have a contract of employment and so do not possess the rights of an ordinary employee or worker. These include the right to a minimum wage, holiday and sick pay and other statutory rights. Volunteers are normally informed about this in a volunteer agreement, which includes a volunteer policy and voluntary work outlines. The volunteer agreement should explain what supervision and support system is available, insurance cover, equal opportunities and how disagreements will be resolved.

**Minimum Age:**

Many voluntary organisations give children voluntary work, provided they are covered by the organisation's insurance. However, in order to protect children from being exploited, the law limits what children under school-leaving age can do.

**Health & Safety:**

When volunteering, an employer must assess any risks to their health and safety and to take steps to reduce them.-just as if you were a paid employee. Where there are different health and safety risks for volunteers than employees, then the protection being provided must reflect this.

**Pay, expenses and training:**

Volunteers are generally excluded from the National Minimum Wage and receive only basic expenses for work done. Expenses do not count as wages as it is taken to be costs one would not have had if one was not volunteering. However, if you receive training that is not directly relevant to the voluntary work being done or receive a fixed regular amount for "expenses" that is more than the volunteer spends, a volunteer may be classed as an "employee" or a "worker".

**Data Protection:**

A volunteer has the same rights under the Data Protection Act as an employee. This means the organisation the volunteer is working for must comply with rules on personal data held about the volunteer on a computer or paper files. None of this data can be processed without the volunteer's permission.

**Discrimination:**

The diverse nature of volunteering and the varied relationships between volunteers and the organisations that engage them mean that equality legislation in the UK does not apply to volunteers in the same way as it does to employees. However; volunteers are currently protected from discrimination in so far as the organisation is providing goods, facilities and services to the public. These provisions have been retained in the Equality Act 2010 and extended to cover age.

It is not therefore accurate to say that UK discrimination legislation does not apply to volunteers. The legislation relating to discrimination in employment applies to employees, and to `workers` as defined in the discrimination legislation. Any person who is not an employee but is working under a contract-such as a casual – could be a `worker`, in this context. Contract, in this sense, does not mean a piece of paper; it means a relationship in which there is an exchange of consideration, money or something else of value, given or promised in exchange for the work.

The true test of whether volunteers are employees and therefore entitled to employment rights which needs to be protected by both employment and discrimination laws will be tested by the two recent cases of *X v Mid Sussex Citizen's Advice Bureau and Masih v Awaz FM*<sup>65</sup>

**(vi)** A volunteer who is working under a contract and is expected to work regularly or a fixed number of hours could legally, be an employee (and entitled to the full range of employment rights); a volunteer who is working under a contract but without having to work specified times or hours could be a worker (and entitled to the more limited rights that workers have, including minimum wage, paid holiday etc.

Where a volunteer receives only disbursements for genuine out-of-pocket expenses, a contract is unlikely to be created and if the volunteer were to claim discrimination, the legislation would probably be held not to apply. However, where a volunteer receives fixed rate `expenses` which are not linked to actual expenditure, such as `£10 per day to cover expenses`, this is likely to be seen legally as payment in exchange for the work, creating a contract.

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<sup>65</sup> Op.Cit.

If the volunteer receives a sessional fee, pocket money, honorarium or any other form of money, this is likely to be seen as payment in exchange for the work, creating a contract. If an employment tribunal decides that a contract has been created, the volunteer will be able to bring a claim of discrimination.

Where a volunteer receives non-money benefit which is necessary for the work (such as relevant training, or protective clothing), this is unlikely to create a contract. Where a volunteer receives something which is not necessary for the work, an employment tribunal might or might say a contract has been created.

(vii) -

## **(B) Research & Statistics:**

(viii) Research, statistics and other information about volunteering are available variously and from different sources in the UK.

The major source of volunteering data comes from the Citizenship survey which has been undertaken every two years since 2001 and collects information from adults in England and Wales about volunteering, community and citizenship. Statistics on volunteering and factors such as age, ethnicity and deprivation are available here. The survey used to be undertaken by the Home Office but now lies with the Department for Communities and Local Government. There are others such as the National Survey of Volunteering. This survey is from 1997.

The latest National Statistics from the Citizenship Survey were released in July 2010. This is a household survey covering a representative core sample of 10,000 adults in England and Wales each year. The data is collected through face o face interviews. Statistics from the Citizenship Survey include data covering a range of issues including community cohesion, empowerment, values, racial and religious prejudice and discrimination, volunteering and charitable giving.

Key statistics from the survey include:

- In **2009-10**, **40%** of adults volunteered formally at least once in the 12 months prior to interview. Levels of formal volunteering at least once a year have decreased since **2003 to 2007-08** when they were between **42%** and **44%**, but are unchanged on other years;
- In the same period **25%** of adults volunteered formally at least once a month. Levels of formal volunteering at least once a month are again lower than in **2003-2007-08** when they were between **27%** and **29%**, but are unchanged on other years;
- In **2009-10**, levels of informal volunteering were higher than levels of formal volunteering, with **54%** volunteering informally, at least once in the 12 months prior to interview, and a **29%** volunteering informally at least once a month, a similar pattern to previous years;
- Levels of informal volunteering at least once in the last year are lower than in previous years, for example, **2001 (67%)**, **2007-08 (64%)** and **2008-09 (62%)**. Levels of informal volunteering at least once a month are also lower than in previous years; for example **37%** in **2003** and **2005** and **35%** in **2007-08** and **2008-09**;
- There was some variation in levels of volunteering by age. Those aged **75 years** and above were less likely to participate in formal volunteering at least once a year (**29%**) than any other group (levels varied between **37%** and **46%**). Those aged **75 years** and above were also less likely to participate in informal volunteering at least once a year (**40%**) than in any other group (levels varied between **51%** and **59%**);
- For formal volunteering at least once a month, **21%** of those aged **26 to 34 years** and those aged over **75 years** volunteered in comparison with **26%** to **29%** of those aged **35 to 74 years**. For informal volunteering at least once a month, **25%** of those aged

75 and above volunteered in comparison with **33%** of those aged **65 to 74 years** and **32%** of those aged **16 to 25 years**;<sup>66</sup>

- Younger people aged 16-25 were less likely than older people, aged 35 to 74, to participate in regular formal volunteering, but a higher proportion of people aged 16-25 were regular informal volunteers (41%)<sup>67</sup>, than in any other age group (with the exception of those aged 35-49);
- People with a disability or long-term limiting illness were less likely to regularly participate in formal volunteering than those not classified as such (22% compared with 28%); People educated to degree level (or equivalent) were more likely to be regular formal volunteers than those with A-level or lower qualifications;
- People classified as being at risk of social exclusion were less likely to regularly participate in formal volunteering than those not classified as at risk (21% compared with 31%) or to regularly participate in informal volunteering (32% compared with 37%)

**(ix)** Many researches in the UK have focused attention on volunteering as a potential route back to work. Most of those researches attempt to explore the evidence for the link between volunteering and employment for unemployed volunteers, though there is a clear lack of statistical evidence. Despite this lack of evidence for a direct link, it is clear from the sparse information available that volunteering can offer both hard and soft skills that tend to stand volunteers in good stead when entering the job market.

The Institute for Volunteering Research (IVR) recently published a report, which explored the role of volunteer centres in strengthening the link between volunteering and employability. The project explored the critical success factors for employability projects and the issues confronting organisations attempting to engage with the agenda. The research warned, however, that the failure of large scale research to establish a direct link between volunteering and job outcomes should urge us both to be sceptical as to the strength of the link and also to pursue fresh research in this area.<sup>68</sup>

Despite the limitations of the evidence base, there is strong quantitative and qualitative evidence that volunteering can endow individuals with a range of skills which could stand them in good stead when trying to enter the job market.

In national surveys of volunteering, volunteers consistently rank the development and acquisition of new skills as a key motivation and benefit of volunteering.<sup>69</sup> The types of hard skills often highlighted by volunteers include media, IT skills and languages, gathering and analysing information and other job-specific skills. But volunteering is generally seen as giving even stronger support to the development of softer skills such as motivating co-workers, managing time, teamwork and communication and organisational skills.

Perhaps, even more significant is the role volunteering can play in overcoming the wider barriers to work that unemployed people often face, such as lack of self-esteem, confidence and purpose.

The importance of these personal benefits cannot be overstated as they consistently emerge as the key employability benefit for unemployed volunteers<sup>70</sup>.

Other employability benefits include demonstrating to employers one's willingness and ability to work, tapping in to social networks and hearing about employment opportunities, and increased access to training.

There is also an increasing body of research that highlights the factors which can impact the strength of the link between volunteering and increased employability benefits. Recent

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<sup>66</sup> Source: Citizenship Survey, Communities & Local Government; Helping Out: A national survey of volunteering and charitable giving, Cabinet Office, April 2008

<sup>67</sup> Citizenship Survey-2007-08

<sup>68</sup> 'A Gateway to Work: The role of volunteer centres in supporting the link between volunteering and employability, 2009.

<sup>69</sup> Low et al. (2007) Helping Out: A national survey of volunteering and charitable giving. Cabinet Office.

<sup>70</sup> IVR, 2009.



research from IVR demonstrates the importance of ongoing support for volunteers in their role<sup>71</sup>. This support can range from building confidence, offering meaningful and challenging activities and financial support such as travel and other expenses.

The above research and other studies highlight the importance of volunteering as part of a wider job search strategy, and many give weight to recognising the individual motivations and aspirations of the volunteer, which impact both the likely positive outcomes of the experience and the way that it is designed and managed. Hirst<sup>72</sup> also isolated a number of factors as being positively correlated to gaining employment, including more hours given, working with the public, variety of tasks, working with other volunteers and discussing and reviewing the volunteering experience.

Finally, studies have acknowledged the broader benefits that volunteering can have for employed people. The wider potential benefits of volunteering on mental and physical health, quality of life and satisfaction and enjoyment are all extremely important. Some of these wider benefits are thought to be particularly relevant to unemployed volunteers such as meeting people, a sense of achievement, something definite to do, supporting self-development, widening horizons and combating social isolation.

The studies somewhat insisted that these wider benefits must be considered when evaluating the impact of volunteering for unemployed volunteers as the evidence suggests that volunteering can have a dramatic effect on an individual's quality of life and well-being.

### **Conclusion:**

The available research evidence suggests there is a relatively strong belief in the value of volunteering as a direct route into work, and the need for employers to pursue this policy is growing due to the increasing rate of unemployment.

The range of questions used by most of the researches in establishing the link between volunteering and employability included the following:

- Has the development of new volunteering roles and opportunities led to improved employment skills and employment success?
- How has volunteering supported other development in individuals (e.g. confidence, language, cultural knowledge etc.)?
- Have the volunteering roles offered supported the development of vocational experience, skills and confidence?
- What experiences or training were particularly beneficial for volunteers?

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<sup>71</sup> Rochester, C. (2009), A Gateway to Work, IVR

<sup>72</sup> Hirst, A. (2001) Links between volunteering and employability; Research Report RR309, DfES: London.

## Annex 2

# Country responses to the case study on racial discrimination

## Austria

### ***Answers provided by the Ombud for Equal Treatment***

1. Austria is a federal state where – depending on the subject and the locality of the matter – regulatory competence is held either by the federal state or the Länder. As a general principle, the federal equal treatment act is not applicable in matters that fall within the regulatory competence of the nine Länder. The Länder of course are under the same obligation as the federal state to implement the relevant directives within their area of competence.

On the federal level, Austria did not go any further than implementing the already existing directives (2000/43/EC and 2004/113EC). Some of the Länder although went further and provide prohibitions on discrimination on all grounds mentioned in Article 13 EC in all areas mentioned of the directives 2000/43/EC, 2000/78EC and 2004/113EC.

According to the allocation of competences of the Austrian Constitution, private law has to be regulated on the federal level. The rent or the acquisition of an apartment – whether it be a municipal apartment or not - is usually based on a private law contract, why for the present case therefore would fall within the scope of application of the federal equal treatment act.

The Federal equal treatment act prohibits, inter alia, direct or indirect discrimination on grounds of ethnic origin with regard to access to, and supply of, goods and services, which are available to the public, including housing. Municipal housing concerns the access and supply of housing. Special regulations for Roma people with regard to the access to municipal housing arise to a difference of treatment on the ground of ethnic origin. The Federal equal treatment act is therefore clearly applicable to this case.

The Federal equal treatment act does not require for the existence of direct or indirect discrimination that there is a complainant. In line with the ECJ ruling in the Feryn case (6.2.2007, C- 54/07) the question of what constitutes direct or indirect discrimination within the meaning of Directive 2000/43 must be distinguished from that of the legal procedures provided for a finding of failure to comply with the principle of equal treatment.

2. According to the Federal Act Governing the Equal Treatment Commission and the Ombud for Equal Treatment, the Ombud for Equal Treatment is competent to provide as a first step advice, support and information and may further on intervene, negotiate, try to find a friendly settlement or any other out of court solution. The Ombud can also submit cases to the Equal Treatment Commission, but can not file a suit.

In the present case, the concerned woman had to run through a special procedure in order to obtain a new public apartment because of her ethnic origin. She is treated less favourably than another is in a comparable situation on the ground of her ethnic origin. The woman is therefore affected by discrimination and can – herself or via the Ombud for Equal Treatment or other representatives (like NGOs) - introduce a procedure before the equal commission for the examination of the particular case. The Equal Treatment Commission is responsible to decide in proceedings free of charge. The Equal Treatment Commission is not competent to grant damages; it only delivers a – non-binding – decision upon the violation of the prohibition of discrimination and gives recommendations on how to apply the right to equality.

The concerned woman can also bring the case to a Civil Court and seek for compensation for the discrimination. The Court then delivers a binding judgement and has to grant damages in case of a violation of the Equal treatment Act. However such a procedure would involve the risk to pay the costs of the proceedings in case of loss of the procedure.

Also the Ombud for Equal Treatment can publish recommendations on the possible infringements of the principle equal treatment. Further on, on a *proprio motu* basis or on request of the Ombud for Equal treatment, the Equal Treatment Commission can also prepare general opinions on possible infringements of the principle of equal treatment and can give recommendations on how to apply the right to equality in that context.

**3.** The special procedure for Roma people in regard to the decision on who will be offered a public housing apartment is a direct discrimination in the sense of the federal equal treatment act. Otherwise then the other applicants, Roma people applying for public housing are subjected to the practice, that the Roma contact person can refuse a Roma person to move to the municipality on any ground. Even so this procedure has been initiated with the consent of the local Roma people with the aim of avoiding local problems between Roma persons and Roma families in the public housings, it remains that Roma people applying for public housing are treated less favourably than others in a comparable situation on the ground of their ethnic origin.

**4.** Neither the directive nor the federal equal treatment act knows a justification when it comes to direct discrimination on grounds of ethnic origin or race.

The Austrian constitution and the federal act on minorities foresee that, the language and culture as well as the existence and preservation of ethnic minorities have to be respected, safeguarded and supported.

Measures promoting equality provided for in laws, decrees or by other means which aim at the elimination of, or compensation for, discrimination on grounds of ethnic origin, can not be deemed to be discrimination within the meaning of the Federal Equal Treatment Act. Therefore measures aiming at eliminating or compensating discrimination of ethnic minorities can justify that a person is treated less favourably than another in a comparable situation because of its ethnic origin.

In the present case the special procedure for Roma people in regard to their application for public housing aims to avoid local problems between Roma people. In the opinion of the Ombud for Equal Treatment, positive measures justifying a difference of treatment intent to eliminate discrimination of a whole ethnic group and can not be measures aiming to resolve differences within an ethnic minority. The special procedure for Roma people in regard to their application for public housing is therefore discrimination according to the federal equal treatment act.

The ECHR ruling *DH v Czech Republic* (Application No. 57325/0), states that the consent of a person to a less favourable treatment does not exclude that discrimination can be claimed. In line with this judgment, the difference of treatment of the present case cannot be justified by the fact that this process has been agreed with the local Roma themselves.

**5.** There is not enough information indicating that there have been instructions to discriminate in the present case.

**6.** The victim of the discrimination could claim before a civil court for compensation for the economic loss and personal damage suffered though the special procedure for Roma people.

## Belgium

### ***Answers provided by the Centre for Equal Opportunities and Opposition to Racism***

**1.** Belgium is a federal state where – depending on the subject and locality of the matter – legislative authority is independently held by either the federal state, the Communities (3) or the Regions (3). As a general principle, federal anti-discrimination law is not applicable in matters that fall within the competence of the Communities or the Regions. On the other hand, the Communities and Regions are of course under the same obligation as the federal state to implement the relevant European legislation within their areas of competence.

The fight against discrimination in the field of social housing in Belgium is the responsibility of the Regions. They have made regulatory provisions that guarantee equal treatment in access to housing regardless, for example, of national origin or ethnicity (access to and offering of goods and services accessible to the public).

There is no need for a victim of discrimination under this mechanism to start the legal action. This may start the intervention of a body designated for this purpose.

The Centre for Equal Opportunities and Opposition to Racism (CEOOR) is an autonomous federal public agency, whose authority to deal with discrimination cases, in accordance with the 15 February 1993 CEOOR Establishment Act, is limited to the federal anti-discrimination and anti-racism legislation. However, today cooperation agreements are being negotiated with the Communities and Regions in order to expand the CEOOR's legal mandate to non-federal discrimination cases.

2. The civil court has jurisdiction in the matter. The Centre for Equal Opportunities and Opposition to Racism (CEOOR) is limited to the federal anti-discrimination and anti-racism legislation. However, today cooperation agreements are being negotiated with the Communities and Regions in order to expand the CEOOR's legal mandate to non-federal discrimination cases. This means that we could be declared competent to join the case in Court (depending on the cooperation negotiations).

3. There is a direct discrimination because this mechanism introduces the possibility to refuse accommodation to any person or family based solely on their ethnicity (Roma origin)

4. No. The criterion of ethnicity allows for no exceptions to escape it by invoking a justification

i) Only the Flemish Community recognises ethnic minorities, this in order to pursue a policy of integration of ethno-cultural diversity in the society. But that does not include rights for minority groups as groups, only as persons. Right of movement is well recognised. Though the transition period for access to the Belgian labour market for Bulgarian and Romanian workers is still in application (until 2011).

ii) No, but knowledge of the language of the region, and therefore the learning is encouraged, especially in the framework of the "Inburgering process".

iii) No, in any case.

5. In the case it seems that the municipality and the property company decided together of the implementation of the working group. Between them, there is no such an instruction to discriminate. But it is still necessary to watch out the relationship between the municipality and its Roma employee.

6. Damages may be set, and prohibition may be ordered to stop the implementation of this discriminatory mechanism. Diversity plans may also be developed, but may not lead to discriminatory decisions. The level of compensation awarded would be between 650 and 1300 Euros for cases of discrimination in the labour area. There is no specification for housing in the Belgian law.

## Cyprus

### ***Answers provided by the Office of the Commissioner for Administration (Ombudsman)***

1. I) Taking into account that:

a) Directive 2000/43/EC prohibits direct or indirect discrimination on the basis of racial or ethnic origin in relation to, inter alia, access to and supply of goods and services which are available to the public, including housing, and, that,

b) The ECJ ruled in the case of Feryn C-54/07 that, for the purposes of Directive 2000/43/EC, discrimination does not necessarily require that there is an identifiable complainant/victim,

We arrive to the conclusion that this case falls within the scope of the Directive 2000/43/EC

1. The Directive 2000/43/EC was transposed into national legislation with Law N. 59(I)/2004. The provisions of Law N.59(I)/2004 which refer to the concept of discrimination and the scope of the law, are almost word-for-word translation of the relevant corresponding provisions of the race Directive. Therefore, for the reasons cited above, the case also falls within the scope of the national Law N. 59(I)/2004.

## 2. The District Court and the Equality Body.

3. According to the facts of the case, a different procedure was in effect especially for Roma applicants of municipality apartments. In essence, the procedure rendered their applications subject to the approval of other tenants of Roma origin, already living in the area of the apartment. In our opinion this is a case of direct discrimination on the basis of race/ethnic origin, under our national legislation which transposed Directive 2000/43/EC.

4. According to national Law N. 59(I)/2004, the prohibition of direct discrimination on the basis of a person's racial/ethnic origin is without objective justification or exception. The only situation that the Law allows for different treatment on the basis of racial/ethnic origin is within the framework of adopting and maintaining positive action measures in order to prevent or compensate for disadvantages linked with racial or ethnic origin.

Regarding the additional points raised, we would like to add the following:

- There is no reference in our constitution, or in other laws, regarding specifically the rights of Roma to their culture and language. Regarding culture and language our Constitution recognises expressly only the rights of the 2 larger communities (Greek Cypriots and Turkish Cypriots) and 3 other religious minorities – the Maronites, Armenians and Latins - which have been recognised as “ethnic minorities” within the scope of protection of the *Framework Convention for the Protection of National Minorities* of the Council of Europe”.
- Both within the scope of the Directive and of the national legislation (Laws N. 58(I)/2004 and N. 59(I)/2004), the cultural practices within a racial or ethnic group can be lawful justification for discrimination, only for cases concerning: a) indirect discrimination and b) access to employment and occupation where a special cultural characteristic constitutes a genuine and determining occupational requirement.
- We do not think that the decisions of the European Court of Human Rights (ECHR) in the cases of *DH v Czech Republic Application No. 57325/00* and *Orsus and Others v Croatia Application No 15766/03* can be applied in our case study.

Concretely, in the case of *DH v Czech Republic* it was accepted by the ECHR that the criterion for selecting the students that were placed in “special schools” was their performance to an intellectual capacity test and not their race or ethnic origin. Relevantly, in the case of *Orsus and Others v Croatia*, the ECHR concluded that the initial placement of the applicants - who were of Roma origin - in separate classes had been based on their insufficient knowledge of the Croatian language and not on their race or ethnic origin. Further to that, the court held that the placement of the applicants in separate classes had been a positive measure designed to assist them in acquiring knowledge necessary for them to follow the school curriculum.

Contrary to the above, our case study, as it is inferred by the facts presented, is about a practice which directly discriminates against Roma applicants for municipal apartments.

5. It is deduced/inferred from the facts of the case that an instruction to discriminate was probably given by the municipality to the working group which examined and decided upon the applications for apartments

6. Law N.59(I)/2004 provides that, if, in a case before it, the District Court rules that unlawful discrimination occurred, it awards “*just and reasonable*” compensation/damages.

Further to the above, the Law provides that unlawful discrimination is an offence and the parties committing this offence are subject to a fine up to £4.000 (€6.840) and/or imprisonment up to 6 months.

## Czech Republic

### **Answers provided by the Office of the Public Defender of Rights**

#### **1. National anti-discrimination law**

Prohibition of discrimination against on the ground of race/ethnic origin is right of every individual and it is constitutionally guaranteed in the Czech Republic. Discrimination regarding human rights and fundamental freedoms on the listed grounds - among others on the ground of race or ethnic origin – is generally prohibited by the Art. 3 par. 1 of the Charter on Fundamental Rights and Basic Freedoms.<sup>73</sup> The same document contains special chapter dealing with the rights of national and ethnic minorities which assures all members of these groups the right to maintain and develop their own culture, habits and language. It also recognises their right to be involved in the proceedings regarding matters of national and ethnic groups.

The constitutional provisions mentioned above are further specified by the Act No. 273/2001 Coll., on the national and ethnic groups’ members’ rights. Sec. 6 par. 1 of this Act guarantees members of the groups the right to participate in the social, economic and cultural life as well as the right to be involved in the public matters on all the administrative levels. Defined municipalities are obliged to promote to exercising the rights of the Roma minority and to help integration of this group into the society.

Discrimination in access to and supply of services available to the public including housing is expressly prohibited by the Act No. 198/2009 Coll., on equal treatment and on the legal means of protection against discrimination and on amendment to some laws (here and after as “Anti-discrimination Act”)<sup>74</sup>. Direct discrimination is characterised (Sec. 2 par. 3) **as an act (omission) where one person is treated less favourably than the another person in comparable situation on grounds of race, ethnic origin, nationality, sex, sexual orientation, age, disability, religion, belief or opinions**. Therefore any act which is expressly based on the race or ethnic origin of a person and leads to less favourable treatment should be considered discriminatory.

According to background of the case as introduced, there is a procedure which applies only in case of Roma applicants. It is not clear whether the procedure is formal/official rule or just informal practice of the municipality. With respect to the case law of the European Court of Human Rights (hereinafter referred to as “ECHR”)<sup>75</sup> for qualifying discrimination does not matter whether the “veto proceedings” is formalised or not; discrimination can result also from *de facto* situation. Anyway, it may be considered as different treatment *prima facie* based on the prohibited ground. Since direct discrimination is characterised as less favourable treatment, questions are if the procedure can be considered as less favourable and who is an individual in comparable situation with who compared would be a Roma person disadvantaged? To the second question, I would say that person in comparable situation is non-Roma applicant who is also willing to get a municipal apartment. Answering the first question, it can be assumed, Roma and non-Roma applicants are treated differently because Roma applicants are “required” to give consent to sharing an application with Roma contact person of the city municipality. Sharing an application means initiating proceedings that can

<sup>73</sup> The Charter is part of the Czech constitutional law.

<sup>74</sup> See the Art. 1 sec. 1 j) read in conjunction with the Art. 2 sec. 3.

<sup>75</sup> See *Zarb Adami v. Malta* (17209/02; § 76)

lead to rejecting a Roma applicant. Therefore Roma applicants are treated less favourably than non-Roma applicants.

In addition, less favourable treatment can be recognised also in motivation of dividing applicants to groups according to their ethnicity. The offered explanation of such a practice procedure consists in avoiding troubles. It evokes conclusion that Romas are potential troublemakers while non-Romas are not and because of that, Roma applicants have to be approved by the current Roma residents. The practice is therefore not free from prejudice. In compliance with principle of equal treatment with persons irrespective their ethnic origin, every human being should be treated as an individual; everyone has the right to be considered independently on the fact that he/she belongs to the certain ethnic/race group.

Another question, which can arise regarding the case, is, whether discrimination can occur within a group characterised by the same prohibited ground. However, as the circumstances are presented, problem is not less favourable treatment among Roma people themselves. The Roma already living in the municipal apartments are asked whether new Roma applicants can move in or not; the procedure is applied for the purpose of the municipality working group decision making. Consequently, an entity responsible for the discriminatory acting in this case is in the first place the municipality which provides housing (as service recognised by the Anti-Discrimination Act). The present occupants of the municipal housing are not responsible for the discrimination because they do not have any official power to decide on who is going to move in the apartment.

As far as the Czech Ombudsman is informed, such similar case has not been solved in the Czech Republic yet. It is therefore difficult to predict, how the questions raised above would be handled by the Czech courts. Anyway, the Public Defender of Rights (hereinafter referred to as “Defender” or “Ombudsman”) assumes that if an act or practice is applied exclusively on persons of Roma origin, according to the Anti-discrimination Act, it is possible to qualify it as discriminatory on the ground of race/ethnic origin.

Therefore the case falls within the scope of the Czech Antidiscrimination Act.

#### a) **The Race Directive 2000/43/EC**

Regarding scope of the Directive, it shall apply to all persons (both the public and private sectors) including public bodies, in relation to “...*access to and supply of goods and services which are available to the public, including housing.*”<sup>76</sup> Since it is municipal housing, which is probably available to the public, it is going on in this case, the Directive shall apply.

The Race Directive provides definition of discrimination as follows: “*where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.*” Indirect discrimination is on the other hand characterized as presence of “...*an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.*”

Since there is criterion clearly based on ethnic origin, it needs to be considered according to the concept of the direct discrimination. As to a comparator, comparable situation, it is *mutatis mutandis* possible refer to the arguments set forth above.

**2.** In terms of the Anti-Discrimination Act, the authority competent to decide on the discrimination claims of an individual is a county court: “*In the event of a violation of the rights and obligations following from the right to equal treatment or of discrimination, the person affected by such act shall have the right to claim before the courts...*”

The Defender should according to the Sec. 21b of the Act No. 349/1999 Coll. on the Public Defender of Rights<sup>77</sup> provide assistance to victims of discrimination in lodging their proposals

<sup>76</sup> Art. 3 par. 1 h)

<sup>77</sup> „The Defender shall contribute to promotion of the right to equal treatment of all persons irrespective of their race or ethnic origin, nationality, sex, age, disability, religion, belief or opinions, and to this end, he/she shall  
a) provide methodological assistance to victims of discrimination in lodging their proposals for commencement of proceedings concerning discrimination,

for commencement of proceedings concerning discrimination. On the other hand, the Ombudsman is not entitled to settle the discrimination disputes. Besides helping the victims of discrimination, the Ombudsman publishes reports and issues the recommendations as well as maintains research regarding discrimination matters. In context of the discrimination in access to housing, the Ombudsman's first recommendation on equal treatment was dedicated to the question of non-discriminatory access to housing with emphasis on the municipal housing.

In terms of the case, it should be noted that the Act No. 128/2000 Coll., the Municipalities Act, enables the Ministry of the Interior to control municipalities in management of their property including municipal housing. According to this Act, Ministry performs supervision over local government's legislation; it also controls exercising of local administration. Within its supervision and control competence, Ministry can use its powers to derogate act of a municipality if it is discriminatory. On the other hand, Ministry cannot solve claims of the individuals regarding the acting of a municipality.

In terms of Anti-discrimination Act the direct discrimination is “...shall mean an act, including omission, where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on grounds of race, ethnic origin, nationality, sex, sexual orientation, age, disability, religion, belief or opinions.” Indirect discrimination is characterised as “...an act or omission where a person is put at a disadvantage compared to other persons on any of the grounds specified...above on the basis of an apparently neutral provision, criterion or practice. Indirect discrimination shall not be taken to occur if such a provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”

According to the wording of the definitions set above, it can be assumed that there is direct discrimination on the ground of race/ethnic origin. The practice is not *prima facie* neutral; it is obviously based on the race/ethnic origin criterion.

Regarding direct racial/ethnic discrimination, the Anti-Discrimination Act allows it to be justified in very limited situations.<sup>78</sup> Different treatment in terms of the Roma Housing Case is not such a situation. The acting of the municipality therefore cannot be justified. Race Directive does not open more space to justification of different treatment based on race or ethnic origin. Except some cases regarding access to and employment and positive actions, different treatment *prima facie* based on race or ethnic origin cannot be justified.<sup>79</sup> Stricter attitude to justifying different treatment based on race or ethnic origin has also reflection within European as well as US jurisprudence (strict scrutiny test). E.g. in case of D.H. and others against Czech republic – appl. No. 57325/00, par. 176, the ECHR stated: “*The Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures (Timishev, cited above, § 58).*”].

As mentioned above, Czech national law grants protection of ethnic minorities in the constitution within statutory specified conditions. The main statutory source of such a specification is the already noticed Act No. 273/2001 Coll., on the national and ethnic groups' members' rights. Since it is not possible to consider mutual compliance of two pieces of statutory legislation, legislative act can be assessed only whether corresponding with the

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b) undertake research,

c) publish reports and issue recommendations on discrimination-related issues,

d) provide for exchange of the available information with the relevant European parties.”

<sup>78</sup> According to the Sec. 6 par. 3 is different treatment in matters of the employment or an occupation, if “based on substantive grounds consisting in the nature of the performed work or activities and the requirements made are appropriate to that nature”, lawful so that it does not constitute discrimination.

<sup>79</sup> Preamble: “(17) The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin, and such measures may permit organisations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons. (18) In very limited circumstances, a difference of treatment may be justified where a characteristic related to racial or ethnic origin constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.”



constitution. Possible disharmony of the right not to be discriminated on grounds of race or ethnic origin and the right not to be discriminated on the same grounds can be solved only by the constitutional court.

However, if members of the racial or ethnical minority are treated differently, in more favourable way, it could be in terms of Sec. 7 par. 2 Anti-Discrimination Act considered lawful: *“Measures aimed at preventing or compensating for disadvantages resulting from a person’s membership of a group of persons defined by any of the grounds specified in Section 2 (3) and ensuring equal treatment and equal opportunities for that person shall not be considered to be discrimination.”*

Since the treatment with people of Roma origin in the Roma Housing Case was less favourable, cannot be lawful according to the provision cited above and for the same reason cannot be lawful either under the Race Directive.

As to the question of consent to discrimination, the Art. 1 of the Charter on Fundamental Rights and Freedoms states: *“All people are free, have equal dignity, and enjoy equality of rights. Their fundamental rights and basic freedoms are inherent, inalienable, non-imprescriptible, and not subject to repeal.”* Consequently, anyone can effectively relinquish protection granted to his/her human rights and fundamental freedoms. Accordingly, ECHR enounced: *“However, under the Court’s case-law, the waiver of a right guaranteed by the Convention – in so far as such a waiver is permissible – must be established in an unequivocal manner, and be given in full knowledge of the facts, that is to say on the basis of informed consent...”*<sup>80</sup>

**3.** Instruction, as well as inciting discrimination is forbidden by the Sec. 4 par. 4 and 5 of the Anti-Discrimination Act.<sup>81 82</sup> However, there is no such an act recognisable in the case. Since the procedure/mechanism of the municipality can already be considered discriminatory, due to the fact that it is the working group which requests permission from Roma people that already live in the apartments, neither instruction nor inciting can be qualified here. In addition, there is no subordinate position which could be abused to instruct to discriminate.

1. According to the Sec. 10<sup>83</sup> of the Anti-discrimination Act, person affected by discriminatory act shall have the right to claim before the courts to:

- a) Be refrained from the discrimination,
- b) The consequences of such an act be remedied and
- c) Be provided with appropriate compensation.

In case that remedy as characterised above appears insufficient, the person also has the right to monetary compensation for non-material damage. The level of monetary compensation is not limited *ex lege*; it depends on a court deliberation and should be assessed according to the seriousness of the damage and the circumstances of the case.

Problem probably would arise if there is no particular person affected by discrimination act or measure. The Czech courts, including Czech constitutional court, had an opportunity to decide on the cases, where indefinite group of people were discriminated against. Thing is that these cases had been brought before the courts prior The Anti-Discrimination Act became effective (since September 1<sup>st</sup> 2009). They were therefore qualified according to the

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<sup>80</sup> In details, see *D. H. and others v. The Czech Republic*, appl. no 57325/00, §§ 202 – 204.

<sup>81</sup> Sec. 4 par. 4: *“Instruction to discriminate shall mean the conduct of a person who misuses the subordinate position of another to discriminate against a third party.”*

<sup>82</sup> Sec. 4 par. 5: *“Inciting discrimination shall mean the conduct of a person who persuades, confirms or encourages another to discriminate against a third party.”*

<sup>83</sup> Sec. 10: *“(1) In the event of a violation of the rights and obligations following from the right to equal treatment or of discrimination, the person affected by such act shall have the right to claim before the courts, in particular, that the discrimination be refrained from, that consequences of the discriminatory act be remedied and that (s)he be provided with appropriate compensation. (2) Should a remedy under paragraph 1 above not appear sufficient, particularly due to the fact that a person’s reputation or dignity or respect in society has been harmed, the person shall also have the right to monetary compensation for non-material damage. (3) The amount of the compensation under paragraph 2 above shall be assessed by the court taking into account the seriousness of the damage and the circumstances under which the right was violated.”*

general civil law provisions regarding protection of personhood<sup>84</sup>. Due to this fact, their qualification is slightly different. So far there is no similar discrimination case in the Czech Republic, which would the courts decided upon. However in the event that a case of discrimination where no identifiable victim would be assessed by the national courts, the European law (including case law) must be taken into account and whereas national legislation differs, the European law should be applied. According to the judgement in *Feryn* case (C-54/07; operative part, point 2): “Article 15 of Directive 2000/43 requires that rules on sanctions applicable to breaches of national provisions adopted in order to transpose that directive must be effective, proportionate and dissuasive, even where there is no identifiable victim.”

Anyway, the Roma woman in the case was affected by the procedure, although it finally did not lead to refusal of her application; she therefore should theoretically have the right to bring the claim before a court in terms of Czech national law.

## Denmark

### **Answers provided by the Danish Board of Equal Treatment**

First of all we wish to reiterate that the mandate of the Board is limited to the assessment concrete cases that are submitted to the Board.

The answers provided below are therefore merely based on informal opinions from the Secretariat, and should not be seen as opinions from the Chairpersons and members of the Board. In order for the Board to address these issues we would need a concrete complaint from an alleged victim.

- 1) This case would fall under the scope of our national legislation that implements directive 2000/43EC.
- 2) The Board of Equal Treatment would be competent to handle a case regarding discrimination of the Roma people in Denmark.
- 3) In our opinion this special screening mechanism is aimed at Roma only and would therefore constitute a case of discrimination.
- 4) The screening procedure in the municipality is aimed at Roma only. This constitutes a case of direct discrimination.

The Complaints Committee for Ethnic Equal Treatment which existed prior to the Board of Equal Treatment has in 2007 examined with two similar types of cases. In both cases the Committee found that the Roma people had been subject to direct discrimination because of their ethnic origin:

In the first case, a Danish municipality had started an integration project which meant that some of the persons targeted were referred to the same two counsellors because of their ethnic origin. The Complaints Committee debated whether this measure could fall under the scope of “genuine and determining occupational requirements” as stated in article 4 of directive 2000/43EC. The Committee did not find that this was the case as the referral mechanism was not done on a voluntary basis. It was therefore in breach of the law and a case of direct discrimination.

In the second case, the same municipality had placed a child of Roma background in a special school class where all students had a low record of attendance. The pupils in the class were all of Roma origin. The Committee found that this was a case of direct discrimination. Even though the student had been placed in this class for educational purposes, she was primarily placed in this class because she was a person of Roma origin who had these kinds of problems. A student of Danish origin with the same kind of problems would most likely not have been placed in this particular school class.

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<sup>84</sup> Sec. 11 of the Act No 40/1964, the Civil Code: „ An individual shall have the right to protection of his or her personhood, in particular of his or her life and health, civic honour and human dignity as well as of its privacy, name and expressions of personal nature.“

5. It would be possible for the Board of Equal Treatment to award compensation to the victims.

We wish to reiterate that the answers above reflect an informal discussion that took place in the secretariat. The answers have not been approved by the chairpersons of the Board.

### ***Answers provided by the Danish Institute for Human Rights***

1. Yes the case would fall under the scope of the Act on Ethnic Equal Treatment.<sup>85</sup> The act is a civil act and it prohibits direct or indirect differential treatment because of a person's race or ethnic origin. The prohibition covers all public and private activities accessible to the public concerning social protection and health care, social benefits, education and access to and delivery of goods or services including housing which is accessible for the public.

Furthermore it would fall under the criminal Act on the Prohibition against Discrimination due to Race etc.<sup>86</sup> which penalises, as a part of occupational or non-profit activities, refusal to serve a person on equal terms as others because of the person's race, skin colour, national or ethnic origin, religion and sexual orientation. In a judgment from the Eastern High Court from 1991 the court found that a municipality had taken unlawful considerations by recommending to the public housing association that they did not rent out to immigrants (persons with a foreign nationality).<sup>87</sup>

The court referred to the criminal Act on Prohibition against Discrimination due to Race etc.

Regarding the Feryn Case see under question 2.

2. The Board of Equal Treatment which is an administrative complaints body dealing only with cases of discrimination would be competent to handle the case according to the civil Act on Ethnic Equal Treatment while the ordinary courts would be competent according to the criminal Act on the Prohibition against Discrimination due to Race etc.

The Board of Equal Treatment cannot take cases *ex officio*. However according to the Feryn case there is the presumption that the Board of Equal Treatment could handle a case where there is a *risk* that discrimination occurs, even though the person who has filed a complaint has not been exposed to discrimination. In a case from 2009 the Board of Equal Treatment found that a defendant's statement in a newspaper article, that she preferred female applicants as sales personnel when she had to fill available positions, gave such a clear statement on the defendant's unwillingness to hire men, that there was an assumption of direct discrimination.<sup>88</sup> The complainant in the case had not applied for a job at the workplace, which was a car dealer.

It is presumed that the Danish Institute for Human Rights - as a specialised equality body - would be able to file a lawsuit against - in this case the municipality - without a complainant. There is however no precedence to support this. The institute - as a specialised equality body - would, however, be able to contact the municipality and draw their attention to the problem.

3. This case would constitute direct discrimination.

The former administrative complaints body, the Complaints Committee for Ethnic Equal Treatment, found in a case from 2007 that a municipality's project called "Joint Effort" which entailed visitation of persons with a Roma background to two specific case workers was a violation of the prohibition against direct discrimination due to race or ethnic origin cf. the Act on Ethnic Equal Treatment.<sup>89</sup> The municipality saw this set up with visitation as a benefit for

<sup>85</sup> Act No. 374 on Ethnic Equal Treatment of 28 May 2003.

<sup>86</sup> Act No. 626 on the Prohibition against Discrimination due to Race etc. of 29 September 1987.

<sup>87</sup> U.1991.358Ø.

<sup>88</sup> Decision No. 12/2009 from the Board of Equal Treatment.

<sup>89</sup> Decision No. 780.19 of 11 July 2007 from the Complaints Committee for Ethnic Equal Treatment.

persons with a Roma background, who had a difficult time getting into the labour market and maintaining a connection to the market. The purpose of the set up was to include knowledge about the way of life of Roma people as well as knowledge about their culture in order for the municipality to give the individual the support s/he needs to get into the labour market. The Complaints Committee, however, still found that the set up was a compulsory measure towards persons with a Roma background, which constituted a violation of the prohibition against direct discrimination.

**4.** In this case there is no objective justification or exception based on race or ethnic origin.

Roma people do not constitute a national minority in Denmark under the Framework Convention for the Protection of National Minorities. They do however constitute an ethnic minority and thus have the right not to be discriminated against due to their ethnic origin. There is no specific right for Roma people to their own culture and their own language; however, this would be seen as part of their ethnic origin thereby constituting a violation against the prohibition against direct discrimination if they are treated less favourable due to their culture or language. Roma people have the same rights to freedom of movement as other people.<sup>90</sup>

In connection with the deposit of the instrument of ratification by Denmark of the Framework Convention for the Protection of National Minorities, Denmark has declared that the Framework Convention shall apply to the German minority in South Jutland of the Kingdom of Denmark, thus giving the German minority in Denmark the rights which follow from the convention. Furthermore a declaration exists – the Copenhagen-Bonn declaration - which is a mutual declaration from 1955 which among other things states that to profess one's loyalty to the German people and the German culture should not be contested or verified by an official authority.

Regarding cultural practices it is highly unlikely that they within a racial or ethnic group could constitute lawful justification for discrimination.

It follows very clearly from the Act on Ethnic Equal Treatment section 6, that the act cannot be waived to detriment of the person who is exposed to differential treatment due to race or ethnic origin thus making any consent to racial discrimination not valid.

**5.** Instruction to discriminate is categorised as differential treatment c.f. section 3, subsection 5 of the Act on Ethnic Equal Treatment and it requires that the person giving the instruction has an actual authority to give the instruction to the person s/he is giving it to. The Roma person participating in the working group was not employed or hired by the city which means that the "relationship" which has to be in place in order for there to be an "instruction situation" does not exist. One could argue that instruction to discriminate comes from the municipality to the working group, however, in my opinion this is a stretch. It is the municipality which is responsible for how the housing services/decisions are carried out and it is the municipality that has set up procedures which must be seen as a violation of the prohibition against discrimination.

**6.** According to section 9 of the civil Act on Ethnic Equal Treatment the sanctions of remedies could be compensation. According to the criminal Act on Prohibition against Discrimination due to Race etc., the sanctions could be either a fine or imprisonment for no more than six months.

There is no fixed level of the compensation awarded. However a case from the Board of Equal Treatment can give an example of the level of compensation. The Board found that it was in violation of the Act on Ethnic Equal Treatment that the complainant was refused to rent an apartment on the ground that the respondent would not rent to non-Danes. The complainant was awarded a compensation of DKK 5,000 which the respondent was to pay

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<sup>90</sup> There is a difference in right to freedom of movement due to citizenship as well as between EU citizens and non-EU citizens.

within 14 days.<sup>91</sup> In cases which regards the labour market the awarded compensation by the Board of Equal Treatment is usually higher.<sup>92</sup>

## Finland

### **Answers provided by the Office of the Ombudsman for Minorities**

1. Yes, the case falls within the scope of the Race Directive 2000/43/EC; Article 2 and Article 3.1 (h). The prohibition of discrimination is laid down in Article 2 and Article 2 also includes the concept or definition of discrimination. According to Article 3.1 h, the Directive applies to all persons, as regards both the private and public sectors, including public bodies, in relation to access and supply of goods and services which are available to the public, including housing.

The case also falls within the scope of the Finnish Non-Discrimination Act, Section 2.2 (4): "the supply of or access to housing and movable and immovable property and services on offer or available to the general public other than in respect of legal acts falling within the scope of private affairs and family life."(84/2009) According to Section 6 discrimination is prohibited (among other grounds) on the ground of national or ethnic origin and discrimination is defined in Section 6.

An individual complainant is not necessary in order to establish that the action by the municipality and the municipality-owned joint-stock property-company is discriminatory (see ECJ preliminary ruling in the Feryn case, C-54-07, 1.: *"The fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination..., such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market."*)

Please see also the opinion of the Committee on the Elimination of Racial Discrimination of 8<sup>th</sup> August 2007 (CERD/C/71/D/40/2007, 8.8.2007, Murat v. Denmark, 7.3): *"...the uncontroversial fact that one of the teachers at the school admitted having accepted an employer's application containing the note "not P" next to his name and knowing that this meant that students of non-Danish ethnic origin were not to be sent to that company for traineeship is in itself enough to ascertain the existence of a de facto discrimination towards all non-ethnic Danish students, including the petitioner..."*

2. The Ombudsman for Minorities monitors the Non-Discrimination Act when it comes to discrimination on the ground of racial or ethnic origin in the provision of public and private services including housing. Also the Discrimination Tribunal is competent in this case. The Tribunal can prohibit anyone who has violated the anti-discrimination provisions of the Non-Discrimination Act from continuing or repeating the discriminatory practice. If necessary, the Tribunal can reinforce the prohibition by imposing a conditional fine. The Tribunal may also order payment of the conditional fine as provided in the Act on Conditional Imposition of a Fine. The Tribunal can also confirm a conciliation settlement between the parties.

Individuals can bring cases before the Discrimination Tribunal themselves or they can start by contacting the Ombudsman for Minorities. The Ombudsman for Minorities can bring cases before the Discrimination Tribunal on behalf of a victim of discrimination or in her own name with or without a victim. A victim of discrimination can seek guidance, advice, recommendations and conciliation from the Ombudsman for Minorities.

A victim of discrimination can bring a compensation claim before a district court. The Ombudsman can assist a victim in court in cases of special relevance for the prevention of ethnic discrimination.

Alternatively, the case could be dealt with as a criminal case. Discrimination is prohibited in Section 11, Chapter 11, of the Penal Code:

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<sup>91</sup> Decision from the Board of Equal Treatment no. 34/2010 of 4 June 2010.

<sup>92</sup> Decision from the Board of Equal Treatment no. 27/2010 of 23 April 2010 (compensation awarded was DKK 25,000 kr.)

A person who in his/her trade or profession, service of the general public, exercise of official authority or other public function or in the arrangement of a public amusement or meeting, without a justified reason

(1) refuses someone service in accordance with the generally applicable conditions;

(2) Refuses someone entry to the amusement or meeting or ejects him/her; or

(3) places someone in an unequal or an essentially inferior position owing to his/her race, national or ethnic origin, colour, language, sex, age, family ties, sexual orientation, disability or state of health, religion, political orientation, political or industrial activity, ... or another comparable circumstance shall be sentenced, unless the act is punishable as industrial discrimination, for *discrimination* to a fine or to imprisonment for at most six months.

If dealt with as a criminal case, the rule on the burden of proof in the Non-Discrimination Act could not be used. The prosecutor would have to prove the case completely. The prosecutor would also have to prove some level of intent, which is not necessary for the definition of discrimination in the Non-Discrimination Act. The benefit of taking the case forward as a criminal case would be stronger sanctions: a fine. The prosecutor could also put forward civil claims on behalf of the victim such as compensation claims according to the Non-Discrimination Act without any risk relating to legal costs for the victim.

**3.** There is direct discrimination on the ground of ethnicity, because Roma are treated less favourably than others are treated in a comparable situation. Direct discrimination is defined in Section 6.2 of the Non-Discrimination Act as follows: 1) *the treatment of a person less favourably than the way another person is treated, has been treated or would be treated in a comparable situation.*

The Roma woman and her non-Roma husband were subject to a special procedure directly because of the ethnic origin of one of the family members. Applicants of non-Roma origin and applicants without any person of Roma origin belonging to the family were not subject to the procedure in question.

**4.** No, there is no objective justification, because in direct discrimination cases there is no possibility to justify the action. Neither is there any applicable exception in the Non-Discrimination Act.

The Roma and other groups have a constitutional right to maintain and develop their own language and culture. According to the preparatory works, the provision obligates the public administration to allow and to support the development of the language and culture of the groups in question. The provision also constitutes a constitutional basis for the development of these groups' living conditions in accordance with their cultural traditions. On the other hand does the provision not give these groups the right to deviate from the Finnish legal order by invoking their own culture (Free translation from the preparatory works, HE 309/1993 vp, of Section 17.3 of the Constitution).

Among the fundamental rights laid down in the Constitution is also the freedom of movement, Section 9.1: *"Finnish citizens and foreigners legally resident in Finland have the right to freely move within the country and to choose their place of residence."*

Since it is a direct discrimination case, there is no way to justify the action. Even in indirect discrimination cases, the right to one's own culture does not include a right to discriminate. This means that there is no conflict with the prohibition to discriminate. The constitutional right to one's own culture does not include a right to breach national legislation (such as the Non-Discrimination Act or the prohibition to discriminate as laid down in the Constitution).

Cultural practices can in some circumstances justify action, that otherwise would be seen as indirectly discriminatory, but only if the cultural practices do not lead to discrimination.

A person's consent to discrimination is irrelevant and consent does not justify discrimination (see ECtHR in DH v. Check Republic Application No. 57325/00 and Orsus and Others v

Croatia Application No. 15766/03). According to the judgment in D.H and others, para. 204: "In view of the fundamental importance of the prohibition of racial discrimination ... the Grand Chamber considers that, ..., no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest (see, *mutatis mutandis*, *Hermi v. Italy* [GC], no. 18114/02, § 73, ECHR 2006-...)".

5. The municipality and/or the municipality-owned joint-stock property-company has probably instructed possible new employees on what the Roma working group does and instructed to ask for the permission of Roma applicants to sharing personal information with the Roma working group. These kinds of instructions also constitute discrimination (Non-Discrimination Act Section 6.2 (4): "an instruction or order to discriminate"). It would, however, be challenging to prove this form of discrimination in this case.

It is also possible that the municipality has instructed the municipality-owned joint-stock property-company to discriminate, but there is no proof supporting such a claim. The Roma contact person probably has instructed the municipality and the company, but this is irrelevant, since the Roma contact person was not the one offering housing.

6. The Discrimination Tribunal could prohibit the municipality and the municipality-owned joint-stock property-company to continue or to repeat the discriminatory behaviour. If necessary, the Tribunal can reinforce the prohibition by imposing a conditional fine.

In order to get compensation the victims of discrimination would need to bring the case before a district court (the Non-Discrimination Act, Section 9). In addition, a victim can claim damages if appropriate.

Also the husband of the Roma woman is discriminated against by association (see ECJ, Coleman case, C-303/06) and can, therefore, claim compensation.

There is very little case law in Finland on the level of compensation. The two discrimination cases related to housing that I am aware of, where the Non-Discrimination Act has been applied, have resulted in 2500e or 3000e compensation/person.

## France

### ***Answers provided by the HALDE***

1. The whole scheme would be considered as discriminatory pursuant to criminal and civil French law. By no means, the allocation of social housing shall be made through such a work group and/or contact person. Moreover, taking into consideration the ethnic origin, race or nationality of any person to allocate social housing rentals is strictly forbidden. Conditions of eligibility for social housing allowance are provided by law and refer to objective and non-discriminatory criteria such as the maximum income of the household as defined by law.

Housing is qualified as a service within the meaning of criminal provisions relating to discrimination.

**Article 225-2 of the Penal Code** punishes discrimination committed against a natural or a legal person, by three years' imprisonment and a fine of EUR 45,000. The discrimination may consist of the refusal to supply goods or services (1°) or subjecting the supply of goods or services to a condition based on one of the prohibited grounds (4°).

**Article 225-1 of the Penal Code** states that discrimination is understood as any distinction applied between persons by reason of, amongst others, origin membership or non-membership, true or supposed, of a given ethnic group, nation or race of one or more members.

**Article 2-1° and 2° of Law no 2008-496 of 27 May 2008 relating to the adaptation of National law to Community law in matters of discrimination, completing the**

**transposition of Directives 2000/43/EC, 2000/78/EC, 2002/73/EC, 2004/113/EC** provides that any direct or indirect discrimination, based on the true or supposed membership or non-membership of an ethnic group or race, is prohibited notably in the fields of access to goods or services or the supply of goods or services.

**Article 1 of Law 89-462 of 6 July 1989 (so-called *Mermaz Law*)** forbids any refusal to let housing to a person on specific prohibited grounds, such as origin and membership or non-membership - true or supposed - of a given ethnic group, nation, or race. This ban applies to private as well as social housing.

The prohibition provided by article 225-2 4° relating to subjecting allowance of social housing rental to a condition based on origin or membership or non-membership, true or supposed, of a given ethnic group, nation or race of one or more members (4°) is applicable even when there is no identifiable victim.

On the contrary, qualifying such a situation as a discriminatory refusal of social housing rentals as referred to in article 225-2 1° of the Penal Code would require to identify a victim at first.

The abovementioned relevant provisions of *Mermaz Law* and Law no 2008-496 may not require any identifiable victim according to *Feryn Case-law*.

**2.** The Criminal Court or depending on the amount of the litigation, the County court (*Tribunal de grande instance*) / District Court (*Tribunal d'instance*) would be competent.

The French anti-discrimination and equal opportunities Commission, the HALDE (Haute autorité de lutte contre les discriminations et pour l'égalité) would also be competent.

**3.** The allowance scheme of social housing rentals described in the case is directly discriminatory under French Law.

For example, a Criminal Tribunal condemned a social housing institution which had interpreted the concept of social mix as including a reference to origin in order to prevent concentration of certain racial groups<sup>93</sup>. The investigation showed that the manager of rentals had established a strategic social housing access plan, for which it had instructed an employee to complete data on the racial/ethnic origin of each tenant. The data were used to terminate or offer loans according to quotas. The social housing corporation was condemned to a EUR 20,000 fine and to pay EUR 10,000 as compensation to an intervening NGO (*SOS Racisme*) in particular.

**4.** There is no justification in case of direct discrimination based on ethnic origin or race in reference to the above-mentioned texts (see our developments referred to in point 1).

The respect of social mix would be rejected as irrelevant even if such a situation may have an impact on the level of sanction<sup>94</sup>.

**i)** According to the French Constitution, France has no minorities. The French Republic is "one and indivisible", meaning that she is made up of equal citizens, not separate communities. France has not ratified the framework Convention for the protection of minorities nor the European Charter for Regional or Minority Languages.

The official language of the French Republic is French (art. 2 of the French Constitution) although regional languages are now officially recognised since the revision of the French Constitution created in July 2008.

The right to liberty of movement is generally protected under the European Convention of Human rights and under French Constitutional Law<sup>95</sup> but no specific protection is given to the Roma Community in this respect.

<sup>93</sup> St Etienne Criminal Court February 3, 2009, *SOS Racisme vs. Metropole habitat*, no 304/09,

<sup>94</sup> In this respect, please refer to the abovementioned St Etienne Criminal Court case-law (point3).

<sup>95</sup> See Constitutional Council Decision no. 79-107 DC 12 July 1979 whereby the Council recognised that the liberty had a constitutional value.



Just before the accession of Romania and Bulgaria to the European Union, the French government put in place a transitory status for Bulgarians and Romanians concerning their right of movement on the French territory. This notice of the Home Office dated December 22, 2006 limited their free movement and their right to stay for a period under three months notably if they were considered to be an unreasonable charge for the French social system. Following the intervention of the highest administrative Court (*Conseil d'Etat*), such a restriction was deleted<sup>96</sup>.

Besides, travellers are depicted by national law as an administrative category determined by its way of life. They appear, in practice, as an identified group with one common factor – that they are victims of the same differences in treatment, due to their belonging, actual or assumed, to the Gypsy community.

To circulate in the country, French travellers must be in possession of travel permits.

Three types of permits, depending on the stability of the bearer's income, are provided:

- Travellers with no regular income (*Revenu minimum d'insertion*, or minimum mainstreaming subsidy is not considered regular income), must have a travel log, to be stamped every three months by the local police or *gendarmerie nationale*. Those circulating without such a book may be sentenced to imprisonment from 3 months to one year.
- Travellers with regular income must carry a travel log, to be stamped every year. Those who do not are subject to a fine.
- Roving merchants (travellers listed with the Registry of Commerce or on the registry of professions) must have a special travel log, which does not require stamping. Failure to do so may give rise to a fine.

These rules are currently undergoing careful review by the European Commission, as evidenced in a report entitled, "The Situation of Rom Travellers in an Enlarged European Union" (2004), in which it is observed, as regards France that "Travellers are required to show a 'travel permit', which paradoxically places a requirement on a single ethnic group regarding what is a general right – freedom of movement".

The entire system governing travel permits and, in particular, the travel log that requires stamping every three months, justifies the constant ID checks, insofar as failure to have such a log is considered an offence.

In two decisions no. 2007-372 of 17 December 2007 and no. 2009-143 of 6 April 2009, the HALDE deemed that such a system appeared to be in contradiction with article 12 of the Universal Declaration of Human Rights on freedom of movement for individuals. Moreover, the HALDE considered that the system clearly creates a difference of treatment against Travellers, as defined in article 14 of the European Convention on Human Rights (ECHR) combined with article 2 of its additional Protocol no. 4 prohibiting discrimination impairing the individual exercise of freedom of movement.

So far, the HALDE's recommendations to the government to modify such legislation have gone unheeded.

## ii) No.

On the contrary, the French legislation provides for specific accommodation for Travellers. According to Law no. 2000-614 of 5 July 2000 relating to the Welcome and Housing of Travellers (so-called *Besson Law*), every department shall provide accommodation schemes for travellers and every municipality over 5000 inhabitants is required to equip welcoming areas (stopping places) for them.

In a suspended judgement, the Lyon County Court recognised that Roma who lived in informal settlements without basic infrastructure (not to say hardly habitable dwellings) on a site belonging to the Department were regarded as plaintiffs' "home" within the meaning of Article 8 of the European Convention of Human Rights. As the Department was not using this

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<sup>96</sup> Council of State (*Conseil d'Etat*) Opinion 26 November 2008, no. 315441, *M. S*

parcel of land and could not prove any immediate project about it, their expulsion was not justified<sup>97</sup>.

iii) No waiver of the right not to be subjected to racial discrimination can be accepted.

In a judgement dated November 10, 2009<sup>98</sup>, the highest judicial Court (*Cour de cassation*) deemed that an employer who requested from an employee to change his first name from Mohammed to Laurent was discriminatory according to the Labour Code. The fact that this employee had accepted to change his first name during the hiring process was not considered as a relevant element for justification.

5. Article 1-2° of Law no 2008-496 defines instructions to discriminate as a form of discrimination. The fact of enjoining any person to engage in a discriminatory behaviour is therefore prohibited.

Provocation to racial discrimination and complicity are also prohibited under articles 23 and 24 of the Law on the Press dated July 29, 1881 (in case of public provocation) and article R. 625-7 of the Penal Code (in case of non public provocation). According to the highest judicial Court, such provocation refers to discrimination within the meaning of article 225-1 and 225-2 of the Penal Code (<sup>99</sup>).

6. The general principle in French Civil Law is to remedy the prejudice by the award of compensatory pecuniary damages, indemnifying the financial and moral damage. On one hand, punitive damages are not allowed. On the other hand, there is no ceiling on the maximum amount of compensation that can be awarded.

Pursuant to Law no 2006-396 on Equal Opportunities of March 31, 2006, the HALDE is entitled to suggest a settlement, if public prosecution has not yet been brought about. According to Article 11-1 of revised Law creating the HALDE (Law n° 2004-1486 of 30 December 2004), *“When the High Authority finds that instances of discrimination have occurred as sanctioned by Articles 225-2 and 432-7 of the Criminal Code (...), the HALDE may, if the case has not yet given rise to public proceedings, offer the perpetrator a “penal transaction” involving the payment of a fine not to exceed EUR 3,000 where individuals are concerned and EUR 15,000 where corporations are concerned and, where applicable, in compensation for the victim. The size of the fine is set according to the seriousness of the offence as well as the income and financial responsibilities of the relevant Party”*.

The Law no. 2004-204 of 9 March 2004 (so-called *Perben II* Law) increased criminal sanctions relating to an offence of discrimination to a maximum of three years imprisonment and a EUR 45,000 fine (article 225-2 of the Penal Code). It also created an aggravating factor when discrimination is committed by a person holding public authority or discharging a public service mission, in the discharge or on the occasion of that office or mission. Such discrimination is punished by five years' imprisonment and a fine of EUR 75,000 where it consists of refusing the benefit of a right conferred by the law (article 432-7 1° of the Penal Code).

In addition, article 225-19 of the Penal Code foresees ancillary sanctions such as posting or publication of the judgment, closing down of a public place, exclusion from procurement contracts, confiscation of a business, suspension of civil rights, and a list of further penalties.

It is also important to note that legal persons, including the State and all public services, can be condemned as well, and this liability does not exclude that of the natural person.

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<sup>97</sup> Lyon County Court (*Tribunal de Grande Instance*) 16 November 2009, no. 2009/02850

<sup>98</sup> Court of Cassation 10 November 2007, no. 08-42286

<sup>99</sup> Court of Cassation, Criminal Chamber, April 12, 1976 and Court of Cassation, Criminal Chamber May 22, 1989

# Greece

## ***Answers provided by the Greek Ombudsman***

1. According to the law 3304/2005 which transfers both 2004/43 and 2000/78 directives in the Greek legal order, the range of the law includes definitely the access to housing. Since at the current case the authorities followed the above mentioned described practice only in respect to a racially determined group of people such practice would have been also under the extend of the Greek Law.

2. According to the above-mentioned law the Greek Ombudsman is competent when the discriminatory practice concerning racial issues derives from any public service. A special comity of the Ministry of Justice is competent whenever the discrimination comes from individuals or legal entities of the private sector. Thus the Greek Ombudsman would be competent in the current case.

3. I would consider the discrimination as a direct one, since according to the data of the case the practice of the local authorities refers only to a specific group of people [Roma]. The race of the people is the crucial factor on which the policy of the Finnish Authorities is based. Thus the precondition which is necessary according to the directive and the Greek law in order to characterise a practice as a direct discrimination or not [the less favourable treatment of a person comparing to others due to his/her race in similar cases] is fulfilled.

4. According to the 3304/2005 law the only acceptable exceptions to the non-racial discrimination principle are those concerning the affirmative actions and the differential treatment due to the nature of the professional activities. Yet in the concrete case there was no attempt of justification of the administrative activity based on any of these two grounds since the only reason offered by Finnish authorities was the avoidance of violence among people of the same racial origin. Such reason could be an acceptable ground of exception only if the case concerned discrimination based on age, sexual orientation, disability, religious or other beliefs since according to the law and the directive, public order is an acceptable ground of discrimination only when discrimination refers to one of the above-mentioned categories.

i) Freedom of movement is guaranteed by Greek constitution and law, yet freedom of movement does not extend to a freedom of establishment. There is also no right to culture or language of any special group recognised by the Greek Constitution. The only exception to this rule is the International Treaty of Lausanne ratified the Greek state which recognises special educational rights to the Muslim Minority as such [the right to have educational programmes in their mother tongue]. Generally speaking, the Greek constitutional order does not recognise special group rights, thus we cannot see any conflict between these rights and prohibitions against racial discrimination. The jurisprudence of the ECHR is not very helpful on this issue also, since it recognises only rights of individuals and not of groups as such.

ii) Cultural practices within a racial or ethnic group are not included to the acceptable grounds of exceptions which are by the Greek law and the directive. There is no indication that the practice of the Finnish authorities aimed at combating the disadvantages of Roma people due to their origin, constituting thus a measure of affirmative action. It is clear of the data of the case that the concrete measures were taken on grounds concerning public order and not promoting the disadvantages of Roma.

iii) According to ECHR jurisprudence consent to discrimination cannot be considered to be free as far as groups of people who suffered a long period of exclusion are concerned. Under such circumstances the consent is not considered as free. Additionally the consent of people cannot override the scope of the directive and the law since the exceptions is clearly described.

5. The question concerning the instructions could be answered only within the context of the penal remedies which are foreseen in the Greek law [article 16]. Only the judge during the examination of the case can investigate the accurate legal characterisation of the actions of the persons involved. Since according to the wording of the provision anyone who violates the law is sentenced to 6 months up to three years, the judge can investigate the degree and the nature of each public servant's involvement. Ombudsman is unable to undertake such kind of investigation since due to the accurate description of his/her duties in the law which does not extend to the examination of the subjective motives which determines the official's actions.

6. Ombudsman's intervention, whose action does not extend beyond the non-legally binding recommendations addressed to the administration. In theory such case it could be also a case of civil liability but still there are still no such cases pending to the Greek courts. The victim of discrimination can also apply to the administrative and penal courts and also he/she can ask for the re-examination of the practice by the administration itself, by applying one of the administrative remedies which are provided to the people by the Greek Code of Administrative Procedure.

## Hungary

### ***Answers provided by the Hungarian Equal Treatment Authority***

1. The case falls under the scope of the 2000/43/EC Race Directive as Art 3. Paragraph 1.h of the Directive expressly refers to housing.

The Hungarian Equal Treatment Act (hereinafter ET Act) is the implementation of the Race Directive and as such prohibits discrimination based on e.g. race and ethnic origin in the field of housing.

Art. 26. reads as follows:

„It is a particular violation of the principle of equal treatment when, because of his/her characteristics defined in Article 8, a person is a) inflicted with direct or indirect negative discrimination in respect of the granting of housing subsidies, benefits, interest subsidies by the state or a municipality, b) put in a disadvantageous position in determining the conditions of sale or leasing of state owned or municipal housing and plot”.

The case also falls under the scope of civil law protection of inherent rights. Under Art 76 of the Civil Code, discrimination against private persons on the grounds of gender, race, ancestry, national origin, or religion shall be deemed as violations of inherent rights. Under civil law, the person whose inherent rights have been violated may bring a claim before the local civil court demanding the court declaration of the occurrence of the infringement, demand to have the infringement discontinued and the perpetrator restrained from further infringement; demand that the perpetrator make restitution in a statement or by some other suitable means and, if necessary, that the perpetrator, at his own expense, make an appropriate public disclosure for restitution; demand the termination of the injurious situation and the restoration of the previous state by and at the expense of the perpetrator and, furthermore, to have the effects of the infringement nullified or deprived of their injurious nature. The person whose inherent rights were violated can also file charges for punitive damages in accordance with the liability regulations under civil law.

The Equal Treatment Authority (hereinafter ETA) is the competent administrative body to investigate complaints of discrimination. In line with the Feryn case the ETA would not require any identifiable victim to initiate proceedings against the municipality. The ETA may also initiate proceedings against the municipality *ex officio* under Art. 15. para. 5 of the ET Act. NGOs and other interest representation organisations can instigate a procedure at the ETA (*actio popularis*) since the violation of the principle of equal treatment in the present case is based on such a characteristic that is an essential feature of the individual, and the violation

of law or a direct threat of the violation affects a larger group of persons that cannot be determined accurately.

In civil lawsuits the Prosecutor, the ETA and NGOs may also bring claims in the aforementioned circumstances, in which the violation of equal treatment affects a larger group of persons and based on the essential feature of the individuals. Ethnic origin is considered to be an essential feature of the individual.

Civil law proceedings except *actio popularis* may only be initiated by the person whose inherent rights has been violated, therefore civil courts would require an identifiable victim and enforce his rights in person.

**i)** The municipality applied a specific procedure in case of applicants for housing of Roma origin. This procedure was general in terms that it applied to all Roma applicants and it was public.

In the Feryn case the ECJ held that “Public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory within the meaning of Article 8(1) of Directive 2000/43”

In the present case there were no declarations or statements from the municipality that Roma applicants would not be offered apartments, but it was clear that there was a difference in treatment since the municipality applied a particular procedure in case of Roma applicants. In case of non-Roma applicants the future neighbours were not consulted prior offering the apartment. Therefore, non-Roma applicants were not subjected to be refused because of their future neighbours having objections. As a consequence Roma applicants were treated less favourably.

In line with the ECJ’s decision I assume that establishing a public procedure applied to only applicants of a certain ethnic origin is also sufficient for a presumption of the existence of a policy which is directly discriminatory.

**2.** Both the Equal Treatment Authority, as an administrative remedy, and the local or Municipal Civil Court as a judicial remedy would be competent in the present case.

**3.** Art 9. of the ET Act defines indirect discrimination as a disposition that apparently complies with the principle of equal treatment but put any persons or groups having a protected feature at a considerably larger disadvantage than other persons or groups in a similar situation were or would be.

Since the municipality applies a specific procedure only in case of Roma applicants, its policy is certainly not neutral and therefore does not constitute indirect discrimination. The less favourable treatment is clearly based on the applicants’ ethnic origin therefore this constitutes direct discrimination.

**4.** In case of direct discrimination based on race or ethnic origin no justification can be lawful according to Art 7. (3) of the ET Act and Art 2 Para 2a of the Race Directive.

**i)** Minority rights do not conflict in any ways with the anti-discrimination law. The Minority Act (Act LXXVII of 1993 on the Rights of National and Ethnic Minorities) declares the right of national or ethnic minorities to their own culture and the right to national or ethnic identity as a fundamental human right. National or ethnic minorities are regarded as components in the formation of the state.

The right to freedom of movement is granted by the Constitution and it is a fundamental right as well, however no specific right as such is provided for the Roma minority. It is important to note that the Hungarian Roma community unlike Travellers is settled. Travelling or circulating around the country is not considered to be part of their cultural heritage.

ii) No. Under the Act on Equal Treatment no justification shall be accepted in case of direct discrimination and unlawful segregation based on racial origin, ethnic or national origin, colour or nationality.

iii) No. As the ECHR decided in the DH v. Czech Republic case, no waiver of the right not to be subjected to racial discrimination can be accepted even if it is satisfied that it is established in an unequivocal manner and be given in full knowledge of the facts.

5. Non-Roma family members may also be affected by the policy of the municipality, therefore discrimination by association can also occur.

6. Under the ET Act the ETA may order that the situation constituting a violation of law be eliminated, prohibit the further continuation of the conduct constituting a violation of law, order that its decision establishing the violation of law be published or impose a fine. The amount of the fine imposed may vary from HUF Fifty thousand to HUF Six million. These legal consequences may be applied collectively.

The ETA in determining the appropriate sanctions takes into consideration that have been effected by the violation of law, what were the consequences of such violation, the frequency of the unlawful conduct and the financial standing of the perpetrator.

Parties to the procedure may also settle an agreement. The ETA is obliged to call the parties' attention to the possibility to conclude the procedure by entering into an agreement. The ETA approves these agreements by a resolution if it is given that the agreement complies with statutory conditions.

In 2009 the ETA approved an agreement concluded between a municipality and a Roma family (EBH/98/2010). The Roma family complained that the municipality terminated their tenancy contract because of their Roma origin. The family was renting a municipality owned apartment for years, but their neighbours were complaining for their behaviour. The municipality terminated the contract because of the high level of complaints received from their neighbours. The parties finally concluded an agreement in which the municipality apologised for the termination of the contract and confessed that the termination was not in accordance with law, therefore it was null. The family promised to refrain from any activities that may disturb the neighbours.

Complainants are entitled to initiate civil lawsuits against the perpetrators even after receiving final and binding decision of the ETA. Under Art 76 of the Civil Code, discrimination against private persons on the grounds of gender, race, ancestry, national origin, or religion; shall be deemed as violations of inherent rights. (See answer 1.)

## The Netherlands

### ***Answers provided by the Dutch Equal Treatment Commission***

#### ***1. Applicability of EC Law***

Yes, this case falls within the scope of the Race Directive 2000/43/EC, article 3, 1, h, in conjunction with article 2 of that Directive.

Article 2 stipulates what constitutes direct and indirect discrimination on the basis of race or ethnic origin.

In article 3, 1, h of the Directive it is stated that the Directive is applicable to the access to and the provision of publicly available services, among which housing services.

#### ***Need for a complainant***

Article 7 of the Race Directive stipulates:

1. Member States shall ensure that judicial and/or administrative procedures, [...], for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, [...].

2. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

This article does not say expressly that such associations or organisations as mentioned in article 7, 2 of the Directive have a right of their own to take up a case if there is no complainant. However, in the Feryn judgement (C-54/07), the European Court of Justice (ECJ) established that such organisations do have a right to bring a claim to court in the absence of a victim. In the Feryn case, the company called Feryn stated publicly that it would not recruit employees of Moroccan origin. Although no one had complained to be the victim of discrimination by the company, the ECJ found that the public statement on its own already constituted a breach of the principle of equal treatment in the access to the labour market as possible candidates could have been deterred to apply for a job with the company after knowing about the statement. The ECJ also established that the Belgian National Equality Body had a right of its own to bring such a case, when there is no (alleged) victim of discrimination, to court.

In the Netherlands, article 12, 2, e of the Equal Treatment Act (ETA) stipulates that those organisations that have as a statutory task to promote the interests of those protected by the equality legislation, can ask the Dutch Equal Treatment Commission (ETC) for a decision in a discrimination case. The article does not say that such an organisation needs to represent an (alleged) victim of discrimination. While article 12, 2, a states that individuals requesting a decision of the ETC need to have a personal interest in that decision, this admissibility criteria does not apply to these organisations. Therefore, the ETC has often admitted requests for a decision that were filed out of 'general interest' by e.g. anti-discrimination bureaus. However, in such cases where there is a victim, but the victim does not want to bring a claim and the anti-discrimination bureau (or lobby organisation) takes up the case, the organisation needs the permission of the victim before their case is admissible.

Such organisations can also bring a discrimination claim before a court. Such a right has since long been acknowledged in Dutch case law.

Another question is: If the Roma woman of the case had asked the national equality body to bring her claim to a court – or, in the case of the Netherlands, if she had asked the ETC for a decision, with or without the help of an anti-discrimination bureau – would she have had a case, as she was eventually offered an apartment in November 2009? This would not have made a difference in the practice of the Dutch ETC, as what is relevant in order to establish whether someone has an interest in a decision is that she, as a Roma, had to follow a special procedure in order to get that apartment.

#### *Applicability of Dutch equality law*

As for the applicability of the Dutch equality legislation to the present case, a distinction needs to be made between the claim against the municipality and the claim against the property company.

#### The case against the municipality

Article 7 of the ETA says that it is prohibited to discriminate in the access to or the provision of goods and services by – among others – organisations that are active in the field of housing.

However, this article only applies to private actors and not to public actors, such as the municipality. This is because article 7 of the ETC only applies to commercial activities in relation to the provision of goods and services, among which the hiring out of houses. The housing policy of a (local) government cannot be qualified as a commercial activity, as the municipality only decides on the rules by which the housing service is carried out and does not act as a private company on the housing market.

So, article 7 of the ETA is not applicable to the complaint against the municipality.

But article 7a of the ETA would probably be applicable. In this article, it is stated that discrimination on the ground of race is prohibited in relation to social protection, including social security and social advantages.

The ETA does not give a definition of the term 'social protection' but during the discussion in the Parliament it was said that the term should not be interpreted strictly. Also, in its decision 2006-222 the ETC has held that a local housing policy, aiming at distributing (certain types of) available houses/plots of land in the best possible way, fall under the scope of social protection.

In that particular case a family of travellers claimed that a municipality failed to involve the interests of travellers in its local housing policy. The ETC held that the housing policy of the municipality did not refer explicitly to Roma or travellers. But by not incorporating the housing needs and wishes of travellers in its housing policy, the policy had an adverse affect on the group of travellers, which established indirect discrimination. The indirect discrimination was objectively justified however, as in the past there had only been little demand for the plots of land that were reserved for the (semi-)mobile homes of travellers/Roma, while there was a large demand for other types of housing and as the municipality had some mechanisms in place whereby those interested in a plot of land designated for travellers, could easily register their interest.

It is noteworthy that the ETC, in cases like these where a claim is brought against a public organ under article 7a ETA, leaves the public organ a larger margin of appreciation in the formulation of its policy when the legislature has done so too, except when a policy refers directly to race/ethnicity. If a policy does not refer directly to race/ethnicity, the choices made by the public body when formulating its policy should be scrutinised less intensely.

#### The case against the property-company

The property-company is a private company, so their acts do fall within the scope of article 7 of the ETA, relating to the provision of and the access to goods and services.

However, the facts of the case mention that the property-company carries out rules set by the municipality and that the municipality is still responsible for how the housing services/decisions were carried out. If the property-company has no discretionary powers of its own to implement/carry out the rules set by the municipality, the question arises if the company can be held responsible for any breach of the equality legislation.

The ETC has given various decisions in cases in which a petition was filed against a company that (allegedly) discriminated but did so while carrying out legislation to which it was bound. In all such cases, the main question was, as is stated above, whether or not the company had any power or possibility in law or in practice to deviate from the legal rules or to interpret them according to their own views.

If so, the company can be held accountable for its acts. If not, the ETC has taken different approaches, but most often it has held that it can investigate such a claim, but that the company has an objective justification for its acts (i.e. abiding by the law). In a few cases, the ETC has held that it was not competent to investigate the claim (as the ETC cannot investigate the public law acts of (local) government bodies, as was explained above, except in cases in which it is claimed that racial discrimination took place in relation to social protection).

**2.** The ETC would be competent to investigate the two claims, as stated above.

After obtaining the non-binding decision of the ETC, the organisation can turn to a court to obtain a binding judgement and maybe restoration and compensation. The anti-discrimination organisation can also go to court directly, without a prior decision of the ETC.

In both cases, a District Court would be competent. The claim against the municipality would have to be filed with the administrative law sector of the District Court, the claim against the property-company with the civil law sector.



**3.** This case would constitute direct discrimination on the ground of race by the municipality in its housing policy as the policy refers explicitly to the Roma origin of the applicants. Whether there is also direct discrimination by the property-company depends on the tasks and responsibilities of the property-company (see above), but if it is presumed that the property-company has a margin of appreciation to deviate from/alter the rules set by the municipality in such a way that the discrimination of Roma in the housing policy is stopped/prevented, there is also direct discrimination by the property-company. In any case, the property-company has an obligation of its own to inform the municipality of the discriminatory character of its housing policy.

On a different note, the question could come up whether the procedure for Roma is an unfavourable treatment, as they have a right that non-Roma do not have, to refuse an apartment if Roma that they are not well-connected with, are living too close by for their taste.

Despite this right to refuse apartments, however, the ETC would probably find that the special procedure for Roma constitutes direct discrimination as it is also unfavourable for Roma applicants. This is due to the fact that in the procedure for Roma, local Roma already living in the municipality can deny housing rights for Roma seeking to live in the municipality. For non-Roma, there is no such barrier. Also, and in connection with the previous, the municipality shares personal data on the Roma seeking to live in the municipality with the Roma contact person and through him/her, with the local Roma community. Such breach of privacy rights does not occur for non-Roma looking for a house in the municipality.

**4.** Direct discrimination on the ground of race, both when it occurs in labour relations or in the provision of goods and services cannot be objectively justified by a legitimate aim and by appropriate and necessary means to achieve that aim.

The only exception to direct discrimination on the ground of race is listed in article 2, 4 of the ETA.

This subsection states:

The prohibition on discrimination on the grounds of race contained in this Act does not apply:

- a. in cases where a person's racial appearance is a genuine and determining requirement, provided that the aim is legitimate and provided that the requirement is proportionate to that aim;
- b. if the discrimination concerns a person's racial appearance and constitutes, by reason of the nature of the particular occupational activity in question or of the context in which it is carried out, a genuine and determining occupational requirement, provided that the aim is legitimate and the requirement is proportionate to that aim.

The present case concerns housing, so the exception for genuine and determining (occupational) requirements is not relevant here.

**i)** There is no such right to the enjoyment of their own culture and language expressly listed in the ETA. But the Netherlands have signed and ratified the International Covenant on Economic, Social and Cultural rights, which contains a right to the enjoyment of one's own culture (article 15). This right is also protected by the Convention on the Rights of the Child (article 29). Furthermore, the Netherlands are a party to the Framework Convention for the Protection of National Minorities of the Council of Europe. However, only the Frisians are recognised as a national minority. Also, the Netherlands have ratified the European Charter for Regional Languages. In this convention, Romani is recognised as a minority language (together with some other languages), but only the Frisian is an official language that is e.g. taught in schools.

The right to freedom of movement is not different for Roma and non-Roma in the Netherlands, there is no special right to freedom of movement for Roma or travellers.

The ETC has not seen cases in which these cultural rights of Roma conflict in any way with the prohibition against racial discrimination.

**ii)** The ETC has not (yet) decided on cases in which the cultural practices of a racial or ethnic group were relied on as a justification for discrimination.

In the past, the ETC has given decisions on cases that had to do with cultural practices and with cases in which discrimination occurred within a religious minority group.

For instance, in case 2006-51 the ETC was asked to decide on the refusal by a school to admit a Muslim student who refused physical contact with males out of religious principles. The school refused her, because they wanted her to shake hands with (female and) male teachers and students. The school argued that shaking hands is a normal way to greet another person in the Netherlands and that a school has a duty to teach its students decent morals and how to behave in society. The ETC held that the school, by claiming that the dominant culture is the only acceptable norm and by requiring of students that they behave according to that norm, exclude minority groups. The ETC did not see the need to oblige students to shake hands, while all the school wanted was that students displayed/developed decent manners and there are many ways to greet another person in a respectful way. As far as the school was concerned about the sex discrimination aspect, the ETC concluded that the girl could be asked not to distinguish between men and women and not to shake hands with anyone. So, the ETC did not accept the cultural practices of the dominant Dutch culture to serve as an objective justification for the exclusion of a Muslim student.

In a different case (2005-222), the ETC came to the conclusion that an Islamic school could not oblige all of its female teachers to wear a headscarf. In this case it was relevant that the school also employed some female teachers that were not Muslims and who did not have to wear a veil. The ETC concluded that the school, although it has a consistent policy towards its religious identity, could not convince the ETC why it was necessary to require from all its female Muslim teachers, including those teaching e.g. mathematics, to wear a veil. The ETC in this decision pointed out that the right of religious schools to set rules in relation to their religious nature for students and teachers forms an exception to the principle of non-discrimination and therefore has to be interpreted in a very strict manner. In this case the ETC did not accept that the religious practices of a religious group lead to the refusal of a job candidate who belongs to the same religious group.

Given these decisions, it does not seem likely that the cultural practice of a racial or ethnic group can easily form an objective justification for discrimination on the ground of race.

**iii)** No it is not.

The ETC had not decided any case in which a victim of discrimination or – as in the present case – members of the minority group consented to the discrimination.

However, in the above mentioned case of *D.H. v Czech Republic*, the European Court of Human Rights (ECHR) decided that while it is possible to waive a right guaranteed under the European Convention of Human Rights if this happens on the basis of informed consent and without constraint, it is not true for the right not to be subjected to racial discrimination, due to the fundamental importance of the prohibition of racial discrimination. A waiver of that right would be counter to an important public interest.

**5.** Depending on the way in which the responsibilities and tasks are divided between the municipality and the property-company, there may be an instruction to discriminate given by the municipality to the property-company.

The ETC would not so easily conclude that the municipality or the property-company instruct the Roma contact person to discriminate, as the Roma contact person is a private person and not a company or other legal entity. In Dutch law, a legal instruction to discriminate can only be established between two legal persons (companies, associations, state actors etc) and not between a legal person and an individual/natural person.

**6.** The ETC cannot impose sanctions or grant remedies. It can only give a decision on whether or not the equality legislation has been violated and it may make non-binding recommendations.

The Courts may impose sanctions, such as a fine, or provide for remedies, such as the restoration of a previous situation or the voidance of a decision. Compensation in the form of a payment to the victim is not very common in the Netherlands.

## Norway

### ***Answers provided by the Equality and Anti-discrimination Ombud***

1. The case falls within both the Norwegian Anti-Discrimination Act and the Race Directive, see article 3 paragraph 1 litra h.

There is no need for a complainant under the Norwegian Act since the Ombud can take on cases ex officio.

2. Under the directive identification of a complainant is not necessary. ECJ decision 54/07 Feryn clearly states that. In Norway the Equality and Anti-Discrimination Ombud would be competent to handle the case, as well as the ordinary courts.

3. The system/practice regarding housing services for Roma applicants would be considered direct discrimination, because it is a system/practice designed specifically for this group. The system/practice puts Roma applicants at a particular disadvantage compared to other applicants of other ethnic origins, since the system/practice leads to a random application process without securing the rights of the individual applicants.

4. Under Norwegian law there *can* be objective justification for direct differential treatment based on race/ethnic origin in exceptional circumstances, but in this case it is hard to imagine that such justification would exist. It should be noted that housing is a basic aspect of people's lives, which means that there is little room for differential treatment. In the ECHR case DH v. Czech Republic it was stated that the result/consequences of the education practice were so negative that the otherwise justification would not hold up.

The Roma is considered to be a national minority under Norwegian law, which means that Roma people have a right to their own culture and language as well as freedom of movement. There can be a conflict between the prohibition against ethnic discrimination and the rights national minorities have under:

- The UN Convention on Civil and Political Rights Article 27
- The Council of Europe Framework Convention for the Protection of National Minorities and
- The European Charter for Regional or Minority Languages

The conflict of rights can typically occur where a minority within the national minority claims that traditional culture/practices lead to, for example, inadequate education (because of the right to travel for example). The question would then be if the authorities have balanced the conflicting interests correctly and minimised negative effects of the practice in question.

It is not possible to consent to ethnic discrimination as a main rule. This can be illustrated by a case we had where a woman was fired from her job because she was wearing a headscarf. She entered into an agreement with her employer awarding her compensation if she accepted the dismissal and dropped the case. She changed her mind and the Ombud stated that discrimination had occurred. In principle the Ombud cannot handle cases without the consent of the injured party, but exceptions apply – for example if the party has been put under pressure, the case is of great importance etc.

The ECHR decisions in DH v. Czech Republic and Orsus and others v. Croatia supports the view that consent does not constitute objective justification– at least when it comes to very negative effects of the alleged discrimination.

5. It is difficult to establish discrimination in the form of instruction to discriminate by the municipality, and it is not necessary either. The municipality discriminates directly by designing or allowing a system/practice which opens up to random processes but it does not *instruct* the contact persons to act discriminatory.

6. The sanctions for the Ombud in this case would be a non-binding statement to change the practice and rectify the negative effects of the injured parties. In practice the public administration has a duty to follow the Ombud's statements and will normally do so in practice. Our experience is that parties often reach an out of court settlement in discrimination cases. This will more likely happen in cases between private parties.

The courts could of course render a judgment obliging the municipality to pay compensation to the victims. As we have no relevant jurisprudence, it is difficult to consider the level of compensation. We would assume that compensation in cases like this would be less than EUR 6000, because the level of compensation for non-economic loss is not very high under Norwegian law. In cases of illegal dismissal due to for example pregnancy or the employee wearing a head scarf the level of out of court compensation has been about EUR 15 000.

## Slovakia

### ***Answers provided by the Slovak National Centre for Human Rights***

1. The case falls within the scope of the Act No 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination amending and supplementing certain other law (the "Anti-discrimination Act") which prohibits discrimination inter alia in the area of provision of goods and services, including housing.

Par. 2 of the Anti-discrimination Act stipulates:

(1) Compliance with the principle of equal treatment shall consist in the prohibition of discrimination on grounds of sex, religion or belief, racial, national or ethnic origin, disability, age, sexual orientation, marital status and family status, colour of skin, language, political or other opinion, national or social origin, property, descent or other status.

Slovak Anti-discrimination Act allows the use of *actio popularis* in cases concerning violation of equal treatment principle (without the need to have identified victim of discrimination) and so it is in line with ECJ decision Feryn C-54/07. Slovak National Centre for Human Rights or NGO whose activities are aimed at or consist in the protection against discrimination may seek the protection of right to equal treatment in judicial proceeding if the violation of the equal treatment principle affects the rights of larger group of persons, their interests or freedoms protected by law, or if public interest is seriously threatened by such violation. Slovak National Centre for Human Rights or NGO may seek that the person violating the equal treatment principle be made to refrain from such conduct and, where possible, rectify the illegal situation (so the Anti-discrimination Act does not entitle them to claim adequate satisfaction or non-pecuniary damage in cash).

2. Slovak National Centre for Human Rights ("the Centre") is competent to give expert opinion, conduct independent survey, and provide legal assistance to complainant or mediation service. The Centre has also the authority to represent parties in the proceedings concerning violation of the principle of equal treatment. In case of legal action the district court is competent to handle the case.

3. Direct discrimination on the ground of race/ethnic origin (presumably also on the ground of national origin as Roma in Slovakia are regarded as national minority) because the procedure described above applied to Roma applicants and as a result Roma applicants were/are treated less favourably than non-Roma applicants in the same situation (the procedure contains extra reasons for refusing Roma applicants to move somewhere or not).

**4.** Under the Anti-discrimination Act direct discrimination based on race/ethnic origin (or nationality) cannot be justified, neither is different treatment on those grounds admissible in the area of provision of goods and services, including housing.

The rights of national minorities and ethnic groups are guaranteed in Section Four 34 of the Constitution of the Slovak republic. Besides the general prohibition of discrimination stated in article 12 of the Constitution, article 33 states that membership in any national minority or ethnic group may not be used to the detriment of any individual. Article 34 of the Constitution of the Slovak republic stipulates:

(1) Citizens belonging to national minorities or ethnic groups in the Slovak Republic shall be guaranteed their universal development, particularly the rights to promote their culture together with other members of the minority or group, to disseminate and receive information in their mother tongues, to associate in national minority associations, to establish and maintain educational and cultural institutions. A law shall lay down details thereof.

(2) In addition to the right to learn the official language, the citizens belonging to national minorities or ethnic groups shall, under the conditions laid down by a law, also be guaranteed:

- a) The right to be educated in their language,
- b) The right to use their language in official communications,
- c) The right to participate in the decision making in matters affecting the national minorities and ethnic groups.

(3) The exercise of the rights of citizens belonging to national minorities and ethnic groups guaranteed by this Constitution must not lead to threat to the sovereignty and territorial integrity of the Slovak Republic and to discrimination of other population.”

Roma and other national minorities and ethnic groups have rights to their own culture and language, as well as a right to freedom of movement (according to Article 23 of the Constitution freedom of movement and residence shall be guaranteed), the Centre does not think that those rights guaranteed by Constitution conflict in any way with prohibition against racial discrimination.

Cultural practices within a racial or ethnic group are not mentioned as lawful justification for direct discrimination under the Anti-discrimination Act or within the scope of the Race Directive 2000/43/EC, maybe in particular case of indirect discrimination preserving cultural practices could be deemed as legitimate aim but still the objective justification must be satisfied.

In line with decision of the European Court of Human Rights in *DH v Czech Republic* Application and *Orsus and Others v Croatia* person's consent cannot be considered as justification for racial discrimination, as it would be counter to an important public interest.

**5.** The Anti-discrimination Act defines instruction to discrimination as an action laying in the abuse of subordinate position of a person for the purpose of discrimination against a third person and incitement to discrimination as persuading, affirming or inciting a person to discriminate against a third person. We do not think that any other form of discrimination was established because the procedure has been agreed with the local Roma themselves.

**6.** According to par. 9 of the Slovak Anti-discrimination Act the complainant may seek that the person violating the principle of equal treatment be made to refrain from such conduct and, where possible, rectify the illegal situation or provide adequate satisfaction. Should adequate satisfaction prove to be not sufficient, especially where the violation of the principle of equal treatment has considerably impaired the dignity, social status and social functioning of the victim, the victim may also seek non-pecuniary damages in cash. Concerning the level of compensation, there is a lack of cases in order to estimate the level of compensation awarded but in general the Slovak courts took a rather restrictive approach and they are quiet reluctant to award any financial compensation to a victim. In case of *actio popularis* the organisation

initiating the procedure may seek that the person violating the equal treatment principle be made to refrain from such conduct and, where possible, rectify the illegal situation (it is not entitled to claim adequate satisfaction or financial compensation in cash).

## Sweden

### **Answers provided by the Equality Ombudsman**

1. Discrimination is prohibited in the supply of housing to the general public under Chapter 2, Section 12 of the Discrimination Act; this provision is a transposition of Directive 2004/43/EC cf. Article 3, paragraph 1 h). From the circumstances described in the case it is doubtful whether any individual has been disadvantaged in the way required according to the prohibitions of discrimination. It seems as if in August 2009 the Roma couple was offered a flat but that the flat hunters said no to the flat both because a Roma man lived nearby and because the flat was in poor condition. After that the Roma couple was offered a flat in November 2009.

However, under the judgment of the European Court of Justice in *Feryn C – 54/07* it ought to be possible to bring an action for discrimination before a court under the Directive even though there is no individual complainant. The circumstances in the case show that the Roma are discriminated against by the municipality and the municipal property company. The Roma risked being put at a disadvantage solely because they are Roma. The disadvantage to them can in that case be that they are refused a flat and that the processing time for their cases is longer than for other people with a different ethnic origin.

The problem under Swedish legislation is that the Equality Ombudsman can only bring an action on behalf of an individual who consents to this, under Chapter 6, Section 2 of the Discrimination Act. There is no possibility in Sweden corresponding to the one available under Belgian law in the *Feryn* case, i.e. bringing an action when discrimination has occurred or risks occurring without the requirement of a prior complaint having been filed.

The *Feryn* judgment states that it is for the national court to assess whether national legislation allows a possibility of bringing legal or administrative proceedings to enforce the obligations under the Directive even if the equality body is not acting in the name of a specific complainant or in the absence of an identifiable complainant (cf. paragraph 27 of the judgment).

The Directive only states minimum rules in this context (Article 6 and Article 7).

In the *Feryn* judgment it was clearer that the employer had stated categorically that he will “not recruit any employees of a certain ethnic or racial origin”. In the present case it is not as clear-cut that Roma are sure to be refused housing in a corresponding way. The claimant has to fulfil their part of the burden of proof by demonstrating facts that provide grounds to assume a discriminatory housing policy. Possibly it is enough to show that in the case in question the municipality discriminated against Roma in its processing of housing applications. The discrimination means that account was taken of their ethnic origin, which *may* in turn lead to them being refused housing in certain cases.

In the *Feryn* judgment the Court refers to recital 8 to Directive 2000/43/EC which states that a purpose of the Directive is to “foster conditions for a socially inclusive labour market”. It ought to be possible to make a corresponding argument in our case. Applying discriminatory selection criteria for access to housing on grounds of race or ethnic origin can be considered to undermine the achievement of the objectives of the EC Treaty, including the attainment of a high level of social protection, the raising of the standard of living and quality of life and economic and social cohesion and solidarity (cf. paragraph 9 of the recital to Directive 2000/43/EC).

2. The Equality Ombudsman or a non-profit organisation whose statutes state that it is to look after the interests of its members may bring an action on behalf of an individual who

consents to this under Chapter 6, Section 2 of the Discrimination Act. The action is brought before a court of general jurisdiction.

**3.** Since any less favourable treatment is based directly on Roma origins it is a question of direct discrimination.

**4.** Possibly it is a legitimate objective in the context to strive for “good neighbourliness” and the Roma contact person’s work and possibilities of refusing someone housing are then means that are viewed as appropriate and necessary to achieve the objective. Note that the opposite party has the burden of proof and must in that case show that the criterion “appropriate and necessary means” has been fulfilled by, for example, presenting statistics that show a high proportion of problems in housing areas with many Roma and /or experience of trouble between certain Roma groups.

Sweden has ratified two Conventions concerned with the rights of Roma. Sweden ratified the Conventions in 2000. The Conventions regulate the right to influence, the right to language, culture and identity, and protection from discrimination. Matters regulated include the right to service from public authorities in their own language and the right to mother-tongue instruction. These rights ought not to be in conflict with the prohibition of discrimination, and ought instead to work together with it. Roma should have access to housing on the same terms as other people. In contrast, the circumstances in the case do suggest that Roma are discriminated against in/excluded from the housing market. The prohibition of discrimination and the role of the Ombudsman in combating discrimination should aim to eliminate barriers to, for example, Roma developing their identity. It is important to have transparent systems for access to housing, for example.

**5.** Possibly the view can be taken that an instruction to discriminate was given by the municipality to the working group/Roma contact person who were, in turn, given the assignment of refusing someone housing in the municipality with reference to their Roma origin. However, under Swedish law an effect that puts someone at a disadvantage must have arisen for the prohibition of giving an order or instruction to discriminate against someone to be applicable. That is, the instruction must be put into practice.

**6.** A natural or legal person who violates a prohibition of discrimination in the Discrimination Act shall pay compensation for discrimination for the offence resulting from the infringement. When compensation is decided, particular attention shall be given to the purpose of discouraging such infringements. The compensation shall be paid to the person who has been offended by the infringement (cf. Chapter 5, Section 1). The Equality Ombudsman is obliged to try to reach an out-of-court settlement with the opposite party before the Ombudsman brings an action before a court. An out-of-court settlement involves compensation to the person subjected to discrimination. Sometimes an out-of-court settlement also contains an apology from the opposite party and an intention to change discriminatory rules and practices.

## United Kingdom – Great Britain

### ***Answers Provided by the Equality and Human Rights Commission***

**1.** The Equality & Human Rights Commission provides its answer on the assumption that according to the national constitution, the Roma and other groups have the right to maintain and develop their own culture and language. Additionally there exists a constitutional right of freedom of movement within the country and to choose their place of residence, and that the public authorities shall guarantee the observance of basic human rights and liberties.

This case would seem to fall within the scope of the UK’s Equality Act 2010, (EqA 2010), which comes into effect in October 2010 and which combines all our anti-discrimination laws into one single equality act.

For the purposes of the question, direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation.

Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

*“that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”*

In terms of national legislation, s.29 (1) (EqA 2010), provides that (a “service provider”) concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service. This makes it unlawful for any person concerned with the provision of goods, facilities and services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities and services.

S.29 (2) further provides that a service provider (A) must not, in providing the service, discriminate against the person (B)-

- (a) as to the terms on which A provides the service to B
- (b) by terminating the provision of the service to B;
- (c) by subjecting B to any other detriment

S 20 (2) (a) provides examples of the facilities and services mentioned in subsection (1) including access to and use of any place which members of the public are permitted to enter and (b), accommodation in a hotel, boarding house or other similar establishment and (g) the services of any profession or trade, or any local or other public authority.

Additionally, s.33 (1) (disposal or management of services) makes it unlawful for a person, in relation to premises in Great Britain for which he has the right and power to dispose, to discriminate against another as to the terms on which he offers him those premises, by not disposing of the premises to B or A’s treatment of B with respect to things done in relation to persons seeking premises.

The facts of the case would suggest that the case fell within the scope of the Directive insofar as the ‘principle of equal treatment’ prohibiting both direct and indirect discrimination, whatsoever, on any of the grounds referred to in Article 1, applies.

The purpose of the Council Directive (2000/43/EC), (“the Directive”) which implements the principle of equal treatment between persons irrespective of racial or ethnic origin, is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States, the principle of equal treatment.

For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

Article 3 of the Directive stipulates that it shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to, among others, access to and supply of goods and services which are available to the public, including housing ((Article 3(1) (h)).

In Feryn<sup>100</sup> the case started when a Belgian garage doors firm publicly declared that it would not recruit employees of a certain ethnic or racial origin, thereby dissuading certain candidates from putting themselves forward for recruitment.

The question before the ECJ was whether such statements made by an employer in the context of a recruitment process constitute discrimination if there is no identifiable complainant who considers himself to be a victim of it.

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<sup>100</sup> Centre for Equal Opportunities & Opposition to Racism of Belgium v Firma Feryn NV-C-54/07.



Initially, with regard to this question, Ireland and the United Kingdom both argued that it was not possible for there to be direct discrimination within the meaning of Directive 2000/43/EC. They argued that the Directive was inapplicable where the alleged discrimination resulted from public statements made by an employer concerning its recruitment policy and where there had been no identifiable complainant contending that he has been the victim of that discrimination.

The Court accepted that whilst it was true, as contended by both Ireland and the UK, that Article 2(2) (a) of Directive 2000/43/EC defines direct discrimination as a situation in which one person 'is treated' less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin, it could not be inferred from this that the lack of an identifiable complainant led to the conclusion that there is no direct discrimination within the meaning of the Race Directive.

The Court further held that there was no need to identify a complainant given that the objective of Directive 2000/43, as stated in the preamble was to "foster conditions for a socially inclusive labour market". That since recruitment and selection criteria were clearly covered by the Directive, achievement of this objective "would be hard...if the scope of the Directive were to be limited to only those cases in which an unsuccessful candidate for a post, considering himself to be the victim of direct discrimination, brought legal proceedings against the employer..."<sup>101</sup>

Like the decision of the Court, this Commission considers that the absence of an identifiable complainant does not necessitate the conclusion that there is no direct discrimination within the meaning of the Directive. In short, the existence of such direct discrimination is not dependent on the identification of a complainant who claims to have been a victim. And the notion therefore that such statements are distinct from recruitment "arrangements" is clearly dismissed

## 2.

- A claimant can bring proceedings directly to the County Court;
- The EHRC can also bring a claim where discriminatory adverts occur;
- The EHRC could support a claimant or intervene to provide submissions but is not able to decide cases on discrimination.
- The EHRC can also bring judicial review proceedings where there is no claimant but a policy is discriminatory.

## 3. Definition of Discrimination:

### Direct Race Discrimination

S.13(1)(EqA 2010), provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

S.13 (5) provides that if the protected characteristic is race, less favourable treatment includes segregating B from others.

Less favourable or unreasonable treatment is not in itself unlawful, it must be for a reason related to one of the proscribed grounds of discrimination

"Race" in this context includes colour, nationality and ethnic origin (s.9)

In relation to the protected characteristic of race, a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group and a reference to persons who share a protected characteristic is a reference to persons of the same racial group.

A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls-s.9(3).

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<sup>101</sup> Paras.24-25

The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group-s.9 (4). These provisions are similar to the definitions under the Race Directive.

In the UK, the Roma are generally covered by the existing anti-discrimination laws. There is no specific legislation on Roma minorities as such. The Equality Act 2010 and its predecessor legislations protect all racial groups from discrimination.

Romani Gypsies and Irish Travellers have been held to be `ethnic` groups for the purposes of the EqA 2010. The criteria for determining whether a group constitutes an ethnic group is set out in the House of Lords judgement in the case of *Mandla (Seva Singh) v Dowell Lee*<sup>102</sup>, where the Lords held that to constitute an ethnic group` under the Race Relations Act 1976 (RRA 1976) and now the Equality Act 2010, a group had to regard itself, and be regarded by others as a distinct community by virtue of certain characteristics.

Two essential factors are:

- a long-shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which is kept alive;
- a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.

Other relevant considerations which are likely to indicate, but not essential to define a distinct ethnic group include:

- a common geographical origin or descent from a small number of common ancestors;
- a common language, not necessarily peculiar to that group.

In *CRE v Dutton*<sup>103</sup>, the Court of Appeal found that Romani Gypsies were a minority with a long-shared history, a common geographical origin and a cultural tradition of their own.

There is no indication that these protection and rights afforded to Romanis are in conflict with the prohibition against racial discrimination as if a Roma feels that he or she has been discriminated against directly or indirectly, or victimised or harassed in any of the areas covered by the EqA 2010 on racial grounds, he or she can make a complaint of discrimination.

Throughout the UK legislation the underlying assumption of national policies addressing the Roma is that their collective rights are properly protected-whatever their status-national citizens or foreigners in the broader framework of legislation against racism, discrimination and xenophobia, on the one hand, and of mainstream welfare provisions and benefits on the other hand.

Domestic discrimination legislation generally prohibits direct discrimination but current UK legislation is subject to a number of exceptions which have been considered necessary in order to balance the potentially conflicting fundamental rights of different groups.

S.23 (1) EqA (2010) provides that on a comparison of cases for the purposes s.13 and 19, of persons of a particular racial group with that of persons not of that group, there must be no material difference between the circumstances relating to each other.

For the purposes of establishing a contravention of this Act by virtue of s.13 (1), it does not matter whether A has the protected characteristic. (s.24 (1)).

The Commission believes that the scenario at hand presents a clear case of direct race discrimination based on the claimant's nationality as the claimant's treatment was based on her national or ethnic origin of being a Romani. The differential selection procedures of the respondents may be unlawful under the RRA for the very fact that there are two separate procedures, one for Roma people and one for other applicants the use of which are determined by certain subjective characteristics, one of which is based on their ethnic origin.

#### Indirect Discrimination:

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<sup>102</sup> [1983] 2 AC 548

<sup>103</sup> op.cit.

Articles 1 and 2 of the Race Equality Directive prohibit both “direct” and “indirect” discrimination. The definition of *direct discrimination* taken from Council Directive 97/80 EC provides that *direct discrimination* occurs “where a person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin”. Unlike in US caselaw, there is no express requirement here that a claimant show intent to discriminate. The test is unequal treatment.

According to the Directive, *indirect discrimination* occurs “where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”.

As the criterion or practice was not neutral there was no indirect racial discrimination.

4. Under the Council of Europe Convention on the Protection of National Minorities there is a right for national minorities such as Roma to their culture and language. The Convention has been signed and ratified by the United Kingdom but it has not been implemented directly into national law.

Conflicts could possibly arise between the rights of groups to their culture and the prohibition on racial discrimination but it is important to recognise that where there is any such conflict the prohibition on racial discrimination prevails as it is binding domestic law. Racial discrimination within particular racial groups is unlawful under all circumstances.

It is not possible to consent to racial discrimination. In *DH v the Czech Republic* the European Court of Human Rights held that even though Roma parents had in some cases agreed for their children to be sent to special schools, that could not constitute justification for racial discrimination.

5. S.111(1) (EqA) 2010, provides that a person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6, or 7 or s.108 (1) or (2) or 112(1) (a basic contravention).

S.111 (2) provides that a person (A) must not cause another (B) to do in relation to a third person (C), anything which is a basic contravention, and;

S.111 (3), provides that a person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.

For unlawful instructions, the instructor must have authority over the person subjected to the instructions or the latter must be accustomed to act in accordance with his wishes—***CRE v Imperial Society of Teachers of Dancing***<sup>104</sup>

In this scenario, it is difficult to say how much authority the municipality had over the municipality-owned joint-stock property company, who owned the buildings in question or what authority they had on the Roma contact, who does not appear to be an employee, or do we know how long the municipality had been working with the property company or the Roma contact to establish a course of dealings which could be said to have made them accustomed to acting in accordance with their wishes.

There is no indication, on the facts, that the municipality actually instructed, caused or induced either the property company or the Roma contact to discriminate.

This section does not apply unless the relationship between A and B is such that A is in the position to commit a basic contravention in relation to B, as a reference in this section to causing or inducing a person to do something includes a reference to attempting to cause or induce the person to do it. There is no such information, on the facts.

It would appear therefore that there is insufficient information on the facts to conclude that there was instruction from the municipality to discriminate.

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<sup>104</sup> [1983]

**6.** Under the Directives, the national courts must ensure violations of the principle of equal treatment are satisfactorily remedied. Sanctions against discriminators must be effective i.e. achieve the desired outcome, proportionate, i.e. adequately reflect the gravity and nature of loss and/or harm suffered and dissuasive, i.e. deter future acts of discrimination.

The UK traditionally imposed sanctions for most forms of discrimination. Financial compensation may include compensation for past and future loss and injury to feelings, damages for personal injury such as psychiatric damage or exemplary damages to punish the discriminator. The victim is, accordingly directly compensated

Other remedies include interim relief to stop the discrimination and obliging the discriminator to take action to prevent or reduce the effects of discrimination on the victim, such as an order to reinstate him or her in their jobs or to adopt a particular mode of practice.

Sometimes there are specific sanctions on companies or organisations which differ from those imposed on individuals.

# Annex 3

## Country Responses to the Case Study on Gender Identity Discrimination

### Austria

#### ***Answers provided by the Ombud for Equal Treatment***

**1.** Austria did not go any further than implementing the already existing Council Directives, including the Council Directive 2004/113/EC. The federal Equal Treatment Act therefore prohibits discrimination on the ground of sex in the areas of employment and occupation and access to goods and services including housing.

There is no express or implicit protection against gender reassignment in the Austrian Federal Equal Treatment Act. However, following the ECJ ruling P v S and Cornwall County Council Case (C-13/94) the prohibition on the ground of sex also covers discrimination on the ground of gender reassignment and gender identity.

In the present case the basic and the supplementary health insurances are offered by private health insurer offering insurance services based on private contracts. Hence following the ECJ jurisprudence this case would fall within the scope Austrian Federal Equal Treatment Act.

**2.** In your answer please consider whether the Council Directive provides protection from discrimination arising from the gender identity or reassignment of a person.

In your answer please consider whether the Council Directive provides protection from discrimination arising from the gender identity or reassignment of a person.

The Austrian Equal Treatment Act mainly reproduces the wording of the directive 2004/113. The Answer to this question is therefore the same then the answer to question 1.

**3.** Gender reassignment financed entirely though a private health insurance would be considered as a service and would therefore be covered by the Council Directive 2004/113/EC and the Federal Equal Treatment Act.

However gender reassignment financed by the social insurance carriers falls in the area of social security and would not be covered by the Council Directive 2004/113 and the Federal Equal Treatment Act.

**4.** If the case falls in the scope of application of the Federal Equal Treatment Act the competent organisations will probably be the following:

The Ombud for Equal Treatment will be competent to provide - as a first step - advice, support and information and may further on intervene, negotiate, try to find a friendly settlement or any other out of court solution. The Ombud can also submit the case to the Equal Treatment Commission, but cannot file a suit.

The Equal Treatment Commission will be responsible to decide in proceedings free of charge upon a violation of the Federal Equal Treatment Act. The alleged victim can bring in the case by him/herself or via the Ombud for Equal Treatment or other representatives (like NGOs). The Equal Treatment Commission is not competent to grant damages; it only delivers a – non-binding – decision upon the violation of the prohibition of discrimination and gives recommendations on how to apply the right to equality.

If the case falls in the scope of application of the Federal Equal Treatment Act the Civil Court will be also competent to decide upon the case. It delivers a binding judgement and is competent to grant damages in case of a violation.

**5.** The alleged facts of the case could amount to an indirect discrimination on the ground of sex.

The insurance company justifies the fact that it does not reimburse the breast augmentation operation for male to female transsexuals while it does reimburse costs of breast removal for female to male transsexuals with the fact that it has to apply national law. This national law foresees that the costs of breast augmentation surgery can be covered by the basic health insurance only if the operation follows a breast amputation. Hence this regulation or practice of the insurance company regulation has for effect that an apparently neutral provision put male transgender persons at a particular disadvantage compared with female transgender persons in regard to gender reassignment.

The male to female transsexuals has to be compared in this case with the female to male transsexual.

**6.** The insurance company justifies the fact that it does not reimburse the breast augmentation operation for male to female transsexuals while it does reimburse costs of breast removal for female to male transsexuals with the fact that it has to apply national law. The legitimate aims enumerated exemplarily in the ground of justification 16 of the Council Directive 2004/113/EC do not state that national legislation can per se be a legitimate aim justifying an indirect discrimination according to the Council Directive 2004/113/EC. In general it remains uncertain whether or not national legislation can per se be a legitimate aim justifying an indirect discrimination according to the Council Directive 2004/113/EC.

The insurance company could try to justify the indirect discrimination with the argument that covering breast augmentations for male to female transsexuals would bring financial disadvantages to the company. The argument of costs by itself might not be enough to consider an aim as legitimate. The European Court of Justice argued for example in the case of *Steinicke* (11.9.2003, C/77/02), that *to concede that budgetary considerations may justify a difference in treatment between men and women which would otherwise constitute indirect discrimination on grounds of sex would mean that the application and scope of a rule of Community law as fundamental as that of equal treatment between men and women might vary in time and place according to the state of the public finances of Member States.*

In general Austrian tort law requires that the author of the damage is liable for this damage. The insurance company could therefore argue that the company is not liable for the indirect discrimination, since this discrimination resulted from the mandatory application of national law. However following the ECJ rulings *Dekker* (ECJ, 8.11.1990, C-177/88) and *Draehmpaehl* (ECJ, 22.4.1997, C-180/95), the Austrian legal literature argues that the Federal Equal Treatment Act does not make liability on the part of the person guilty of discrimination conditional on proof of fault or on the absence of any ground discharging such liability. Following these rulings the insurance company could not exclude its guiltiness of an indirect discrimination by referring to national law, which does not comply with the Federal Equal Treatment Act and the Council Directive 2004/113/EC.

In conclusion that means that the private insurance case could violate the Federal Equal Treatment Act by not reimbursing the breast augmentation operation for male to female transsexuals while it does reimburse costs of breast removal for female to male transsexuals.

**7.** The sanctions would be paying damages (immaterial and material damage) if such were awarded by the courts.

**8.** National legislation regarding health insurance, which is not in conformity with the Equal Treatment directives, can be challenged before the Constitutional Court. However the Ombud for Equal treatment has not the powers to bring cases or unconstitutional laws to the Constitutional Court.

**9.** The Ombud for Equal Treatment is not aware of any jurisprudence relating disability with transsexuals.

However the Ombud for Equal Treatment is in general not competent to deal with discrimination cases with regard to disability. Discrimination on ground of disability is regulated under an own Disability Act. There is an Ombud for disability issues who is competent to deal with discrimination on the ground of disability.

## Cyprus

### **Answers provided by the Office of the Commissioner for Administration (Ombudsman)**

1. The national insurance legislation does not prohibit discrimination based on gender. However, in our opinion, this case falls within the scope of national Law N.18 (I)/2008, which transposed into national legislation the provisions of Directive 2004/113/EK.

It should be noted that the provisions of Law N.18 (I)/2008 are almost word-for-word translation of the corresponding provisions of the Directive 2004/113/EK. Therefore, the reasons given below with regard to applicability of the Directive (see Question 2), also apply with regard to applicability of the national law.

- No, there is no explicit or implicit protection against gender reassignment discrimination in our national legislation, except for law.

2. In examining the question we took into consideration the following:

a) Insurance services qualify as a “service”, within the meaning of article 50 of the Treaty Establishing the E.C (see answer to Question 3 below).

b) The opinion of the ECJ in *case C-13/94 P v S Cornwall County Council* (April 1996). In summary the Court had ruled that the scope of the gender equality legislation in the field of employment should include discrimination arising from the gender reassignment of a person. Relevantly, the Court stated that to “*tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard*”.

c) The opinion of the ECJ in *case C-117/01 K.B. National Health Service Pensions Plan* (January 2004) in which the Court ruled that the exclusion of a female-to-male transsexual partner of a female member of a Pension Scheme, constitutes sex discrimination in breach of Article 141 of the EC Treaty concerning the principle of equal pay for men and women, and also that, individuals are protected not only on the sex given to them at birth but also on their “gender role”.

d) The Decision of the European Court of Human Rights in *Case - Van Kück v. Germany* (June 2003) by which it was generally ruled that, where an insurance plan covers “medically necessary” treatments, medical expenses related to gender reassignment should be covered. More specifically, the Court decided that the refusal of a health insurance company to refund part of the applicants’ costs for a gender reassignment treatment and the fact that the applicant was asked to prove the medical necessity of the treatment in Courts - having regard that “*gender identity is one of the most intimate aspects of a person’s private life*” - violated Article 8 of the European Convention on Human Rights (right to respect for private life).

e) The introduction, more recently, of Directive 2006/54/EC of the European Parliament and of the Council – published on July 5<sup>th</sup> 2006 - on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. The Directive, for the first time in EU Law, contained an explicit reference to discrimination on the basis of “gender reassignment” of a person. Specifically, recital 3 of the preamble of the Directive, which states the following:

*The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.*

Having regard to all of the above, we arrived to the opinion this case should fall within the scope of Directive 2004/113/EC, even though “gender identity” or “gender reassignment” is not explicitly included in the text of Directive.

**3.** Article 50 of the Treaty Establishing the E.C states that:

*Services shall be considered to be ‘services’ within the meaning of this Treaty where they are normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.*

*‘Services’ shall in particular include:*

- (a) Activities of an industrial character;*
- (b) Activities of a commercial character;*
- (c) Activities of craftsmen;*
- (d) Activities of the professions.*

As we stated above, in our opinion, insurance services qualify as a “service”, within the meaning of the above article of the Treaty

The District Court and the Equality Body (i.e. The Ombudsman’s Office)

**4.** According to the facts of the case the Insurance Company is basing its discriminatory practice on national legislation which, regarding breast augmentation operations, only covers the costs of operations that follow a “breast amputation”.

In view of the above and the case law described in question 2, we tend to the opinion that the controversial criterion/provision of the insurance company is an apparently neutral criterion/provision which, results in putting persons of one sex at a disadvantageous position compared with persons of the other sex. Therefore we view this as a case indirect discrimination which violates article 4.1(b) of Directive 2004/113/EC.

The complainants are men who want to have a gender reassignment. The more appropriate comparators to establish discrimination in this case are women who want to have gender reassignment i.e. female to male transsexuals.

**5.** On the basis of the facts given, we do not think that objective justification or exception exists in this case.

**6.** According to National Law N.18(I)/2008 - which transposed Directive 2004/113/EK:

a) Remedies

In case of a lawsuit, the competent court awards “*fair and reasonable*” compensation.

b) Sanctions

(i) Any person discriminating within the scope of the law is guilty of an offence and is subject to a fine not exceeding €7.000 and/or imprisonment not exceeding 6 months.

(ii) If the discrimination is exhibited by a company/organisation, the directors/officials are considered guilty if the offence is committed with their consent or tolerance are subject to the above sanctions, while the organisation is subject to a fine up to €12.000.

**7.** No.

**8.** We do not think it would fall under the scope of Directive 2000/78/EC



# Czech Republic

## **Answers provided by the Office of the Public Defender of Rights**

1. Sexual identification is according to the Sec. 2 par. 4 of the Act No. 198/2009 Coll., on equal treatment and on the legal means of protection against discrimination and on amendment to some laws (hereinafter as “Anti-Discrimination Act”) considered to be discrimination on grounds of sex.<sup>105</sup> One of the legal fields<sup>106</sup> protected by the Anti-Discrimination Act is access to and provision of healthcare; transsexuals should therefore be protected from discrimination within these types of legal relations. It should be also noted, that the Anti-Discrimination Act specifies constitutional prohibition of discrimination contained in the Art. 3 par. 1 of the Charter of Fundamental Rights and Basic Freedoms; it also transposes the relevant regulations of the European Union.

Right to free medical care from means of public insurance is constitutionally based by the Art.3 of the Charter of Fundamental Rights and Basic Freedoms.<sup>107</sup> Every individual has an obligation to contribute to public health insurance system; he/she can choose his/her insurance company.<sup>108</sup> The scope of health care which is fully recovered by the public health insurance is exhaustively listed by the Act No. 48/1997 Coll., on Public Health Insurance, as amended (hereinafter referred to as “Public Health Insurance Act”). In addition, there is also a possibility to conclude a contract with private health insurance company. Gender reassignment – male to female as well as female to male - is covered almost fully (except some of the hormonal medicals). Additional cosmetic surgery as breast augmentation or supplementary penis reconstruction is not reimbursed. Breast removal is unlike breast augmentation covered from the public insurance system.

With regard to the information provided above, the case in question would be qualified according to the Public Health Insurance Act which stipulates that breast removal is covered while breast augmentation is not. The only way how it is possible to dispute the Public Health Insurance Act from anti-discrimination perspective is to claim unconstitutionality of the Act (in details, see answer to the question No. 3).

2. The scope of the Directive is defined as providing goods and services, “...which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies...”. The term “service” in the Directive refers to The Treaty on the Functioning of the European Union (hereinafter referred to as “EU Treaty”) which defines this term as performance “normally provided for remuneration”<sup>109</sup>. Since health insurance is available to the public and there is equivalency of mutual performance, it can be considered ad service recognised by the EU law.

Questions are, whether the treatment is less favourable and if so, is it covered by grounds of gender? Problem is also comparability of situation of MtF and FtM transsexuals.

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<sup>105</sup> “Discrimination on grounds of pregnancy, maternity and paternity and on grounds of sexual identification shall also be considered to be discrimination on grounds of sex.”

<sup>106</sup> Sec. 1 par. 1: “This Act transposes the relevant regulations of the European Communities<sup>1</sup> and, in relation to the Charter of Fundamental Rights and Basic Freedoms and the international agreements that are part of the legal order, defines more precisely the right to equal treatment and prohibition of discrimination with respect to

a) the right to employment and access to employment

b) access to an occupation, business or other self-employment,

c) employment contract, service and other paid employment, including remuneration,

d) membership of, and involvement in, trade unions, workers’ councils or employers’ associations, including the benefits such associations provide to their members,

e) membership of, and involvement in, professional associations, including the benefits such legal persons governed by public law provide to their members,

f) social security,

g) the granting and provision of social advantages,

h) access to and provision of healthcare,

i) access to and provision of education,

j) access to goods and services, including housing, to the extent as they are offered to the public, or in their supply”

<sup>107</sup> “Everyone has the right to the protection of his health. Citizens shall have the right, on the basis of public insurance, to free medical care and to medical aids under conditions provided for by law.”

<sup>108</sup> Process of establishing an insurance company is specially regulated.

<sup>109</sup> Art. 57 of the EU Treaty (former Art. 50 of the EC Treaty)

Comparability is not the same category as identity. Comparability of the situations consequently should consist in the fact that compared elements have certain similar characteristics. From this point of view, only people with gender dysphoria are in mutually comparable situation. Comparator to male to female transsexual therefore should be female to male comparator. So far as breast augmentation in case of male to female transsexuals is not covered by the Dutch health insurance system while breast removal is, there is different – less favourable – treatment. With respect to the fact that according to the legislation, male to female transsexuals are deprived from access to the reimbursement concerning breast surgery in 100% cases, they are treated less advantageously than female to male transsexuals.

As to form of discrimination, since the Dutch legislation is *prima facie* gender neutral, indirect discrimination can be considered in this case. It is therefore necessary that the criterion or practices are “...*objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary...*” In case that corporation, which acts discriminatory against because of application of the national legislation, is owned by private person and not by the state, it is objectively justified. Obeying the legislation cannot be to the detriment to the private persons. On the other hand, it is possible to say that insurance company should follow also proportionality between the aim and means employed to achieving it. Since it is not appropriate to require private person to assess, whether the legislation they have to follow, corresponds with the EU law, means used to reach the aim is appropriate and necessary. On the other hand, if the Dutch legislation applied by the insurance company is discriminatory, would be different question.

### 3. a) The Public Defender of Rights

In terms of the Anti-Discrimination Act, the authority competent to decide on the discrimination claims of an individual is a county court: “*In the event of a violation of the rights and obligations following from the right to equal treatment or of discrimination, the person affected by such act shall have the right to claim before the courts...*”

The Czech Public Defender of Rights (hereinafter referred to as “Defender” or “Ombudsman”) should according to the Sec. 21b of the Act No. 349/1999 Coll. on the Public Defender of Rights<sup>110</sup>, as amended, provide assistance to victims of discrimination in lodging their proposals for commencement of proceedings concerning discrimination. On the other hand, the Ombudsman is not entitled to settle the discrimination disputes. Besides helping the victims of discrimination, the Defender publishes reports and issues the recommendations as well as maintains research regarding discrimination matters.

#### b) NGOs

According to the Sec. 11 of the Anti-Discrimination Act, an organisation,  
a) Which was founded for the protection of the rights of victims of discrimination, or  
b) whose objects of activities specified in the statutes or rules consist in protection against discrimination or the aforementioned fact follows from its activities or is stipulated in a law, may provide information about available legal help and cooperation in the drafting or supplementing of proposals and applications to persons claiming protection against discrimination. These organisations can also submit petitions to administrative authorities; if there is possibility to commence administrative proceedings, they can as well initiate it.

#### c) Courts

Since the claimed discrimination action consist in following the discriminatory legislation, it is possible to challenge constitutionality of the law or to challenge it is euro-conformity.

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<sup>110</sup> “*The Defender shall contribute to promotion of the right to equal treatment of all persons irrespective of their race or ethnic origin, nationality, sex, age, disability, religion, belief or opinions, and to this end, he/she shall*  
a) *provide methodological assistance to victims of discrimination in lodging their proposals for commencement of proceedings concerning discrimination,*  
b) *undertake research,*  
c) *publish reports and issue recommendations on discrimination-related issues,*  
d) *provide for exchange of the available information with the relevant European parties.*”

The only body which is entitled to take a decision regarding unconstitutionality of the law is constitutional court. The proceedings before constitutional court is regulated by the Act No. 182/1993 Coll., on the Constitutional Court, as amended. According to the Sec. 64 par. 1 of this Act, there is exhaustive list of persons and entities that can claim unconstitutionality of a statute before the Constitutional Court.<sup>111</sup> An individual person (natural or legal) can challenge conformity with the constitution only within constitutional complaint. Constitutional complaint can be brought when a person alleges that his/her/its fundamental rights and basic freedoms guaranteed in the constitutional order have been infringed as a result of the final decision in a proceeding to which he/she/it was a party, of a measure, or of some other encroachment by a public authority. Consequently, there has to be an authoritative decision to challenge. In the transgender case, it would probably be a last court decision made in the case. Merits of the case would therefore be based in claiming discriminatory nature of the legislation according to the Art. 3 par. 1 of the Charter of Fundamental Rights and Basic Freedoms: *“Everyone is guaranteed the enjoyment of her fundamental rights and basic freedoms without regard to gender, race, colour of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status.”* According to the accessory character of the constitutional enactment of the non-discrimination, this provision would have to be read in conjunction with the Art. 31. It stipulates: *“Everyone has the right to the protection of his health. Citizens shall have the right, on the basis of public insurance, to free medical care and to medical aids under conditions provided for by law.”*

Euro-conformity of national legislation can be generally challenged before a court when raising a claim, typically based in a civil law (e.g. seeking for remedy). In the transgender case, it may be damage caused to a plaintiff by obligation to pay a breast surgery. In such a situation, a court should decide according to the euro-conformal interpretation of the national law, or – if it is not clear - seek for preliminary ruling before the Court of Justice of the European Union. Even though, ECJ in *Marleasing* case<sup>112</sup> accepted, that inadequate implementation of a directive can influence the interpretation of national law even between individuals. However, a health insurance company as a private entity would not be probably found liable for damage claimed in this case.

## Denmark

### **Answers provided by the Danish Board of Equal Treatment**

First of all we wish to reiterate that the mandate of the Board is limited to the assessment concrete cases that are submitted to the Board.

The answers provided below are therefore merely based on informal opinions from the Secretariat, and should not be seen as opinions from the Chairpersons and members of the Board. In order for the Board to address these issues we would need a concrete complaint from an alleged victim. At this point of time no cases on gender identity have been submitted to the Board from a victim.

**1.** Under the Danish civil anti-discrimination legislation, the issue of transsexuals would most likely be considered as falling under the “gender” definition. The person would thus be covered both inside and outside the labour market.

<sup>111</sup> Sec. 64 par. 1: *“A petition, under Article 87 para. 1, lit. a) of the Constitution, proposing the annulment of a statute, or individual provisions thereof, may be submitted by:*

*a) the President;*

*b) a group of at least 41 Deputies or a group of at least 17 Senators;*

*c) a Panel of the Court in connection with deciding a constitutional complaint;*

*d) the government, under the conditions stated in § 118;*

*e) anyone who submits a constitutional complaint under the conditions stated in § 74 of this Statute or who submits a petition for rehearing under the conditions stated in § 119 para. 4 of this Statute.”*

<sup>112</sup> *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, C-106/89; see also *Von Colson and Kamann v. Land Nordrhein-Westfalen*, Case 14/83.

Under the criminal anti-discrimination legislation, this would be considered as falling under the “sexual orientation” definition. There is one case reported on this where a person in a shop refused to assist a male transvestite on the same terms as all other customers in the shop because of him being a transvestite, wearing a dress. This person and the company were both issued a fine.

2. To our knowledge, gender reassignment would be treated as a service and fall under Council Directive 2004/113/EC of 13 December 2004.
3. To our knowledge, this would also be treated as a service under our national legislation.
4. The Board of Equal Treatment would be competent to handle a case regarding the civil anti-discrimination legislation and a claim based on gender identity.
5. The complaint is made by male to female transsexuals – hence these persons identify themselves with women and not men. The comparator must therefore be other women. Other women could find themselves in the same situation, but only those women who are in need of a breast augmentation and have not gone through a breast amputation prior to this. To our knowledge this would be a case of indirect discrimination. All women are in principle entitled to this financial support. However, only when the augmentation follows amputation. This will indirectly impact on both the male to female transsexuals and the group of women who wants augmentation and have not gone through amputation.
6. In our opinion there is an objective justification for this, as the criteria for providing financial support in almost all cases will be given to persons who have been subject to grave illness such as breast cancer. In this regard it should be noted that both men and women could benefit from this financial support.
7. The victim may be awarded compensation.
8. Yes, this may also be challenged in front of our national courts.

We wish to reiterate that the answers above reflect an informal discussion that took place in the secretariat. The answers have not been approved by the chairpersons of the Board.

### ***Answers provided by the Danish Institute for Human Rights***

1. There is no official legal definition of ‘transgender’, ‘transsexual’ or ‘transvestite’ in Denmark. However, the case would fall under the scope of the Act on Gender Equality.<sup>113</sup> It follows from section 1a, subsection 1 (1) of this act that it covers all employers, authorities and organisations within the public administration and non-profit activities. Furthermore it follows from section 1a, subsection 1 (2) of the act that it covers authorities and organisations and all persons who provide goods and services to the public both within the public sector as well as the private sector including public bodies, and which are offered outside the area of private- and family life as well as transactions carried out in this context. This section implements article 3 (1) of the 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.

Services must be interpreted in accordance with article 50 of the Treaty of the European Union, thus include in particular (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions.

There is no case law on this specific issue. There is, however, precedence within the Danish system that a case involving gender reassignment falls under the scope of gender equality

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<sup>113</sup> Consolidated Act No. 1095 on Gender Equality of 19 September 2007.

acts. In Decision No. 23/2001 from the former Gender Equality Board staff from a hospital was accused of saying derogatory remarks to the complainant who was admitted to a hospital in order to receive gender reassignment surgery. The Gender Equality Board did not find it sufficiently established that the hospital staff had made the alleged derogatory remarks. Although discrimination was not found in this case, the Gender Equality Board did handle the complaint as opposed to rejecting it with reference to its mandate to only handle complaints about gender discrimination.

**2.** Not relevant since it would fall under the national legislation, but irrespective of this the case would fall under the scope of the directive.

**3.** In Denmark gender reassignment will, as a starting point, most likely be seen as part of the health care system. It thus follows, from section 115 (subsection 1 in the Act of Health Care), that permission can be given to gender reassignment if the applicant's sexual instinct entails considerable psychological sufferings or social deterioration.<sup>114</sup>

However when it comes to the issue of discrimination it might not be necessary to be so categorical about what it is, as long as it falls under the scope of the act which it most likely will either as a service or as what occurs in connection to an authority's activities in the public sector.

**4.** The insurance company's actions fall under the scope of the Gender Act of Equality. Thus if the complainant wants to lodge a complaint against the company s/he can file a complaint with the Board of Equal Treatment which is an administrative complaints body dealing only with cases of discrimination. The complainant can also choose to take the case directly before the courts.

**5.** The starting point should be to examine what is covered by the insurance, including which procedures are covered. Does it for instance cover gender reassignment as such, or does it cover different procedures/services? We are informed those which are to be reimbursed are treatments of a plastic-surgical nature, if these are *necessary* for the correction of primary sexual characteristics of established transsexualism. The insurance company argues that in the national legislation on health insurances, it is stated that the costs of breast augmentation surgery can be covered by the basic health insurance only if the operation follows a breast amputation. It is however not clear whether the motive for this differential treatment is due to the fact that placement of breasts is not seen as *necessary* for the correction of primary sexual characteristics of established transsexualism (and whether breasts are seen as primary sexual characteristics) or whether it is due to the fact the breast amputation is usually connected with treatment of for instance cancer.

The motive for differential treatment is of importance when investigating whether indirect discrimination has occurred in order to uncover whether the practice of only reimbursing the cost of a breast augmentation which follows a breast amputation is objectively justified. I would argue that the present case could constitute indirect discrimination since the reimbursement is depending on the person having a breast amputation and this requirement applies to both transgender men and transgender women but since transgender men will seldom be in need of a breast amputation but instead a breast placement this affects them in an unfavourable way.

Both transgender men and transgender women want to achieve a gender reassignment. However the men wanting to become women are treated differently than the women wanting to become men. Thus the comparator should be one from the opposite sex wanting a gender reassignment.

**6.** The motive for only reimbursing the cost of breast amputation is not uncovered by the facts of the case. It is therefore difficult to have an examination of whether there is a legitimate aim and whether the means of achieving that aim are appropriate and necessary.

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<sup>114</sup> Consolidated Act No. 913 on Health Care of 13 July 2010.

However whatever the motive one could argue that whether you have breasts and want to have them removed or whether you do not have them and want to have them is fundamentally the same problem when the issue is gender reassignment and the fact the biology does not match the experienced gender. So why are – if that is the case – breasts seen as a sexual characteristic which is necessary to remove when it comes to women wanting to become men and not seen as a sexual characteristic which is necessary to have placed when it comes to men wanting to become women?<sup>115</sup>

7. Compensation would be given according to section 3 c of the Act on Gender Equality.

8. If Parliament passed legislation which was not in accordance with EU directives this would be addressed not through the Board of Equal Treatment but in a different way. Incompatible rules could be set aside by a court in accordance with the principle of EU supremacy, if necessary in connection with a preliminary reference to the European Court of Justice. Furthermore the Danish Institute for Human Rights could go into dialogue with Parliament and/or contact the European Commission to make them aware of the fact that is a national law which is incompatible with an EU directive.

There is no constitutional court in Denmark.

9. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation does not cover the area of supply of goods and services so the present case would in my opinion not fall under the scope of this directive. Moreover disability as a discrimination ground is as such not protected outside the labour market by the Danish anti-discrimination legislation. However, Denmark has ratified the Convention on the Rights of Persons with Disabilities<sup>116</sup> but the range of the scope of this convention is not clear.<sup>117</sup>

## Finland

### ***Answers provided by the Office of the Ombudsman for Minorities***

1. Yes, this case falls under the Act on Equality between Women and Men (609/1986). Discrimination in the provision of goods and services on the ground of sex is prohibited in Section 8 e of the Act. Transsexuals/gender reassignment/gender identity is not specifically mentioned in the Act, but in accordance with case law of the European Court of Justice (see for example P v. S and Cornwall Council, Case C-13/94, (1996) IRLR 347), discrimination on the basis of sex or gender covers discrimination on the basis of sex reassignment as well as discrimination on the basis of a person being male or female. The Employment and Equality Committee of the Finnish Parliament referred in 2005 (TyVM 3/2005 vp - HE 195/2004 vp) to the case law in question and also the Ombudsman for Equality monitoring the Act follows the view that discrimination on the ground of gender reassignment is a form of gender discrimination.

2. Yes, the case falls under the scope of the Council Directive 2004/113/EC of 13<sup>th</sup> December 2004. Please see Articles 2 b, 3.1, 4.1 b.

The Council Directive 2004/113/EC of 13 December 2004 does not mention transgender or gender reassignment explicitly. Even if discrimination based on gender reassignment is not mentioned explicitly, according to the case law of the European Court of Justice (P v. S and

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<sup>115</sup> Interesting information would be whether there are given alternatives to having breast placement for instance in form of hormones.

<sup>116</sup> The ratification entered into force 23 August 2009.

<sup>117</sup> To define transgender as a disability in any way I find very problematic. Transgender is where biology does not match the experienced gender and as such does not enter the sphere of disability.

Cornwall Council, Case C-13/94, (1996) IRLR 347), discrimination on the ground of sex covers discrimination on the ground of gender reassignment.

**3.** According to recital 11 of the Council Directive, 'services' should be taken to be those within the meaning of Article 50 of the Treaty establishing the European community. According to this Article 'services' is defined in the following way:

Services shall be considered to be 'services' within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

'Services' shall in particular include:

- (a) Activities of an industrial character;
- (b) Activities of a commercial character;
- (c) Activities of craftsmen;
- (d) Activities of the professions.

Without prejudice to the provisions of the chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

According to Section 2.1 (1) of the Act on the Status and Rights of Patients (785/1992), the terms 'health care and medical care' mean measures taken by health care professionals or in a health care unit in order to assess the state of health of a person or to restore or maintain it.

'Service' is not defined in the Act on Equality between Women and Men. In the preparatory work it is mentioned, that also health care services would be covered by the scope of application of the Act. The Act itself covers both public and private actors, which means it would not make any difference if the gender reassignment was an activity "of a commercial character" or offered as part of public health care service.

To conclude, according to EC and Finnish legislation as well as EC case law, remuneration is not a deciding factor as to what is seen as 'service'. I believe gender reassignment would be treated as a service in Finland.

**4.** The Ombudsman for Equality, who monitors the Act on Equality between Women and Men, would be competent. In addition, the Equality Board can prohibit anyone who has violated the anti-discrimination provisions of the Act from continuing or repeating the discriminatory practice. If necessary, the Board can reinforce the prohibition by imposing a conditional fine.

Individuals cannot bring cases before the Finnish Equality Board but must consult the Ombudsman for Equality. The Ombudsman for Equality can refer cases involving violations of the anti-discrimination provisions of the Equality Act to the Board.

A victim of discrimination can bring a compensation claim before a district court. The compensation is minimum EUR 3.420.

**5.** There is at least indirect discrimination on the ground of sex including gender reassignment. For a scheme, criterion or practice to be discriminatory on a specific ground it is not necessary for everyone in that group to be affected. A specific scheme, practice or criterion is often not relevant for everyone in a specific group. Also, a specific scheme, practice or criterion is discriminatory already if it more often leads to a discriminatory result concerning for example members of a specific ethnic group, but not in all cases.

One could possibly argue, that it is even a case of direct discrimination on the ground of gender including gender reassignment, since male to female transsexuals and female to male transsexuals are treated differently in the provision of services. Discrimination can be direct also when there is no direct referral to the discrimination ground. One could claim that the scheme is not neutral, since some operations are covered and others are not without any

obvious reasons, and, since this means less favourable treatment of male to female transsexuals.

My view is that the logical comparator is a transsexual person undergoing a female to male surgery. In Finland there is no case law yet on the question who would be the appropriate comparator. However, for example direct discrimination on the ground of pregnancy is seen as a form of direct gender discrimination, even if the comparator in the case of a pregnant woman would be a non-pregnant woman, i.e. someone of the same sex (Equality Act, Section 7.1 (2)).

**6.** If the case was put forward as direct discrimination, no justification would be possible. In the Equality Act there is no relevant exception.

In cases of indirect discrimination objective justification is possible. In my view the will of a private company to comply with national legislation could be seen as a legitimate aim that possibly could justify the difference in treatment regarding the basic health insurance scheme.

However, the insurance company has not referred to any justification at all regarding their supplementary health insurance policies, which means there is no objective justification. The company was free to amend the supplementary insurance scheme and should have done so in order for it not to discriminate in its provision of insurance services.

Supplementary health insurance should not be offered in a discriminatory manner regardless of rules on the minimum scope of national basic health insurances. If supplementary insurance is offered, it has to be offered in a way that is not against the prohibition to discriminate.

**7.** Please see reply 4. Also, the victim could report the incident to the police and try to bring the case as a criminal one.

**8.** No, but a discriminated person could go to court and refer to the direct-effect of the Directive as well as to the prohibition to discriminate and other fundamental and human rights. The person could try to claim damages from the state, if the state had not implemented the Directive regarding national basic health insurance.

Courts should apply laws in a “fundamental rights friendly manner”, that eliminates contradictions between the Constitution and regular laws. Section 106 of the Constitution lays down the primacy of the Constitution:

If, in a matter being tried by a court of law, the application of an Act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution.

Further, Section 107 of the Constitution lays down the subordination of lower-level statutes:

If a provision in a Decree or another statute of a lower level than an Act is in conflict with the Constitution or another Act, it shall not be applied by a court of law or by any other public authority.

In other words, a court should not apply a law that is clearly against the Constitution (including Section 6 on equality: Everyone is equal before the law. No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person....). However, it is not very common that a law is “in evident conflict” with the Constitution, since the Parliamentary Committee for Constitutional Law gives statements on the constitutionality of draft bills.

The Equality Ombudsman could suggest a change in the discriminatory legislation to be made. There is no constitutional court in Finland.



9. Council Directive 2000/78/EC is not applicable in this case, since it does not cover the provision of services. I am not sure whether a person wishing to undergo gender reassignment could be seen as disabled.

The Non-Discrimination Act prohibits discrimination on the ground of disability and health, but the Act applies to discrimination in the provision of services only if the discrimination is based on ethnic origin, i.e. the Act is not applicable in this case.

Discrimination on the ground of disability and state of health or another comparable circumstance in the provision of services is prohibited in Section 11, Chapter 11, of the Penal Code:

A person who in his/her trade or profession, service of the general public, exercise of official authority or other public function or in the arrangement of a public amusement or meeting, without a justified reason

- (1) refuses someone service in accordance with the generally applicable conditions;
- (2) Refuses someone entry to the amusement or meeting or ejects him/her; or
- (3) places someone in an unequal or an essentially inferior position owing to his/her race, national or ethnic origin, colour, language, sex, age, family ties, sexual orientation, disability or state of health, religion, political orientation, political or industrial activity, ... or another comparable circumstance shall be sentenced, unless the act is punishable as industrial discrimination, for *discrimination* to a fine or to imprisonment for at most six months.

If dealt with as a criminal case, the rule on the burden of proof in the Equality Act could not be used. The prosecutor would have to prove the case completely. The prosecutor would also have to prove some level of intent, which is not necessary for the definition of discrimination in the Non-Discrimination Act or in the Equality Act. The benefit of taking the case forward as a criminal case would be stronger sanctions: a fine. The prosecutor could also claim damages on behalf of the victim, if appropriate. There would be no possibility to claim compensation on the ground of disability or health discrimination, since the Non-Discrimination Act is not applicable in this case and the Equality Act only covers gender discrimination including gender reassignment (not disability).

## France

### ***Answers provided by HALDE***

1. In France, any issue pertaining to private insurance is, as a matter of principle, covered by the anti-discrimination legislation relating to the access of goods and services provided by the Penal Code and the Law no 2008-496 of 27 May 2008 relating to the adaptation of National law to Community law in matters of discrimination, completing the transposition of Directives 2000/43/EC, 2000/78/EC, 2002/73/EC, 2004/113/EC and 2006/54/EC. Besides, the Insurance Code also includes specific provisions in this respect.

**Article 225-2 of the Penal Code** punishes discrimination committed against a natural or a legal person, by three years' imprisonment and a fine of EUR 45,000. The discrimination may consist of, in particular, the refusal to supply goods or services (1°) or subjecting the supply of goods or services to a condition based on one of the prohibited grounds (4°).

Sex is one of the 18 prohibited grounds expressly referred to in **article 225-1 of the Penal Code**.

These provisions cover discriminatory access to insurance services. For example, in another field, the HALDE as well as the Grenoble Court of Appeals and the highest judicial Court

(*Court of Cassation*) decided that they prohibited an insurer from refusing car insurance to an old person, taking age into account when evaluating risks<sup>118</sup>.

**Article 2-4 of the Law no 2008-496 of 27 May 2008** prohibits any discrimination, based on sex, whether direct or indirect, in relation to access to goods and services.

More specifically **article 111-7 of the Insurance Code** prohibits any direct or indirect discrimination based on the consideration of sex when used as a factor for the calculation of premiums and the granting of insurance service and resulting in differences of premiums and services. Exceptions to this principle must be provided by Ministry's Bylaws under strict conditions.

However, bearing the costs of a surgery like a gender reassignment surgery is not a matter of private insurance coverage in France. It is an issue pertaining to public policies. Both gender reassignment surgery and hormone treatments are thus funded by the French State.

Article L. 322-3 paragraph 4 of the Social Security code provides for reimbursement of costs when:

- The beneficiary is recognised as severely affected by a competent medical authority (*service du contrôle médical*) or by a disease leading to an invalidating pathology and
- This affection requires a sustained and a particularly costly treatment.

Until recently, transsexuals benefited from a State subsidy which was reserved for chronic illness. Transsexuals enjoyed an exemption from user fees for medical care but under an "ALD23" classification relating to recurring or persistent problems. This (stigmatizing) classification derived from that of the World Health Organization (WHO). It was also linked to a leading medical journal, Diagnostic and Statistical Manual of Mental Disorders, which refers the medical profession and which identified transsexuality as disorders, just as homosexuality was a few years ago.

With the entering into force of the Decree n° 2010-125 of 8 February 2010, France is now the first country to remove transsexualism from the list of recognised mental illnesses.

It is also to be noted that **article L1110-3 of the Public Health Code** enshrines a general principle of non-discrimination in access to health care without any limitative list of prohibited grounds. With reference to *P.v. S. and Cornwall County City* ECJ case-law, any difference of treatment against transsexuals would be considered as sex discrimination.

2. Irrelevant

3. The French interpretive framework would not range this case and, more specifically, gender reassignment surgery under the field of access to goods and services but as a matter of Public Healthcare.

4. The Administrative Tribunal of Social Security would be competent.

5. Irrelevant.

6. In your answer please consider what the impact is of having national health insurance legislation which sets out the minimum scope of insurance that must be offered but does not provide a maximum scope to that insurance.

7. Irrelevant.

8. Irrelevant.

9. Irrelevant.

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<sup>118</sup> Court of Cassation Criminal Chamber, April 7, 2009, no. M 08-88.017, No 2074, in appeal from Nîmes Court of Appeals, *Lenormand v. Balenci*, no 08/00907 November 6, 2008; HALDE Decision n°2008-177 of September 1st, 2008

## Greece

### ***Answers provided by the Greek Ombudsman***

1. If we focus only to the strict medical aspect of the case the answer is positive. According to the law 3769/2009, implementing 2004/113/EC directive, any direct or indirect discrimination regarding the providing of services is forbidden. Since the differential treatment concerning the same type of service [surgical operations that are necessary for altering sex] is based solely on sex, even if the ground for such treatment is a neutral one, the case falls within the scope of the law and the directive.

2. As far as the term service is involved, surgery provided by medical institutions [private & public] is covered by the directive and the law 3769/2009 since the only exceptions to the material scope of the law are those referring to education and Mass Media.

3. The crucial issue is not whether or not gender reassignment, as such, is treated as a service but as to whether surgery and other medical treatment, which is necessary for reassignment, is considered as service and the answer is positive. According to the Greek legal order it is considered to be a medical service any act undertaken not only due to medical treatment but due to aesthetic reasons, if surgical equipment is necessary for the fulfilment of the personnel's tasks [art. 112 of the law 1565/1939]. As far as the directive is concerned there is no indication stemming from the wording of the provisions that surgery is not included to the term service.

4. According to the above mentioned law the Greek Ombudsman is competent when the discriminatory practice concerning sex derives from any public service. The so-called Consumer's Ombudsman is competent whenever the discrimination comes from individuals or legal entities of the private sector. Thus the Greek Ombudsman would be competent in the current case.

5. The answer to the above question depends on the reasons for the differential treatment. If the breast augmentation and removal are covered by the insurance companies only in cases of strictly health reasons and the differentiation between removal and augmentation relies on the fact that removal is considered in any case as a medical act and augmentation is considered as a medical act only in cases that operation follows a breast amputation, then there is in my view a neutral ground on which the distinction is based and which can be challenged only if there are appropriate scientific data that could challenge this assumption. On the other hand if according to the Dutch law concerning medical services the term service includes any kind of operation aiming not only at the medical treatment but also at treatment for aesthetic reasons, then the refusal of the Dutch authorities can be considered as an indirect discrimination.

6. The fact that the national health insurance legislation sets out a minimum scope of insurance that must be offered is indifferent concerning the current case, since the Dutch legislation seems to exclude totally this kind of surgery from the "Umbrella" of the social security system. If the social security system covered such expenses then the crucial question would be whether or not there was a differential treatment as far as the amount of money reimbursed is concerned, between male to female surgeries and vice versa.

7. Ombudsman's intervention, whose action does not extend beyond the non-legally binding recommendations addressed to the administration. Yet according to the law 3769/2009 if Ombudsman's intervention does not come to a satisfactory result, Ombudsman's findings are being proceed to the authority which is competent to search the case from a disciplinary point of view [art. 11 par. 3 of the law]. In theory such case could be also a case of civil liability but still there are no such cases pending to the Greek courts. The victim of discrimination can also apply to the administrative courts and also he/she can ask for the re-examination of the

practice by the administration itself, by applying one of the administrative remedies which are provided to the people by the Greek Code of Administrative Procedure.

8. In Greece there is no constitutional court but any court is competent to review any law in terms of constitutionality and compliance to the EU law and ECHR. If such a case would have been arose within the Greek legal order a safe legal ground in favour of the arguments of the plaintiff that there is discrimination, would be the provisions of the ECHR which are directly applicable by the Greek Courts. The jurisprudence of the Strasbourg Court offers some very interesting case law which could be implemented in the current case. Among these cases I would rely on the *Van Raalte v Netherlands* case, in which the court judged that people's contribution to the social security system should not discriminate between men and women. Thus, a provision of the Dutch law which excluded unmarried women who did not have children and were over 45, and not men with the same characteristics, from their contribution to the fund related to family allowances, was discriminatory, since there was no justifiable ground for such deviation, taking into account that the underlying logic of each social security system is the equal contribution of the beneficiaries. Relying on this case, we could claim that if the underlying logic of each social security system is the equal contribution of the beneficiaries, then there should be no discrimination between the contributors regarding the allowances. Thus, any differentiation concerning the beneficiaries' allowances should not discriminate on sex or any other ground.

## Hungary

### ***Answers provided by the Equal Treatment Authority***

1. In Hungary sex reassignment surgery is not covered by the national health insurance system, and only 10 percent of the costs may be reimbursed as provided by the law on compulsory health insurance services. In Hungary only the Constitutional Court may revise any provision that is in violation of the principle of equal treatment.

For these reasons nor the Equal Treatment Authority, nor the Civil Court would be competent.

2. Yes.

3. Yes.

4. See answer 1.

5. Direct discrimination based on gender. Only the female to male transsexuals are in comparable situation.

6. Not applicable.

7. See answer 1.

8. See answer 1.

## The Netherlands

### ***Answers provided by the Equal Treatment Commission***

1. Yes it does. The Dutch Equal Treatment Act (ETA) does not include gender reassignment, gender dysphoria or gender identity as an explicit ground. But following the European Court of Justice (ECJ) in the case of *P/S and Cornwall County Council* (case C-13/94, 30 April 1996)

the Dutch equal Treatment Commission (ETC) decided that discrimination related to gender reassignment falls within the scope of the ground 'sex'.

The ETC has adopted this view in a number of cases from 1998 until present. Also, it has not only decided that transsexuals fall under the protection of the ground 'sex' but trans persons in a broader perspective, such as transgenders and transvestites (see e.g. case number 2007-201).

The ETA covers discrimination on a number of grounds, among which sex, in labour relations, self employment, the membership of a workers association or an employers association, education and the supply of goods and services.

The present case concerns the reimbursement of medical treatment by a health insurance company. The case was inspired by a case that the ETC dealt with in 2009. In its decision in this case, the ETC concluded the following in relation to its competence (paragraphs 3.2 – 3.8):

#### Competence of the Commission

Pursuant to article 7, first paragraph under a) of the Equal Treatment Act (AWGB) discrimination on the grounds of sex is prohibited, among other things, when offering or granting access to goods or services and when concluding, executing or terminating agreements in that connection, if this is done in the course of a profession or a business.

The first question that needs to be answered is whether it concerns the commercial exchange of goods and services as meant in article 7 AWGB or a unilateral government action that the Commission is not competent to judge. The question of whether the ground of sex is at issue will be pursued by the Commission under 3.17 below.

The Respondent argues that concerning the basic health insurance, the Commission is not competent to judge this question, because the Respondent only complies with obligations of the government laid down in the Healthcare Insurance Regulations (Rzv) adopted under the Zvw. This means that it concerns a unilateral government action the Commission is not competent to judge, according to the Respondent.

Concerning the question of whether or not the basic health insurance is a matter of unilateral action on the part of the government, the Commission finds as follows: Until 1 January 2006 health insurance funds and health insurers that were admitted in accordance with article 33 of the Exceptional Medical Expenses Act (Awbz) were designated as implementing bodies as meant in the Compulsory Health Insurance Act (Zfw). The decisions of these implementing bodies were based on compulsory applicable regulations. Appeal and objection related to a right to a provision or compensation under the Zfw was possible, subject to the General Administrative Law Act (Awb). In this context the Commission ruled at the time that it had no jurisdiction to judge claims under the Zfw and the resulting regulations, because of unilateral government action that fell outside the scope of article 7 AWGB (also see CGB 17 June 2004, 2002-72).

In the Statement of Defence (EK, 2004-2005, 29 763, page 29 et seq.) the following was argued concerning the nature of the insurance under the Zvw: "As explained in the further report the Government prefers a private-law form of the compulsory health insurance with strong public guarantees to facilitate the optimum combination of social safeguards on the one hand and room and incentives for people's own responsibility, freedom of choice and competition on the other. (...) The choice for the private-law insurance variation entails that the legal relationships in the triangle health insurer – care provider – insured will all have a private-law nature again." Also in view of the above, the District Court of Arnhem, administrative law section, found in a case of an insured party against an health insurer concerning the refusal to reimburse the costs of some medication, that this does not concern a decision within the meaning of the Awb and that it is not competent to rule in the dispute (DC of Arnhem, 2 March 2007, AWB 06/3148, LJN: BA0940).

Now that the relationship between the health insurer and the insurance taker has a private-law nature, not only concerning the basic health insurance, but also concerning the supplementary insurances, there is no unilateral government action. This does not alter the

fact that the Respondent is bound by strict laws and regulations concerning the basic health insurance.

The decision not to reimburse the costs of placing artificial breast implants is a decision related to the commercial exchange of goods and services. This is in line with the previous considerations of the Commission concerning a decision about a supplementary insurance in CGB 17 June 2004, 2004-73.

In view of this, the application of the Petitioner comes under the scope of article 7, first paragraph under a) AWGB. Therefore, the Commission is competent to test the actions of the Respondent against the AWGB, both concerning the basic health insurance and the supplementary insurance. The Commission will now judge whether the Respondent discriminated against the Petitioner on the ground of sex by not reimbursing the costs of placing artificial breast implants as part of the male to female sex change.

**2.** Yes it would. As mentioned above, it was the ECJ who first decided that discrimination arising from gender identity or gender reassignment falls under the scope of discrimination on the ground of sex. The goods and services directive does not provide for an explicit protection on the ground of gender identity/gender reassignment.

The activities of a health insurance company fall under the scope of the Directive as it says, in article 3:

[..] this directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.

**3.** Yes it would. Gender reassignment is a medical treatment in different stages, involving hormone treatment and operations to first and/or second degree sex organs and often also psychological consultations. Such treatments are offered, in the Netherlands, by a few hospitals that have special gender reassignment teams.

Medical treatments are generally regarded by the ETC as services. There is no reason to assume that medical treatments should not be considered a service under the Council Directive.

The present case concerns not the gender reassignment in itself, but the reimbursement of the costs of such a transition by a health insurance company. As was explained above, the ETC considers the activities of (health) insurance companies as services under the ETA and the Council Directive.

**4.** The ETC is competent to investigate the claim.

After obtaining the non-binding decision of the ETC, the petitioner can turn to a court to obtain a binding judgement and maybe restoration and/or compensation. The petitioner could also go to court directly, without a obtaining a prior decision of the ETC.

If the petitioner would bring his claim before a court, the civil sector of a District Court would be competent to hear it.

**5.** In its decision in this case, the ETC concluded the following in relation to this question (paragraphs 3.9 – 3.15 on the legal framework, paragraphs 3.16 and 3.18 - 3.23 on the basic health insurance and paragraphs 3.29 – 3.31 on the supplementary health insurance):

#### Legal framework

Article 1 of the AWGB provides that discrimination includes both direct and indirect discrimination. The concept of direct discrimination includes discrimination that directly refers to or is directly based on one of the grounds protected by the AWGB, including sex. By indirect discrimination is meant discrimination resulting from a seemingly neutral criterion,

regulation or action that affects certain people in particular because of a person-related feature protected by the AWGB.

Pursuant to article I, heading and under d) Zvw, a health care insurance is a non-life insurance concluded between a healthcare insurer and an insurance taker for someone required to be insured, which complies with the regulations laid down by or pursuant to this act and the coverage of which does not exceed the limits laid down by or pursuant to this Act.

Article 2.4, first paragraph, heading and under b) Healthcare Insurance Decree (Bzv) provides that the medical care to be reimbursed includes, as far as relevant, treatments of a plastic-surgical nature, if these are necessary for the correction of:

- 1° abnormalities in appearance combined with demonstrable physical impairments;
- 2° mutilations resulting from a disease, accident or medical treatment;
- 3° (...);
- 4° (...);
- 5° primary sexual characteristics of established transsexualism.

Article 2.1 of the Health Insurance Regulations (Rzv) provides, as far as relevant, that the care as meant in article 2.4 Bzv does not include:

- (...)
- c. the surgical placement and the surgical replacement of an artificial breast implant, unless a part of the breast or the whole breast was removed;
  - d. the surgical removal of an artificial breast implant without medical necessity;
- (...).

The Respondent reproduced the above provisions verbatim in article 6.4 of its policy conditions for the basic health insurance. As far as relevant, this article stipulates the following:

With due observance of the above paragraphs, we reimburse the costs of treatments of a plastic-surgical nature, if these are necessary for the correction of:

- Abnormalities in appearance combined with demonstrable physical impairments;
- Mutilations resulting from a disease, accident or medical treatment;
- (...);
- (...);
- (...);
- Primary sexual characteristics of established transsexualism.

Furthermore, article 6.4 of the policy conditions provides, as far as relevant, that the insured has no right to reimbursement of the costs of treatments of a plastic-surgical nature, if they concern:

- (...)
3. The surgical placement and the surgical replacement of an artificial breast implant, unless a part of the breast or the whole breast was removed;
  4. The surgical removal of an artificial breast implant without medical necessity;
- (...).

The Commission will first examine whether the Respondent discriminated against the Petitioner on the grounds of sex relating to the basic health insurance, After that, the Commission will judge whether the Respondent discriminated against the Petitioner on the grounds of sex relating to the supplementary insurance.

#### Discrimination on the ground of sex under the basic health insurance

The Petitioner argued that the Respondent discriminated against her on the grounds of sex by refusing to pay the costs of placing artificial breast implants in connection with the male to

female sex change, whereas the Respondent does reimburse the costs of a breast amputation (mastectomy) in connection with a female to male sex change. Both operations serve the same purpose, according to the Petitioner, namely the correction of the breast size. Therefore, the Petitioner does not rely on a distinction between transsexuals and non-transsexuals, between men and women or between men and men or women and women, but on a distinction made between two groups of transsexuals, namely male to female transsexuals and female to male transsexuals.

The Respondent argued that placing artificial breast implants in connection with male to female sex changes is excluded pursuant to article 6.4 of the policy conditions of the insurance coverage. Reimbursement of placing artificial breast implants is only possible after the part or whole removal of a breast. Therefore, placing and replacing artificial breast implants in connection with transsexualism is not covered. In view of the provisions of the insurance policy the Respondent simply cannot reimburse the costs of placing artificial breast implants in connection with the male to female sex change.

Pursuant to article 6.4 of the policy conditions the correction of secondary sexual characteristics of established transsexualism, as far as it concerns the correction (amputation) of the breasts as part of the female to male sex change, does in general belong to the benefits to be insured. In this connection the Respondent points out that for males a mastectomy (breast amputation) to correct gynaecomastia (breast development in males) does in general qualify for reimbursement, if it concerns mammary gland tissue and if this gynaecomastia exists for more than 12 months. This concerns breast development showing a clear feminisation of the breast, comparable to a Tanner stage M4 or higher. This also applies to transsexuals. If these conditions are met, the treatment does qualify as a benefit to be insured under the basic health insurance. In most cases the female to male sex change concerns a female breast with a Tanner stage M4 or higher. The Respondent has no knowledge of cases where the reimbursement of the costs of mastectomy in female to male transsexuals was refused.

The Commission expressly points out that if a healthcare insurer decides to include a certain type of care in a policy contract he should not make any forbidden distinctions on one of the grounds protected by the equal treatment legislation, including sex.

The Commission is of the opinion that in the case of transsexualism the placement of artificial breast implants on the one hand and mastectomy on the other is comparable. It is true that from a medical and possibly also financial point of view the operations are not the same, but in both cases it essentially concerns corrections of the breast size as a secondary sex characteristic.

The Commission concludes that pursuant to article 6.4 of the policy conditions of the Respondent there is no right to compensation for the surgical placement of artificial breast implants, unless the breast was partly or wholly removed, and that this article is applied in such a way that the coverage does include the reimbursement of the costs of a mastectomy. The surgical placement and replacement of artificial breast implants, other than after a mastectomy, is not only for females and transsexuals wanting to change from female to male; artificial breast implants can also be placed in males. This not only occurs after a mastectomy, for instance in the case of breast cancer, but also to make the chest look fuller and well-muscled, according to websites of plastic surgery clinics offering such a treatment. Therefore, the provision is neutral. Therefore, the application of article 6.4 of the policy conditions does not make a direct distinction on the ground of sex.

However, applying this provision does affect females in particular, since the placement of artificial breast implants, other than after the partial or full removal of the breast, is much more uncommon for males than for females. Of the transsexuals it especially affects persons who have a male to female sex change, because the correction of the breasts is not reimbursed in those cases, whereas under this provision mastectomy in the case of a female to male sex change is reimbursed. Therefore, the Commission concludes that in this connection the provision as laid down in article 6.4 of the policy conditions does make an indirect distinction between transsexuals having a male to female sex change and transsexuals having a female



to male sex change. In conclusion, the Petitioner who is undergoing a male to female sex change is indeed indirectly discriminated against on the ground of sex.

#### **Discrimination on the ground of sex under the supplementary insurance**

Concerning the supplementary insurance the Respondent stated that its supplementary insurance policies contain no provisions whatsoever that would provide coverage for medical care for the correction of secondary sex characteristics, such as the breasts in male to female sex changes or female to male sex changes.

The Commission concludes that the supplementary insurance of the Respondent does not contain any provisions on the basis of which reimbursement of medical care for the correction of the breasts as secondary sex characteristics in male to female sex changes or female to male sex changes can be claimed. Therefore, the supplementary insurance contracts of the Respondent currently do not include any provision that leads to (direct or indirect) discrimination on the grounds of sex in this connection. In addition, the Respondent cannot be expected to include the reimbursement of the costs of placing artificial breast implants in its supplementary insurance policies only because of the fact that the legislator excluded these in the Zvw. The Respondent has freedom of contract in this respect, provided that the restrictions imposed by the equal treatment legislation are observed. It has not become evident that the Respondent has acted contrary to the equal treatment legislation in this respect.

Based on the above, the Commission concludes that the Respondent did not unlawfully discriminate against the Petitioner by rejecting the reimbursement of the costs of placing artificial breast implants under the supplementary insurance.

**6.** In its decision in this case, the ETC concluded the following in relation to this question (paragraphs 3.24 - 3.28):

#### **Objective justification of the distinction in the basic health insurance**

Under certain circumstances indirect discrimination can be justified. Pursuant to article 2, first paragraph, of the AWGB the prohibition of discrimination does not apply to indirect discrimination which is objectively justified because of a legitimate goal, whereas the means for achieving that goal are appropriate and necessary. Concerning this exception, the party making the distinction should put forward facts that justify the distinction.

The Respondent argued that by its reimbursement policy concerning breast removals and the surgical placement of artificial breast implants the company is only implementing statutory regulations relating to the benefits to be insured pursuant to the Zvw and the resulting legislation. The Respondent expressly points out that in accordance with the Zvw the company does not have the possibility of reimbursing the Petitioner for the costs of placing artificial breast implants on the basis of the basic health insurance.

The Commission endorses the position of the Respondent concerning the basic health insurance. Pursuant to article 1, heading and under d), of the Zvw the insured benefits of a healthcare insurance may not exceed what the Zvw provides for. If the policy conditions do not match the provisions of or pursuant to the Zvw, the policy contract does not qualify as a healthcare insurance within the meaning of the Zvw. The provisions of the Zvw and the resulting regulations, as included under 3.11, 3.12 and 3.13, offer no room for including the reimbursement of placing artificial breast implants in the basic health insurance.

Based on the above, the Commission concludes that the Defendant did not unlawfully discriminate against the Petitioner on the ground of sex by rejecting the reimbursement of the costs of placing artificial breast implants under the basic health insurance.

The Commission finds that article 2.1 Rvw, on which the policy conditions concerned have been based, makes an indirect distinction. That is why the Commission will use its authority to inform the responsible Minister of this decision. In this connection, the Commission notes that it does not fully understand the ratio of article 2.1 Rvw, which reads that the surgical placement of an artificial breast implant other than after the partial or full removal of the

breast, is not reimbursed, whereas pursuant to article 2.4, first paragraph, heading and under b), of the Bzv the insured is entitled to reimbursement of the costs of a mastectomy.

7. The ETC cannot impose sanctions or grant remedies. It can only give a decision on whether or not the equality legislation has been violated and it may make non-binding recommendations.

The Courts may impose sanctions, such as a fine, or provide for remedies, such as the restoration of a previous situation or the voidance of a decision. Compensation in the form of a payment to the victim is not very common in the Netherlands.

8. No, the ETC does not have that power, as the ETA does not cover national legislation regarding health insurance schemes. The ETC only covers the terrains mentioned under question 1: labour relations, self employment, the membership of a workers association or an employers association, education and the supply of goods and services.

But the petitioner can challenge the legislation before a court. There is no constitutional court in the Netherlands, but he/she can go to the administrative sector of a District Court. The petitioner cannot claim that the government has violated the obligations contained in the ETA, as the ETA is not applicable to acts of government (except for legislation/policy relating to social protection which constitutes racial/ethnic discrimination). But she could claim that the government violates the obligations laid down in Council Directive 2004/113/EC by keeping the legislation on health insurance schemes in place and that the government therefore has not implemented the Directive correctly.

The ETC, although it cannot give a decision on whether the legislation in relation to the health insurance schemes is in breach of the equality legislation, has informed the Minister of (among others) Public Health, of its decision and has asked for an official reaction of the Minister.

9. Although you could probably bring this claim under the ground of disability too, as gender dysphoria – which may lead to gender reassignment – is classified internationally as a psychiatric illness, it would not seem sensible to do so unless the petitioner him/herself self-identified as having a disability, as many transsexuals do not perceive of themselves as being ill and as the classification of transsexualism as a psychiatric illness is being challenged by both transsexuals and scholars. If you would pursue such a claim, a comparison might be made between transsexual women - who are then by definition suffering from a (chronic) psychiatric illness - who want a breast augmentation as part of their gender reassignment and women (with or without a handicap) who want a breast augmentation for non-medical reasons.

But, if the petitioner in this case would have argued that she felt discriminated against on the ground of disability, this complaint would not have been admitted under the present Dutch equality legislation. This is because the Dutch equality legislation does not cover disability discrimination in the field of the supply of and access to goods and services. The same is true for the current EC legislation. The case may however in the future fall under the scope of the proposed Council Directive on the provision of goods and services.

## Norway

### ***Answers provided by the Equality and Anti-discrimination Ombud***

1. The case falls within the Norwegian Gender Equality Act. It is not necessary to decide whether gender reassignment is a service or not under Norwegian law, as the Gender Equality Act covers all sectors of society. There is no explicit protection against gender reassignment discrimination under Norwegian law, and there will probably not be in the future

either, as the proposal for a new comprehensive anti-discrimination act does not mention gender reassignment discrimination specifically.

**2.** We would assume that the case would fall within the scope of Council Directive 2004/113/EC. Health care is a service which is paid for by the recipients through insurance premiums or taxes – see the Lisbon treaty article 57. Health care services are listed as an example in the preamble section 12.

The ECJ stated in *P v. S and Cornwall County Council* that discrimination arising from gender reassignment of a person is considered to be discrimination on the ground of sex.

Thus, discrimination based on gender reassignment would fall within the scope of this directive.

**3.** Gender reassignment should be covered by insurance plans as “medically necessary treatment” according to the European Court of Human Rights (ECHR), see the judgment in *van Kück v. Germany (Application no. 35968/97)*. Accordingly, gender reassignment would be considered a health care service under the Council Directive. Under Norwegian law it is not necessary to define gender reassignment as a health care service, as the Gender Equality Act covers all areas of society, including services.

**4.** The Norwegian Equality and Anti-Discrimination Ombud could handle the case, as well as the courts.

**5.** The insurance regulations are seemingly neutral, but they have a negative effect for transsexuals. The criterion is “particular disadvantage”, which is fulfilled in this case as gender reassignment is a necessary procedure related to identity for the persons in question. We would say that this would constitute indirect discrimination on the ground of gender identity.

The question of comparators can be attacked from different angles – if one looks at the result of the procedure the outcome would be the same for Female to Male (FTM) and Male to Female (MTF), namely gender reassignment, although the procedure is different. The MTFs could be compared to the FTMs.

Also, transsexuals could be compared to the rest of the population covered by the insurance scheme, insofar as the insurance covers *necessary health service*. The argument would be that transsexuals do not receive necessary health service, which the non-transsexuals receive, and therefore they are being discriminated against. The ECHR have stated that states are required to provide for the option of surgery for transsexuals, but also to have insurance plans covering medically necessary treatment in general – see judgments by the ECHR: *van Kück v. Germany (Application no. 35968/97) - paragraphs 47, 73 and 82 and L. v. Lithuania (Application no. 27527/03) - paragraphs 59 and 74*.

**6.** As a starting point the objective justification assessment would probably conclude that complying with national legislation requirements is a legitimate aim for the insurance company, and that it is necessary for the company to comply with national legislation. If the national legislation sets forth a *maximum* scope of insurance coverage which excludes gender reassignment, the correct defendant would be the *state*, which has adopted discriminatory legislation. It is hard to imagine that such legislation can be deemed *necessary*, and an objective justification would therefore not exist for the state. This will certainly be the case in the light of existing ECHR practice, as referred to above, by which the state is bound.

If the state has only set a *minimum* scope of insurance the question of discrimination will arise if the insurance company in choosing the minimum level of coverage is putting certain groups at a particular disadvantage. One could argue that although breast augmentation procedures in general should not be reimbursed under the minimum scope an exception should be made for breast augmentation relating to gender reassignment. The insurance company will probably argue that the alleged indirect discrimination is objectively justified and will point to the costs of including coverage for gender reassignment procedures. Since transsexuals are very few the costs will probably not be very high. Excluding transsexuals from necessary medical treatment will in light of this argument be considered disproportionate.

7. The sanctions of the Ombud towards discriminatory legislation are only to provide non-binding decisions. However, when it comes to discriminatory practices or regulations the government is supposed to act in accordance with the Ombud's statements and will do so most of the times. Private parties should also comply with the Ombud's statements but has no legal duty to do so. However, out of court settlements are not uncommon in such cases. Also, the Equality and Anti-Discrimination Tribunal/Board which handles complaints over the Ombud's statements can issue legally binding decisions for private parties. Non-compliance can result in fines being issued.

8. The ordinary courts can decide upon handling such a case, which national act should prevail. The lawsuit would have to be brought against the state. The Ombud could act as *amicus curiae* in the court case. It is assumed that the Ombud might bring cases before the court by its own. However, it is not clear whether the Ombud could act in this capacity, as the question has never been tried.

9. The 2000/78/EC Directive does not cover protection in the access to and supply of goods and services. Thus, arguing disability as the ground for protection against gender reassignment discrimination would be difficult, unless medical treatment is a benefit provided for by a union or workers' organisation – see article 3 section 1 *litra d*).

One would assume that transsexuals would be opposed to use disability as the ground for protection – it would certainly be controversial. In Norway there would not be a need to argue for protection under the disability discrimination ban as protection under the ground gender equality would be sufficient.

## Slovakia

### ***Answers provided by the Slovak National Centre for Human Rights***

1. The case falls within the scope of the Act No 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination amending and supplementing certain other law (the "Anti-discrimination Act") which prohibits discrimination also in the area of healthcare and provision of goods and services

Under article 2 of the Anti-discrimination Act compliance with the principle of equal treatment shall consist in the prohibition of discrimination on grounds of sex, religion or belief, racial, national or ethnic origin, disability, age, sexual orientation, marital status and family status, colour of skin, language, political or other opinion, national or social origin, property, descent or other status. In line with ECJ decision in *P v S and Cornwall County Council (C-13/94)* the protection against reassignment discrimination in Slovak legislation arises from protection against sex discrimination.

The principle of equal treatment in the area of healthcare is also regulated by the Act No. 576/2004 Coll. on health care, services provided in context with health care and on amendments and supplements as amended by further law. According to article 11 of this act the right to healthcare is guaranteed to everyone in compliance with the principle of equal treatment in healthcare expressed in separate law (Anti-discrimination Act). In compliance with the principle of equal treatment, the discrimination on grounds of sex, religion or belief, marital status and family status, colour of skin, language, political or other opinion, trade union activity, national or social origin, disability, age, property, descent or other status.”

2. The case will fall within the scope of the Council Directive 2004/113/EC, healthcare services are also expressly mentioned in recital 12 of this directive. Even though directive 2004/113/EC does not expressly mention discrimination arising from the gender identity or reassignment of a person, in line with ECJ decision in P v S and Cornwall County Council (C-13/94) such discrimination is prohibited by protection against discrimination on grounds of sex. In forenamed decision concerning equal treatment within the scope of Directive 76/207 (Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions) ECJ stated that: “Since the right not to be discriminated against on ground of sex constitutes a fundamental human right, the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. It must extend to discrimination arising from gender reassignment, which is based, essentially if not exclusively, on the sex of the person concerned, since to dismiss a person on the ground that he or she intends to undergo, or has undergone, gender reassignment is to treat him or her unfavourably by comparison with persons of the sex to which he or she was deemed to belong before that operation.”

### 3. National legislation:

Act No. 576/2004 Coll. on health care, services provided in context with health care and on amendments and supplements as amended by further law defines healthcare as a complex of professional activities performed by healthcare providers including the provision of medication, and dietary foodstuffs in order to prolong the life of a natural person, improve the quality of his or her life, and ensure healthy development of future generations. Healthcare includes prevention, dispensation, diagnostics, treatment, bio-medical research, nursing care and midwifery. In the context of the Act No. 576/2004 Coll. (especially par 12 concerning legal relationships in healthcare) gender reassignment would be treated as a health care.

Council Directive 2004/113/EC:

Under the council directive the gender reassignment shall be treated as a service (healthcare services as expressly mentioned in recital 12 of the directive). It is also in line with settled case law of the Court of justice that medical activities fall within the scope of Article 60 of the Treaty (now art. 50).

4. Slovak national centre for human rights (“the Centre”) is competent to give expert opinion, conduct independent survey, and to provide legal assistance to complainant or mediation service. The Centre has also the authority to represent parties in the proceedings concerning violation of the principle of equal treatment.

In case of legal action the district court is competent to handle the case. Parties to the proceedings concerning the violation of the principle of equal treatment may also be represented by legal entities:

- a) Who have such authority under a separate law, or
- b) Whose activities are aimed at or consist in the protection against discrimination.

The **Health Care Surveillance Authority** (“Authority”) has been established by the Act No. 581/2004 Coll. on Health Care Insurance Companies and Surveillance over Health Care and on Amendment and Supplementation of Certain Acts as a legal person and is vested with performing surveillance over provision of health care and public health care insurance in the field of public administration. The Authority supervises whether the health care was provided properly and in accord with legal norms and imposes sanctions. The Authority also supervises

the implementation of the Act No.581/2004 Coll. (Act on Health Insurance Companies, Supervision of Health Care and on modification and amendment of some acts as amended by subsequent regulations) and of the Act 580/2004 Coll. (Act on Health Insurance and imposes penalties for the breach of those acts).

**5.** We would consider the case as an indirect discrimination. According to apparent neutrally provision costs of breast augmentation surgery are covered by the basic health insurance for everyone only if the operation follows a breast amputation but this provision put a specific group of persons (male to female transsexuals) at a disadvantage compared with the other persons (female to male transsexuals).

**6.** Indirect discrimination can be justified if provision, criterion or practice in question is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Since we do not know what the aim and purpose of national legislation is (although we can guess it is the question of financial resources), it is difficult to say if the aim is legitimate and if the means are appropriate and necessary.

Having national health insurance legislation which sets out the minimum scope of insurance that must be offered but does not provide a maximum scope to that insurance may have both positive and negative impact. Positive side is that insurance company can reimburse also medical treatments not listed in legislation but unfortunately it is probable that transsexual people will not be in the centre of insurance companies' interest and therefore their insurance schemes will not reflect their special needs arising from gender reassignment (negative side).

**7.** According to par. 9 of the Slovak Anti-discrimination Act the complainant may seek that the person violating the principle of equal treatment be made to refrain from such conduct and, where possible, rectify the illegal situation or provide adequate satisfaction. Should adequate satisfaction prove to be not sufficient, especially where the violation of the principle of equal treatment has considerably impaired the dignity, social status and social functioning of the victim, the victim may also seek non-pecuniary damages in cash.

**8.** In Slovakia, a normative instrument with lower-ranking legal force may not contradict a normative instrument of higher-ranking legal force. The Constitutional Court of the Slovak Republic oversees and rules on the compatibility of:

1. Laws with the Constitution and constitutional acts;
2. Government regulations, universally binding legal provisions of ministries and other central government bodies with the Constitution, constitutional acts and laws;
3. Universally binding regulations of local authority bodies with the Constitution and laws;
4. Universally binding legal provisions of local bodies of state administration with the Constitution, laws and other universally binding legal provisions;
5. Universally binding legal provisions with international treaties promulgated in the manner laid down for the promulgation of laws.

The Constitutional Court shall commence proceedings upon a motion submitted by persons stipulated in the Constitution of the Slovak Republic (e.g. the President of the republic, the Government, any court in connection with its decision-making...). Slovak National Centre for Human Rights is not among those persons and so it is not entitled to challenge national legislation in front of the Constitutional Court.

**9.** Since the case falls within the existing legislation prohibiting discrimination on the ground of sex, there is no need to apply legislation protecting against the disability discrimination. Labelling the transsexualism as a disability probably would not be welcomed by the transsexuals themselves and it may even provoke negative stereotypes towards the group of transsexual persons.

# Sweden

## **Answers provided by the Equality Ombudsman**

**1.** There is protection against discrimination in the Swedish Discrimination Act (2008:567) with regard to the supply of goods, services or housing to the general public (cf. Chapter 2, Section 12, point 1). However, in the transposition of Directive 2004/113/EC insurance services were exempted from the prohibition of discrimination associated with sex (cf. second paragraph of the same Section).

However, the exemption has probably been transposed wrongly in Swedish legislation since the exemption in the Discrimination Act covers *all* insurance services. The exemption in the Directive is only aimed at differences in individuals' premiums and benefits if the use of sex is a determining factor in a risk assessment based on relevant and accurate actuarial and statistical data (cf. Article 5 paragraph 2 and paragraph 19 of the recital in the Directive).

The Swedish Discrimination Act states expressly that a person who intends to change or has changed the sex they belong to is covered by sex as a ground of discrimination (cf. Chapter 1, Section 5).

**2.** The situation is covered by Directive 2004/113/EC, cf. Article 3, point 1, which states that the Directive shall apply to all persons who provide goods and services, which are available to the public. A person who intends to have a sex change and is put at a disadvantage on account of this is covered by the prohibition of sex discrimination according to judgment *C-13/94 P v. S and Cornwall County Council* of the European Court of Justice where the Court issued a preliminary ruling on the interpretation of Council Directive 76/207/EEC on the equal treatment of men and women in working life. The same assessment ought to apply under Directive 2004/113/EC.

**3.** There is also protection concerning discrimination with regard to health and medical care and other medical services in the Discrimination Act (cf. Chapter 2, Section 13). If you feel that you are of the 'wrong sex' and want to change your sex, this is seen by the Swedish Health and Medical Care Act as an illness and you are given a diagnosis. Any discrimination with regard to physical procedures as part of a sex change would therefore come under the prohibition of discrimination with regard to health and medical care in the Discrimination Act. Under Directive 2004/113/EC the particular insurance service described in the case ought to fall within the scope of the Directive, i.e. the insurance company is providing a service under Article 3, paragraph 1. Since the scope covers services available to the public in both the public and the private sector, medical procedures provided in healthcare should also be a service covered by the Directive.

**4.** Under the Swedish Discrimination Act, the Equality Ombudsman or a non-profit organisation whose statutes state that it is to look after the interests of its members may bring an action on behalf of an individual who consents to this. The Equality Ombudsman or the association then brings the action as a party in the case. In disputes outside working life the action is brought before a court of general jurisdiction. In disputes under labour law the action is brought before the Labour Court. This is stated in Chapter 6, Section 2 of the Discrimination Act.

**5.** As the circumstances are described in the case, the insurance company has a rule entailing disadvantage aimed directly at men who want to have a sex change and another rule that does not entail disadvantage that is aimed at women. The rule entailing disadvantage involves direct discrimination of men on grounds of sex. Men and women who want to have a sex change are in a comparable situation, i.e. both men and women have sex changes. At the same time, it is obviously possible to discuss whether the services concerned are intrinsically comparable. The opposite party will probably argue that breast enhancement is one service while breast amputation is another and that they are not comparable. The national legislation appears to be indirectly discriminatory with regard to sex, i.e. providing

insurance for breast enhancement only as a result of breast amputation is a rule that, while gender-neutral, disadvantages in practice men who want to have a sex change. At the same time, it is doubtful whether legislation that in itself provides for favourable treatment is discriminatory solely on the grounds that it does not cover certain groups.

6. The fact that the national legislation states that the cost of a breast enhancement can only be covered by the guaranteed health insurance if such an operation is carried out as a result of a breast enhancement does not alter the assessment that the insurance company has a directly discriminatory rule. Even if the insurance company is obliged to provide such an insurance policy, it is still possible for the company to provide supplementary insurance policies. These supplementary insurance policies may have discriminatory conditions with regard to sex, which seems to be the case here.

It is difficult to see any possibility of an exemption or a legitimate objective.

7. A natural or legal person who violates a prohibition of discrimination in the Discrimination Act shall pay compensation for discrimination for the offence resulting from the infringement. When compensation is decided, particular attention shall be given to the purpose of discouraging such infringements. The compensation shall be paid to the person who has been offended by the infringement (cf. Chapter 5, Section 1). The Equality Ombudsman is obliged to try to reach an out-of-court settlement with the opposite party before the Ombudsman brings an action before a court. An out-of-court settlement involves compensation to the person subjected to discrimination. Sometimes an out-of-court settlement also contains an apology from the opposite party and an intention to change discriminatory rules and practices.

8. It is doubtful whether national legislation can be set aside by a court in Sweden. Sweden has a legal system without a constitutional court.

9. At the same time, it is clear from the case-law of the European Court of Justice that courts and public authorities have a duty not to apply national legislation that is contrary to European Union law. Cf, for example, C- 555/07 paragraph 56 which states that it is for the national court, hearing proceedings between individuals, to ensure that the principle of non-discrimination on grounds of age, as given expression in Directive 2000/EC, is complied with, disapplying if need be any contrary provision of national legislation..

## United Kingdom – Great Britain

### ***Answers provided by the Equality and Human Rights Commission***

1. This case would fall under the Equality Act 2010

2. Yes this case would fall within Council Directive 2004/113/EC.

The Goods and Services Directive provides that direct discrimination occurs (Article 2(a)) *‘where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation’*.

The fact that the Gender Goods and Services Directive uses the formulation of *‘on grounds of sex’* means that Member States should protect against discrimination connected to sex, including gender reassignment. The Directive means that treatment need not be on the grounds of a person’s actual sex (birth or reassigned) but rather, on the basis of sex more generally.

In the decision in *P v S*, the ECJ observed that:<sup>1</sup>

*The scope of the Directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. [EHRC emphasis]. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the*



*Directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.*

Moreover, the Gender Recast Directive makes clear in Recital 3:

*'The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.'*

Therefore it is clear that the gender equality Directives apply to gender reassignment.

**3.** Claims for discrimination in services are heard in the County Court (or Sheriff's Court in Scotland).

**4.** Indirect discrimination on grounds of gender reassignment and sex under Equality Act 2010)

There is a potential claim of indirect discrimination on grounds of sex and gender reassignment against the insurance company. There are no express provisions prohibiting indirect discrimination on *combined* grounds in UK domestic legislation, only on grounds of sex and gender reassignment separately.

Determining the pool for comparison is very complex in this case and it would be critical to its success or failure. In the UK, the starting point is the whole of the group to which the provision is applied and the tribunal would be wary of any further sub division. Therefore, arguably, the correct pool could be either all men and women who want to claim for the breast enlargement under the basic insurance policy or all transsexual people who want to make a similar claim. If the matter were left at that then the claimants' case is likely to fail as they would not be able to establish either that men were put at a particular disadvantage compared to women by this provision (as only a miniscule number of men would want to have breast enhancement compared to a larger number of women seeking such surgery); similarly they would not be able to show that transsexual people were put at a particular disadvantage as MtF transsexuals would not want to have breast placement surgery and therefore would not be disadvantaged by this rule).

However, the claimants could pursue such a claim on the basis of the approach taken in the Employment Appeal Tribunal case of De Bique v MOD where the Employment Appeal Tribunal suggested that the Tribunal should select from the range of pools available to them the one that *will 'realistically and effectively test the particular allegation before them'*. The court therefore considered two characteristics (race and sex) together when considering whether or not the claimant had been indirectly discriminated against. The claimants in the insurance case would have to ask the County Court to follow the EAT's precedent.

It must be noted however that De Bique does not sit well with existing domestic case law, as the Court of Appeal (a higher court) found in the case of Bahl v Law Society that complaints of discrimination experienced because of a number of characteristics must be considered separately.

The approach adopted by the court to the selection of the pool of comparators is not clear cut and would be crucial to the success or failure of this case.

**5. A) Claim for indirect discrimination against Insurers.**

**i) Basic Insurance policy:**

Under 19 Equality Act 2010 a provision, criterion or practice is objectively justified where the insurer can show that it is 'a proportionate means of achieving a legitimate aim'.

In this case the insurer would rely on the fact that they were constrained by domestic legislation in the way they provided basic insurance to defeat the claim. The court would therefore examine the legislative provisions. The courts are required by EU law to read

domestic legislation compatibly with EU provisions where it is possible to do so, and disapply it where it is not possible.<sup>119</sup> **Therefore the court would consider the government's reasons for introducing a provision which appears to indirectly discriminate against Trans women, assess whether there is a legitimate aim and whether the means to achieve it are appropriate and necessary.**

**In determining the question of legitimacy the court would consider whether the provision is legal and non discriminatory and one which represents a real, objective consideration.**

The court would then go on to consider if application of the provision was proportionate (i.e. appropriate and necessary) in the circumstances. It would evaluate the discriminatory effect of the provision as against the service provider's reasons for applying it, taking into account all relevant facts. 'Necessary' does not mean that the provision is the only possible way of achieving the legitimate aim, it is sufficient that the same aim could not be achieved by any less discriminatory means. The greater financial cost of not using a less discriminatory approach cannot, by itself, provide a justification for applying a particular provision. Cost can only be taken into account as part of the service provider's justification if there are other good reasons for adopting it. The more serious the disadvantage caused by the discriminatory provision, the more convincing the objective justification must be.

**We do not have the government's reasons for framing the provisions in this way and therefore cannot venture an answer on the above issues.**

**ii) Additional Insurance policy:**

In relation to the failure to provide cover under an *additional* insurance scheme, **the case would turn on whether the Insurers could show that there was a legitimate aim in not doing so and whether the means of achieving that aim were proportionate.**

The above considerations in (a) would apply.

**6.** The court would make a declaration of discrimination and could award damages for pecuniary loss, injury to feelings where it is just and equitable to do so. Aggravated and exemplary damages are also available in certain cases.

**7.** In the UK equality law does not have a higher status than other legislation in the courts and there is no written constitution. However, as described above, it is possible to challenge domestic legislation if it is incompatible with EU law or if the government failed to comply with the statutory equality duty (as described in 2 below).

The case would be against the government.

**B. Judicial Review against the Government regarding the legislation setting out the basic insurance policy**

As stated above, courts have to interpret domestic legislation, as far as possible, in light of the wording and purpose of EU law<sup>120</sup>.

This is so even where the domestic legislation covers the same area as the EU law, but was not intended to implement it<sup>121</sup>. Where a provision in domestic legislation is contrary to EU

<sup>119</sup> Under EU law, national courts have an obligation to interpret domestic law consistently with an EU Directive, so far as it is possible to do so. Where it is not possible to do so, it is an established principle that the domestic law should be disapplied where the Respondent is a public authority. In this case the insurance company is arguably an emanation of the state in respect of the basic insurance and therefore the claimants could ask the court to give the Directive direct effect and disapply the domestic legislation. Alternatively, the claimants could argue that the court should disapply the domestic legislation which is inconsistent with a general principle of EU law of equal treatment, even in a claim against a private company - see *Kucukdeveci v Swedex GmbH and Co*; *Mangold v Helm* [2006] IRLR 143, ECJ, paras 77 - 8; *Simmenthal* [1978] ECR 629, para 21

<sup>120</sup> In accordance with the ECJ finding of *Marleasing SA v La Comercial Internacional de Alimentacion* C106/89 [1992] 1 CMLR 305

<sup>121</sup> *Marleasing*

equality law the domestic provision should be disapplied where the European provision is directly effective. It is likely that the Gender Goods and Services Directive would be deemed to be directly effective against the insurance company in respect of the basic insurance policy as its policies are prescribed by legislation and therefore it is arguably an emanation of the state in respect of those policies. Even if it is deemed to be a private body, the Directive can be relied upon to set aside incompatible national legislation according to ECJ case law<sup>122</sup>.

An affected party, including the EHRC, could potentially apply for a Judicial Review of domestic legislation which was incompatible with EU law.

There is no provision in the Gender Goods and Services Directive permitting cases to be pursued on grounds of sex and gender reassignment *combined* and therefore such a case may fall at this hurdle because the complainants would be not be able to adduce evidence to show that natal males as a group were put at a particular disadvantage by this provision compared to natal females, as few (natal) men would require breast augmentation; nor could they show that people proposing to undergo gender reassignment were put at a particular disadvantage compared to non trans people as female to male trans people were not disadvantaged by the provision as they would only require breast removal.

**Therefore such a claim may fail.**

**However, if it were found that it was possible to take a claim for indirect discrimination on a combination of gender reassignment and sex under the Gender Goods and Services Directive the government the court would then consider if trans women were put at a particular disadvantage by the provision. If so, the government could resist the claim if they were able to show that the provision is objectively justified by ‘a legitimate aim and the means of achieving that aim are appropriate and necessary’.** The same considerations as set out in 1 (a) above would apply.

### **C. Judicial Review for possible failure to comply with statutory duty to eliminate disability and/or gender reassignment discrimination**

It is also possible for the EHRC, and other affected parties, to challenge the government in the High Court regarding, for example, the development of new legislation, as it is required to comply with the public sector equality duty to have due regard to the need to eliminate discrimination and advance equality of opportunity in all of its functions. There are various requirements including a duty to consult with those affected and assess the impact on equality of policy proposals. The government would have to show that they had due regard to their statutory duties in developing the legislation. This would include considering if any indirect discrimination and whether it could be objectively justified. The court could be asked to consider not only whether the aim could be achieved by less discriminatory means, but also whether it would be proportionate for the government to have adopted a different approach which could better advance equality of opportunity for Trans people.

### **9. Proposed directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in the access to and supply of goods and services**

Arguably this case would also fall under the scope of the proposed Directive prohibiting discrimination in services on grounds, inter alia, of disability.

#### **Equality Act**

If the claimants were able to show that they meet the test for disability under the Equality Act (that is, someone who has a physical or mental impairment which has a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities) then they would have a potential claim for disability discrimination (on the basis that the insurers failed to discharge their duty to make reasonable adjustments where their policy placed trans men at a substantial disadvantage) or for indirect disability discrimination. Gender dysphoria is

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<sup>122</sup> Mangold v Helm C-144/04 [2006] IRLR 143; Seda Kucukdeveci v Swedex GmbH and Co C-555/07 [2010] IRLR 346.

recognised by the World Health Organisation as a medical condition. Such claims would be heard in the County Court.

**Note: As Equinet is well aware, there is no protection from disability discrimination in services under EC Directives presently, although there is a draft Directive which would prohibit such discrimination currently under discussion. The fact that there is protection in the UK but not in other Member States creates a hierarchy of protection across Europe and therefore undermines the fundamental principal of free movement.**

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## Equinet member organisations

| Country               | Member   |
|-----------------------|--|
| <b>Austria</b>        | Ombud for Equal Treatment<br><a href="http://www.gleichbehandlungsanwaltschaft.at">www.gleichbehandlungsanwaltschaft.at</a>  |
| <b>Belgium</b>        | Centre for Equal Opportunities & Opposition to Racism<br><a href="http://www.diversite.be">www.diversite.be</a> and <a href="http://www.diversiteit.be">www.diversiteit.be</a> |
| <b>Belgium</b>        | Institute for the Equality of Women and Men<br><a href="http://igvm-iefh.belgium.be/en">http://igvm-iefh.belgium.be/en</a>   |
| <b>Bulgaria</b>       | Commission for Protection against Discrimination<br><a href="http://www.kzd-nondiscrimination.com">www.kzd-nondiscrimination.com</a>   |
| <b>Croatia</b>        | Office of the Ombudsman<br><a href="http://www.ombudsman.hr">www.ombudsman.hr</a>  |
| <b>Cyprus</b>         | Office of the Commissioner for Administration (Ombudsman)<br><a href="http://www.ombudsman.gov.cy">www.ombudsman.gov.cy</a>  |
| <b>Czech Republic</b> | Office of the Public Defender of Rights<br><a href="http://www.ochrance.cz">www.ochrance.cz</a>  |
| <b>Denmark</b>        | Board of Equal Treatment<br><a href="http://www.ast.dk">www.ast.dk</a>   |
| <b>Denmark</b>        | Danish Institute for Human Rights<br><a href="http://www.humanrights.dk">www.humanrights.dk</a>  |
| <b>Estonia</b>        | Gender Equality Commissioner<br><a href="http://www.svv.ee">www.svv.ee</a>   |
| <b>Finland</b>        | Ombudsman for Equality<br><a href="http://www.tasa-arvo.fi">www.tasa-arvo.fi</a>   |
| <b>Finland</b>        | Ombudsman for Minorities<br><a href="http://www.ofm.fi">www.ofm.fi</a>   |
| <b>France</b>         | High Commission against Discrimination and for Equality<br><a href="http://www.halde.fr">www.halde.fr</a>  |
| <b>Germany</b>        | Federal Anti-Discrimination Agency<br><a href="http://www.antidiskriminierungsstelle.de">www.antidiskriminierungsstelle.de</a>   |
| <b>Greece</b>         | Greek Ombudsman<br><a href="http://www.synigoros.gr">www.synigoros.gr</a>  |
| <b>Hungary</b>        | Equal Treatment Authority<br><a href="http://www.egyenlobanasmod.hu">www.egyenlobanasmod.hu</a>  |
| <b>Hungary</b>        | Office of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities<br><a href="http://www.kisebbsegiombudsman.hu">www.kisebbsegiombudsman.hu</a>        |

| Country                      | Member   |
|------------------------------|--|
| <b>Ireland</b>               | Equality Authority<br><a href="http://www.equality.ie">www.equality.ie</a>   |
| <b>Italy</b>                 | National Office against Racial Discrimination<br><a href="http://www.unar.it">www.unar.it</a>  |
| <b>Latvia</b>                | Office of the Ombudsman<br><a href="http://www.tiesibsargs.lv">www.tiesibsargs.lv</a>  |
| <b>Lithuania</b>             | Office of the Equal Opportunities Ombudsman<br><a href="http://www.lygybe.lt">www.lygybe.lt</a>                                      |
| <b>Luxemburg</b>             | Centre for Equal Treatment<br><a href="http://www.cet.lu">www.cet.lu</a>   |
| <b>Malta</b>                 | National Commission for the Promotion of Equality<br><a href="http://www.equality.gov.mt">www.equality.gov.mt</a>                    |
| <b>Netherlands</b>           | Dutch Equal Treatment Commission<br><a href="http://www.cgb.nl">www.cgb.nl</a>   |
| <b>Norway</b>                | Equality and Anti-Discrimination Ombud<br><a href="http://www.ldo.no">www.ldo.no</a>   |
| <b>Portugal</b>              | Commission for Citizenship and Gender Equality<br><a href="http://www.cig.gov.pt">www.cig.gov.pt</a>                                 |
| <b>Romania</b>               | National Council for Combating Discrimination<br><a href="http://www.cncd.org.ro">www.cncd.org.ro</a>                                |
| <b>Serbia</b>                | Commission for Protection of Equality<br><a href="http://www.ravnopravnost.gov.rs">www.ravnopravnost.gov.rs</a>                      |
| <b>Slovakia</b>              | National Centre for Human Rights<br><a href="http://www.snslp.sk">www.snslp.sk</a>   |
| <b>Spain</b>                 | Spanish Race and Ethnic Equality Council<br><a href="http://www.igualdadynodiscriminacion.org">www.igualdadynodiscriminacion.org</a> |
| <b>Sweden</b>                | Equality Ombudsman<br><a href="http://www.do.se">www.do.se</a>   |
| <b>UK – Great Britain</b>    | Equality and Human Rights Commission<br><a href="http://www.equalityhumanrights.com">www.equalityhumanrights.com</a>                 |
| <b>UK – Northern Ireland</b> | Equality Commission for Northern Ireland<br><a href="http://www.equalityni.org">www.equalityni.org</a>                               |

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