Dynamic Interpretation
European Anti-Discrimination Law in Practice

Case Studies 2006

Report by Equinet's Working Group 3 on Dynamic Interpretation

Dynamic Interpretation – European Anti-Discrimination Law in Practice is published by Equinet, the European Network of Equality Bodies.

Equinet builds on the project "Towards the uniform and dynamic implementation of EU anti-discrimination legislation: the role of specialised bodies" which is supported by the European Community Action Programme to Combat Discrimination (2001-2006).

Equinet partners: Ombud for Equal Treatment, Austria | Centre for Equal Opportunities and Opposition to Racism, Belgium| Institute for Equality Between Men and Women, Belgium | Commission for Protection against Discrimination, Bulgaria | Office for the Commissioner for Administration, Cyprus | Danish Institute for Human Rights, Denmark | Gender Equality Commissioner, Estonia | Office of the Chancellor of Justice, Estonia | High Authority against Discrimination and for Equality, France | Commission for Racial Equality, Great Britain | Disability Rights Commission, Great Britain | Equal Opportunities Commission, Great Britain | Greek Ombudsman, Greece | Equal Treatment Authority, Hungary | Office of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities, Hungary | Equality Authority, Ireland | National Office Against Racial Discrimination, Italy | National Human Rights Office, Latvia | Equal Opportunities Ombudsman, Lithuania | Equal Treatment Commission, Netherlands | Equality Commission for Northern Ireland, Northern Ireland | Equality and Anti-discrimination Ombud, Norway | Commission for Equality and Against Racial Discrimination/High Commissioner for Immigration and Ethnic Minorities, Portugal | National Council for Combating Discrimination, Romania | National Centre for Human Rights, Slovakia | Office for Equal Opportunities, Slovenia | Ombudsman against Ethnic Discrimination, Sweden | MPG, International Partner

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The views expressed in this publication are not necessarily shared by all partners of the project.

Production:
Equinet Secretariat
MPG - Rue Belliard 205 box 1
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ISBN: 2-930399-38-4

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Preface

Equinet's Working Group on Dynamic Interpretation focuses on how to interpret legal concepts and issues in anti-discrimination law with a view to harmonised implementation of EU law in this area in order to secure equality at the highest possible level.

In 2006 the working group adopted a practical approach to dynamic interpretation using real-life cases brought before them to form a basis for a comparative analysis of the application of anti-discrimination law in their different countries. The working group asked partners to consider five hypothetical cases, based on real cases that had come before certain Equinet partners and to apply their own national law to the facts of these cases. Members of the working group were required to respond and other Equinet partners were asked to participate on a voluntary basis.[1] The five cases concerned 1) race, nationality, education and segregation; 2) religion, gender and occupational requirements; 3) mental disability (Asperger's Syndrome) and employment; 4) physical disability and employment; 5) a positive action measure and race.

The cases consider several key legal concepts under Directives 2000/78, 2000/43 and 2002/73 amending Directive 207/76, such as direct and indirect discrimination, the shift in the burden of proof, positive action, occupational requirements and reasonable accommodation. The cases were selected on the basis that they concern various discrimination grounds and fields, to enable Equinet partners dealing with only one or a few grounds to make a contribution. As a result it has proven impossible to include all the contributions of Equinet partners to every case. On the other hand some partners submitted contributions from non-Equinet partners dealing with a ground or field they themselves are not empowered to address. In general however it can be said that the cases provide a good overview of the range of practices in the EU.

Three members of the working group have analysed the cases and contributions and produced a report for every case, highlighting key findings and conclusions (Chapters 1-5). In addition, overall conclusions were drawn up by the working group during a meeting in October 2006 in Brussels at which the reports were discussed. These are summarised at the beginning of this publication.

The working group decided to publish all partner contributions (Annex 1-5). The individual contributions show that despite the fact that the Member States involved in this exercise have all implemented the directives, the approach to certain issues and outcomes of the cases are often very different. The analyses show that there are similarities as well as differences in interpreting the directives. The working group hopes that good practices will provide inspiration to other partners and contribute to greater harmonisation of the implementation of EU law in this area.[2]

On behalf of the Working Group on Dynamic Interpretation,

Femke Wegman
Moderator

[1] The cases were completed by experienced employees at the national equality bodies. Whilst the answers cannot be read as official statements of the bodies, all information used in this report was approved by the bodies before publication.
[2] All of the information contained in the report is accurate as of 21 November 2006.

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Conclusions

The reports on the cases show that many similarities exist in the approach of Equinet partners to dealing with cases. However several conclusions can be drawn regarding the need for greater harmonisation of the implementation of EU law in the area of anti-discrimination.

Direct/indirect discrimination

There appears to be no consistency in the findings returned by partners regarding direct or indirect discrimination. Part of the problem is the choice of discrimination ground. For example, in the case of a language criterion some partners use the ground of (native) language or mother tongue and conclude a finding of direct discrimination. Others, who use the ground of race, returned findings of indirect discrimination.

Furthermore it would appear from the responses to the questionnaires from the specialised equality bodies that some Member States have a fluid concept of direct and indirect discrimination, with some, like the UK when it concerns the ground of disability, do not have the concept of indirect discrimination at all, although there is a form of discrimination known as *disability related discrimination*, which may address some of the aspects of indirect discrimination. This is relevant because the selection of one option over another may have far-reaching consequence: under the European directives indirect discrimination can be objectively justified but direct discrimination cannot.

Some countries, such as Belgium, have the possibility of an objective justification of direct discrimination (also on grounds other than age, since direct discrimination on the ground of age can be justified on the basis of article 6 of Directive 2000/78/EG). From the responses to the questionnaires it seems that the possibility of justifying direct discrimination also exists in the laws of Italy, Norway and Sweden, although in the case presented to the specialised bodies from these countries (see the case on religion, gender and employment, page 24) they all concluded there was no objective justification. It may be however that there is confusion between objective justification and genuine occupational requirement. This is dealt with below.

It was found that there is a need for Equinet partners to use, where possible, the grounds in the directives and apply the directives' concepts of direct and indirect discrimination. Furthermore, it was also found that Member States need to be particularly alert to provisions in their legislation that enable justification of direct discrimination on grounds other than age and need to consider whether their legislation needs to be amended in this regard.

Occupational requirements within churches and other public or private organisations of which the ethos is based on religion or belief

Norway has a general exception to the prohibition of discrimination for religious institutions or communities on the basis of religion, which specifically does *not* apply to the employment sector. However, since article 4(2) of Directive 2000/78/EC considers *occupational* requirements, it can be questioned whether the Norwegian exception is in line with the directive. Norway also has an exception, which permits religious organisations to engage in differential treatment in recruitment practices with respect to persons living in homosexual co-habitation. Section 4(2) of Directive 2000/78/EC however does not permit that the difference of treatment justifies discrimination on another ground, e.g. sexual orientation.

Norwegian legislation contains exceptions to direct discrimination regarding occupational requirements within churches and other public or private organisations of which the ethos is based on religion or belief that may not be in line with Directive 2000/78/EC and a revision of legislation in Norway related to these exceptions may therefore be appropriate.

Occupational requirements as an exception to direct discrimination or as a justification for discrimination

In Belgium discrimination *can* be objectively and reasonably justified by an occupational requirement, where according to Article 4(1) of Directive 2000/78/EC a difference of treatment "*shall not constitute discrimination"* in the case of an occupational requirement. Belgian legislation seems not to be in line with the directive on this point, since discrimination is established but objectively justified. This is a different finding than discrimination not having been established in the first place.

Belgian legislation, as well as legislation of other countries that have the same approach as Belgium, needs to treat occupational requirements as an exception to discrimination, instead of an objective justification to discrimination, in order to be in line with article 4(1) of Directive 2000/78/EC. Revision of legislation may be appropriate to ensure this is the approach taken.

Reference to international standards

For some Equinet partners international standards and even case law do not play a major role when dealing with a discrimination case, while partners that do use them are positive about it. International standards and case law are not only useful for interpretation of national provisions of legislation, but also in supporting particular positions in order to strengthen an argument or where the national legislation does not provide assistance.

Equinet partners have the experience that international standards and case law are useful in interpretation of national provisions of legislation and underpinning positions. The consistency of interpretation and development of positions would be aided if international standards were referred to as a matter of course by Equinet Partners.

Definition of disability

Whilst there are very clear advantages to following the approach of the Employment Equality Directive and not having a definition of disability in national legislation it does have significant disadvantages – one of these in particular being that any case law of the ECJ on definition is likely to be followed by the courts of those countries which have no definition. Thus a relatively narrow definition of disability – which seems to ignore the social model of disability (which focuses on the barriers which people face as a result of impairment, rather than impairment itself being a problem) – as reached in Navas[3] may be taken up by those countries that have no definition. Equality bodies in countries with no definition of disability may wish to consider legislation which provides a broad approach to a definition, rather than leave its determination to the courts.

[3] Case C-13/05 Navas v Eurest Colectividades SA. The full judgment can be read on the Court of Justice of the European Communities Website at: http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=&datefs=&datefe=&nomusuel=navas&domaine=&mots=&resmax=100

Equality bodies working in Member States that do not have a definition of disability may wish to consider whether a definition, which could be more generous in its coverage by including the social model of disability (which focuses on the barriers which people face as a result of impairment rather than impairment itself being a problem) would be preferable to the Navas[4] implications.

Reasonable accommodation

In Sweden the duty to provide reasonable accommodation is only owed to a job applicant and it does not apply at all once a person is in a job. This appears to be in breach of the obligations under Directive 2000/78/EC. The duty contained in Article 5 of this directive is broad ranging – the obligation is to provide reasonable accommodation "*to enable a person with a disability to have access to, participate in, or advance in employment, or to provide training for such a person*". Clearly this covers getting in to work, staying in work, and getting on in work (progression and attaining promotion). Indeed, given that the majority of people become disabled during their working life, it would be a fairly redundant provision if it did not cover the full working cycle. However, we understand that Sweden has already taken up this issue and that legislation is currently underway to address it, which will come into force in a year or two.

In Sweden, the duty of reasonable accommodation applies to job applicants, but not to employees. Legislation to redress this apparent breach of article 5 of Directive 2000/78/EC is under way, but may take another year or two to be enacted. Speeding up the enactment process would be appropriate.

Positive action

There is a lack of consistency between Member States as to the criteria, which must be satisfied for positive action measures to be lawful.

There is a question as to whether domestic and ECJ case law on gender related positive action measures should be applied in the same way to race, particularly given that there are some differences in the scope of sectors in which positive action measures can be taken.

One of the means to seek clarification on the legal scope of positive action measures regarding race or ethnic origin is to make applications to the ECJ. Since not all Equinet partners have, under national legislation, a mandate to do so, Equinet and its partners should consider alternative strategies to submit applications.

There is also a lack of consistency between Member States concerning the scope of positive action measures permitted both across the six grounds of equality and across different sectors.

As part of the European Commission's work on considering the need for further anti-discrimination legislation under Article 13 of the EU Treaty or the effectiveness of current anti-discrimination legislation, the Commission could consider whether specific criteria for positive action measures to be lawful should be set out in the legislation. Equinet partners can support such a strategy of the Commission, based on their experience with the present inconsistency as to the criteria that must be satisfied for positive action to be lawful. A case in point is the following example from Slovakia: the positive action provision in its Anti-discrimination Act allowing the adoption of specific balancing measures to prevent disadvantages linked to racial and ethnic origin was not held to be specific enough in defining the criteria for such measures

[4] See footnote 3

to be lawful and was thus held by its Constitutional Court to be incompatible with its Constitution.

Furthermore, it would be useful to determine what exact positive action measures are possible across the six grounds of equality, across different sectors and whether positive action measures are actually being applied in practice even where they do exist.

There is a lack of consistency between Member States as to the criteria which must be satisfied for positive action measures to be lawful, in the scope of positive action measures permitted, and it is not clear whether positive action measures, where they exist, are actually applied in practice. Hence it would be useful if the European Commission considered the need for legislation explicitly stating the criteria for positive action at the European level. Furthermore, a study to determine whether and under which criteria and conditions positive action measures are actually applied, may help to determine the effectiveness of the positive action provisions in the directives.

Chapter 1
Case study on race, nationality and segregation

The case

A Somali boy has been refused admission to a public school and claims that he has been discriminated against on the grounds of his race and/or nationality. The school states that the boy has been refused admission because the quota of pupils that speak the language of the country as a second language has already been reached. The school has a policy by which only 25% of the children in the school do not have the language of the country as their mother tongue. With this policy, the school has two aims: to protect the quality of education and to integrate foreign pupils. The school also wants to avoid becoming a so-called 'black school' which, because of the bad name these schools tend to have, could finally lead to closure of the school. The school stresses that it does not refuse pupils on the grounds of their race. The population of the neighbourhood in which the school is situated is made up of 25% ethnic minorities. [5]

The questions

Working group members and other Equinet partners were asked to consider the case in the context of their legislation and jurisprudence or to describe how the case would be considered by the competent authority in their country. The following specific questions were asked:

1. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system?

3. Which ground(s) would apply here? E.g. race, nationality. Please explain.

4. Would the refusal to admit the boy constitute direct or indirect discrimination or no discrimination at all?

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.

6. Would you use international standards in your argumentation, e.g. General Recommendation 19 of the United Nations Committee on the Elimination of Racial Discrimination (CERD) on racial segregation and apartheid?

> *CERD General Recommendation 19:*
>
> *'1. The Committee on the Elimination of Racial Discrimination calls the attention of States parties to the wording of article 3 [of the International Convention on the elimination of All Forms of Racial Discrimination (ICERD)], by which States parties undertake to prevent, prohibit and eradicate all practices of racial segregation and apartheid in territories under their jurisdiction. The reference to apartheid may have been directed exclusively to South Africa, but the article as adopted prohibits all forms of racial segregation in all countries.*
>
> *2. The Committee believes that the obligation to eradicate all practices of this nature includes the obligation to eradicate the consequences of such practices undertaken or tolerated by previous Governments in the State or imposed by forces outside the State.*
>
> *3. The Committee observes that while conditions of complete or partial racial segregation may in some countries have been created by governmental policies, a condition of partial segregation may also arise as an unintended by-product of the actions of private persons. In many cities residential patterns are influenced by group differences in income, which are sometimes combined with differences of race, colour, descent and national or ethnic origin, so that inhabitants can be stigmatized and individuals suffer a form of discrimination in which racial grounds are mixed with other grounds.*

[5] The case below was based on a case that came before the Dutch Equal Treatment Commission in 2003. Dutch Equal Treatment Commission, 29 July 2003, opinion 2003-105. The full text of the opinion can be found on the Equinet website: www.equineteurope.org

> *4. The Committee therefore affirms that a condition of racial segregation can also arise without any initiative or direct involvement by the public authorities. It invites States parties to monitor all trends which can give rise to racial segregation, to work for the eradication of any negative consequences that ensue, and to describe any such action in their periodic reports.'*

Twelve reactions were received, from the following organisations:

- Austrian Ombud for Equal Treatment
- Belgium Centre for Equal Opportunities and the Fight against Racism
- Danish Institute for Human Rights
- Estonian Chancellor of Justice
- French High Authority against Discrimination and for Equality
- British Commission for Racial Equality
- Hungarian Parliamentary Ombud
- Italian National Office against Racial Discrimination
- Dutch Equal Treatment Commission
- Norwegian Equality and Anti-discrimination Ombud
- Slovak National Centre for Human Rights
- Swedish Ombudsman Against Ethnic Discrimination

Summary of findings

Legislation

The first thing to note is that the various countries would deal with the case under different kinds of legislation, sometimes depending on whether the school is a primary or secondary one (Norway), or one in which the school is situated in a community/province (Austria and Belgium). In most countries, for example Austria, Hungary, the Netherlands, Norway and Slovakia, the case falls under equal treatment legislation, sometimes as a result of activating a specific ground(s) (e.g. race or ethnicity in Denmark, France and the UK) or spheres (e.g. education in Belgium (Flemish part)). Others, such as Norway, Slovakia, France, Belgium (French part) and Estonia said the case would (also) be dealt with under legislation on education, which refers to the right of a child to attend school or the obligation of a school to accept children within its area. Norway stated that pupils whose knowledge of Norwegian is insufficient must follow a preliminary course in Norwegian before they may join the ordinary school programme and that it is therefore unrealistic that a child on the grounds stated in the case would be refused. Belgium, Estonia and Slovakia furthermore mentioned general legislation, such as constitutions or administrative acts.

Discrimination ground

The different grounds that would be used by the countries were ethnicity or (ethnic) origin/belonging, race, colour, (native) language, mother tongue and the non-discriminatory ground of the right to attend school. The countries that used ethnicity/(ethnic) origin or race as a ground based their decision on different arguments, such as the fact that the school wants to avoid becoming a so-called 'black school' (Estonia, Italy) or that language is an essential element of ethnic origin (Netherlands, Sweden). The Racial Equality Directive prohibits discrimination on the grounds of racial or ethnic origin.

Direct or indirect discrimination?

Under the Racial Equality Directive direct discrimination occurs where one person is, has been or would be treated less favourably than another in a comparable situation on grounds of racial or ethnic origin. 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.

Regarding the question of whether the refusal to admit the boy would constitute direct discrimination, indirect discrimination or no discrimination at all, the first two options were mentioned by the partners. Part of the problem is the choice of discrimination ground. In the case of a language criterion some partners use the ground of (native) language or mother tongue and conclude direct discrimination. Others, who use the ground of race, conclude indirect discrimination. This is of concern, as choosing one option or another may have far-reaching consequences, given that under the European directives indirect discrimination can be objectively justified but direct discrimination cannot.

The countries that would deal with the case under the grounds of (native) language or mother tongue all answered that the case would constitute direct discrimination.

The countries where the case would fall under the grounds of either ethnicity or (ethnic) origin/belonging, race or colour differed in their approach. Austria, Denmark, Italy, the Netherlands, Slovakia, Sweden and Great Britain concluded that the case would constitute indirect discrimination since the language criteria is seemingly neutral but mainly targets immigrant groups. In other words: the language criteria would put persons with the same race, ethnic or national origin as the boy at a particular disadvantage when compared with other persons as they would be less likely to speak the country's main language as their mother tongue. Italy and Sweden concluded direct discrimination because the boy was refused entrance and was targeted as an individual. Austria concluded that there would be direct discrimination, arguing that a quota of pupils who speak the language of the country as a second language does not seem to be a neutral prohibition/criterion. Great Britain explicitly mentioned that their provision on direct discrimination has been interpreted narrowly given that there is no defence to direct discrimination.

There is a need for Equinet partners to use, where possible, the grounds in the directives and apply the directives' concepts of direct and indirect discrimination.

Objective justification test

The answers regarding justification varied. According to the Racial Equality Directive indirect discrimination can be objectively justified when there is a legitimate aim and the means of achieving that aim are appropriate and necessary.

The directive does not mention an objective justification test for direct discrimination. Belgium however used an objective justification test in the case of direct discrimination. This is of concern given that this is a concept intended to be used for indirect and not direct discrimination (also on grounds other than age, since direct discrimination on the ground of age can be justified on the basis of article 6 of Directive 2000/78/EC). Others, such as France, the Netherlands and the Great Britain, explicitly said no objective justification was possible after concluding direct discrimination.

The wording of the tests mentioned by the partners differs, but generally speaking the tests resemble the Racial Equality Directive test. At the time of the analysis (beginning/mid 2006) the wording of the objective justification test in the Hungarian Act on Equal Treatment did not empower the judge to scrutinise whether the means applied are appropriate and necessary for achieving the aim of a certain regulation, but seemed to refer to the rationality test as elaborated by the Hungarian Constitutional Court and not to the necessity and proportionality test of the same Court. According to Hungary, the simple rationality test referred to in the Hungarian Act on Equal Treatment is therefore most probably not in line with the Racial Equality Directive. The Hungarian Ombudsman for Minorities had therefore proposed that it be amended. In the meantime, the Hungarian legislator has amended the Act on Equal Treatment. The amendment will come into effect on 1 January 2007 and, in the case of racial discrimination, sets a stricter standard than Directive 2000/43/EC.

Most partners, such as Denmark, Belgium, the Netherlands and Slovakia, found the aims of protecting the quality of education and the integration of foreign pupils a legitimate one.

Denmark, the Netherlands and Great Britain argued that the school's statement that it wants to avoid becoming a so-called 'black school' which - because of the bad name these schools usually have - could finally lead to the closure of the school, may constitute another aim, which would probably not be legitimate. Denmark argued that this would not be a legitimate aim unless a clear link to for instance the quality of education can be presented. The Netherlands said the aim would be discriminating in itself. The Great Britain argued that the aim would not be an appropriate part of social policy as it encourages segregation of schooling.

Regarding the necessity of the means to achieve the aims of protecting the quality of education and the integration of foreign pupils, various partners referred to other – less radical - possibilities than using a quota: additional language lessons (Norway), a 'priority system' that uses a pre-enrolment possibility for certain language-groups (Belgium), improving the structures inside the school (Italy). Norway would in this regard take into account whether a school has adequate resources for additional language lessons. Also, the Norwegian practice of requiring pupils whose knowledge of Norwegian is insufficient to follow a preliminary course in Norwegian before they join the ordinary school system would be an alternative, although this must be weighed against the benefits of learning a language through joining school.

When the real case came before them, the Netherlands had, in relation to the aim of protecting the quality of education, investigated whether there were groups within the school for which a higher percentage of pupils who speak the language of the country as a second language had been admitted than the 25% maximum (for example because siblings of existing pupils are always admitted to the school). They also investigated whether the system used by the school to assess whether a pupil speaks the language of the country as a second language involved repeated language evaluations while at school to determine whether – despite a good command of the Dutch language – the pupil was still classified as speaking the language of the country as a second language. Interesting in this regard is Denmark's reference to a case where a municipality had decided to re-allocate children who were just about to start kindergarten if a language test showed the need for further development of skills in the Danish language to be justifiable. A quota of 30 % of such children per institution was set up and only so-called bilingual children who do not have Danish as their mother tongue were tested. The quota and re-allocation was based on a language test of the children with two languages, and only applied to those children that did indeed show a need for developing further skills in the Danish language. On this specific basis the Danish Complaints Committee found the actions justifiable.

Other partners said the means could (also) be disproportionate. Belgium stated that the means could prejudice the right of a child to enrolment in a school of its choice. According to Denmark, attention should be paid to any evidence given by the authorities or the school that could give an objective picture of whether reducing the number of pupils with two languages and a different mother tongue does indeed help to secure the quality of the education and 'integration'. The Netherlands said that by definition the measure employed by the school cannot contribute to the integration of those pupils who are not admitted to the school on the basis of the quota of non-native speakers having been reached. It also said that there was no evidence of the existence of an integration policy targeting all pupils, regardless of their background and whether or not they have a good command of the language of the country. The burden of the measure appeared to be exclusively on the smallest group, namely on those pupils who speak the language of the country as a second language.

On the basis of the findings, it would seem that Belgium will need to be particularly alert to direct discrimination (also on grounds other than age) being capable of justification and should consider whether its legislation needs to be amended.

International standards

As far as the question of whether partners would use international standards in their arguments was concerned, the answers differed. Denmark answered that it has referred in another case directly to General Recommendation No. 19 of ICERD. Austria said that international standards in general and General Recommendation No. 19 of ICERD are very helpful and they would use it. Estonia and the Netherlands said that they use international standards for interpretation of provisions of legislation, in order to make the argumentation stronger. The Netherlands refers to the ICERD when using the definition of race. Italy could - in the case of a lack of national legislation - use the international standard as a criteria of interpretation of national law and also, in some cases, directly. Slovakia answered that when publishing expert opinions in cases related to the principle of equal treatment, it is their practice to work with national as well as international anti-discrimination legislation, recommendations of international organisations and jurisprudence of national and international courts.

Some partners would probably not refer to international standards because national legislation and regulations implement international standards (Norway), because the law and its *travaux préparatoires* provide enough support (Sweden) or because general principles of administrative law prohibit discrimination on the basis of origin in school enrolment (France). Norway however does not exclude the possibility that a decision from the Ombud would make a reference to a specific international instrument or decision deemed as particularly relevant to the case.

In the UK international conventions maybe referred to in cases but are not binding as they are agreements between the executives of countries (governments) rather than decisions of domestic or international courts. Hungary answered that Hungarian courts (except the Constitutional Court) are rather reluctant to apply international instruments, and they base their decisions mostly on domestic law.

For some Equinet partners international standards and even case law do not play a major role when dealing with a discrimination case, while those partners that do use them are positive about it. International standards and case law are not only useful for interpretation of national provisions of legislation, but also in supporting particular positions in order to strengthen argumentation or where the national legislation does not provide assistance. The consistency of interpretation and development of positions would be aided if international standards were referred to as a matter of course by Equinet Partners.

Chapter 2
Case study on religion, gender and employment

The case

A Muslim woman applied for a post at an Islamic high-school as a teacher of the Arabic language. The woman has a university degree in Arabic language and literature, she is qualified to teach high-school students and did an internship at another Islamic school. She had heard that this school was looking for a teacher of the Arabic language. The woman does not wear a headscarf. The school rejects the woman for the post because the school expects all its female Muslim teachers to wear a headscarf. Non-Muslim female teachers may request exemption from this rule. The school's statutes state that the school has the aim of creating possibilities for higher education based on Islamic principles as well as the aim of creating possibilities for acquiring knowledge of Islam at a higher educational level. The activities and decisions of the school are tested against the Koran and Soennah. The school can determine its own regulations. The school's regulation for personnel states that female personnel must, apart from their hands and face, cover their whole body. The regulation states that the school can grant an exemption. The school employs 95 employees of which 55 are women. Of the female employees, 38 are Muslim and 17 are non-Muslim. All 17 non-Muslim employees have at their request been granted exemption from wearing a headscarf. [6]

The questions

Working group members and other Equinet partners were asked to consider the case in the context of their legislation and jurisprudence or to describe how the case would be considered by the competent authority in their country. The following specific questions were asked:

1. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not.

2. Which court, organisation, instance would be competent?

3. Which ground(s) would apply here? E.g. religion, gender. If both please explain how you would approach the analysis.

4. Would this constitute direct or indirect discrimination?

5. Does an exception as mentioned in Article 4 (2) of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation exist in your country and would it apply in this case?

> *Article 4 (2) Directive 2000/78/EC*
> *'Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.*
>
> *Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.'*

6. If you find this case would lead to direct or indirect discrimination, would there be an objective justification?

[6] This case is based on a case that came before the Dutch Equal Treatment Commission in 2005. Dutch Equal Treatment Commission, 15 November 2005, opinion 2005-222. The full text of the opinion can be found on the Equinet website: www.equineteurope.org

7. How would you balance these conflicting basic human rights: the freedom of religion and the prohibition of discrimination.

Twelve reactions were received from the following organisations:
- Austrian Ombud for Equal Treatment
- Belgian Centre for Equal Opportunities and the Fight against Racism
- Dutch Equal Treatment Commission
- Estonian Chancellor of Justice
- French High Authority against Discrimination and for Equality
- British Commission for Racial Equality
- British Equal Opportunities Commission
- Hungarian Parliamentary Ombud
- Italian National Office against Racial Discrimination
- Norwegian Equality and Anti-discrimination Ombud
- Slovak National Centre for Human Rights
- Swedish Ombudsman against Ethnic Discrimination

The Danish Institute for Human Rights informed us that the Danish Gender Equality Board had rejected the case as they did not consider that it concerned discrimination on the grounds of gender. Given the diversity of the reactions received it is difficult to draw definitive conclusions and the analysis is therefore limited to some preliminary remarks. The individual responses of these partners can however be found in the Annex to this report (Annex 2).

Summary of Findings

Legislation

Most equality bodies, among others Austria, Belgium, Hungary, the Netherlands, Norway, Slovakia and Sweden based their case solutions on national equal treatment legislation, which usually deals with the sphere of employment or more specifically, recruitment and conditions of employment. Norway, Estonia and Great Britain referred to specific gender equality legislation. The UK also referred to equality legislation specifically on religion and belief in the employment sphere. Belgium said that under certain circumstances, namely when the school had the intention of refusing the teacher on the basis of her race or ethnic origin, this kind of case could also be treated under the Anti-Racism Act, which is criminal law and with which Belgium fulfils its obligation under the International Convention on the Elimination of All Forms of Racial Discrimination. Some countries use general employment legislation, including principles on equal treatment. Examples are Estonia (in addition to specific gender equality legislation) and France. The latter uses the Labour Code when the school is a private one. In the case of a public school France referred to general principles applicable to the public service, including the absolute prohibition of discrimination on the basis of religion and thus the right of women *not* to wear a headscarf. Other countries, e.g. Norway, have a system in which public and private schools are subject to different kinds of legislation. Norway stated however that despite this, legislation in the area of recruitment and working conditions is the same for the public and private education sectors. Slovakia referred to its constitution and to the more detailed legislation based on its constitution dealing with freedom of religious faith and the position of churches and religious societies.

Grounds

All partners refer to the ground of religion, but the reasons for using this ground were diverse. Belgium for example analysed the case under the ground of religious discrimination as the dress code required by the school is based on a religious principles. France referred to the freedom to practice one's faith as he or she chooses. Italy looked at the exception rather then the general rule by arguing that the exception was not generally applicable to female Muslim and female non-Muslim teachers.

A large number of the partners, such as Austria, Estonia, France, Italy, Norway, Slovakia, Sweden, and Great Britain would potentially use or had at least discussed the possibility of using the ground of gender. Estonia for example argued that only women have to wear headscarves in order to show their religion. In other words, men did not have to wear any religious symbols (e.g. follow certain dress codes or have a beard). Belgium also stated that gender was an option in theory in the event that there was no dress code (e.g. a beard) for men.

France specifically did not use the ground of gender, arguing that this would raise a conflict between sex discrimination and freedom of religion and that it would therefore be more efficient to use the ground of religion as it covers the right to practice one's religion as one chooses. Slovakia said it could theoretically also consider the case as multiple discrimination on the grounds of gender and religion.

Belgium would also use the ground of race or ethnic origin. Belgium argued that wearing a headscarf is linked to the Muslim belief and that Muslims are more often of non-European origin. Great Britain explicitly excluded this possibility, arguing that although some religious groups such as Jews and Sikhs have been recognised as racial groups in the UK, persons who are Muslim do not constitute a racial group.

Direct/indirect discrimination

A large number of the partners, including Austria, Belgium, Estonia, France, Italy, the Netherlands, Norway, Slovakia and Great Britain, stated the case would constitute direct discrimination on the ground of religion. Slovakia for example argued that the Muslim woman was deprived of an exemption from a general school regulation enabling non-Muslim women at their request not to wear a headscarf.

With regard to the ground of gender, three partners, namely Estonia, Italy and Great-Britain said the case would lead to direct discrimination on the ground of gender while two partners - Belgium and Norway - argued the case would constitute indirect discrimination on the ground of gender. It has already been noted in the analysis of the first case that this is interesting, since choosing one option or another may have far-reaching consequences, given that under the European directives indirect discrimination can be objectively justified whereas direct discrimination cannot be.

It is also noteworthy that in Sweden, the case appears to lead to both direct and indirect discrimination on the ground of religion and gender. Indirect, as it is a seemingly neutral criteria that mostly targets persons who do not wear headscarves (which includes believers as well as non-believers and can be a function of the great variety of versions of Islam). Direct, because you need to ask exemption from the rule, it only targets women and it targets this woman on the basis that she is a Muslim.

In addition, Belgium indicated that the case would lead to indirect discrimination on the ground of ethnic origin.

There is a need for Equinet partners to use, where possible, the grounds in the directives and apply the directives' concepts of direct and indirect discrimination.

Occupational requirements within churches and other public or private organisations the ethos of which is based on religion or belief

In Austria, Italy, the Netherlands, Slovakia and the UK an exception as mentioned in Article 4 (2) of Directive 2000/78/EC exists. According to the Austrian response, wearing a headscarf in this case is not a genuine, legitimate and justified occupational requirement for a language teacher and it therefore does not fall under the exception.

The Netherlands said the exception would not apply. The Netherlands examined successively whether the specific case involved a denominational educational establishment, whether the job requirement being challenged is necessary for the fulfilment of the principles of the establishment, and whether the job requirement is based on an established policy founded on the objects of the establishment and is actually implemented. It concluded that the school failed to convince the Dutch Equal Treatment Commission of the necessity of the headscarf requirement because there was nothing to show that a Muslim teacher who does not wear a headscarf, unlike a Muslim teacher wearing a headscarf or a non-Muslim teacher with or without a headscarf, is unsuitable or would be less suitable for the position of teacher or otherwise constitutes an obstacle to meeting the requirements which are necessary for or otherwise relevant to filling the position within the establishment. This was all the more true in the case of positions like that of a teacher of Arabic, which do not entail any imparting of religious knowledge or rules.

Great Britain also answered that it is unlikely that this exception would be applicable to the facts of the case. It argued that there is no evidence that being of Muslim religion is a genuine requirement for the position as a teacher of the Arabic language. The decision to not employ the woman was not based on her religion (as she is Muslim), but the fact that she did not wear a headscarf. In addition, the fact that the school employs non-Muslim teachers is evidence that being Muslim is not a requirement for the position. Italy did not say whether or not the exception would apply or but stated that the question of whether the qualities requested by church, public or private organisations the ethos of which is based on religion or belief are essential, lawful and justified would have to be examined (objective test).

Hungary answered that the Article 4(2) exception exists in its legislation but that this Hungarian exception is more akin to the Article 4(1) exception of the directive, which is more general:

> *'Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.'*

Hungary brings the case under this more general occupational requirement exception, arguing that wearing a headscarf might also be conceived as an occupational requirement for Muslim women, who are presumably expected by the school to convey a version of Muslim faith in which the headscarf worn by women – among other elements- plays an indispensable role.

Great Britain and Belgium also refer to a similarly more general exception. In Great Britain the more general exception exists alongside the Article 4(2) exception.

Norway answered that it has two exceptions in its legislation based on Article 4(2) of Directive 2000/78. One is a general exception to the prohibition of discrimination for religious institutions or communities on the basis of religion, which specifically does *not* apply to the working sector. As Article 4(2) of the directive considers *occupational* requirements it can be questioned whether the Norwegian exception is based on this article. The second exception permits religious organisations to engage in differential treatment in recruitment with respect to persons living in same-sex partnerships, which would not apply to schools, even of a religious character. This raises the question however of how the second exception sits with the prerequisite of Article 4(2) of the directive that the difference of treatment should not justify discrimination on another ground. Norway answered that neither exception applies to this case since the first does not include the employment sphere and the second does not include schools.

Belgium, Estonia, France and Sweden answered that they do not have an exception as set out in Article 4 (2) of Directive 2000/78/EC.

Norwegian legislation contains exceptions to direct discrimination regarding occupational requirements within churches and other public or private organisations of which the ethos is based on religion or belief that may not be in line with Directive 2000/78/EC and a revision of legislation in Norway related to these exceptions may therefore be appropriate.

Objective justification

Estonia, France, Great Britain, Italy, Norway and Slovakia answered that direct discrimination on the ground of religion could not be objectively justified while Belgium answered that it could. Belgium explained that both direct and indirect discrimination can be objectively and reasonably justified. The analysis of the first case already points out that the European directives do not contain a provision for the objective and reasonable justification of direct discrimination (on grounds other than age, since direct discrimination on the ground of age can be justified on the basis of article 6 of Directive 2000/78/EG). Furthermore Belgium said that discrimination can be objectively and reasonably justified by an *occupational* requirement, whereas according to Article 4(1) of Directive 2000/78/EC a difference of treatment *shall not constitute discrimination* in the case of an occupational requirement. Belgian legislation seems not to be in line with the directive on this point, since discrimination is established but objectively justified. This is a different finding than discrimination not having been established in the first place. According to Belgium, direct discrimination on the ground of religion in this case cannot be justified by an occupational requirement. It argues that although the aim - to preserve a true Islamic education - is legitimate, the fact that the woman would only be teaching language and not religion and that there are other female teachers in the school not wearing a headscarf, means that the requirement in question does not seem proportionate to its stated legitimate aim.

With regards to the ground of gender, Estonia and Italy answered that the direct discrimination on the ground of gender could not be objectively justified, and Norway answered that the indirect discrimination on the ground of gender could not be objectively justified.

From the answers it seems that Italy, Norway and Sweden also have the possibility of justifying direct discrimination, although in this case they concluded there was no objective justification. It is possible that there may be confusion between objective justification and genuine occupational requirements. Italy argued that the school asks for a special practice (wearing headscarves) that cannot be considered essential for the activity of teaching the Arabic language. It did however say that this might be different if the subject being taught was religion. Norway argued that a different school regulation for Muslim and non-Muslim female teachers regarding the wearing of scarves would not stand the test of objectivity because the strong Islamic tendency and educational purpose of the school would be insufficient as an objective justification, given, amongst other things, that this is not a religious institution.

Sweden said there would possibly be an objective justification if the school was strictly teaching religious matters and the teacher was supposed to perform some kind of sermon or other strictly religious activity or the teacher in some other way could be regarded as someone close to a cleric.

With regard to the ground of ethnic origin, Belgium answered that indirect discrimination on the ground of ethnic origin cannot be objectively justified. It argued that if the school is allowed to require the wearing of a headscarf, it would conclude that the fact that only non-Muslim women are exempted from the obligation precludes objectively and reasonably justified indirect discrimination on the basis of ethnic origin. When examining whether there is a legitimate aim and whether the distinctive requirement is necessary and proportionate with regard to this aim, given the fact that non-Muslim women would not be obliged to wear a headscarf as a teacher of the Arabic language, Belgium considered that one can hardly consider the wearing of a headscarf as something necessary for fulfilling the activity of a language teacher.

On the basis of the findings, it would seem that Belgium, Sweden, Italy and Norway will need to be particularly alert to direct discrimination (on grounds other than age) being capable of justification and should consider whether their legislation needs to be amended.

Belgian legislation, as well as legislation of other countries that have the same approach as Belgium, needs to treat occupational requirements as an exception to discrimination, instead of an objective justification to discrimination, in order to be in line with article 4(1) of Directive 2000/78/EC. Revision of legislation may be appropriate to ensure this is the approach taken.

Conflicting human rights

The answers to the question on balancing the conflicting basic human rights, namely the freedom of religion and the prohibition of discrimination varied greatly in nature. Italy, in describing the case as 'a case of discrimination for religious reasons, but directed against women', shows this difficulty. Estonia found it a rather delicate matter and therefore that the legislator should consider enacting regulations in that field carefully.

France expressly did not use the ground of gender, arguing that this would raise a conflict opposing sex discrimination and freedom of religion and that it would therefore be more efficient to use the ground of religion, as it covers the right to practice one's religion as one chooses. The British Commission on Racial Equality stated that this issue does not arise as the Religion and Belief Regulations 2003 only have scope over religious discrimination, not the issue of freedom of expression which in Great Britain is a human rights issue under the Human Rights Act 1998, which implemented the European Convention on Human Rights. As a result the case would be dealt with under the Religion and Belief Regulations, not the Human Rights Act.

Hungary answered that under Hungarian law it is quite clear that there are cases in which freedom of religion prevails over the right to non-discrimination. Hungary however also states that the relationship between the individual's right to freely exercise his/her religion and the state's duty not to interfere in religious matters is more obscure. There are no *a priori* standards which determine how to reconcile this obligation of non-interference with the obligation to ensure the equal protection of laws should the individual's right to freely exercise his/her religion come into collision with the internal affairs of a church.

Italy argued that the freedom of religion - also meaning that people must have the possibility to choose the best way to express their religious belief - must be granted to all people. But in this case they gave priority to the prohibition of discrimination, because an Islamic school may ask for a Muslim teacher but it is not reasonable to ask for a special dress as an essential quality if the same request is not addressed to all people. Sweden also states that the freedom of religion may not encroach upon the prohibition of discrimination, other than in exceptional cases.

The Netherlands say that in order to delineate the ban on discrimination on the one hand and the freedom of religion and belief and the freedom of political persuasion, closely connected with the freedom of expression and the freedom of association, on the other hand, Dutch equal treatment legislation has an exception for occupational requirements within churches and other public or private organisations the ethos of which is based on religion or belief. It follows from the Dutch system of equal treatment legislation that exceptions like those must be interpreted restrictively to prevent this norm from being undermined too much.

According to Norway, the right to manifest one's religion has its limitations in certain spheres. The working sector is typically secular. However allowances to the secular feature of the working sector are being made in order to avoid discrimination at work. Schools constitute a typical platform where many aspects of freedom of religion and non-discrimination meet. The Private School Law specifies that employees are subject to the same treatment as employees

in the public teaching sector. This is a reminder, when it comes to employment conditions, of where the limit is set. On the other hand, within a religious community/institution, freedom of religion is given free rein while the prohibition against discrimination is limited.

Slovakia is of the opinion that a religious institution has to accept the will of its members not to manifest their religion publicly and that in this case it is the right of a Muslim woman to decide not to wear a headscarf.

Chapter 3
Case study on racial discrimination and positive action

The case

The Arts Foundation of Fantasia is the public authority for promoting the arts in Fantasia, which is a Member State of the EU. In 2003 it commenced an initiative called Pulsart which had the aim of supporting and raising the profile of African and Asian artists in Fantasia.

In 2004 the Arts Foundation commissioned research by an independent consultant into the level of ethnic diversity in the publishing industry in Fantasia. The study produced a number of findings including that:

- the publishing industry is not ethnically diverse with 87% of employees being of white ethnic origin;
- despite the percentage of persons from ethnic minorities (such as Africans or Asians) regularly doing creative writing (7-10%) being higher than the national overall average (4%), this was not reflected in the percentages of ethnic minorities on publishers' lists of accepted writers.

As part of the initiative the Arts Foundation developed a competition in December 2005 called the Pulsart Writers Prize, which was a competition for short stories. The competition was advertised to the public and winners were to be published in a well-known private publishing company's anthology in 2006.

The advertisement indicated that the competition was only open to "residents of Fantasia from African or Asian backgrounds". The Arts Foundation have stated that the intention of the competition is to increase the number of Africans and Asian writers works being published and decrease disadvantage linked to racial and ethnic origin in the publishing industry. [7]

The questions

The following specific questions were asked:

1. Would the Arts Foundation's advertisement or the competition fall within the scope of anti-discrimination law in your country?
Would competitions being run by a public authority be regulated by your anti-discrimination law? Would the advertisement or competition constitute direct or indirect racial discrimination? Would it make any difference if the organisation running the competition was from the private sector?

2. Which court, organisation would be competent? (please specify the level of the court in the court system)

3. If the advertisement or competition does constitute discrimination in your country do you have any positive action provisions under anti-discrimination law? And if so what is the test for positive action measures? Do you have a test of proportionality of the measure and whether the means used meets the need? Do the facts here satisfy the test in your country?

4. In your country, how would the provision in Article 5 of the Racial Equality Directive (which permits positive action by Member States) be applied to the facts and would that affect the lawfulness of the competition?

> *Article 5 of the Racial Equality Directive provides*
>
> *"With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin".*

5. In your country would the relevant court or organisation consider other international instruments which contain provisions on positive action, such as Article 1(4) of the United Nations International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and how would those provisions be applied to the facts?

7 This study is based on complaints made to the Commission for Racial Equality in the United Kingdom in 2005. The names have been changed for reasons of confidentiality. The information included is accurate as of 21 November 2006.

Article 1(4) provides:

"Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

6. In relation to the six different strands of discrimination (race, sex, disability, religion, age, sexual orientation and age) what is the scope of your national legislation permitting positive action?

In other words what different sectors do the positive action measures cover and are there differences depending on the strands? For example in relation to race, are positive action measures permitted across the full range of fields coming within the scope of the Racial Equality Directive (employment, access to and supply of goods and services, education, social protection such as social security or healthcare, social advantages) or only some of those?

Responses were provided in table format and are contained at the end of the report. They were received from the following organisations[8]:

- Austrian Ombud for Equal Treatment
- Belgian Centre for Equal Opportunities and Opposition to Racism
- British Commission for Racial Equality
- Dutch Equal Treatment Commission
- Estonian Office of the Chancellor of Justice
- Greek Ombudsman
- Hungarian Equal Treatment Authority
- Hungarian Parliamentary Ombudsman
- Norwegian Equality and Anti-discrimination Ombud
- Slovakian National Centre for Human Rights
- Swedish Ombudsman against Ethnic Discrimination

Summary of findings

Would the advertisement or the competition fall within the scope of anti-discrimination law? Would they constitute direct or indirect discrimination?

Most countries' responses (seven of the ten countries) were that the advertisement or competition would fall within the scope of the anti-discrimination law of their country and be likely to constitute direct discrimination.

The exceptions to this were Estonia, Slovakia and Sweden. In Estonia the facts would fall within the Advertising Act, which prohibits racial discrimination so would therefore still be discriminatory.

In Slovakia public competitions are regulated by their Civil Code, not their anti-discrimination law but in this case it may be that the competition is considered positive action under the anti-discrimination law (see below).

In Sweden, the advertisement or competition would not fall within the scope of anti-discrimination law as neither an advertisement nor a competition would fall within the scope of

[8] The Hungarian Equal Treatment Authority and the Hungarian Parliamentary Ombudsman are not members of the working group but are Equinet Members who contributed the information voluntarily. In addition, although Norway is an Equinet Member it is not an EU Member State and therefore is not required to have transposed the Directives. However, since 2004 Norway has been an associated member of the EU Community Action Programme to Combat Discrimination and has agreed to implement legislation meeting the minimum standards of the directives.

access to goods and services. This is because in Sweden provisions regarding goods and services only apply where the claimant purchases a good or service and in this case it is a competition so such provisions would not apply.

In Austria an interesting response regarding the law stated that the facts may also fall within not only the scope of access to services, but also the anti-discrimination law relating to equal treatment regarding self-employment.

Would it make any difference if the organisation running the competition was from the private sector?

For all countries it would not make a difference if the organisation running the competition was public or private: in other words, if it was a private organisation there would still be direct discrimination (for the countries that said the conduct was discriminatory).

Which court or organisation would be competent and how would it be decided where a claim is brought?

Which organisation or court was competent depended on which organisation or court was competent in the country to determine claims of direct discrimination.

In most countries (Belgium, Estonia, Hungary, Sweden, Netherlands, Austria and Norway) a claim can be brought either before the equality body which can make a determination, which is usually non-binding, or before the relevant court determining racial discrimination claims, which is often a district court. The only country where the equality body cannot make a determination was the United Kingdom as this is not within the competences of the Commission for Racial Equality. In the UK all claims of racial discrimination must be brought before employment tribunals, county courts or administrative courts. In most countries, the decision as to whether to file a claim is usually at the discretion of the claimant who believes he or she has been discriminated against.

If the advertisement or competition is discriminatory, are there positive action measures under your anti-discrimination law and if so would they apply here?

Positive action measures:

Article 5 of the Racial Equality Directive (2000/43/EC) provides that:

> *"With a view to achieving full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin."*

In relation to employment, ECJ case law in the context of gender equality has established a test of proportionality for a positive action measure to be lawful:

- there must be an under-representation of a group in a sphere of employment;
- the aim of increasing equality of opportunity for women to obtain work is a legitimate aim; and
- any derogation from the principle of equal treatment must remain within the bounds of what is appropriate and necessary to achieve the aim.

The majority of countries do have express provisions within their anti-discrimination legislation permitting positive action. Estonia does not have an express provision but its Supreme Court has recognised that positive action measures may be possible. Sweden does have positive action provisions but they are limited to issues linked to gender in working life and ethnicity in the labour market.

Belgium does not currently have an express provision, but the law is currently in the process of being revised to introduce an express provision.

All countries, whether there are express provisions within the law or court decisions on the issue of positive action, apply a test of proportionality but with a wide range of differences in the scope of what must be satisfied under the domestic legislation.

Case law in Estonia has established a three-stage test of the suitability, necessity and proportionality of the measure.

In Norway the test for positive action is made up of 1) the suitability of the measure; 2) the possible negative consequences of the measure in relation to other groups; and 3) whether alternative measures can achieve the purpose.

In Hungary there are two different tests. Under Act CXXV of 2003 of the Equal Treatment Act:

> *"(1) the measure aimed at the elimination of inequality of opportunities based on an objective assessment of an expressly identified social group is not considered a breach of the principle of equal treatment if a) it is based on an Act, on a government decree based on an Act or on a collective contract, effective for a definite term or until a specific condition is met.*
> *The action defined in Subsection (1) shall not infringe any fundamental right, shall not provide any unconditional preference, and shall not exclude consideration of individual aspects."*

Interestingly, the Act on Minorities also provides specific protection for 13 recognised minorities in Hungary and two public authorities have been established to promote the integration of national minorities. Within that role the organisations can *"promote activities aimed at diminishing the cultural and political disadvantage which derive from the fact that they belong to minorities."*

In the UK the test under the Race Relations Act is different. One test relates to encouraging people from certain ethnic groups to apply for jobs or providing them with training to be in a better position to apply for jobs. This test is very specific requiring that there is no person in that racial group working at the establishment, or a lower proportion of that racial group than in a particular geographical area within Great Britain or in the whole of Great Britain. The other test is general and applies to providing facilities or services to meet the special needs of persons of that racial group regarding their education, training, or welfare or ancillary benefits.

In Austria the test is much broader, for example in relation to employment the law provides:

> *"Specific measures foreseen in laws, decrees, in collective agreements or in general regulations of the employer for the promotion of equal opportunities in professional life compensating or preventing discrimination on one of the grounds listed in § 17 shall not be considered as discrimination in terms of the law".*

Slovakia also has a more general test stating:

> *"With a view to ensuring full equality in practice and compliance with the principle of equal treatment, specific positive actions to prevent disadvantages linked to racial or ethnic origin may be adopted."*

In Greece the provision on positive action under Article 6 of Law 3304/2005 is also very general, stating:

> *"Taking or retaining in force special measures aiming at the prevention or the compensation of disadvantages, due to race or ethnic origin does not constitute discrimination."*

Would the facts satisfy the positive action test?

Eight of the ten countries said that the facts would probably not satisfy their tests for lawful positive action for not being proportionate under their law. In some countries this may be because the measure is not prescribed by law (for example Austria and Hungary), and in others it may be because the measure is not for a definite period (for example Hungary) or because other less radical measures have not been considered (for example Belgium).

The response of Slovakia is important. In October 2005 its Constitutional Court ruled that a specific positive action measure under paragraph 8, Article 8 of their Anti-discrimination Act was incompatible with their Constitution, which requires equal treatment. It was incompatible because it:

- constituted more favourable treatment;
- did not set out criteria for taking measures;
- did not contain a provision limiting its duration.

The facts of this case would not satisfy the requirements set out in the above ruling of the Constitutional Court and therefore the competition would be unlawful.

However on the present facts it is still possible that the competition could be lawful because positive action measures could be interpreted as falling within the meaning of "anti-discrimination measures" under paragraph 2, Article 1 of the Anti-Discrimination Act, although there is no case law on this (see Annex 3, Slovakia's response).

One country (the Netherlands) said that it was not possible to provide a definitive view given the absence of positive action cases in the sphere of goods and services and self-employment. In the context of sex discrimination in the employment sphere, the Dutch Equal Treatment Commission, referring to the ECJ case law, applies a strict test in relation to achieving equal outcomes and a less strict test in relation to improving access to and competitive position in the labour market. The Dutch Equal Treatment Commission takes the view that positive action policies on the grounds of race (in the employment sphere) must be assessed as much as possible by applying the ECJ tests applied to the ground of sex, with the consideration that the Dutch Equal Treatment Commission is also bound by the norms of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), in particular section 2(2) of the Convention.

Norway said that the facts are probably lawful as the measure is not very radical and the negative consequences on other writers would probably be small. Greece also expressed the view that the competition would be lawful as it would have the legitimate aim of redressing a discriminatory balance and would be a proportionate means of achieving that aim.

In your country, how would the provision in Article 5 of the Racial Equality Directive (which permits positive action by Member States) be applied to the facts and would it make any difference to the lawfulness of the competition?

In most countries the positive action measures that have been introduced in the law were made pursuant to and in implementation of the provision in the EU directives. In most countries, as the domestic legislation or court decisions have introduced a test that is more prescriptive than the terms in the directive, the directive's provision would not directly aid in determining the lawfulness of the competition.

Would the relevant court or organisation consider other international instruments such as Article 1(4) of the UN International Convention on the Elimination of All Forms of Racial Discrimination and how would it apply such provisions to the facts?

In five of the countries international conventions such as ICERD have actually been incorporated into domestic law and therefore must be applied by public authorities and courts.

Exceptions to this are Sweden, the UK and Hungary. In all countries however, the courts can refer to provisions in international conventions in interpreting domestic law.

None of the countries were of the view that the international provision would make any difference to the result, although Norway said that in relation to Article 1(4) of ICERD, this would mean that the measure could only be maintained until the aim was achieved.

The Netherlands also stated that Article 2(2) of ICERD, which requires countries to take concrete measures to ensure adequate protection and development of racial groups to guarantee them full and equal enjoyment of human rights and fundamental freedoms, could also be applied to the present facts.

In relation to the six different grounds of discrimination (race, sex, disability, religion, age, sexual orientation and age) what is the scope by sector of your national legislation permitting positive action?

Four of the eleven organisations did not respond to this question: the Slovakian National Centre for Human Rights, the Norwegian Equality and Anti-discrimination Ombud, the Estonian Office of the Chancellor of Justice and the Hungarian Equal Treatment Authority. However the position in Hungary was set out by the Hungarian Parliamentary Ombudsman.

There were wide ranging responses to this question. The strand of race was in general terms the one which had the widest coverage in terms of the numbers of sectors in which positive action measures could be taken. The sector of employment was in general terms the sector where positive action measures could be taken on most grounds. Belgium had the widest coverage as positive action is permitted on all grounds and in all sectors, although it is important to point out that their law is at the time of writing being revised. This revision will further define the sectors in which positive action can be taken. Sweden had the narrowest coverage as positive action is only permitted in employment on grounds either of race or gender.

Conclusions

Whilst under the Racial Equality Directive and indeed the Employment Equality Directive there is no obligation on Member States to implement positive action measures to prevent or compensate for disadvantage, most Member States have in fact created specific provisions in their domestic law concerning positive action.

However, the number of requirements which must be explicitly satisfied under domestic legislation in order for positive action measures to be lawful and not constitute unlawful positive discrimination differ greatly. Most of the Member States which provided responses indicated that they have several criteria in their legislation that must be satisfied which include factors such as whether:

- the measure is derived from a specific law;
- it is for a legitimate aim and proportionate;
- it does not provide an absolute preference for a particular group;
- it is for a specified period and only in force until the aim is achieved.

Often these criteria have been developed from domestic or European Court of Justice case law in relation to positive action measures to achieve gender equality. Most of the countries with strict criteria expressed the view that the competition would not be likely to be lawful.

Several Member States (and Norway) only have very general positive action measures in their domestic legislation that closely reflect the wording of the EU Racial and Employment Directives. These countries nevertheless applied a test of proportionality but were more likely to consider the competition to be lawful.

In the case of Slovakia, as the positive action provision in its Anti-discrimination Act allowing the adoption of specific balancing measures to prevent disadvantages linked to racial and ethnic origin was not held to be specific enough in defining its criteria to be lawful, the Slovakian Constitutional court ruled last year (by majority) that the provision was incompatible with the Constitution.

Several conclusions can be drawn from the above:

There is a lack of consistency between Member States as to the criteria, which must be satisfied for positive action measures to be lawful.

There is a question as to whether domestic and ECJ case law on gender related positive action measures should be applied in the same way to race, particularly given that there are some differences in the scope of sectors in which positive action measures can be taken.

One of the means to seek clarification on the legal scope of positive action measures regarding race or ethnic origin is to make applications to the ECJ. Since not all Equinet partners have, under national legislation, a mandate to do so, Equinet and its partners should consider alternative strategies to submit applications.

There is also a lack of consistency between Member States concerning the scope of positive action measures permitted both across the six grounds of equality and across different sectors.

As part of the European Commission's work on considering the need for further anti-discrimination legislation under Article 13 of the EU Treaty or the effectiveness of current anti-discrimination legislation, the Commission could consider whether specific criteria for positive action measures to be lawful should be set out in the legislation. Equinet partners can support such a strategy of the Commission, based on their experience with the present inconsistency as to the criteria that must be satisfied for positive action to be lawful. A case in point is the following example from Slovakia: the positive action provision in its Anti-discrimination Act allowing the adoption of specific balancing measures to prevent disadvantages linked to racial and ethnic origin was not held to be specific enough in defining the criteria for such measures to be lawful and was thus held by its Constitutional Court to be incompatible with its Constitution.

Furthermore, it would be useful to determine what exact positive action measures are possible across the six grounds of equality, across different sectors and whether positive action measures are actually being applied in practice even where they do exist.

There is a lack of consistency between Member States as to the criteria which must be satisfied for positive action measures to be lawful, in the scope of positive action measures permitted, and it is not clear whether positive action measures, where they exist, are actually applied in practice. Hence it would be useful if the European Commission considered the need for legislation explicitly stating the criteria for positive action at the European level. Furthermore, a study to determine whether and under which criteria and conditions positive action measures are actually applied, may help to determine the effectiveness of the positive action provisions in the directives.

Chapter 4
Case study on disability discrimination
Asperger's Syndrome

Relevant legislation

The parts of the Employment Equality Directive which are relevant to both case studies on disability[9] are as follows:

> *Article 2: Concept of Discrimination*
> *1. 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.*
>
> *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 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:*
>
> *i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or*
>
> *ii) as regards the persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate the disadvantages entailed by such provision, criterion or practice.*
>
> *Article 5: Reasonable accommodation for disabled persons*
> *In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.*
>
> *Article 10: Burden of proof*
> *Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.*

In addition, Article 119 EC Treaty and Articles 2 and 4 of the Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex will also be relevant in respect of the first case study (see the Norwegian response).

The case

Mr. B was employed by a furniture company from November 2001 as a customer adviser. The employer was aware that B has Asperger's Syndrome and of the particular difficulties he experienced as a result of this impairment. The main features of his condition are an impairment of social interaction, social communication and social imagination. Mr. B made repeated requests to be provided with a mentor under the respondent's mentoring scheme. This would have assisted Mr. B in understanding how his behaviour might affect others and would have provided a way in which other employees could raise concerns they had regarding his behaviour towards them. No mentor was provided. Mr. B was dismissed in October 2004 for unintentional sexual harassment which, under the employer's disciplinary

[9] Both cases were based on cases which had come before the employment tribunal in England and Wales.

code, was classified as gross misconduct. Mr. B accepted that he might, owing to his impairment, have caused unintentional sexual harassment. Mr. B appealed unsuccessfully against his dismissal. He also raised a grievance about the failure to provide him with a mentor. Although the grievance was discussed at the appeal meeting, the letter dismissing his appeal did not set out the respondent's finding in relation to his grievance. The tribunal which heard Mr. B's case found that another employee who worked at the same place as Mr. B and who does not have Asperger's syndrome was accused of sexual harassment and general harassment but was not dismissed, but rather was moved to another store. [10]

The Questions

The following specific questions were asked:

1. Does the case fall within the scope of anti-discrimination law in your country – in particular, would Mr. B be disabled under your anti-discrimination law? Please explain how or why not

2. Which court, organisation would be competent? (please specify the level of the court in the court system)

3. Which ground(s) would apply here? Please explain

4. Would the dismissal of Mr. B constitute direct discrimination, indirect discrimination or no discrimination at all?

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.

6. Would there be a failure to make reasonable accommodation in this case (particularly in relation to the mentor)? How would this part of the claim be dealt with under your legislation?

7. How would the shifting of the burden of proof apply in this case?

Eight Responses were received and are contained at the end of the report. They were from the following organisations:

- Norwegian Equality and Anti-discrimination Ombud
- Estonian Office of the Chancellor of Justice
- British Disability Rights Commission
- Greek Ombudsman
- Hungarian Equal Treatment Authority
- Dutch Equal Treatment Commission
- Slovakian National Centre for Human Rights
- Swedish Ombudsman against Ethnic Discrimination

Following the meeting of the working group on 27 October 2006, a further question was asked:

What remedies would be available for this discrimination, and would these include re-instatement or re-engagement?

There was a very short timescale for responses to this – only a week – and fewer organisations were able to respond. Those who did were:

- Dutch Equal Treatment Commission
- British Disability Rights Commission
- Greek Ombudsman
- Estonian Office of the Chancellor of Justice
- Swedish Ombudsman Against Ethnic Discrimination

[10] See footnote 9.

The individual responses from the partners are set out after this analysis. Although broadly similar responses were received, there are some interesting differences in approach and content, to which the analysis below draws attention.

Summary of Findings

Anti-discrimination legislation and the definition of disability

Partners were first asked whether this situation would fall within the scope of anti-discrimination law within their country, and in particular whether Mr. B would be disabled under such legislation. There were different approaches to the legislation which would govern this situation: for example, in Great Britain there is a specific piece of legislation prohibiting disability discrimination under which this case would fall (this legislation pre-dates the Employment Equality Directive). In other countries, such as Estonia and Hungary, there is a single piece of legislation which prohibits discrimination on a range of grounds, including disability. In Norway, although such discrimination would fall under legislation covering a number of grounds (the Working Environment Act), a new law will soon be passed which will specifically cover discrimination against disabled people. In Slovakia, discrimination is prohibited under the Constitution generally, as well as by specific anti-discrimination legislation.

So far as the question of disability is concerned, all partners' responses indicated that Mr. B would have a disability under their legislation, provided that his Asperger's was at the more severe end of the scale. However, there were very different approaches to the definition of disability in legislation. The majority of partners who responded have no definition of disability contained in the legislation – in Greece, for example, there is no definition of disability, although the response indicated that it was likely that the Asperger's described would be covered. Similarly, in the Netherlands, whilst the case would fall under the Dutch Act on Equal Treatment on the grounds of disability or chronic illness, there is no definition of disability or chronic illness (although there are indications in it's *travaux préparatoires* as to what disability is - disability and chronic illness can be physical, mental or psychological; a disability is in principle irreversible; and a chronic illness does not have to be irreversible, but at least lengthy). Similarly, in Norway, although there is no definition of disability, the *travaux préparatoires* relating to the legislation indicate that there must be some permanence for it to amount to a disability (temporary impairments being the subject of other requirements under the legislation). Forthcoming disability legislation in Norway will make no differentiation between temporary and permanent impairments (except strictly short term impairments, which will not be covered). In Hungary, Mr. B would be covered under the protected characteristic of health. Some countries – notably Estonia and Slovakia – had a definition contained in social benefits legislation for disabled people which could be considered in deciding whether or not an individual is disabled.

Only Sweden and Great Britain appear to have a definition of disability contained in the legislation. In Sweden this requires that the condition be permanent (or a permanent condition must be expected to arise). In Great Britain in order for an impairment to amount to a disability its effects must be substantial, long term (last a year or likely to last a year), and adverse. This contrasts with Ireland, for example, which – although it did not respond to the case study – is known to have an extremely broad definition of disability. The British definition (as well as the *travaux préparatoires* in Norway and the Netherlands) does, though, accord with the ECJ view of the definition of disability in the Navas case.[11]

[11] Case C-13/05 Navas v Eurest Colectividades SA. The full judgment can be read on the Court of Justice of the European Communities Website at:
http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=&datefs=&datefe=&nomusuel=navas&domaine=&mots=&resmax=100

ECJ Ruling in Navas

Ms. Navas was employed by Eurest, an undertaking specialising in catering. On 14 October 2003, she was certified as unfit to work on grounds of sickness and she was not in a position to return to work in the short term. On 28 May 2004, Eurest gave Ms. Navas written notice of her dismissal, without stating any reasons, whilst acknowledging that the dismissal was unlawful and offering her compensation. On 29 June 2004, Ms. Navas brought an action against Eurest, maintaining that her dismissal was not valid as it was discriminatory – based on her leave of absence from her employment for eight months. She sought an order that Eurest reinstate her in her post. In Spanish law, sickness is not expressly referred to as one of the prohibited grounds of discrimination. The Spanish court hearing the case referred the matter to the ECJ: it was the view of the Spanish court that there is a causal link between sickness and disability, and that, given that sickness is often capable of causing an irreversible disability, workers must be protected in a timely manner under the prohibition of discrimination on grounds of disability. The referring court also suggested that, should it be concluded that disability and sickness are two separate concepts and that if Community law does not apply directly to sickness, it should be held that, in accordance with Community law principles of non-discrimination, sickness should be added to the attributes in relation to which the Employment Equality Directive prohibits discrimination.

On the first question, which the ECJ summarised as asking whether the general framework laid down by the Employment Equality Directive for combating discrimination on grounds of disability confers protection on a person who has been dismissed by his employer solely on grounds of sickness, the ECJ held that "disability" in the context of the directive must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life. By using the concept of "disability" in the directive, the legislature deliberately chose a term that differs from "sickness". The two concepts cannot simply be treated as being the same. The importance which the Community legislature attaches to measures for adapting the workplace to the disability demonstrates that it envisaged situations in which participation in professional life is hindered over a long period of time. For the limitation to fall within the concept of disability it must therefore be probable that it will last for a long time. There is nothing in the directive to suggest that workers are protected by the prohibition on grounds of disability as soon as they develop any type of sickness. A person who has been dismissed on account of sickness does not fall within the scope of the directive.

The ECJ went on to helpfully clarify the relationship between the prohibition of discrimination and the reasonable adjustment provisions in Article 5 of the directive, by saying that the prohibition as regards discrimination on grounds of disability contained in the directive precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his or her post. On the second question – whether sickness can be regarded as a ground in relation to which the directive prohibits discrimination – the Court rejected the suggestion of the referring court and held that the scope of the directive could not be extended beyond discrimination based on the grounds exhaustively listed in Article 1, and thus sickness could not be regarded as a ground in addition to those in relation to which the directive prohibits discrimination.

Whilst there are very clear advantages to following the approach of the Employment Equality Directive and not having a definition of disability in national legislation it does have significant disadvantages – one of these in particular being that any case law of the ECJ on definition is likely to be followed by the courts of those countries which have no definition. Thus a relatively narrow definition of disability – which seems to ignore the social model of disability (which focuses on the barriers which people face as a result of impairment, rather than impairment itself being a problem) – as reached in Navas[12] may be taken up by those countries that have no definition. Equality bodies in countries with no definition of disability

[12] See footnote 11

may wish to consider legislation which provides a broad approach to a definition, rather than leave its determination to the courts.

Which court (and level of court) or organisation would be competent?

Partners had a variety of approaches for dealing with a complaint of this nature. Some had only an employment court (such as Great Britain), whilst others had an option of an administrative procedure (in Greece for example this would be a special body of the Ministry of Labour and Employment and the Equal Treatment Commission whilst in Norway it would be the Equality and Anti-discrimination Ombud) as well as a court of first instance. The remedies which an individual could obtain seemed to vary depending on whether the case was brought using an administrative mechanism or activated by a judicial procedure before a court. The Dutch Equal Treatment Commission said that it would be competent to deal with such a case, although it would give a non-binding opinion and a court claim would have to be taken to get a binding decision.

Which grounds would apply?

All the partners responded that the ground under which this claim would fall would be disability. Interestingly, the Norwegian response also raised the issue of gender discrimination. This was on the basis that behaviour such as Mr. B's might be considered to be bad male behaviour, even if the reason underlying the behaviour is one of disability, whereas if a woman acted in a similar way, it may be more likely that her behaviour would be understood as relating to her disability rather than something for which she should be made responsible. This could well amount to indirect discrimination on grounds of gender.

Direct discrimination or indirect discrimination?

All the partners responded that the treatment of Mr. B would constitute discrimination. All indicated that if, as it seemed, the circumstances of the other employee who was accused of harassment but moved to another store were the same as Mr. B's, then it would amount to direct discrimination. It is worth noting though that there are certain exemptions in particular countries to the principle of direct discrimination, whereby if certain conditions are satisfied, an act will not amount to direct discrimination. These circumstances tended to be raised under "objective justification" and so have been dealt with there (see below).

Greece responded that, in addition to direct discrimination, the treatment could also amount to indirect discrimination on the basis that the disciplinary code was an apparently neutral condition which puts a disabled person such as Mr. B at a substantial disadvantage. Estonia also indicated that it could amount to indirect discrimination. Interestingly, in Norway, there is no definition of either direct or indirect discrimination in the legislation. In Great Britain there is no concept of indirect discrimination in relation to disability – instead there is "*disability-related*" discrimination (less favourable treatment for a reason relating to disability, as opposed to on grounds of) and this would be applicable if the person who had been moved to another store had not been an appropriate comparator for the purposes of direct discrimination. Whilst the Employment Equality Directive does have a qualification in relation to indirect discrimination and disability – in that indirect discrimination may be justified where there are provisions in place to provide reasonable accommodation for disabled people – in Great Britain the Disability Rights Commission has indicated its concern to the government that there may be situations which would be covered by indirect discrimination but potentially not by the provisions which Great Britain currently has in force. This is particularly in light of the anticipatory nature of the indirect discrimination provisions – which ***would*** put people of a particular disability at a particular disadvantage compared with other people. Working group 3 also felt that there may be an issue of non-compliance in this respect.

Objective justification

The majority of partners indicated that direct discrimination cannot be justified, although there were some situations where treatment would not amount to direct discrimination – for example, in the Netherlands, there would be no direct discrimination if, amongst other things, the discrimination is necessary to protect health and safety. The Dutch Equal Treatment Commission thought that the employer in this case would appeal to this section of the law, arguing that the safety of his employees was at risk. The question then would be whether the employer is credible, particularly in light of his moving another employee accused of sexual harassment and general harassment not being dismissed but being moved to another shop. In Norway, there are also exceptions from the prohibition on discrimination – for example, if Mr. B's behaviour could not be controlled by employing a mentor as requested by him, then the conclusion as to direct discrimination might be different. Sweden indicated that there could only be justification for direct discrimination if Mr. B was so ill that he could not perform his work.

In the case of indirect discrimination, justification was established if the measure had a legitimate aim and the means of achieving the aim were appropriate and necessary. Greece believed that the disciplinary code would be justified as having a legitimate aim (respect of dignity of other employees) and as being appropriate and necessary (to dissuade employees from misconduct). Other partners did not reach firm conclusions.

Reasonable accommodation

All partners except Sweden indicated that the reasonable accommodation provisions would apply in some way to Mr. B's situation. In Sweden, the duty to accommodate applies only when employing someone and not when someone is already in employment (although Article 5 of the Employment Equality Directive is clearly intended to cover people in all stages of employment. This is confirmed by the Navas judgment which states that: "the prohibition, as regards dismissal, of discrimination on grounds of disability contained in Articles 2(1) and 3(1) (c) of Directive 2000/78 precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post.") However, we understand that legislation is currently underway to address this, and that it will be in force in a year or two. Several partners, such as Greece and Slovakia, raised the issue of disproportionate burden – any breach of the reasonable accommodation duty being dependent on the extent of the burden that might be imposed on the employer. Estonia believed that it was unlikely that a long-term mentor would have been required under the legislation. In Norway, interestingly, a failure to provide accommodation is deemed to be indirect discrimination, whilst in Great Britain, a failure to make adjustments is in itself a separate form of discrimination.

In Sweden, the duty of reasonable accommodation applies to job applicants, but not to employees. Legislation to redress this apparent breach of article 5 of Directive 2000/78/EC is under way, but may take another year or two to be enacted. Speeding up the enactment process would be appropriate.

Shifting of the burden of proof

All partners had broadly the same response to this question – if it appeared that Mr. B had been dismissed because of his disability, it would fall to the employer to prove that this was not the reason for the treatment.

How would the prohibition on disability discrimination and on gender discrimination be balanced in this case?

There were different approaches to this question from the partners. Some (Great Britain and Sweden) indicated that this was solely about disability. Others considered the impact on Mr. B

of the mentor, and whether this would prevent gender discrimination from arising in relation to his female colleagues. In the Netherlands, health and safety of female colleagues might mean that there was no discrimination. Broadly speaking, though, it was clear that in those organisations dealing with both disability and gender discrimination, these anti-discrimination provisions have to be evenly applied, and any impact on female employees would not outweigh the obligations to Mr. B.

What remedies would be available for this discrimination (would this include re-instatement or re-engagement)?

Responses on remedies varied. In some countries – Sweden and Estonia – an individual could be entitled both to their job back and to compensation, whilst in the Netherlands you could get your job back but no compensation, and in Great Britain compensation but not your job back.

Chapter 5
Case study on disability discrimination
Physical Impairment

The case

Ms. T was employed as a veterinary nursing assistant at a small veterinary practice and had been so employed since 12 July 2004. She spent time on the reception desk and also doing nursing duties for operations – there were about 8 a week. There was another nursing assistant employed at the veterinary practice who did effectively the same job. On 25 May 2005, Ms. T was admitted to hospital following a stroke, and on 13 June 2005 she was informed that she had a visual impairment. Her mother telephoned her employer, who dismissed her immediately. She appealed against the decision but this was rejected. [13]

The questions

Working group members and other Equinet partners were asked to consider the case in the context of their legislation and jurisprudence, or to describe how the case would be considered by the competent authority in their country. The following specific questions were asked:

1. Does the case fall within the scope of anti discrimination law in you country – in particular, would Ms. T. be disabled under your anti-discrimination law? Please explain how or why not.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)

4. Which ground(s) would apply here? Please explain.

5. Would the dismissal of Ms. T constitute direct discrimination, indirect discrimination or no discrimination at all?

6. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.

7. Would there be a failure to make reasonable accommodation in this case? How would this part of the claim be dealt with under your legislation?

8. How would the shifting of the burden of proof apply in this case?

Seven responses were received to the case study, from the following organisations:

- Norwegian Equality and Anti-discrimination Ombud
- Estonian Office of the Chancellor of Justice
- British Disability Rights Commission
- Greek Ombudsman
- Dutch Equal Treatment Commission
- Slovakian National Centre for Human Rights
- Swedish Ombudsman against Ethnic Discrimination

The individual responses from these partners are set out in an Annex following this analysis. Although broadly similar responses were received, there are some interesting differences in approach and content, to which attention is drawn in the analysis below.

Summary of findings

Anti-discrimination legislation and definition of disability

Partners were first asked whether this situation would fall within the scope of anti-discrimination law within their country, and in particular whether Ms. T would be disabled under such legislation. There were different approaches to the legislation which would govern this situation: for example, in GB there is a specific piece of legislation prohibiting disability

[13] This case was based on a case that had come before the employment tribunal in England and Wales. The relevant parts of the directive in relation to this case are set out at the beginning of the previous chapter.

discrimination under which this case would fall (this legislation pre-dates the European Employment Equality Directive); in other countries, such as Estonia there is a single piece of legislation which prohibits discrimination on a range of grounds, including disability. In Norway, although such discrimination would fall under legislation covering a number of grounds (the Working Environment Act), a new law will soon be passed which will specifically cover discrimination against disabled people. In Slovakia, discrimination is prohibited under the constitution generally, as well as specific anti-discrimination.

So far as the question of disability is concerned, all partners' responses indicated that Ms. T would have a disability under their legislation. There were however very different approaches to the definition of disability in the legislation. The majority of partners who responded have no definition of disability contained in the legislation. In Greece, for example, there is no definition of disability, although the response indicated that it was likely that the Asperger's described in the previous chapter would be covered. Similarly, in the Netherlands, whilst the case would fall under the Dutch Act on Equal Treatment on grounds of disability or chronic illness, there is no definition of disability or chronic illness (although there are indications in it's *travaux préparatoires* as to what disability is – disability and chronic illness can be physical, mental or psychological; a disability is in principle irreversible; and a chronic illness does not have to be irreversible, but at least lengthy.). Similarly, in Norway, although there is no definition of disability, the *travaux préparatoires* relating to the legislation indicate that there must be some permanence for it to amount to a disability (temporary impairments being the subject of other requirements under the legislation). Forthcoming disability legislation in Norway will make no differentiation between temporary and permanent impairments (except strictly short term impairments, which will not be covered). Only Sweden and the UK appear to have a definition of disability contained in the legislation – and this requires, in Sweden, that the condition be permanent (or a permanent condition must be expected to arise) whilst in the UK in order for an impairment to amount to a disability its effects must be substantial, long term (last a year or likely to last a year), and adverse. This contrasts with Ireland, for example, which – although it did not respond to the case study – is known to have an extremely broad definition of disability. The UK definition (as well as the *travaux préparatoires* in Norway and the Netherlands) does however accord with the ECJ view of the definition of disability in the Navas case – the details of which (and difficulties with) are set out in the previous chapter. Some countries – notably Estonia and Slovakia – had a definition contained in social benefits legislation for disabled people that could be considered in deciding whether or not an individual is disabled.

Which court (and level of court) or organisation would be competent?

Partners had a variety of approaches to dealing with a complaint of this nature. Some had only an employment court (such as GB), whilst others had the option of an administrative procedure (in Greece, for example, this would be a special body of the Ministry of Labour and Employment and the Equal Treatment Commission, whilst in Norway it would be the Equality and Anti-discrimination Ombud) as well as a court of first instance – or the case could be brought under employment legislation before a court with specialists in employment law hearing it. The remedies which an individual could obtain from a case seemed to vary depending on whether the case was brought using an administrative mechanism or a court. The Dutch Equal Treatment Commission said that it would be competent to deal with such a case, although it would give a non-binding opinion and a court claim would have to be taken to obtain a binding decision.

Which grounds would apply?

All the partners responded that the ground under which this claim would fall would be disability.

Would the dismissal of Ms. T constitute direct discrimination, indirect discrimination or no discrimination at all?

Most partners stated that this would amount to direct discrimination. None of the partners raised the issue of indirect discrimination, although Norway indicated that there is no definition of either direct or indirect discrimination in its current legislation (though there will be a definition in forthcoming disability-specific legislation). Two partners – Estonia and Slovakia – considered whether a question arose here of a genuine occupational requirement - this is dealt with below under objective justification.

If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.

All the partners bar Norway appear to have no possible justification for direct discrimination (though there may be exemptions from the principle of direct discrimination). There is no definition of direct or indirect discrimination in Norway, and their response states that there is an exception to the prohibition against discrimination. Differential treatment whose objective is reasonably justifiable, and does not have an overly radical effect on the person(s) affected and which is necessary for the achievement of a work task or a profession, will not amount to discrimination. Other partners – such as Slovakia and Estonia – indicated that whilst objective justification as such might not be an issue for such direct discrimination, the question of whether or not Ms. T could perform her work would determine whether or not there had been discrimination. Slovakia divided Ms. T's work into nursing and reception duties – she could continue her work as a receptionist but would be unable to do her work as a nurse. This would amount to a professional and health requirement. Differences of treatment do not constitute discrimination if they are objectively justified by the nature of the occupational activities or the circumstances under which such activities are carried out, providing that the extent or form of such differences of treatment are legitimate and justified in view of these activities or circumstances under which they are carried out. In the Netherlands, whilst an employer might raise health and safety as an argument against a finding of direct discrimination, it is nevertheless unlikely that this would succeed, in particular because the employer had not examined how bad the visual impairment of Ms. T was and whether reasonable accommodation could be made. Norway also tied in the behaviour of Ms. T's employer with whether or not adjustments could be made, whilst Greece and Great-Britain could not see any justification possible (in Great Britain it is not possible to justify direct discrimination).

Would there be a failure to make reasonable accommodation in this case? How would this part of the claim be dealt with under your legislation?

Reasonable accommodation was seen as relevant to this situation by all but two partners. In Sweden, the duty arises only in relation to employing someone and not once they are in employment (although Article 5 of the Employment Equality Directive would seem to clearly cover this situation – and this appears to be confirmed by the ECJ Navas decision which states that: "the prohibition, as regards dismissal, of discrimination on grounds of disability contained in Articles 2(1) and 3(1)(c) of Directive 2000/78 precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post.") However, we understand that legislation is currently underway to address this, and that it will be in force in a year or two.

In Greece, it was felt that given that Ms. T was dismissed whilst in work and that there is direct and non-justifiable discrimination, the issue of reasonable accommodation was immaterial. In the actual case before the courts in England and Wales, reasonable accommodation was held not to have been made – and this issue is particularly important in considering compensation (if accommodation had not been made, Ms. T would not have been able to remain in her job anyway, and her compensation would therefore have been much

more limited). The Netherlands stated that there would be a failure to make accommodation – the employer probably did not want to examine how bad Ms. T's visual impairment was and whether to make a reasonable accommodation – and that this would constitute a failure to make reasonable accommodation. Norway, Estonia and Slovakia were unclear as to the extent of the accommodation required: the question of whether or not it would amount to a burden on the employer was of particular relevance. In Norway, general employment law provides that adjustments for one employee may not bring about an increased burden for other employees, which would imply a limitation regarding redistribution of assignments between Ms. T and her colleagues. Thus there was no conclusion from these partners as to whether there would have been a failure to provide reasonable accommodation. Interestingly, none of the partners mentioned having an expert opinion on this issue, something that is likely to be required in order to reach a proper view about what tasks Ms. T could or could not perform.

How would the shifting of the burden of proof apply in this case?

All partners had broadly the same response to this question. If it appeared that Ms. B had been dismissed because of her disability, it would fall to the employer to prove that this was not the reason for the treatment. Similar provisions applied in relation to reasonable accommodation (i.e. grounds to suspect a failure to provide reasonable accommodation), although not all partners specifically addressed this question.

Chapter 6
Key findings of the disability cases

Overall, three key issues emerged from the first and second case study analyses on disability discrimination.

Definition of Disability

The first key issue is about the definition of disability. Whilst there are very clear advantages to following the approach of the Employment Equality Directive and not having a definition of disability in national legislation it does have significant disadvantages – one of these in particular being that any case law of the ECJ on definition is likely to be followed by the courts of those countries which have no definition. Thus a relatively narrow definition of disability – which seems to ignore the social model of disability (which focuses on the barriers which people face as a result of impairment, rather than impairment itself being a problem) – as reached in Navas (see Chapter 4) may be taken up by those countries that have no definition. Equality bodies in countries with no definition of disability may wish to consider legislation which provides a broad approach to a definition, rather than leave its determination to the courts.

Indirect Discrimination

The second key issue relates to indirect discrimination. There is no concept of indirect discrimination in Great Britain in relation to disability. Whilst there are a number of measures which may meet the objectives of a prohibition on indirect discrimination in disability discrimination law in Britain, the British responses have indicated that there may be certain situations which are not captured by the present legislation. This is something which the UK government and the European Commission will need to consider further (and may require clarification by the ECJ).

Reasonable Accommodation

The final issue concerns the reasonable accommodation duty. The duty contained in Article 5 of the Employment Equality Directive is wide ranging: the obligation is to provide reasonable accommodation "*to enable a person with a disability to have access to, participate in, or advance in employment, or to provide training for such a person*". Clearly this covers getting in to work, staying in work, and getting on in work (progression and attaining promotion). Indeed, given that the majority of people become disabled during their working life, it would be a fairly redundant provision if it did not cover the full working cycle. In Sweden, however, the duty to provide reasonable accommodation is only owed to a prospective employee and does not apply at all once a person is in a job. This appears to be in breach of the obligations under the Employment Equality Directive and it is recommended that the Swedish government remedy this breach. However, we understand that legislation is currently underway to address this, but may take another year or two to be enacted. Speeding up the enactment process would be appropriate.

Annex 1
Country responses to the case study on race, nationality and segregation

Austria

Ombud for Equal Treatment

1. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not.
Depending on the type of school, the case either falls within the scope of sec. 31 para. 1 no. 3 Equal Treatment Act (ETA) or within the scope of one of the Equal Treatment Acts of the provinces (Länder).

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)
Organisations:
- The Austrian National Equality Body as a specialised body (Art 13 Council Directive 2000/43)
- Senate 3 of the Equal Treatment Commission: this Commission furnishes an opinion on the facts of the case and declares if discrimination took place or not. This opinion is not enforceable by law.

Court:
- Civil Court. You can appeal to the higher court and again to the highest court.

3. Which ground(s) would apply here? E.g. race, nationality. Please explain.
Ethnic belonging. This term is used by the ETA and covers mainly race and nationality.

4. Would the refusal to admit the boy constitute direct or indirect discrimination or no discrimination at all?
The prohibition of discrimination on the ground of ethnic belonging only came into force in 2004. Therefore no case law exists that we could refer to. The discussion within our organisation led to the following conclusion: it is a case of direct discrimination. A quota of pupils who speak the language of the country as a second language does not seem to be a neutral prohibition/criterion.

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.
Direct discrimination cannot be justified. In any case it might be useful to stress that the aims to protect the quality of education and to integrate foreign pupils could be reached through other measures for example with additional language lessons etc.

6. Would you use international standards in your argumentation, e.g. General Recommendation 19 of the United Nations Committee on the Elimination of Racial Discrimination (CERD) on racial segregation and apartheid?
We think this standard/these standards is/are very helpful and we would use it/them.

Belgium

Centre for Equal Opportunities and Opposition to Racism

1. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not.
a) Preliminary remarks:
Belgium is a federal state where the powers and responsibilities are divided between the federal government, three Communities and three Regions. Each of them has the competence – or even sometimes the legal duty - to provide, within the reach of their powers, anti-discrimination legislation.

The competence of education lies with the Communities. This is why the French, Flemish and German communities have their own educational system.

The Flemish and French Government have both adopted a strategic plan to improve the quality of education including more attention and more means for "disadvantaged" schools and for a minority policy but their approaches are different**.**

b) Overview of legislation which protects equality and non-discrimination in education
The right to freedom of choice in education is a constitutional right and the **Belgian Constitution** also guarantees the parents "freedom of choice", meaning that parents and their children must have access to a school of their choice (see art. 24 Constitution).

Act of 30 July 1981 on the punishment of certain acts motivated by racism or xenophobia (anti-racism law) still gives some competences in the field of education to the federal authorities, in the form of criminal offences, but at the moment this is controversial as some lawyers consider that the competence of education, even when it comes within the criminal law, is an exclusive competence of the Communities.

The **Flemish Act on Equal Opportunities in Education** (decree of 28 June 2002 and the latest amendment 30.08.05) protects the right of enrolment into the school of one's choice**.** Until 2006, according to the decree, a school could refer a newly enrolled pupil to another school but only if this pupil had a mother tongue other than Flemish and only if the school already had 10% more pupils with this profile than the percentage in the catchment area of the school (with a min. of 20%). In this case, the school should accept 35 % of pupils with a mother tongue other than Flemish: 25 % (ethnic minorities) + 10 %. With regard to this

particular case, a Flemish school would not be allowed to refuse this Somali boy.

The new version of the decree (which enters into force for the 2006-2007 school year) has adopted a priority system for Flemish schools for certain groups: (group 1: Flemish speaking pupils (only in Brussels) or group 2: pupils who are disadvantaged because they come from a "poor" background or pupils with a mother tongue other than Flemish). This is an option for schools (not an obligation). This means that pupils belonging to these groups have the priority to be enrolled during a well-defined pre-period (max. 6 weeks) before the official enrolment. After the pre-period and during the official enrolment, the school must accept all pupils unless all the places are filled up. The condition is that the percentage of the disadvantaged group in the catchment area of the school must be 10 % more than the percentage of pupils with this profile in the school. As to the case, we can't determine this percentage because it depends on more factors than being member of a minority group, such as being underprivileged, poor, etc. A local platform of different schools determines the percentage that has to be applied.

In Brussels (bilingual area), the Flemish government is developing a priority policy for pupils who have Flemish as their first language. The percentage of these priority pupils is decided by local platforms and it will not be allowed to exceed 25 %. As to the case, if the school is in Brussels, it can accept 25 % of pupils who have Flemish as a mother tongue only during the pre-period and the individual percentage of the school must be subsequently approved by the local platform. So the Flemish school won't be allowed to refuse this Somali boy during the official admission.

The **French Education Act** (decree 24-07-1997 and the latest amendment see 01-07-05) protects the right of enrolment in a school of one's choice**.** French speaking schools do not take mother tongue into account in their enrolment requirements. As to the case, the French speaking school would not be allowed to refuse this Somali boy.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)

Criminal action: controversial matter (see 1)

Art.4 of the Antiracism Act provides as follows "Any civil servant or public official, any bearer or agent or public authority or public power, who in the exercise of his duties commits discrimination against a person on account of his so-called race, colour, descent, origin or nationality, or who arbitrarily denies any person the exercise of a right or liberty that he may claim, shall be punished by a prison sentence of two months to two years"

The parents (on behalf of their child) and their children can take legal action by asking the criminal court to apply the anti-racism law. But this law requires a certain "intent", the explicit intention to discriminate by refusing the children because of their race, nationality or origin and in this case "the school stresses that it does not refuse pupils on the grounds of their race". For us, it would be a difficult position because the burden of proof is on the claimant; and hence the best approach would be civil action.

Civil action:

Flemish Community: the school must justify the refusal in writing. There are local consultation platforms that have a mediating capacity. Pupils and parents can file a complaint with the Pupil Rights Committee. The Centre for Equal Opportunities and Opposition against Racism participated in this Committee. This Committee can demand the enrolment of the pupil; otherwise the school risks a financial sanction (see decree).

French Community: The same applies. Pupils and parents can file a complaint with the local Committee and ask the Ministry of Education to take measures (enrolment or financial sanction).

The Council of State: Parents or other organisations can file a complaint asking this Council to cancel the school's rule.

3. Which ground(s) would apply here? E.g. race, nationality. Please explain.

See answer to question 4 below.

4. Would the refusal to admit the boy constitute direct or indirect discrimination or no discrimination at all?

Answer to questions 3 and 4: If the school does not respect the percentage (see 1) this policy may be considered as direct discrimination on the ground of the mother tongue. The Anti-discrimination Act states that "direct discrimination occurs if a difference in treatment has taken place that is not objectively or reasonably justified" without making reference to any particular ground. Mother tongue could therefore be considered as a possible forbidden ground of discrimination.

On the other hand this situation could also constitute indirect discrimination on the ground of origin because "indirect discrimination occurs when a seemingly neutral provision, measure or practice has harmful repercussions on persons on which one of the grounds for discrimination set out in § 1 applies, unless said provision, measure or practice is objectively and reasonably justified" (see Anti-discrimination Act).

5. If you find that this case leads to direct or indirect discrimination, would there be an

objective justification? Please elaborate on the objective justification test.
Our Constitutional Court elaborated three conditions to determine if a difference in treatment is objectively or reasonably justified:

Legitimacy test: is the goal of the measure legitimate? In this case, it seems that the school has two valid aims: 'to protect the quality of education and to integrate foreign pupils.
Relevance test: do the means that have been employed help to reach the set goals? We think not because one should also verify whether there are other, less radical means, possible. We would say that the school can reach the aim also with a 'priority system', which seems less radical.
Proportionality test: are the means that have been employed proportionate to the goal? It might be considered as disproportionate because this policy can prejudice the right of enrolment and this policy might thus be considered as discriminatory (for example 6 October 2004 arrêt n° 157/2004 (n° 2780 and 2783).

The test applies to direct as well as indirect discrimination (see answer 4 above).

6. Would you use international standards in your argumentation, e.g. General Recommendation 19 of the United Nations Committee on the Elimination of Racial Discrimination (CERD) on racial segregation and apartheid?
Yes. For example, this antiracism law has adopted many elements from the UN Convention of 1966 on the elimination of all forms of racial discrimination with reference to segregation (see 2: criminal action)

Denmark

Danish Institute for Human Rights

1. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not.
Yes, this case would be covered by the Danish Act on Ethnic Equal Treatment under section 3(1), relating to indirect discrimination.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)
- A complaint could be filed with the Complaints Committee on Ethnic Equal Treatment, according to the Act on Ethnic Equal Treatment section 10(2).
- A complaint could also be filed with the Parliamentary Ombudsman as the school's administration of admission criteria would be regarded as an act of public administration, under the Ombudsman Act chapter 4.
- It is furthermore possible to lodge a complaint directly to the courts under the Act on Ethnic Equal Treatment.

3. Which ground(s) would apply here? E.g. race, nationality. Please explain.
The grounds that would apply (when referring to the Act on Ethnic Equal Treatment) are race or ethnic origin.

The assessment would result in the conclusion that the requirement of the specific country's language as mother tongue would consequently result in pupils with an ethnic origin different from the specific country's population being treated differently, as the group of pupils with a different mother tongue would most often be pupils of a different ethnic origin.

4. Would the refusal to admit the boy constitute direct or indirect discrimination or no discrimination at all?
This would amount to indirect discrimination according to the Act on Ethnic Equal Treatment section 3(1).

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.
It would be assessed whether there would be an objective justification that could be applied.

It should be assessed whether the criteria used when admitting or rejecting a pupil has a legal and justifiable purpose, and whether the measures involved are proportionate, according to the Act on Ethnic Equal Treatment section 3(3).

In the specific case it would be assessed whether the purpose is legal and justifiable. A purpose of "protecting the quality of the education" and "integration" would be regarded legal and justifiable. A purpose of "avoiding becoming a black school" would be more problematic, and would probably not amount to a legal or justifiable purpose, unless a clear link to for instance the quality of education can be presented.

The next step would be to assess whether the measures applied (in this case rejecting a pupil or relocating the pupil with a specific mother tongue to another school) are proportionate. This assessment would include whether the measure is necessary and whether it is appropriate in the specific situation to fulfil the expressed purpose/goal.

It is debatable whether this is fulfilled here. Attention should be paid to any evidence given by the authorities or the school that could give an objective picture of whether reducing the number of pupils with two languages and a different mother tongue does indeed help to

secure the quality of the education and "integration". It should furthermore be assessed whether no other measures could be applied instead of rejecting admission or relocating pupils.

In the Danish Complaints Committee's decision of 2 September 2005 (j. nr. 780.11) the committee found that an identical case where a municipality had decided to reallocate children who were just about to start in kindergartens if a language test showed the need for further development of skills in the Danish language was justifiable. A quota of 30 % of such children per institution was set up, and only so called bilingual children who do not have Danish as a mother tongue were tested.

The main difference is however that the quota and reallocation was based on a language test of the children with two languages and only applied to those children that did indeed show a need for developing further skills in Danish language. On this specific basis the committee found the actions justifiable.

6. Would you use international standards in your argumentation, e.g. General Recommendation 19 of the United Nations Committee on the Elimination of Racial Discrimination (CERD) on racial segregation and apartheid?

In another case that dealt with the question of direct discrimination where a municipality supposedly reallocated pupils on the basis of ethnic origin (decision of 4 February 2005, j. nr. 780.3), the Ministry of Education declared the decisions of the municipality illegal, and the committee therefore refrained from directly assessing whether the specific acts had violated the prohibition against direct discrimination. The committee however generally expressed its view that this would be the case if pupils where reallocated on the grounds of ethnic origin. It moreover directly referred to general recommendation no. 19.

Estonia

Office of the Chancellor of Justice

General

According to the Basic Schools and Upper Secondary Schools Act14 (BSUSA) § 19 (1) a school is required to ensure an opportunity to study for each child who is subject to the obligation to attend school and who resides in the catchment area of the school. Furthermore, BSUSA § 18 states that parents may freely choose a school for a child who is subject to the obligation to attend school if there are vacant places in the school they wish the child to attend. According to BSUSA § 17 (1) children who attain 7 years of age by 1 October of the current year are subject to the obligation to attend school; students are subject to the obligation to attend school until they acquire basic education or attain 17 years of age.

Therefore, if the Somali boy is subject to the obligation to attend school and he resides in the catchment area of the school, he has a right to attend that specific school and the school cannot refuse admission on the basis of its policy. If he is subject to the obligation to attend school and he does *not* reside in the catchment area of the school, but the school, which has vacant places, has refused admission due to his language/race and has chosen someone else to fill the vacant place, the case would fall within the scope of the Administrative Procedure Act (APA) [06.06.2001] (if no one else applies, the school is obliged to grant admission).

APA § 3 (1) states that in administrative procedure, the fundamental rights and freedoms or other substantive rights of a person may be restricted only pursuant to law and (2) states that administrative acts and measures shall be appropriate, necessary and proportionate to the stated objectives. Also, as the APA § 4 (2) says that the right of discretion shall be exercised in accordance with the limits of authorisation, the purpose of the discretion and the general principles of justice (which includes equal treatment), taking into account relevant facts and considering legitimate interests, the public school has to make its decision taking into account the principle of equal treatment.

The Constitution (which is directly applicable) in Article § 12 (1) contains a special anti-discrimination clause: no one shall be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds. Accordingly, discrimination is only allowed if there is another basic right or constitutional legal value.

Currently, were the Somali boy compared to an Estonian, he would have had to have been granted admission. It is possible on the facts that the Somali boy may have been discriminated against on the basis of his language and race. The reasons stated for the discriminatory act are not of the constitutional legal value nor do they arise from any other basic right. Therefore the discriminatory act cannot be justified.

1. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not.

[14] Based on official translations which originate from www.legaltext.ee In Estonia, a distinction between elementary school and primary school is generally not made.

Yes. Through the APA, the Constitution (§ 12 (1)) is applicable. Estonia has not yet transposed the directives (however the provisions of the EU Racial Equality Directive on direct and indirect discrimination on the grounds of race/ethnic origin in education would have indirect effect, following the date for transposition of 1 May 2004).

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)
As the school is a public one, the case would fall within the scope of the Administrative Court, which would be the lowest level in the court system. If the case were to be appealed, the District Court would be competent, and if it were to be appealed once more, the last instance in Estonian court system would be the Supreme Court (administrative chamber).

The Chancellor of Justice also has competence in the field, but its decision will be non-binding on the school; the decision will also be non-disputable. If the person turns to the Chancellor of Justice, it will be difficult for him to seek a legal remedy in the court system later on due to the application deadlines: The Code of Administrative Court Procedure § 9 (1) stipulates that an action for annulment of an administrative act may be filed with an administrative court within thirty days after the date on which the administrative act was made public, unless otherwise provided by law.

3. Which ground(s) would apply here? E.g. race, nationality. Please explain.
Race, because of his skin colour (the school does not want to be called a "black school"), and language, because he speaks the language of the country as a second language (in the Constitution, language is a separate ground).

4. Would the refusal to admit the boy constitute direct or indirect discrimination or no discrimination at all?
Direct discrimination, as the boy has been treated less favourably because of his race or language.

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.
No. The Constitution does not contain any such basic rights that would justify the discriminatory act. Nor are the reasons for discriminating of constitutional legal value.

6. Would you use international standards in your argumentation, e.g. General Recommendation 19 of the United Nations Committee on the Elimination of Racial Discrimination (CERD) on racial segregation and apartheid?
All standards may be used, but only to make the argumentation stronger. So international standards could be used in interpreting certain provisions in the constitution, laws, and regulations.

France

High Authority against Discrimination and for Equality

1. Does the case fall within the scope of anti-discrimination law in you country? Please explain how or why not.
Yes, discrimination based on origin/ethnicity in the area of education is prohibited by article 10 of the Law of December 30, 2004 no 2004-1486. Moreover, in French law all children have a right to go to the school to which they are attached geographically, regardless of their origin. Establishing quotas limiting access on the ground of ethnic origin is in itself considered as discrimination prohibited by law.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)
The administrative tribunal.

3. Which ground(s) would apply here? E.g. race, nationality. Please explain.
In France, the case would be argued on the basis of the right to attend school (Article L122-1 of the Code of Education) and discrimination based on origin (Article 19 of the Law of December 2004).

4. Would the refusal to admit the boy constitute direct or indirect discrimination or no discrimination at all?
The refusal to admit the boy would be held to be direct discrimination.

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.
The right to attend school is absolute and accepts no justification. In addition, there can be no objective justification to direct discrimination.

6. Would you use international standards in your argumentation, e.g. General Recommendation 19 of the United Nations Committee on the Elimination of Racial Discrimination (CERD) on racial segregation and apartheid?
There is no need to refer to international standards to argue the case since general principles of administrative law prohibit discrimination on the basis of origin in attending school.

Great Britain

Commission for Racial Equality

1. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not.

The scenario would fall within the scope of the UK anti-discrimination legislation of the Race Relations Act 1976 (RRA).

Education
In the field of education, section 17(1) (b) provides that it is unlawful for an educational establishment to discriminate against a person "by refusing or deliberately omitting to accept an application for his admission to the establishment as a pupil"

A person discriminates against another if:

Direct discrimination
(a) on racial grounds he treats another less favourably than he treats or would treat other persons (section 1(1)(1)(a); or

Indirect discrimination
Section 1(1)(b):
(b) he applies to the other a requirement or condition which he applies or would apply equally to persons not of the same racial group but:

- which is such that the proportion of persons of the same racial group who can comply with it is considerably smaller than the proportion or people not of that racial group that can comply with it; and
- which he cannot show to be justifiable irrespective of the colour, race nationality or ethnic or national origins of the person to whom it applied; and
- which is to the detriment of that other because he cannot comply with it.

Section 1(1A):
(c) There may also be indirect discrimination where a person applies a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins but:
(i) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons;
(ii) which puts that other at that disadvantage; and
(iii) which he cannot show to be a proportionate means of achieving a legitimate aim.

The differences in the two definitions have come about as a result of the way in which the law has developed. The first definition above has been in place since the introduction of the RRA in 1976. The second definition was introduced in 2003 to comply with the EU Racial Equality Directive but only covers grounds of race, ethnic or national origins.

In practice most types of indirect racial discrimination would probably be covered by the second definition and that is preferable for complainants to apply as it is broader than the first definition.

Racial Segregation
Section 1(2) of the RRA provides that for the purposes of the RRA segregating a person from other persons on racial grounds is treating him less favourably than they are treated and therefore amounts to direct discrimination.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)
As this situation relates to education a claim would need to be brought in a county court in England and Wales or a Sheriff Court in Scotland. If the lawfulness of the decision were then challenged by an appeal it would need to be brought in the High Court

3. Which ground(s) would apply here? E.g. race, nationality. Please explain.
If it was attempted to be argued that there was direct discrimination or the first form of indirect discrimination, all grounds could be applied (i.e. race, nationality, ethnic or national origins, colour).

If it was attempted to be argued that there was the second category of indirect discrimination, only the grounds of race, ethnic or national origin could be applied. In practice as indicated above, a person would probably attempt to argue the second category of indirect discrimination as the test is easier to satisfy, and most factual situations could fall into that category.

4. Would the refusal to admit the boy constitute direct or indirect discrimination or no discrimination at all?

Direct discrimination
It is unlikely the refusal to admit the boy would constitute direct discrimination as the UK provision has been interpreted narrowly given that there is no defence to direct discrimination. In other words, given the boy was not admitted because English was not his mother tongue, rather than on racial grounds, there was probably no direct discrimination. This approach to direct racial discrimination was recently affirmed in the High Court in *Elias v Secretary of State for Defence [2005] EWHC 1435.*

It must also be considered whether there has been direct discrimination by segregation under section 1(2) of the RRA. The fact that the school has indicated that it wants to avoid becoming a so-called 'black school' is some evidence that the school was attempting to create or perpetuate segregation and that they treated the boy less favourably because he was black. However it is more likely that this evidence would have more weight in relation to

the issue of whether any indirect discrimination was justified.

Indirect discrimination
In relation to indirect discrimination, only the second test has been considered as in practice it is the provision which is easier to satisfy and could be relied on in the present facts.
The criteria of only admitting 25% of pupils who do not have English as their mother tongue would put persons with the same race, ethnic or national origins as the boy at a "particular disadvantage" when compared with other persons as they would be less likely to speak English as their mother tongue and therefore be admitted once the quota has been filled. A particular disadvantage must be substantial and not merely trivial: non-admittance would probably be a substantial disadvantage although may also depend on how easy it would be to find an alternative school in the area.

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.
The crucial issue is whether the criteria can be justified as being a "proportionate means of achieving a legitimate aim".

In the context of justification under the test of indirect discrimination (on grounds of colour or nationality) it has been held that the Defendant must prove the requirement or condition was reasonably necessary and not merely convenient: *Singh v Rowntree Mackintosh Ltd* [1979] ICR 554. The decision of *Mandla v Dowell Lee* [1983] IRLR 203 indicated that a convenience or preference was not sufficient to establish justification but that it was not sufficient to establish necessity.

There has also been some guidance of what would constitute justification in the context of sexual discrimination cases. In *R v Secretary of State for Employment, ex parte Seymour-Smith [1995] ICR 889* the Court of Appeal held that a three point test should be applied:

- whether the criterion meets a necessary aim of its social policy;
- whether the means chosen are suitable for attaining that aim; and
- whether the means chosen are requisite for attaining that aim.

In *Allonby v Accrington and Rossendale College [2001] ICR 1189* the Court of Appeal held that to determine what is justified requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition [Gage J at 1210].

Further guidance of the meaning of justification was given in *Kutz-Pauer v Freie Und Hansestadt Hamburg* [2003] IRLR 368. The European Court of Justice held that although Member States have a broad margin of discretion in matters of social policy, it cannot have the effect of frustrating a fundamental principle (in this case the prevention of racial discrimination). Further although budgetary constraints may affect the choice of policy, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination. In other words, an aim of reducing expenditure under the scheme would not in itself constitute a legitimate aim.

What is proportionate depends on a number of factors including whether the means used is suitable and reasonably necessary, is there any other way of achieving the aim in question and is there a way of reducing the potentially discriminatory effect.

It is said that there are two aims of the criterion: to protect the quality of education and to integrate foreign pupils. However it is also said that the "school wants to avoid becoming a so-called black school, which, because of the bad name these schools usually have, could finally lead to closure of the school."
It is likely that the aims of protecting the quality of education and integrating foreign pupils would be regarded as being legitimate aims based on the above interpretations and that having a quota of students that don't have English as their mother tongue would be considered proportionate.

However, the statement that the school wants to avoid becoming a black school given the bad name they usually have is most unlikely to be considered a legitimate aim and if there was evidence that this was one of the explicit or implicit aims, the policy would be unlikely to be justifiable. That aim would not be an appropriate part of social policy as it encourages segregation of schooling.

6. Would you use international standards in your argumentation, e.g. General Recommendation 19 of the United Nations Committee on the Elimination of Racial Discrimination (CERD) on racial segregation and apartheid?
In the UK international conventions maybe referred to in cases but are not binding as they are agreements between the Executives of countries (governments) rather than being decisions of domestic or international courts.

On the present facts, given that there is a specific provision against segregation under section 1(2) of the RRA the focus would probably be on whether there has been direct discrimination in that context (see point 4 above), although it is possible the international standards would also be referred to.

Hungary

Parliamentary Ombudsman

General

It is important to emphasise that the Parliamentary Commissioner for the Rights of National and Ethnic Minorities would not have authority over these cases. Our body's scope is limited to the 13 national and ethnic minorities listed in the Act on Minorities and neither the Somali nor the Muslim communities are included.

The Hungarian Act on Equal Treatment was passed in 2003, and we did not find relevant cases in the reports of the Equal Treatment Authority established in 2005. In the caseload of the regular courts, discrimination cases are rare, and we found only one relevant precedent of the Supreme Court.

The Constitutional Court has been dealing with the notion of discrimination since the beginning of the 1990s. Nevertheless, its abstract norm control has no direct influence on the outcome of individual cases. Its decisions on discrimination were mainly conceived before the Act on Equal Treatment came into force and were based on facts differing essentially from the facts of the sample cases.

Therefore our reply is rather an analysis of possible outcomes than an unambiguous solution based on precedents and clear interpretations by the courts.

1. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not.

The case would fall within both the personal and the material scope of the Act on Equal Treatment. The category of public education institutions is listed among the organisations that have to apply the provisions of equal treatment when establishing legal relationships, in their legal relationships and in the course of their procedures. The grounds of race, colour, nationality and native language are also listed among the characteristics which can form the basis of discrimination (however that list is open ended, thus detrimental treatment on the grounds of any real or presumed position, characteristics or properties would qualify as discrimination).

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)

The Equal Treatment Authority, the Parliamentary Commissioner for Civil Rights, the National Public Educational Evaluation and Examination Centre and the County Courts (these courts have exclusive jurisdiction in personal rights cases).

3. Which ground(s) would apply here? E.g. race, nationality. Please explain.

If direct discrimination were established then native language would be the grounds for this. In the event of indirect discrimination, race or colour would apply.

4. Would the refusal to admit the boy constitute direct or indirect discrimination or no discrimination at all?

See above.

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.

The case could have two outcomes. The first scenario is to be expected if one only takes into account the relevant legislative norms. The second (in our view the right) scenario is probable if one considers also the practice of the Constitutional Court.

In the first scenario the 25% quota would not constitute discrimination. The objective justification test of the Act on Equal Treatment says that any behaviour, practice, etc. which can be reasonably justified under objective considerations in association with the legal regulation in question shall not infringe the requirement of equal treatment. The wording of the Hungarian objective justification test does not empower the judge to scrutinise whether the means applied are appropriate and necessary for achieving the aim of a certain regulation. The Act seems to refer to the rationality test as elaborated by the Constitutional Court and not to the necessity and proportionality test of the same Court.[15]

According to the rationality standard of the Constitutional Court every provision, practice, etc. is deemed to be reasonable if the connection between the applied means and the pursued aim is not arbitrary.[16] Under this test, the Court does not examine if there are less intrusive means of achieving the given aim, but relies on the evaluation of the school (state organ) unless either the aim pursued is illegitimate on its face (which is very rarely the case) or the grounds for classification are arbitrary in the light of the aim pursued.
In this case the ground for classification is the knowledge of the language and this ground is not arbitrary in the light of the aim i.e. quality of education (whereas making distinction on the basis of the race of children would be clearly arbitrary.)

[15] The Court applies the two different standards for different cases, see in the following text. The simple rationality test referred to in the Act is most probably not in line with Council Directive 2000/43/EC, and the Ombudsman for Minorities proposed that it be amended.

[16] No. 35/1994 (VI. 24.) AB Resolution

In the present case, the preservation of quality education and the integration of students whose first language is different from the language of instruction and the prevention of future segregation are clearly legitimate aims. Therefore the issue under the Hungarian Act would be whether restricting the proportion of the student body whose first language is not the language of instruction to 25% is arbitrary in light of the above aims.

It cannot be excluded that the 25 % quota will enhance the integration of the students or the preservation of quality. The school could reasonably come to the conclusion that by restricting the proportion of linguistically disadvantaged students there are greater chances of both maintaining the level of education and integrating precisely the disadvantaged students than in the case of a rather homogeneous student body consisting largely, in the extreme case, of students who do not master the language of instruction.

In the second case the judge would interpret the objective justification test within the context of the whole legal system, i.e. taking into account the relevant constitutional jurisprudence by the Constitutional Court drawn up long before the adoption of the Act on Equal Treatment.
The Constitutional Court has established two different tests to assess the existence of discrimination, according to the types of rights violated in a given case. The so called 'rationality test' applies to regulatory measures/norms that may raise suspicion of discrimination but that are not related to a fundamental right. The test is as follows: restriction or unequal treatment is not discriminatory if it is a result of factors considered reasonable, i.e. if it is not arbitrary.

In respect of fundamental constitutional rights the Constitutional Court applies the so-called necessity/proportionality test: "The actual content of such rights is the limit of the restriction of the fundamental rights: Article 8 (2) of the Constitution provides that not even laws may prejudice the substantive content of fundamental rights. According to the permanent practice of the Constitutional Court substantive content of a fundamental right is violated by a restriction that is not indispensable for the purposes of some other fundamental right or constitutional objective and, even if it is necessary, the injury caused by the restriction is not proportionate with the objective intended to be achieved." (No. 6/1998 (III. 11.) AB Resolution by the Constitutional Court)

In our given case a fundamental right is at stake (the right to education), so the Constitutional Court would use the stricter test. Consequently, the County Court should interpret the text of the Act on Equality in line with the practice of the Constitutional Court, and should apply the necessity/proportionality test. Therefore the court should consider whether the means applied (setting up a quota) are necessary to achieve the aim (preserving quality education, integrating linguistically disadvantaged children, and preventing segregation) and if necessary, whether there are less intrusive means available to achieve that objective. Due to the regulation of the shared burden of proof of the Act on Equal Treatment the school would have to prove that establishing a quota passes the necessity/proportionality test.

6. Would you use international standards in your argumentation, e.g. General Recommendation 19 of the United Nations Committee on the Elimination of Racial Discrimination (CERD) on racial segregation and apartheid?
The Constitution states in article 7 that "[t]he legal system of the Republic of Hungary accepts the generally recognised principles of international law, and shall harmonise the country's domestic law with the obligations assumed under international law." This means that Hungary undertook the obligation to incorporate international conventions, which become part of the legal system. Courts can invoke provisions of these incorporated conventions, since they have the same status as domestic law. However, in reality, Hungarian courts (except the Constitutional Court) are rather reluctant to apply international instruments, and they base their decisions mostly on "domestic law".

Italy

National Office against Racial Discrimination

1. Does the case fall within the scope of anti-discrimination law in the country? Please explain how or why not.
Certainly the case falls within the scope of Italian anti-discrimination law. According to our legislation a public school cannot discriminate against students on the grounds of race or nationality. It is forbidden to refuse someone access to a public school because of his nationality or race (Law for immigration, 25 .7.1998 n. 286, art. 43 and 9.7.2003 n. 215, art. 3). So the school cannot argue that it wants to avoid becoming a "black school" because of the bad name these schools usually have. The only problem may be the concrete possibility of the school having to deal with a large percentage of foreign pupils who speak the language of the country as a second language: but to protect the quality of education it is necessary simply to ameliorate the structures inside the school, not to refuse children entry to the school. And you cannot say that it is

necessary to have a limited number of foreigners inside the school so that they integrate because integration does not depend on percentages.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)
UNAR, the equality body against discrimination for race or ethnic origin, is obviously competent. So the child, with one of his parents, can complain to UNAR against the refusal of the school and ask UNAR for legal advice. But he can also go to the court alone or supported by or represented by (provided the victim gives the association a mandate) an association whose mandate it is to fight against discrimination on the grounds of race. The tribunal of first instance would be competent in this case.

3. Which ground(s) would apply here? E.g. race, nationality. Please explain.
It is a case of discrimination on the grounds of race. In fact the school wants to avoid becoming a so-called "black school."

4. Would the refusal to admit the boy constitute direct or indirect discrimination or no discrimination at all?
The introduction of a fixed percentage for foreign students is a case of indirect discrimination. The refusal of the individual student, as a consequence of the application of this internal policy, is a case of direct discrimination.

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.
As stated before the only objective justification to refuse a student from an ethnic minority background is difficulty of integrating himself into the school due to a lack of knowledge of the Italian language, having Italian as a second language. It may be difficult to improve the situation if there are no teachers who know his original language or it can create some difficulties for other students because he needs more time to improve and to understand the lessons.

6. Would you use international standards in your argumentation, e.g. General Recommendation 19 of the United Nations Committee on the Elimination of Racial Discrimination (CERD) on racial segregation and apartheid?
In this case we can use Italian law because it exists and it contains the same principles that you can find in international legislation. In the case of a lack of internal legislation the international standard may be used as a criteria of interpretation of internal law and also, in some cases, directly.

The Netherlands

Equal Treatment Commission

General remark: this case led to a real opinion of the Dutch Equal Treatment Commission (CGB) (CGB 29 July 2003, opinion 2003-105. The full text of the opinion can be found on the Equinet website: www.equineteurope.org**).**

1. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not.
Yes it did. Section 7(1)(c) of the Equal Treatment Act (ETA) prohibits discrimination on the grounds of race in offering goods and services and in concluding agreements with respect thereto by institutions which are active in *inter alia* the field of education.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)
The Dutch Equal Treatment Commission is competent and can give a non-binding opinion on this case. This procedure is without costs. Parties do not need to have a lawyer. A district court will also be competent and can give a binding opinion on this case. For this procedure, legal charges must be paid. In employment cases before a district court, a lawyer is not obligatory.

3. Which ground(s) would apply here? E.g. race, nationality. Please explain.
Race. Section 1 of the ETA provides that the ETA pertains among other things to discrimination between persons on the grounds of race. According to the definition in the International Convention on the Elimination of All Forms of Racial Discrimination and in accordance with established case-law of the Dutch Supreme Court the term race must be interpreted broadly and includes: skin colour, descent, and national or ethnic origin. The school stated expressly that it did not refuse pupils who speak the language of the country as a second language, but the point was that a different policy applied with regard to pupils who speak the language of the country as a second language and with regard to other pupils. This meant that there was discrimination on the ground of language. Since language is seen as an essential element of ethnic origin, this was regarded as indirect discrimination on the ground of race.

4. Would the refusal to admit the boy constitute direct or indirect discrimination or no discrimination at all?
Section 1 of the ETA provides that discrimination includes both direct and indirect discrimination. Direct discrimination is defined as discrimination based directly on any of the grounds of discrimination mentioned in the ETA. Indirect discrimination is defined as discrimination on the grounds of other

characteristics than race, resulting in discrimination on the grounds of race.

The CGB earlier issued an opinion on the application of a maximum percentage by a foundation for primary education (CGB 6 November 2001, opinion 2001-99). That case concerned the application of a maximum percentage for pupils with a non-Dutch background, which meant that the foundation referred directly to the origin of these children and for this reason discriminated directly on the grounds of race. The facts in the present case were different. It is true that children who are less fluent in Dutch than in another language will virtually always have a non-Dutch origin, but not all pupils of non-Dutch origin will belong to the category of pupils that speak the language of the country as a second language. Since the criterion here was not the origin of the pupils, but their level of command of the Dutch language, the conclusion was that there was no direct discrimination on the grounds of race.

The school applied an admission percentage of 25% (in the Dutch case it was 15%) in respect of pupils that speak the language of the country as a second language. The school's policy has the result that predominantly pupils with a non-Dutch background are affected by this admission percentage, since it is likely that pupils with a non-Dutch background will far more often fall in the category of pupils speaking another language at home than the Dutch language. Consequently, the admission percentage applied by the school resulted in indirect discrimination on the ground of race.

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.

Pursuant to Dutch equal treatment legislation, there may be facts and circumstances, to be put forward by the respondent, which justify the indirect discrimination. It must be examined whether this is the case in a specific situation by assessing the aim of the discrimination and the means used to achieve this aim. The intended aim must be legitimate, in the sense that it must be sufficiently important and non-discriminating, and the means used must be appropriate and necessary. Means are appropriate if they are suitable for achieving the intended aim, and necessary if the same aim cannot be achieved by using other, less discriminating means and if the means are proportionate to the aim. It is only when all these conditions are satisfied that the indirect discrimination does not constitute a violation of equal treatment legislation.

According to the school, the 25% admission percentage for pupils that speak the language of the country as a second language served three aims, namely:

- to protect the quality of education;
- to integrate foreign pupils;
- to avoid becoming a so-called 'black school' which, because of the bad name these schools usually have, could finally lead to closure of the school.

In the real Dutch case, the school later stated that the third aim should not be regarded as an aim of the admission percentage. The ETC did therefore not examine this aim. If it had done so, it would have probably concluded that this aim would not have been legitimate, since it is discriminating in itself.

In the opinion of the CGB, promoting good-quality teaching is in itself a sufficiently important and non-discriminating aim. It further cannot exclude the possibility that applying a maximum percentage of pupils that speak the language of the country as a second language may enhance the quality of teaching. In this regard the school at least had to demonstrate that the percentage of 25% is necessary to enhance the quality of teaching. In this regard the data submitted in this case by the school showed that actually there were several groups within the school to which a higher percentage of pupils who speak the language of the country as a second language had been admitted than the maximum of 25%. This was because brothers and sisters of pupils were always admitted. The school furthermore did not allege that the quality of teaching in these groups was lower than in groups with less than 25% pupils who speak the language of the country as a second language. This followed from test results. The CGB in this regard also referred to other Dutch schools which are known to provide good quality teaching in spite of high, or higher, percentages of pupils that are non-Dutch native speakers or that speak the language of the country as a second language. The school therefore had not demonstrated that maintaining the 25% threshold was necessary to achieve the aim.

The CGB also looked at whether the system used by the school to assess pupils that speak the language of the country as a second language were tested repeatedly. Even leaving aside the question of whether it is useful to subject four-year-olds to a language test, it became clear that pupils would not be tested again as to their command of the Dutch language in the course of their school career. The CGB also found that pupils in higher-grade groups who at a younger age were classified as pupils who speak the language of the country as a second language and who had been attending Dutch education for years and in case of a proven successful policy should be expected to have a good command of the

Dutch language, were nevertheless still classified as pupils who speak the language of the country as a second language. The application of the 25% threshold in these higher-grade groups then meant that no new pupils who speak the language of the country as a second language would be admitted, while based on the school's own criterion in regard to the command of the Dutch language there would no longer be any necessity to refuse such pupils. This meant that the school failed to demonstrate that it was necessary to apply the 25% threshold in all groups and at all times.

The aim of meeting the integration task should in the opinion of the CGB be considered a sufficiently important and non-discriminating aim. The means to achieve this, refusing admission to pupils that speak the language of the country as a second language, was however not a suitable means. By definition it cannot contribute to integration at the school of those pupils who are not admitted to this school because the maximum number of non-native speakers of Dutch has been reached. In the second place there was no evidence of the existence of an integration policy addressing all pupils, both with Dutch and with non-Dutch backgrounds, whether or not they have a good command of the Dutch language. The burdens of the measure appeared to be exclusively on the smallest group, namely to pupils that speak the language of the country as a second language.

The foregoing lead to the conclusion that the application of the maximum admission percentage of 25% had not been proven a suitable means to meet the respondent's integration mandate.

Since the maximum admission percentage of 25% for pupils that speak the language of the country as a second language is not necessary to achieve good-quality teaching and is also unsuitable as an instrument to meet the respondent's integration mandate, the conditions for the existence of an objective justification of the indirect discrimination on the grounds of race practised by the respondent were not fulfilled.

6. Would you use international standards in your argumentation, e.g. General Recommendation 19 of the United Nations Committee on the Elimination of Racial Discrimination (CERD) on racial segregation and apartheid?

It would be possible that the CGB refers to a General Recommendation. In this case however, she has as a standard referred to the ICERD: According to the definition in the International Convention on the Elimination of All Forms of Racial Discrimination and in accordance with established case law of the Dutch Supreme Court the term race must be interpreted broadly and includes: skin colour, descent, and national or ethnic origin.

Norway

Equality and Anti-Discrimination Ombud

Legal background

This case falls within the scope of (1) the Norwegian Education Act and regulations, which set forth the right of pupils to attend school and the conditions under which this right may be implemented, and (2) the Anti-Discrimination Act of 06.03 2005 (enacted 1 January 2006), pursuant to which no one may be discriminated against on the grounds of, amongst other things, ethnic or national origin or the specific basis of language. The law however provides for a general exception based upon objective justification.

Norwegian regulations concerning admission to schools in the public system:

Primary and junior high school:

Pursuant to the Norwegian Education Act and related regulations, all children aged 6 years or more, who find themselves on Norwegian territory for a period of over 3 months, have a right to attend primary, junior and secondary high school. Children are expected to be able to walk to school and therefore have the right to attend a school which is located in the neighbourhood. Accordingly a local school may not, as a matter of principal, refuse admission to any pupil whose address is within the local urban district to which the school belongs. There are however some special conditions that apply to pupils with a foreign mother tongue and whose knowledge of Norwegian is insufficient for them to follow the Norwegian tuition. These are described below under the caption relating to pupils with minority background.

Secondary advanced school:

Pupils who have completed junior high school have a right to attend three years of advanced secondary high schooling leading to professional/technical or university education. The right to attend advanced secondary schooling is subject to the candidate's application to a particular school, and does not imply the right to attend a school located in the immediate vicinity. In this case a school may accept or refuse applicants based upon their grades. Grades reflect the applicant's past level and performance in the specific disciplines /topics. In the case of a foreign applicant, and depending on the particular circumstances, his/her lack of command of the Norwegian language may to a certain degree be deemed as insufficient proficiency for admission to the school.

General Norwegian regulations concerning rights of pupils with minority background to receive special teaching in the Norwegian language:
- Newly arrived immigrants (whether they are minors or adults) are entitled to a specific number of hours of tuition in Norwegian. Pupils whose knowledge of Norwegian is insufficient must follow a preliminary course in Norwegian before they may join the ordinary school programme. In the case of a primary or junior high school pupil this course may take place at another school than the neighbouring school. Upon completion of the preliminary language course he/she will be admitted to the local school.
- In the case of an application to an advanced secondary school, the particular school that is being applied to *may,* depending on whether it has available resources, be responsible for providing the necessary tuition in Norwegian, if the applicant has the required technical proficiency level, and language proves to be a marginal problem. If the school does not have the resources for providing this tuition, the applicant may claim his right to tuition from the municipal schooling administration.

Answers to questions 1-6
The case at hand does not specify the age or educational level of the applicant.

Hypothesis 1: the school in question is a primary/ junior high school:
Assuming that the Somali boy applies to primary or junior high school, he is legally entitled to attend the local school. This right is subject to the prior completion of the preliminary course in Norwegian if his language level was too low to follow the school programme. Once the language course has been completed (whether at the school premises or at another place), he may not be refused entry.

1. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not.
It is actually unrealistic to presume that a Norwegian primary or junior high school would refuse him on the grounds stated in this case. However, were this to occur, the Somali boy would, after completion of the preliminary language course if needed, have a claim for having been discriminated against on the ground of *language* which is specifically prohibited pursuant to the provisions of the Anti-Discrimination Act. The Act applies to all sectors with the exception of private and family matters.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)
A natural step would be to file a complaint with the recently established Equality and Anti Discrimination Ombud/Mediator. This is an administrative body whose mandate is amongst other things, the implementation of the Anti-Discrimination Act. The procedure is simple, quick and free of charge. The case may also be brought before a first instance court, but it is highly unlikely that anyone would follow this procedure due to the costs involved, the need for legal representation, and the procedural requirements.

3. Which ground(s) would apply here? E.g. race, nationality. Please explain.
The Ombud renders a decision on whether discrimination has occurred, and on which grounds. Here it would be a clear case of discrimination based on language as specifically provided in the Anti-Discrimination Act. The reasons for not admitting the boy are based upon uncontested facts, namely the school's general policy and quota rules, and language is specifically alleged as the reason for refusal.

4. Would the refusal to admit the boy constitute direct or indirect discrimination or no discrimination at all?
The Ombud would therefore rule that the refusal to accept the boy is an act of direct discrimination and in contravention of the specific legal prohibition to discriminate on the basis of *language*.

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.
Pupils have an undisputed right to attend the local municipal district school. Assuming the boy has the required command of Norwegian to follow the classes or has completed the prerequisite language course, the Ombud would decide that the denial is being made in violation of the law. The Ombud would in all probability find no valid reason to allow an exception. Given that the detrimental effect of the schools refusal would be high, the Ombud would, were the school unwilling to rectify its position, have the right to order an injunction against the school to cease the discriminatory act. All decisions of the Ombud may, however, be appealed before the Board of Appeals. The Board may also order injunctions, as well as impose fines.

Hypothesis 2: the school in question is an advanced secondary school:
If the Somali boy were to apply to a secondary advanced school, his lack of proficiency in Norwegian could, as mentioned above, be deemed a handicap that actually prevents him from complying with the necessary admission level requirement of the school. A requirement of this kind reflects the school's wish to maintain a certain educational quality and reputation. However this concern is different from the general concern mentioned in this

case, namely the school being a so-called "black school".

As mentioned above, admission to an advanced secondary school is independent of local vicinity parameters. The focus rather is on the applicant's grades. Accordingly it would be an open question as to whether the refusal of the Somali boy would constitute an act of discrimination. A general assessment of his level would be required, and compared to other applicants. If the school determines that language is the only or is the determinant factor that prevents him from admission, then it could be concluded that he is being discriminated against. In this case, however, there are objective reasons that may justify an exception. Accordingly the following step would be to check if the school is in a position to remedy this by providing adequate teaching in Norwegian. If it can be established that the school has the adequate resources for this, the Ombud may decide that the refusal of the boy's application was an act of discrimination for which there were no objective reasons. On the other hand, if such is not the case, the Ombud may decide (provided that *language only* is in the way of his attaining the required proficiency level), that the boy has been discriminated against on the basis of language, but that there were objective reasons for refusing to admit him. At any rate the boy is entitled to receive appropriate language tuition from the municipality in one form or another. After having completed such a programme he would have a new opportunity to apply.

6. Would you use international standards in your argumentation, e.g. General Recommendation 19 of the United Nations Committee on the Elimination of Racial Discrimination (CERD) on racial segregation and apartheid?

The argument that would be used in deciding the case would in all likelihood be based solely on national legislation and regulations since these are the national implementation of international standards regarding the right to education and the prohibition against discrimination. It is not excluded however that a decision from the Ombud would make a reference to a specific international instrument or decision deemed as particularly relevant to the case.

Slovakia

National Centre for Human Rights

1. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not.

This case will fall within the scope of the Slovak anti-discrimination law.

The Constitution of the Slovak Republic represents the framework and basis of all other laws, no law can be in conflict with the Constitution.

The general constitutional principle of prohibition of discrimination in the Slovak legal order is set out in Art. 12 par. 2 of the Constitution, that stipulates:

> *"Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favoured on any of these grounds."*

The right to education is guaranteed by Art. 42 of the Constitution. School attendance is compulsory. According to the Constitution, a law shall lay down the length of attendance. A legal norm regulating the compulsory attendance is Art. 34 par. 3 of the Act Nr. 29/1984 Coll. on the system of primary and secondary schools. According to that provision the compulsory attendance is 10 years.

According to § 5 of the Act Nr. 365/2004Coll. on Equal treatment in Certain Areas and Protection against Discrimination (the "Anti-discrimination Act") in conformity with the principle of equal treatment, discrimination on the grounds of sex, racial, national or ethnic origin shall be prohibited in social security, healthcare, provision of goods and services, and **in education**. Discrimination on grounds of one's relationship with a person of certain racial, national or ethnic origin shall be also deemed to constitute discrimination based on racial, national or ethnic origin.

The Anti-discrimination Act amended provisions of some other special laws in the field of education. [17] From the point of view of the Slovak anti-discrimination legislation the special laws are relevant for this case.

According to Art. 4b of the Anti-discrimination Act cited above rights provided for in the field of education shall be guaranteed equally to all applicants and students in conformity with the principle of equal treatment in education laid down in separate provisions. In conformity with the principle of equal treatment, any discrimination shall be prohibited also on the grounds of gender, religion or belief, marital and family status, colour, language, political and other opinion, trade union involvement, ethnic or social origin, disability, age, property, lineage or other status. Exercising rights and

[17] Act No. 131/2002 Coll. on higher education, Act No. 386/1997 Coll. on further education, Act No. 29/1984 Coll. on the system of primary and secondary schools.

obligations resulting from this Act must be in compliance with good morals. No person may abuse such rights and obligations to the detriment of another applicant or person. No applicant or student shall be victimised or otherwise adversely treated in the context of exercising their rights as a reaction to a complaint, action or petition to start criminal proceedings against another applicant, student, teacher, researcher or artist or other university staff.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)

Applicants for school places or students who are already enrolled[18] who consider themselves wronged in their rights or interests protected by law because the principle of equal treatment has not been applied to them may go before a court and seek legal protection provided for under separate provisions.

Every person who considers themselves wronged in their rights, interests protected by law and/or freedoms because the principle of equal treatment has not been applied to them may according to § 9 of the Anti-discrimination Act pursue their claims by judicial process. They may, in particular, 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[19] 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. The amount of non-pecuniary damages in cash shall be determined by the court, taking account of the extent of non-pecuniary damage and all underlying circumstances. (level of the court: competent district court - first instance court, heard by a judge (Art. 9 and Art. 36 of the Code of Civil Proceedings)).

Other institutions competent to deal with a case of an alleged discrimination in education are e.g. school inspectorates, municipal bodies, authorities on primary and secondary schools, academic authorities on universities or the national specialised body - Slovak National Centre for Human Rights.

In Slovakia the Slovak National Centre for Human Rights provides legal assistance to victims of discrimination. The Centre prepares and publishes an expert opinion in a concrete case, provides information on relevant legal regulations and is entitled to represent parties in the proceedings concerning violation of the principle of equal treatment before a court. The Centre takes the case on behalf of the victim. The consent of the victim is required to represent him/her before a court.

3. Which ground(s) would apply here? E.g. race, nationality. Please explain

The grounds listed in § 5 and § 55 of the Act 131/2002 Coll. on higher education.

According to Art. 5 of the Anti-discrimination Act in conformity with the principle of equal treatment, discrimination on the grounds of sex, racial, national or ethnic origin shall be prohibited in social security, healthcare, provision of goods and services, and in education. In conformity with the principle of equal treatment, any discrimination shall be prohibited also on the grounds of gender, religion or belief, marital and family status, colour, language, political and other opinion, trade union involvement, ethnic or social origin, disability, age, property, lineage or other status (Par. 4b of the Act. 29/1984 Coll.).

4. Would the refusal to admit the boy constitute direct or indirect discrimination or no discrimination at all?

The dividing line between direct and indirect discrimination has never been clear.

According to § 2 (4) of the Anti-discrimination Act indirect discrimination shall mean an apparently neutral instruction, provision, decision or practice that would put a person at a disadvantage compared with other persons, unless such instruction, provision, decision or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The characteristics of the group to which the individual belongs may result in disadvantage. So an apparently neutral practice will disadvantage members of that target group.

In the case above the requirement of quotas for those who speak the language of the country as a second language will primarily affect foreign students (non native speakers).

18 Act Nr. 29/1984 Coll. Refers to applicants and students. The difference between an applicant and a student is that a student has been already officially registered as a student in a concrete school and enjoys the status of a student. An applicant has to fulfil the entrance requirements to become a student. Both categories have to be treated equally when rights provided for in the field of education according to this Act are at stake

19 The courts have interpreted the term “adequate satisfaction” in cases of protection of personality in a way that a justification for the wrongful conduct and a cessation of a wrongful act shall be considered as most appropriate means (Z III- Collection of courts decisions, 1980). Only after this are non-pecuniary damages considered. The amount of non-pecuniary damages in cases of protection of personality as well as in anti-discrimination cases is not limited by law; the determination of the amount to be awarded is at the discretion of the court.

To establish a prima facie case of indirect discrimination it is necessary to have: neutral criterion, particular disadvantage, protected ground and a comparator.

With regards to the facts provided the Centre is of an opinion that a prima facie case can be established, and that "Case 1" constitutes indirect discrimination. To justify it, it is necessary to prove that the means selected pursued a legitimate aim, that they were appropriate and necessary to achieve this aim and that the chosen aim corresponded to a real need.

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.
The definition of indirect discrimination in Art. 2 par. 2 b) of Council Directive 2000/43/EC (and in Art. 2 par. 2 b) of Council Directive 2000/78/EC) has/have been implemented into Art. 2 par. 4 of the Slovak Anti-discrimination Act. The cited provision of the Anti-discrimination Act stipulates:

> *"Indirect discrimination shall mean an apparently neutral instruction, provision, decision or practice that would put a person at a disadvantage compared with other persons, unless such instruction, provision, decision or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."*

With regard to the fact that the Directives have been implemented into the Slovak legal order, when publishing expert opinions the Centre takes into account prior national anti-discrimination legislation.

According to Art. 2 par. 4 of the Anti-discrimination Act, in order to justify indirect discrimination it is necessary to prove that the means selected pursued a legitimate aim, that they were appropriate and necessary to achieve this aim and that the chosen aim corresponded to a real need.

TEST:
1. There was a legitimate aim. The school has two aims: to protect the quality of education and to integrate foreign pupils.
2. It is to be proved whether the means used were appropriate and necessary. Proportionality of measures has to be taken into account, i.e. whether the aim pursued could have been reached by less strict means.

In the opinion of the Centre the school could adopt other alternatives than only the policy of quotas of pupils that speak the language of the country. Another solution may be to adopt new entrance requirements. The school has not sufficiently taken into account the fact that the population of the neighbourhood of the school is 25% ethnic minorities.

If the school refused to provide sufficient evidence and explanation concerning the alleged discrimination, the conduct in question could not be justified. More detailed consideration would depend on the circumstances of the case.

6. Would you use international standards in your argumentation, e.g. General Recommendation 19 of the United Nations Committee on the Elimination of Racial Discrimination (CERD) on racial segregation and apartheid?
When publishing expert opinions in cases related to the principle of equal treatment, it is a practice of the Slovak National Centre for Human Rights to work with national as well as international anti-discrimination legislation, recommendations of international organisations and jurisprudence of national courts (Constitutional Court) and international courts (e.g. European Court for Human Rights, European Court of Justice etc.)

Sweden

Ombudsman against Ethnic Discrimination

1. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not.
Yes it does fall under the anti-discrimination legislation. The law in question forbids discrimination. Not to accept somebody due to their language ought to be considered discrimination in the sense of the law.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)
All discrimination cases which are not under the "working"-directive start in an ordinary district court.

3. Which ground(s) would apply here? E.g. race, nationality. Please explain.
In this case it would be sued on grounds of ethnicity, as language is an integral part of your ethnicity and that was what was targeted in the school's decision. The arguments from the school have no relevance as regards to discrimination.

4. Would the refusal to admit the boy constitute direct or indirect discrimination or no discrimination at all?
Indirect discrimination due to the fact that the language-criteria is a "neutral criteria" that is seemingly neutral but mostly targets immigration groups and direct discrimination due to the fact that it is targeting the boy on grounds of his ethnicity.

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification?

There are no objective justifications in this case. A bad reputation due to "too many immigrants" is not exactly an argument that is justifiable when it comes to admitting pupils or recruiting staff. The quality of the education is not as such related to the number of pupils that speak a certain language, hence it is not a relevant argument.

6. Please elaborate on the objective justification test. Would you use international standards in your argumentation, e.g. General Recommendation 19 of the United Nations Committee on the Elimination of Racial Discrimination (CERD) on racial segregation and apartheid?

No, as the law and its *travaux préparatoires* give enough support.

Annex 2
Country responses to the case study on religion, gender and employment

Austria

Ombud for Equal Treatment

1. Does the case fall within the scope of anti-discrimination law in you country? Please explain how or why not.
The case falls within the scope of the Equal Treatment Act (sec 17 para 1 no 1).

2. Which court, organisation, instance would be competent?
Organisations:
- The Austrian National Equality Body as specialised body (Art 13 Council Directive 2000/43)
- Senate 2 of the Equal Treatment Commission. This Commission furnishes an opinion on the facts of the case and declares if discrimination took place or not. Its rulings have no binding effect on the courts.

Court:
Labour and Social Court

3. Which ground(s) would apply here? E.g. religion, gender. If both please explain how you would approach the analysis.
Religion.
We had a long discussion within our organisation and also with other authorities in our country as to whether the gender ground would also apply here. This discussion is still going on, there is hardly any case law on this issue and for the time being we think that to wear a headscarf (in this special case) is part of religious behaviour and includes no gender aspect.

4. Would this constitute direct or indirect discrimination?
Direct religious discrimination.

5. Does an exception as mentioned in Article 4 (2) of Directive 2000/78/EC exist in your country and would it apply in this case?
Sec 20 para 2 Equal Treatment Act mentions an exception for churches and similar organisations:

> *"A discrimination on the ground of religion or belief shall not be taken to occur in respect of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos."*

The discussion within our organisation:
Does wearing a headscarf in respect of the nature of the occupational activity of a teacher of the Arabic language constitute a genuine, legitimate and justified occupational requirement having regard to the organisation's ethos? We don't think that wearing a headscarf in this case is a genuine, legitimate and justified occupational requirement for a language teacher and so we come to the conclusion that it does not fall under the exception.

6. If you find this case would lead to direct or indirect discrimination, would there be an objective justification?
The Austrian Equal Treatment Act does not provide for justifications in the case of direct discrimination. It only allows exemptions as mentioned above.

Belgium

Centre for Equal Opportunities and Opposition to Racism

General remark:
The Belgian Centre for Equal Opportunities and Opposition to Racism (CEOOR) is not competent to deal with discrimination on the basis of gender. For this reason we will not elaborate on this discrimination ground. This competence belongs to the Institute for the Equality of Women and Men, also a member of Equinet.

1. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not.
Yes. The Anti-discrimination Act of February 25, 2003 is the act that transposes the European directives 2000/43 and 78 into Belgian law and covers, among other grounds, discrimination based on religion and ethnic origin (art. 2§1). This act applies, among other fields, to employment issues, notably the conditions for access to gainful, unpaid, or self-employment, including the selection and appointment criteria, irrespective of the branch of activity, on all levels of the occupational hierarchy, in both the private and the public sector (art. 2§4).

The case could possibly also fall under the scope of the Anti-racism Act of July 30, 1981. With the adoption of this act, Belgium fulfils its obligation under the International Convention on the Elimination of All Forms of Racial Discrimination of March 7, 1966. This act is a criminal law act and only covers racial discrimination. The definitions and procedures adopted in this act are different to the ones used in the Anti-discrimination Act of 2003. The Anti-racism Act also applies to the field of employment. However, in order to treat the present case under the Anti-racism Act, one should be able to show that the school (or the head teacher), by refusing a Muslim teacher who refuses to wear a headscarf, had actually the intention to refuse her on the basis of her race or ethnic origin. We assume that the latter

is not the case. For this reason we won't discuss any further the Anti-racism Act in this case.

2. Which court, organisation, instance would be competent?
The Anti-discrimination Act 2003 provides for the possibility for a victim to ask a civil judge to order the cessation of the discriminatory act. This request should be made at the industrial tribunal (or the court of first instance, on the basis of its residual competence). The victim is free to choose. The difference is that in the industrial tribunal, the judge is assisted by 2 laymen. In most cases, disputes concerning labour relations are brought before the industrial tribunal.

A victim of discrimination can also ask for compensation for the damage sustained. In this case, it would also be the industrial tribunal that is competent (or the court of first instance, on the basis of its residual competence).

In the case that the position of Arabic teacher concerned a vacancy for a public officer with a permanent appointment, the Council of State would be competent for annulling the official decision of the school.[20]

3. Which ground(s) would apply here? E.g. religion, gender. If both please explain how you would approach the analysis.
Gender: see general remark above. From a theoretical point of view we consider that there could be indirect discrimination on the basis of gender, if there was no dress code (e.g. beard) for men.

Religion: We consider that the dress code required by the school is based on a religious understanding. This requirement could therefore constitute discrimination on the basis of religion.

Ethnic origin: The requirement to wear a headscarf could also constitute a distinction based on the origin of the applicant, if one assumes that the wearing of the headscarf is linked to the Muslim belief, and that Muslims are more often of non-European origin.

4. Would this constitute direct or indirect discrimination?
Gender: indirect
Religion: direct
Ethnic origin: indirect

5. Does an exception as mentioned in Article 4 (2) of Directive 2000/78/EC exist in your country and would it apply in this case?

The Anti-discrimination Act 2003 only contains the provision of article 4.1 of Directive 2000/78, concerning the occupational requirements. The Act does not make any reference to article 4.2 of the Directive and the possibility for churches and other religious organisations to require a certain good faith and loyalty.

6. If you find this case would lead to direct or indirect discrimination, would there be an objective justification?
The Anti-discrimination Act 2003 defines *direct discrimination* in a so-called open way: direct discrimination occurs if a difference in treatment that is not objectively or reasonably justified is directly based on, e.g., so-called race, colour, descent, national or ethnic origin, religion or belief, or sex (art. 2§1).

But article 2 §5 of the Anti-discrimination Act 2003 provides that with regard to labour relations a difference in treatment shall be based on an objective and reasonable justification if, owing to the nature of an occupational activity or the context in which it is carried out, such an identification constitutes an essential and decisive occupational requirement, provided the aim is legitimate and the requirement is proportionate to that aim. This only applies to direct discrimination.

Under the Anti-discrimination Act, indirect discrimination occurs when a seemingly neutral provision, measure or practice has harmful repercussions on persons on the basis of one the grounds for discrimination set out in § 1, unless said provision, measure or practice is objectively and reasonably justified.

Gender: see general comment

Religion: The question to be asked is whether a school, whose aim it is to offer education based on Islamic principles and to create possibilities for acquiring knowledge of Islam at a higher education level, can require that all female Muslim teachers wear a headscarf, including a teacher of the Arabic language.

As said above, we consider that the dress code required by the school is based on a religious understanding and this requirement should therefore be examined from the view of possible direct discrimination on the basis of religion. The fact that non-Muslim female teachers are exempted from this requirement does not mean that there is no difference in treatment based on religion with respect to those female Muslim teachers that do not want to wear a headscarf. In fact, although those female teachers are Muslim, they do have a different interpretation of the Islamic belief. Therefore, one can say that they, in comparison with female Muslim teachers that do want to wear a headscarf, are treated differently on the basis of their religion.

[20] All schools in Belgium are publicly funded. The Council of State is competent for those teachers that have a permanent appointment, as opposed to teachers that only have a temporary employment contract.

Direct discrimination in access to employment, also on the basis of religion, can only be justified in the case of an occupational requirement. With regard to Belgian law, one can only speak of an occupational requirement when, owing to the nature of an occupational activity or the context in which it is carried out, the differentiation is based on a legitimate aim and the requirement is proportionate to that aim.

In this case, one can presume that the aim of making a difference is to preserve a true Islamic education, tested against the Koran and the Soennah. Given the fact that the Belgian Constitution provides the right for schools to organise education based on religion (art. 24 of the Constitution), this can be considered as a legitimate aim.

In order to verify whether the requirement of wearing a headscarf is proportionate to that aim, one should consider *in concreto* the nature of the activity for which the woman applied and also the context in which it is carried out.

The nature of her function is teaching the Arabic language. The context in which this activity has to be exercised is the context of a Muslim school in which non-Muslim women can be exempted from wearing the headscarf. Part of the context can also be the fact that in general there are many Muslim women that do not wear a headscarf, and who still define themselves as Muslim.

The fact that the woman would only be teaching language and not religion and that there are other female teachers in the school not wearing a headscarf, means that the requirement in question does not seem proportionate to its stated legitimate aim (i.e. education based on Islam, tested against the Koran and Soennah).

Therefore we would consider this requirement as not compatible with article 2§5 of the Anti-discrimination Act 2003 and therefore constituting direct discrimination (against Muslim women not wanting to wear a headscarf in comparison with Muslim women that do want to wear a headscarf).

Ethnic Origin: The question of whether there could be indirect discrimination on the basis of her origin becomes superfluous since we agreed already that the school cannot require the wearing of the headscarf without discriminating on the basis of religion.

If the result were different, i.e. that the school is allowed to require the wearing of a headscarf, one could examine whether the fact that only non-Muslim women are exempted from the obligation constitutes indirect discrimination on the basis of ethnic origin. This could be the case if one assumes that the wearing of the headscarf is linked to the Muslim belief, and that Muslims are more often of non-European origin.

Indirect discrimination occurs when a seemingly neutral provision, measure or practice has harmful repercussions on persons to which one of the grounds for discrimination applies, unless said provision, measure or practice is objectively and reasonably justified.

We would have to examine whether there is a legitimate aim and whether the distinctive requirement is necessary and proportionate with regard to this aim. Given the fact that non-Muslim women would not be obliged to wear a headscarf as a teacher of the Arabic language, one can hardly consider the wearing of a headscarf as something necessary for fulfilling the activity of a language teacher. Therefore, the fact that only non-Muslim women are exempted from the dress code would constitute indirect discrimination on the basis of origin.

7. How would you balance these conflicting basic human rights: the freedom of religion and the prohibition of discrimination.
Neither the freedom of religion nor the prohibition of discrimination constitute absolute fundamental rights. The freedom of religion (of the school, the management and the pupils) conflicts with the right not to be discriminated against from the moment there is a question of coercion.

Remark: Other possible questions to be asked: Would there be any difference in your appreciation if there were no exemption for non-Muslim women? And if the woman in question would have applied for a vacancy for a religious education teacher?

Denmark

Danish Gender Equality Board

The Danish Gender Equality Board rejected the case as they do not consider that it concerns discrimination on the grounds of gender.

Estonia

Office of the Chancellor of Justice

1. How would you, in your country, consider this case in the context of your legislation and jurisprudence?
Under the Republic of Estonia Employment Contracts Act (REECA) § 10 (1) Employers shall not, upon employment and entry into employment contracts, discriminate against

persons applying for employment on any of the grounds specified in subsection (3) of this section. Subsection (3) states that, prohibited discrimination shall be taken to occur where a person applying for employment or an employee is discriminated against on grounds of sex, racial origin, age, ethnic origin, level of language proficiency, disability, sexual orientation, duty to serve in defence forces, marital or family status, family-related duties, social status, representation the interests of employees or membership in workers' associations, political opinions or membership of a political party or religious or other beliefs.

Currently, the woman has not been employed because of her refusal to wear a headscarf although she is a Muslim. The distinction between her and other women who do not wear headscarves has been made on the grounds of religion: those who are non-Muslims are allowed to work without headscarves, those who are Muslims are not allowed to work without headscarves. The distinction has also been made under gender, as only women are to show their religion via wearing headscarves. In other words: men did not have to wear any religious symbols (e.g. to follow certain dress codes or to have a beard). Therefore, the Gender Equality Act (GEA) § 6 (2) (2), will apply. According to this provision, the activities of an employer shall also be deemed to be discriminating if the employer in the recruitment process imposes conditions, which put persons of one sex at a particular disadvantage compared with persons of the other sex.

As the dominant ground in this case is a religious belief (one may freely exercise chosen religion according to his/her own beliefs), the woman can rely on the REECA § 10 and § 10^2 (2), which bans direct discrimination. Direct discrimination cannot be justified.

2. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not.
Yes, it does. Through REECA and GEA.

3. Which court, organisation, instance would be competent?
- Chancellor of Justice, whether the school is public or private (binding decision if the parties have accepted the proposal of the Chancellor of Justice);
- County Court (binding decision);
- Individual labour dispute resolution body (voluntary procedure before turning to court; binding decision).

4. Which ground(s) would apply here? E.g. religion, gender. If both please explain how you would approach the analysis.
Religion, because only Muslim women have to wear headscarves, and gender, because only women have to wear headscarves in order to show their religion.

5. Would this constitute direct or indirect discrimination?
Direct discrimination.

6. Does an exception as mentioned in Article 4 (2) of Directive 2000/78/EC exist in your country and would it apply in this case?
No.

7. If you find this case would lead to direct or indirect discrimination, would there be an objective justification?
No.

8. How would you balance these conflicting basic human rights: the freedom of religion and the prohibition of discrimination?
As one has a right to exercise religious beliefs also within one religion, the question of discrimination arises also, if a person wants to exercise his or her religious beliefs within a certain religious community, which has a slightly differing set of norms. It is a rather delicate matter and therefore the legislator should consider enacting regulation in that field carefully.

France

High Authority against Discrimination and for Equality

1. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not.
Islamic high schools can either be private with a contract with the state, in which case it is subject to general principles applicable to the public service including the absolute prohibition to discriminate on the basis of religion. In such case no exception could be made to the right of the woman not to wear the veil and the internal regulation of the school would be deemed illegal.

The school can also be fully private, in which case it would be subject to the prohibition of discrimination on the basis of religion as it is applicable to private employers.

In French law, there is no legal definition of religion or belief. It is the Law of December 9, 1905 on the separation of Church and State that addresses the concepts of freedom of worship and beliefs. Article 1 of the law states:

> *"The republic guarantees freedom of belief. It guarantees freedom of worship, the only restrictions being stated therein in the pursuit of the interest of public order."*

Freedom of religion is considered as one aspect of freedom of opinion. According to Jean Rivéro, freedom of religion includes at one end, freedom of belief, hence the freedom to choose between non-belief and membership

of a religion, and at the other end, freedom of worship, that is the individual or collective practice of a religion.

The Lyon Court of Appeal in its decision of July 28, 1997, offered the following definition:

> *"a religion can be defined by the convergence of two elements, an objective element, the existence of a community even if limited, and a subjective element, a common faith…"*

The report of the Commission of enquiry on sects concluded that French law offered no definition of "sects".

For a time, the Court of Cassation considered that, although members of a religious congregation were considered by law to be party to an employment contract, this fact did not mean that all the provisions of the Labour Code were applicable to their employment relations. Thus, it excluded for some time the application of article L122-45 LC on dismissal or on sanctions which can be imposed as a result of behaviour which contravenes instructions which are based on the requirements of the faith of the employer.

However, ever since the decision of the Court of Cassation on April 17, 1991 in Fraternité Ste Pie, the religious orientation of the employer no longer justifies an exception to the application of article L122-45 LC. In this landmark case which preceded the directive, the court decided that the sexual orientation of the employee was not in and of itself sufficient to justify dismissal. It considered at the time that the employer was required to establish that the behaviour of the employee had, considering his function and his objective behaviour, generated substantial disruption ("*trouble caractérisé*") within the community.[21] In 1993, the Court of appeal of Montpellier concluded that provocative distasteful behaviour could justify dismissal.[22] Moreover, in transposing Directive 2000/78 by adopting the Law of November 16, 2001, the legislator did not make any provision for any exception to the principle of non-discrimination on the basis of faith or opinions, and since the new texts the courts have not adjudicated on this issue.

2. Which court, organisation, instance would be competent?
If the school is financed by the state, the administrative court is competent. If it is a private school which receives no funding from the state the labour court (Conseil de prud'hommes) would be competent.

3. Which ground(s) would apply here? E.g. religion, gender. If both please explain how you would approach the analysis.
We would argue the case on the basis of freedom of religion on the basis that one is free to practice one's faith as he or she chooses. Arguing the case on the basis of gender discrimination creates a conflict between sex discrimination and freedom of religion that will not solve the freedom of religion issue. Therefore, it appears more efficient to argue freedom of religion.

4. Would this constitute direct or indirect discrimination?
This would constitute direct discrimination

5. Does an exception as mentioned in Article 4 (2) of Directive 2000/78/EC exist in your country and would it apply in this case?
As discussed in point 1, in transposing Directive 2000/78 by adopting the Law of November 16, 2001, the legislator did not provide for any exception to the principle of non discrimination on the basis of faith or opinions, and since the new texts the courts have not adjudicated on this issue.

6. If you find this case would lead to direct or indirect discrimination, would there be an objective justification?
There can be no objective justification to direct discrimination.

7. How would you balance these conflicting basic human rights: the freedom of religion and the prohibition of discrimination.
In France freedom of religion entails tolerance to others and the right to practice one's religion as one chooses. Therefore, freedom of religion of the individual must be accommodated in the private sector and should not be in conflict with the principle of non-discrimination.

Great Britain

Commission for Racial Equality

Note:
As a preface to these answers, the CRE would not have jurisdiction to answer these questions as it can only deal with discrimination based on racial grounds. Although some religious groups such as Jews and Sikhs have been recognised as racial groups as well, persons who are Muslim do not constitute a racial group.

However as there is currently no government body with jurisdiction over religious and belief associated discrimination and there will not be one until October 2007 when the Commission for Equality and Human Rights commences operating, the CRE has attempted to answer these questions. In addition we have had some experience with religious issues of discrimination given the frequent link between racial and religious discrimination.

[21] Cour de Cassation, chambre sociale, 17 avril 1991, *Droit Social* 1991, 485.
[22] CA Montpelier, January, 28, 1993.

In addition, no answers have been attempted in relation to possible gender discrimination as that is in the remit of the Equal Opportunities Commission.

1. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not.
The case falls within the scope of the Employment Equality (Religion or Belief) Regulations 2003 (RBR) which were introduced to implement the EU Employment Directive in respect of the grounds of religion and belief.

Regulation 6(1)(a) of the RBR provides that it is unlawful for an employer to discriminate against a person in the arrangements he makes for the purposes of determining to whom he should offer employment.

Regulation 3 of the RBR defines direct and indirect discrimination as where:

> *"(a) on grounds of religion or belief, A treats B less favourably than he treats or would treat other persons; or*
>
> *(b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same religion or belief as B, but -*
>
> *(i) which puts or would put persons of the same religion or belief as B at a particular disadvantage when compared with other persons,*
> *(ii) which puts B at that disadvantage, and*
> *(iii) which A cannot show to be a proportionate means of achieving a legitimate aim."*

"Religion or belief" under regulation 2 means "any religion, religious belief, or similar philosophical belief" and would clearly cover the Muslim faith.

2. Which court, organisation, instance would be competent?
Under regulation 28 a complaint of religious discrimination in employment must be made to an employment tribunal.

It is also relevant to note that the CRE has no power to provide assistance in such claims. In October 2007 when the CEHR commences operating, it will be able to support/ apply to intervene in such proceedings.

3. Which ground(s) would apply here? E.g. religion, gender. If both please explain how you would approach the analysis.
The ground of religion would apply here. We do not comment on whether the ground of gender discrimination would or may apply.

4. Would this constitute direct or indirect discrimination?
We would compare how a person in the same circumstances (but for the religion of the Muslim woman) would have been treated. The evidence was that non-Muslim women were granted an exemption from wearing the headscarf and therefore the Muslim woman was being directly discriminated against. No issue of indirect discrimination arises.

5. Does an exception as mentioned in Article 4 (2) of Directive 2000/78/EC exist in your country and would it apply in this case?
Under regulation 7 of the RBR, the genuine occupational requirement exception does exist in relation to employment and applies in two circumstances:

> *"(2) This paragraph applies where, having regard to the nature of the employment or the context in which it is carried out -*
>
> *(a) being of a particular religion or belief is a genuine and determining occupational requirement;*
> *(b) it is proportionate to apply that requirement in the particular case; and*
> *(c) either –*
>
> *(i) the person to whom that requirement is applied does not meet it, or*
> *(ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it,*
>
> *and this paragraph applies whether or not the employer has an ethos based on religion or belief.*
>
> *(3) This paragraph applies where an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment or the context in which it is carried out -*
>
> *(a) being of a particular religion or belief is a genuine occupational requirement for the job;*
> *(b) it is proportionate to apply that requirement in the particular case; and*
> *(c) either -*
>
> *(i) the person to whom that requirement is applied does not meet it, or*
> *(ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it."*

It is unlikely that this exception will be applicable in the present facts. There is no evidence that being of Muslim religion is a genuine requirement for the position as a teacher of the Arabic language. The decision of not employing the woman was not based on her religion (as she is Muslim), but the fact that she did not wear a headscarf. In addition, the fact that the school employs non-Muslim teachers is evidence that being Muslim is not a requirement for the position.

6. If you find this case would lead to direct or indirect discrimination, would there be an objective justification?
As there can be no justification for direct discrimination in Great Britain the conduct would be unlawful.

7. How would you balance these conflicting basic human rights: the freedom of religion and the prohibition of discrimination.
This issue does not arise as the Religion and Belief Regulations 2003 only have scope over religious discrimination, not the issue of freedom of expression which in Great Britain is a human rights issue under the Human Rights Act 1998 which implemented the European Convention on Human Rights. In addition, the UK has not signed the Optional Protocol to the Convention on a freestanding right to non-discrimination (article 14) and there is therefore no separate right to non-discrimination under the Human Rights Act.

As a result the case would be dealt with under the Religion and Belief Regulations, not the Human Rights Act.

Great Britain

Equal Opportunities Commissioner (Gender)

1. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not.
Yes, this would be covered by the Sex Discrimination Act (SDA) as being discrimination in employment.

2. Which court, organisation, instance would be competent?
The Employment Tribunal.

3. Which ground(s) would apply here? E.g. religion, gender. If both please explain how you would approach the analysis.
To the extent that the requirement to wear a headscarf is limited to women, it could amount to sex discrimination in the dress code applied to school staff. However, the case law in the UK makes it clear that in determining whether there is discrimination in dress code, the key questions are whether an equivalent standard of dress is required of men and women (the key authority being Smith v Safeway [1996] IRLR 456, Court of Appeal) and, where there is a dress code, whether it is enforced with equal strictness for men and women.

4. Would this constitute direct or indirect discrimination?
Direct discrimination if anything. As to whether it would be found to be discriminatory see the answer to q.3: if Muslim men were required to wear a certain item of dress in order to comply with religious rules and that requirement was enforced with equal strictness then it may not be discriminatory.

5. Does an exception as mentioned in Article 4 (2) of Directive 2000/78/EC exist in your country and would it apply in this case?
There is an exception to the SDA in the case of employment for the purposes of an organised religion but that is not interpreted as applying to employment by a school with a particular religious ethos.

6. If you find this case would lead to direct or indirect discrimination, would there be an objective justification?
N/a

Hungary

Parliamentary Ombudsman

1. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not.
It falls within the scope of the Hungarian Act on Equal Treatment 2003: all public education institutions are covered by the Act. Religious schools established by any church and operating according to the Act on Public Education, recognised by the state, are obliged to meet the requirements of equal treatment.

2. Which court, organisation, instance would be competent?
Labour Courts, Equal Treatment Authority, Parliamentary Commissioner for Civil Rights, Labour Inspectorates.

3. Which ground(s) would apply here? E.g. religion, gender. If both please explain how you would approach the analysis.
If discrimination could be established: religion.

4. Would this constitute direct or indirect discrimination?
It would not constitute discrimination. The school makes a distinction between Muslim and non-Muslim applicants, but the reasonable justification test would apply. Any measure or provision which can be reasonably justified under objective consideration in association with the legal regulation shall not infringe the requirement of equal treatment. (Art. 7 section 2. Act on Equal Treatment). Teachers do not only teach material subjects, but through their personality, behaviour and appearance also represent a mentality, an ethos, .i.e. they also educate. If the question of Muslim women wearing a headscarf constitutes a matter of religious belief based on the religious doctrines of the Muslim faith, then the school established by this faith can reasonably set this as a requirement for Muslim women who intend to teach at this school.

In a precedent court decision a university established by the Protestant church terminated the student status of a future

teacher of religious studies due to his homosexuality, which he had admitted. The respondent referred to the founding church's doctrines and stated that it makes reasonable distinctions between students based on their sexuality when determining conditions for teachers of religious education. The court declared that the doctrines of churches and their standpoints on moral questions cannot be the subject of the state or state institutions, such as decisions by courts. The Protestant church does not approve of educating homosexual teachers of religious education based on the Bible. This idea cannot be overruled by the state or its institutions. The court ruled that the respondent's standpoint had reasonable grounds in relation to educating teachers of religious education in conformity with the church's doctrines and was therefore not obliged to apply the requirements of equal treatment in this respect. The court declared that making distinctions according to religious doctrine on the basis of the sexual orientation of future teachers of religion does not violate the law. (The court referred to the objective justification test of the Act on Equal Treatment.) (BH 2006.14.)

Presumably, the court would come to a similar conclusion in our present case, i.e. it would reject the allegation of discrimination.
A. The cited ruling is not binding for future cases, although the jurisprudence of higher courts has a de facto authority.
B. On the other hand it is possible that the Constitutional Court would find such an interpretation of the Act on Equal Treatment's justification requirements or even the norm (Article 7 section 2) itself unconstitutional. As we mentioned above the Constitutional Court applies the necessity/proportionality test in such cases where discrimination interferes with constitutional rights. This might result in an opposite outcome.
C. The rationality test normally does not include a close scrutiny of the circumstances of the case. In addition the imperative of separation of church and state presumably dictates an even greater reluctance on the part of the court to interfere with the choice of a religious organisation unless it is blatantly arbitrary. Therefore it is probable that the court will not engage in discussing the field of application of the restricting measure in terms of the taught subject.

5. Does an exception as mentioned in Article 4 (2) of Directive 2000/78/EC exist in your country and would it apply in this case?
The exception does exist:
Section 22. of the Act on Equal Treatment states:

> *"The following shall not represent infringement of the requirement for equal treatment:*
> *distinctions based on religious or other ideological beliefs or national or ethnic identity, arising directly from the spirit that fundamentally determines the nature of the organisation, and that are justified by the content or nature of the occupation concerned and based on a proportionate and real occupational requirement."*

Wearing a headscarf might also be conceived as an occupational requirement for Muslim women, who are presumably expected by the school to convey a version of Muslim faith in which the headscarf of women – among other elements, of course -- plays an indispensable role. As regards the other women, who do not qualify themselves as Muslim, such an expectation necessarily cannot apply, as these teachers are not supposed to represent the spirit of the Muslim religion. On the other hand, freedom of religion includes not only the right to teach in the spirit of a larger stream of a religion, but also to choose to represent the more specific attitude of a religious strand which may not be present among other groups who belong to the larger family of Muslims. In this respect wearing a headscarf can be a genuine occupational requirement, since Muslim teachers have the extra function of representing the ethos of Muslim faith.

6. If you find this case would lead to direct or indirect discrimination, would there be an objective justification?
N/a

7. How would you balance these conflicting basic human rights: the freedom of religion and the prohibition of discrimination?
As described above, under Hungarian law it is quite clear that there are cases in which freedom of religion prevails over the right to non-discrimination. The legislator has already balanced these two basic rights to the extent that it granted an exception for discrimination following from a genuine occupational requirement.

Similarly, the Act in general permits exceptions from the requirement of equal treatment if it is reasonably justified. It is not possible to predict exactly what may count as reasonable grounds in concrete cases; however, the simple rationality criterion could lead to relatively weak protection against discrimination. Therefore, we might conclude that if the distinction is necessary for the protection of fundamental freedoms, then it will usually be proved to be reasonable (a maiori ad minus).

The relationship between the individual's right to freely exercise religion and the state's duty not to interfere in religious matters is more obscure. There are no a priori standards which determine how to reconcile this obligation of non-interference with the obligation to ensure the equal protection of laws should the individual's right to freely exercise his/her

religion comes into collision with the internal affairs of a church.

Italy

National Office against Racial Discrimination

1. Does the case fall within the scope of anti discrimination law in the country? Please explain how or why not.
This case is regulated by law 9.7.2003 n. 216. UNAR was created by law 9.7.03 n. 215 and the field of competences of this organisation concerns only discrimination on racial or ethnic grounds.

The law establishing the UNAR institution makes a reference to forms of racism for religious or cultural reasons and in one interpretation this allows for a wider interpretation of this equality body's field of competence. However in law 9.7.03 n. 216 it is only possible to discriminate in the field of access to employment if the discrimination can be qualified as essential, lawful and justified for carrying out the activity. In this case we cannot qualify the wearing of a headscarf as an essential and lawful factor. This is proved by the fact that the school's regulations grant exemptions for female teachers who are non–Muslim. So the same treatment may be asked for in the case of a Muslim woman who doesn't want to wear a headscarf. The school may ask for a teacher that must be Muslim in order to achieve the aim of higher education based on Islamic principles but cannot expect from her special behaviour in the school.

However the teacher can make a claim to the Court. The Tribunal of first instance would also be competent in this case.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)
As stated before, there is some difficulty in establishing UNAR competence in this case because the field of competence of this organization concerns only discrimination on racial or ethnic grounds.

However the teacher can make a claim to the Court. In this case the Tribunal of first instance would be competent.

3. Which ground(s) would apply here? E.g. religion, gender. If both please explain how you would approach the analysis.
It is a case of discrimination for religious reasons, but directed against women. Italian legislation provides these cases with stronger protection because it requires employers to consider situations in which the discrimination has a different impact on women and men (law 9.7.2003 n. 215 and 216).

4. Would this constitute direct or indirect discrimination?
It is a case of direct discrimination on the grounds of religion and of gender. The school's policy does not introduce a criterion, which excludes someone for religious or cultural origin; it asks for headscarves to be worn by all teachers but it grants the possibility of an exemption. The school has to apply the exception to both Muslim female teachers and also non-Muslim female teachers.

5. Does an exception as mentioned in Article 4(2) of Directive 2000/78/EC exist in your country and would it apply in this case?
This exception exists in our legislation but the instructed lawyer must check if the qualities requested by church or public or private organisations the ethos of which is based on religion or belief are or are not essential, lawful and justified (objective test).

6. If you find that this case would lead to direct or indirect discrimination, would there be an objective justification?
This is unlikely because the school asks for a special practice (wearing headscarves) that cannot be considered essential for the activity of teaching the Arabic language. It may very well be different if the subject was religion, but even then it is still not sure.

7. How would you balance these conflicting basic human rights: the freedom of religion and the prohibition of discrimination.
Freedom of religion must be granted to all people. This means also that people must have the possibility to choose the best way to express their religious belief. Of course an Islamic school may ask for Muslim teachers but it is not reasonable to ask for a special dress as an essential quality if the same request is not addressed to all people. In this case the priority is obviously the prohibition of discrimination.

The Netherlands

Equal Treatment Commission

General remark: this case has led to a real opinion at the Dutch Equal Treatment Commission (opinion 2005-222).

1. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not.
Section 5(1), first sentence and paragraph (a) of the Dutch Equal Treatment Act read with Section 1 of the Dutch Equal Treatment Act provides that it is unlawful to discriminate on the grounds of *inter alia* religion when publicly advertising employment and in procedures leading to the filling of vacancies.

2. Which court, organisation, instance would be competent?

The Dutch Equal Treatment Commission is competent and can give a non-binding opinion on this case. This procedure is without costs. Parties do not need to have a lawyer. A district court will also be competent and can give a binding opinion on this case. For this procedure, legal charges must be paid. In employment cases before a district court a lawyer is not obligatory.

3. Which ground(s) would apply here? E.g. religion, gender. If both please explain how you would approach the analysis.
Religion.

4. Would this constitute direct or indirect discrimination?
Direct discrimination.

5. Does an exception as mentioned in Article 4 (2) of Directive 2000/78/EC exist in your country and would it apply in this case?
Yes an exception exists. Section 5 (2) (c) of the Equal Treatment Act allows denominational educational establishments the possibility of deviating from the prohibition of discrimination. Such an establishment may impose discriminating requirements to the extent that these are necessary for the fulfilment of the principles of the establishment and provided that such requirements do not lead to discrimination solely on the grounds of the other personal characteristics protected by the Act, including sex, race and sexual orientation (cf. CGB 28 September 2000, opinion 2000-67).

The Equal Treatment Act provides an assessment framework for judging the question of whether a denominational educational establishment may invoke the aforementioned exceptional provision at law, to the effect that the Commission must examine successively whether the specific case involves a denominational educational establishment, whether the challenged job requirement is necessary for the fulfilment of the principles of the establishment and whether the job requirement is based on an established policy founded on the objectives of the establishment and actually implemented.

Furthermore it depends on the specific circumstances of the case whether or not the invocation of this exception will be successful (see *inter alia* CGB 1 December 2003, opinion 2003-145, CGB 21 December 2004, opinion 2004-168; CGB 11 February 2005, opinion 2005-19 and CGB 15 June 2005, opinion 2005-102).

The exception however did not apply in this case:
From the school's articles of association it became clear that the school is a denominational educational establishment based on religious principles, which may in principle invoke the statutory exception laid down in Section 5(2)(c) of the Equal Treatment Act. The school's personnel policy should then consistently aim at maintaining the identity of the establishment and the job requirement should be necessary for the position for which the petitioner applied.

With regard to the question whether the respondent's policy is consistently aimed at maintaining the identity of the establishment, the school submitted evidence that the school imposes the obligation to wear a headscarf on all female employees and students, which obligation follows from its formal principles, in particular from the Koran and the Sunnah. The exemption from this obligation for non-Muslim female employees was appropriate since the rules of the Koran and the Sunnah are not applicable to non-Muslims. The school's personnel policy was consistently aimed at maintaining its identity within the meaning of the Equal Treatment Act. The refusal to employ or continue to employ Muslims who cannot or will not comply with this requirement follows from this requirement, as does the possibility for non-Muslims to request exemption from this requirement. In this context it is not the task of the Dutch Equal Treatment Commission to express an opinion on the principles on which the respondent is based, including the question of why the invocation of the exemption clause by a Muslim will not be allowed while such a request made by a non-Muslim will be allowed. It is primarily the responsibility of the respondent to lay down its principles and objectives, as well as what these entail with regard to the requirements to be imposed.

With regard to the issue of the necessity to make this discriminating requirement for the position of teacher, in the present case the position of teacher of Arabic, the following considerations apply:
When the legislation relating to denominational educational establishments was discussed in Parliament it was commented that such establishments may also make job requirements which "may relate to circumstances which do not arise directly from, but are nevertheless relevant to the performance of the job within the establishment" (*Parliamentary Papers II* 1991/92, 22 014, No. 5, p. 83).
The reason for this is that a belief may be relevant in the context of passing on knowledge, norms and values in an educational setting. When assessing the alleged necessity the decisive factor is whether there is an objective connection between the principles and objectives of the establishment and the job requirements made for the purposes of fulfilling them (*Parliamentary Papers II* 1990/91, 22 014, No. 3, p. 18).

The school therefore had to substantiate the necessity of requiring female employees to wear a headscarf, and did this by alleging the religious rules forming part of its principles and the fact that its employees must set an example for the students. The fact that the school would, on request, exempt non-Muslims from the obligation to wear a headscarf would not, in the opinion of the school, detract from this necessity because the religious rules apply only to Muslims and therefore the students need only be set the example that Muslims wear headscarves.

The school however failed to convince the Dutch Equal Treatment Commission of the necessity of the challenged headscarf requirement because there is nothing to show that a Muslim teacher who does not wear a headscarf, unlike a Muslim teacher wearing a headscarf or a non-Muslim teacher with or without a headscarf, is unsuitable or less suitable for the position of teacher or otherwise constitutes an obstacle to meeting the requirements which are necessary for or otherwise relevant to filling the position within the establishment. This is all the more true in the case of positions like that of a teacher of Arabic, for which the petitioner applied, which do not entail any specific passing on of religious knowledge or rules. In other words, the headscarf requirement, even when tested merely for reasonableness, did not in any way prove to be 'necessary' within the meaning of Section 5(1)(c) of the Equal Treatment Act.

This was not changed by the fact that the school applies its rules consistently and with reference to the Koran and Sunnah. For the fact is that the Equal Treatment Act only allows exceptions to the ban on unequal treatment if the discriminating requirements are applied consistently *and* are also necessary. This demands a separate examination against the requirement of necessity, since otherwise this latter requirement would be meaningless.

The parliamentary history of the Act shows that because of the condition of 'being necessary', the establishment must in such a situation be able to put forward sound reasons for the requirements it has imposed in the actual case under consideration (*Parliamentary Papers II* 1990/91, 22 014, No. 3, 17-18). The reasons given by the school would in this case prove to be insufficient.

The necessity of the requirement that a headscarf be worn would also be questionable because in the school's opinion the position of teacher of Arabic can quite well be filled by a non-Muslim teacher, whether or not she wears a headscarf. Unlike the case of the so-called *Maimonides* judgment of the Supreme Court (HR 22 January 1988, *NJ* 1988, 981) the respondent employs female employees who do not belong to its religious community. The only thing the school considers unacceptable is any conduct, which is not in conformity with the religious belief laid down in its principles. So in the present case, contrary to the aforementioned judgement, the reason for the rejection of the petitioner is not that she does not belong to the religious community of the respondent, but that she - while belonging to the same religious community - gives a different expression to her faith. Therefore, the respondent's policy including the possibility of exemption is based on a restriction of the freedom of expression. It was irrelevant that in the *Maimonides* judgment the school's principles were subjected only to the test of reasonableness.

As the respondent failed to demonstrate why, in the case of a teacher of Arabic who adheres to the Muslim faith, the challenged clothing rule is necessary to the practical fulfilment of the respondent's principles, the Dutch Equal Treatment Commission came to the opinion that the respondent may not invoke Section 5(2)(c) of the Equal Treatment Act.

6. If you find this case would lead to direct or indirect discrimination, would there be an objective justification?

The Equal Treatment Act prohibits both direct and indirect discrimination. Direct discrimination is prohibited, unless the Act itself makes an exception. Indirect discrimination is permitted only if there are good grounds (an 'objective justification') for such discrimination.

7. How would you balance these conflicting basic human rights: the freedom of religion and the prohibition of discrimination.

Section 5(1) first sentence and paragraph (a), of the Dutch Equal Treatment Act read with Section 1 of the Dutch Equal Treatment Act provides that it is unlawful to discriminate on the grounds of *inter alia* religion when publicly advertising employment and in procedures leading to the filling of vacancies. In order to delineate the ban on discrimination on the one hand and the freedom of religion and belief and the freedom of political persuasion, closely connected with the freedom of expression and the freedom of association, on the other hand, Subsection 2(c) of this Section allows denominational educational establishments the possibility of deviating from this prohibition. Such an establishment may impose discriminating requirements to the extent that these are necessary for the fulfilment of the principles of the establishment and provided that such requirements do not lead to discrimination solely on the grounds of the other personal characteristics protected by the Act, including sex, race and sexual orientation (cf. CGB 28 September 2000, opinion 2000-

67). It follows from the system of equal treatment legislation that exceptions like those contained in Section 5(2) must be interpreted restrictively to prevent this norm from being undermined too much (most recently CGB 26 January 2005, opinion 2005-8).

Norway

Equality and Anti-Discrimination Ombud

1. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not.

Norwegian regulations concerning private schools. Pursuant to Norwegian law an Islamic high school has the status of a private school. Accordingly it is regulated by the provisions of the Private School Act.

Private primary and secondary schools in Norway must be certified and are, upon certification, entitled to governmental subsidy.

Private schools may on a preferential basis employ teachers who have a background that fits the particular context/nature/image of the school. Accordingly the fact that a teacher is Muslim may be a valid prerequisite for an Islamic school to hire a teacher, depending on the particular position that is being applied for and other relevant factors.

However, once hired, a teacher is entitled to the same working conditions that apply to the public sector schools.

Recruitment and employment conditions for school personnel, whether public or private, are regulated under the Working Environment Act, which contains a specific chapter regarding the protection against discrimination on the basis of political opinion, union membership, sexual orientation, physical disability and age, *but not religion*. As the reason alleged by the school are mainly rooted in religion, the anti discrimination provisions of this act and the exceptions thereto would not apply in this case.

Discrimination based on religion is regulated under the Anti-discrimination Act, which applies to *all sectors* except personal and family relations. Accordingly hiring and employment conditions for school staff that are based on purely religious considerations must be tested against the provisions of the Anti-discrimination Act.

The wording of the general provisions of the Private School Act implies that a private school has a certain freedom when hiring teaching staff, given that the applicant's behaviour/values must be in line with the school's main purpose and ethos. However this allowance must be offset against the question of potential discrimination on religious grounds. Differential treatment on the basis of religious or ethical belief is prohibited in the Anti-discrimination Act, unless justified by reasonably valid reasons.

Employment and working environment conditions must also be tested against the Gender Equality Act which prohibits gender-based differential treatment in the working sector. The provisions of the act apply therefore to questions regarding the wearing of headscarves by female employees.

2. Which court, organisation, instance would be competent?

The case would, upon complaint, typically be handled by the recently established Equality and Anti-discrimination Ombud/Mediator. This administrative body handles, amongst others, complaints alleging violations of the Gender Equality Act and the Anti-discrimination Act.

3. Which ground(s) would apply here? E.g. religion, gender. If both please explain how you would approach the analysis.

The case at hand would be judged accordingly as a discrimination case both on the grounds of gender and religion. Matters concerning the denial by employers of female employees´ *wish* to wear a headscarf at work have been ruled by the previously existing Gender Equality Ombud. The question of an employee being *forced* to wear a headscarf at work, on the grounds that it is specifically required of women, would also fall within the scope of the Gender Equality Act.

4. Would this constitute direct or indirect discrimination?

The case of gender discrimination would be one of indirect discrimination of women. The case of discrimination on the grounds of religion would constitute direct discrimination.

5. Does an exception as mentioned in Article 4 (2) of Directive 2000/78/EC exist in your country and would it apply in this case?

The exception under Article 4 (2) of the EU Directive applies in two different ways under Norwegian legislation.

Firstly religious institutions or communities are granted a general exception to the prohibition of discrimination on the basis of religion under the Anti-discrimination Act. This provision specifically does *not* apply to the working sector. In the case at hand the Anti-discrimination Act and the exception it allows would *not* apply.

Secondly the Working Environment Act permits religious organisations to engage in *differential hiring treatment with respect to persons living in homosexual cohabitation.* This exception does not apply to schools, albeit of a religious character, and would have no relevance in this case. Accordingly, the exception under Article 2(4) of the EU Directive, as implemented in Norwegian law, would *not apply* in this case.

The question of whether the refusal to hire the female teacher would constitute discrimination on the grounds of religion would therefore have to be addressed. One would thereupon have to address the question of whether an exception based upon objective reasons could be granted (see below).

6. If you find this case would lead to direct or indirect discrimination, would there be an objective justification?

(1) Outcome of this case pursuant to the provisions of the Anti-discrimination Act and its prohibition to discriminate on the basis of religious faith or ethical belief:

As mentioned above the law allows an exception based upon the objective justification test. Whereas the individual *right to wear* a headscarf on religious grounds would typically be upheld on the basis of the Anti-discrimination Act, the *obligation to wear* a scarf at work would, however, be in contravention with the same provisions.

Freedom of religion in Norway implies that all individuals are also free from any religious constraint, and the working sector is a secular sphere. As mentioned above, a religious school may hire teaching staff whose demeanour will be in accordance with the school's ethos. However, in this case the female teacher is not seeking to be a religion teacher, but rather to teach the Arab language. She is highly qualified for that post, and has professional experience from another Islamic school. This is strong evidence to the fact that she should be hired. Assuming she is the best qualified of all applicants for the job she has the right to be hired.

Were another candidate equally qualified and willing to wear a scarf, the question would remain open as to whether the school would not be entitled to hire the other candidate. The first candidate would nonetheless have grounds to file a complaint, and the validity of the school regulation would still be put into question.

The right not to be discriminated against on religious grounds at work certainly implies that any employee is free from any religious-based constraint. A differential school regulation for Muslim and non-Muslim female teachers regarding the wearing of scarves would not stand the test of objectivity before the Ombud. The strong Islamic tendency and educational purpose of the school would be insufficient as an objective justification given that, amongst other things, this is not a religious institution.

(2) Outcome of this case pursuant to the provisions of the Gender Equality Act.

Pursuant to the provisions of the Gender Equality Act, reasonable justification may justify indirect gender discrimination. However in this case and as summarised above, there would hardly be any valid reasons for not hiring the female teacher, and at any rate the regulation regarding the clothing of female teachers would be in contravention with the terms of the Gender Equality Law.

7. How would you balance these conflicting basic human rights: the freedom of religion and the prohibition of discrimination.

Freedom of religion in Norway implies that individuals and religious organisations /institutions or communities may exercise their right to manifest their faith, or their ethical belief which includes the absence of religious faith. Although Norway is has a State Church (Luther Protestantism), freedom of religion for all organised religious faiths/organisations or ethical belief communities is a fundamental cornerstone of the country. This right to manifest one's religion has its limitations in certain spheres. The working sector is typically secular. However allowances to the secular feature of the working sector are being made in order to avoid discrimination at work. Certain forms of individual manifestation of one's faith are being permitted at work to the extent that they are not obstructive, for instance the right to wear a headscarf, or the right to use a room for prayer. Other features at the workplace may also have to be adjusted in order to avoid discrimination, for instance the kind of food that is being served. However there are limits to the employer's duties to adjust the working environment for individuals' religious needs. Schools constitute a typical platform where many aspects of freedom of religion and non-discrimination meet. The Private School Law specifies that employees are subject to the same treatment as employees in the public teaching sector. This is a reminder, when it comes to employment conditions, of where the limit is set. On the other hand within a religious community/institution, freedom of religion is given a free rein while prohibition against discrimination is limited.

Slovakia

National Centre for Human Rights

1. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not.

This case will fall within the scope of the Slovak anti-discrimination law.

The Constitution of the Slovak Republic represents the framework for and basis of all other laws, no law can be in conflict with the Constitution. The general constitutional principle of prohibition of discrimination in the

Slovak legal order is stated in Art. 12 par. 2 of the Constitution, that stipulates:

> *"Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favoured on any of these grounds."*

The freedom of religion and belief is guaranteed by Article 24 of the Constitution. This fundamental right is regulated in more detail in Act. Nr. 308/1991 Coll. on freedom of religious faith and the position of churches and religious societies. An individual may rely on its provisions before a national court.

According to the cited Article freedom of thought, conscience, religion and belief shall be guaranteed. This right shall include the right to change religion or belief and the right to refrain from a religious affiliation. Everyone shall have the right to express his or her mind publicly.

Everyone shall have the right to manifest freely his or her religion or belief either alone or in association with others, privately or publicly, in worship, religious acts, maintaining ceremonies or participating in teaching.

With regard to registered churches in Slovakia, churches and ecclesiastical communities shall administer their own affairs themselves; in particular, they shall establish their bodies, appoint clerics, provide for theological education and establish religious orders and other clerical institutions independent from the state authorities.

The exercise of rights under paragraphs 1 to 3 may be restricted only by a law, if it is regarding a measure necessary in a democratic society for the protection of public order, health and morals or for the protection of the rights and freedoms of others.

The legal status of churches officially registered in Slovakia is regulated by the Act Nr. 308/1991 Coll. on freedom of religious faith and the position of churches and religious societies as amended by Act No. 394/2000 Coll.

When professing a religion or belief other fundamental rights and freedoms of citizens must not be restricted, particularly the right to education, the right to choose a profession and appropriate training and the right to access to information (§ 2).

According to § 6 of the Act Nr. 365/2004Coll. on Equal treatment in Certain Areas and Protection against Discrimination (the "Anti-discrimination Act") in conformity with the principle of equal treatment, any discrimination shall be prohibited in employment relations, similar legal relations and related legal relations on grounds of sex, **religion or belief**, racial, national or ethnic origin, disability, age and sexual orientation.

2. Which court, organisation, instance would be competent?

In an employment relationship an employee has the right to submit a complaint to the employer in connection with the infringement of the principle of equal treatment stated in paragraphs 1 to 2; the employer shall be obliged to respond to such a complaint without undue delay, perform retrieval ("retrieval" in this context means cessation of the wrongful conduct), abstain from such conduct and eliminate the consequences thereof.

An employee who considers themselves wronged in their rights or interests protected by law because the principle of equal treatment or the conditions stated in paragraph 1 and 2 of the Labour Code have not been applied to them may go before a court and seek legal protection provided for under the Anti-discrimination Act.

Every person who considers themselves wronged in their rights or interests protected by law and/or freedoms because the principle of equal treatment has not been applied to them may according to § 9 of the Anti-discrimination Act pursue their claims by judicial process. They may, in particular, 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. The amount of non-pecuniary damages in cash shall be determined by the court, taking account of the extent of non-pecuniary damage and all underlying circumstances.
(level of the court: competent district court)

Other institutions competent to deal with a case of an alleged discrimination in employment are trade unions, labour inspectorates or a national specialised body – the Slovak National Centre for Human Rights

In Slovakia the **Slovak National Centre for Human Rights** provides legal assistance to victims of discrimination. The Centre prepares and publishes an expert opinion in a concrete case, provides information on relevant legal regulations and is entitled to represent parties

in the proceedings concerning violation of the principle of equal treatment before a court.

3. Which ground(s) would apply here? E.g. religion, gender. If both please explain how you would approach the analysis.
The grounds listed in § 6 of the Anti-discrimination Act, the ground in § 13 of the Labour Code and other special laws in employment.

In accordance with Art. 6 of the Anti-discrimination Act in conformity with the principle of equal treatment, any discrimination shall be prohibited in employment relations, similar legal relations and related legal relations on grounds of sex, religion or belief, racial, national or ethnic origin, disability, age and sexual orientation.

In labour relations the employer has the obligation to treat employees in compliance with the principle of equal treatment. In conformity with the principle of equal treatment, any discrimination shall be prohibited also on grounds of marital and family status, colour, language, political and other opinion, trade union involvement, ethnic or social origin, property, lineage or other status (Art. 13 par. 1 and 2 of the Labour Code).

In a case of multiple discrimination the Centre would analyse both grounds of discrimination separately or together depending on the character and circumstances of a case. Theoretically in this case the Centre would consider it from the point of view of multiple discrimination on grounds of gender and religion.[23]

4. Would this constitute direct or indirect discrimination?
With regard to information provided in the above case the Centre came to the conclusion that according to the Slovak anti-discrimination law the conduct described above may be considered as direct discrimination of a complainant on the grounds of religion or belief, because a complainant has been treated less favourably than another person.

In the case above the Muslim woman was deprived of an exemption from a general school regulation enabling non-Muslim women at their request to not wear a headscarf. We consider the school regulation, forcing female personnel to cover their body, as discriminatory because the order to wear a headscarf to all Muslim women at the school did not take into account the will of the woman in question.

By analysing "Case 2" the Centre has taken into consideration the Slovak anti-discrimination legislation (The Race Directive and the Employment Directive have been implemented into the Slovak legal order by the Anti-discrimination Act), the jurisdiction of the Constitutional Court of the Slovak Republic[24] and the jurisdiction of the European Court of Human Rights.[25]

5. Does an exception as mentioned in Article 4 (2) of Directive 2000/78/EC exist in your country and would it apply in this case?
The exception mentioned in Art. 4 (2) of the Directive 2000/78/EC is permissible according to § 8 (2) of the Anti-discrimination Act.

In the case of registered churches, religious societies and other legal entities whose activities are based on religion or belief,

[23] In conjunction with multiple discrimination we have taken into account the Article by ***Fredman, S.:*** **Double trouble: multiple discrimination and EU law,** European Anti- Discrimination Law Review, Issue 2, October 2005, s. 14 *("...This led (US) courts to hold that multiple discrimination should be restricted to a combination of only two of the grounds. On this analysis, only race and gender can be addressed, the impact of sexual orientation, religion, disability or age are ignored. The result is both artificial and paradoxical..."*

[24] Decision of the Constitutional Court of the Slovak Republic Nr. **III. ÚS 64/2000** from 31.1.2001, published in the Collection of Decisions of the Constitutional Court 2001, p. 181-182. The Constitutional Court expressed the legal opinion: *"...although the churches and religious associations are entitled to exercise their rights independently from state authorities, concurrently they have to respect the legal order of the state if the activities in question are performed within the framework of a civil law relations, an employment relationship or other related legal relations."*
Provided the Muslim woman was employed at school on a basis of a valid employment contract, the employer, although a representative of a Muslim community, has a legal obligation to respect the legal order prohibiting discrimination in employment on the ground of religion or belief.

[25] In the Case Leyla Şahin v. Turkey from 10.11.20005 the European Court of Human Rights decided there had been no violation of Art. 9 of the Convention. The Court reiterated that the freedom of thought, conscience and religion in Art. 9 entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion. …While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares….In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected… it requires the State to ensure mutual tolerance between opposing groups…. the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other… .There must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it…

differences of treatment based on age, sex, religion or belief and ascertainment of sexual orientation shall not constitute discrimination where they are related to employment by or to carrying out activities for such organisations. Registered churches, religious societies and other legal entities whose activities are based on religion or belief may require the individuals who are employed by them or carry out activities for them to act in conformity with their religion or belief and with the principles of their religion or belief.

We do not think that the exception is applicable in this situation.

6. If you find this case would lead to direct or indirect discrimination, would there be an objective justification?
Provided the case would be defined as a **direct discrimination** there would be no objective justification (§2(3) of the Anti-discrimination Act), but §8(2) has to be taken into account, too.

Art. 2 par. 3 of the Anti-discrimination Act defines direct discrimination as any action or omission where one person is treated less favourably than another person is, has been or would be treated in a comparable situation.

Art. 8 par. 2 stipulates in the case of registered churches, religious societies[26] and other legal entities whose activities are based on religion or belief, differences of treatment based on age, sex, religion or belief and ascertainment of sexual orientation shall not constitute discrimination where they are related to employment by or to carrying out activities for such organisations. Registered churches, religious societies and other legal entities whose activities are based on religion or belief may require the individuals who are employed by them or carry out activities for them to act in conformity with their religion or belief and with the principles of their religion or belief.

In this case the Centre came to the conclusion that the conduct in question may be considered as direct discrimination.

7. How would you balance these conflicting basic human rights: the freedom of religion and the prohibition of discrimination.
With regard to the circumstances of a case, the evidence submitted and the social situation in the country, a fair balance between the two rights at stake shall be reached.

Freedom of religion and belief is very important in a democratic society. Religious associations are entitled to take care and observe religious and clerical traditions.

On the other hand everyone shall have the right to manifest freely his or her religion or belief either alone or in association with others, privately or publicly.

A religious institution has to accept the will of its members not to manifest their religion publicly. In “Case 2” it is the right of a Muslim woman to decide not to wear a headscarf.

Sweden

Ombudsman against Ethnic Discrimination

1. Does the case fall within the scope of anti discrimination law in you country? Please explain how or why not.
Yes, it falls under the legislation that deals with discrimination in the labour market as she is applying for an ordinary job at the school, which in turn is regarded as any other workplace in the country. But in the light of the jurisprudence it is doubtful it would succeed. This is due to the fact that there is only one case of discrimination on grounds of ethnicity and religion that has succeeded in the labour tribunal out of around 20.

2. Which court, organisation, instance would be competent?
The Labour Tribunal.

3. Which ground(s) would apply here? E.g. religion, gender. If both please explain how you would approach the analysis.
Religion and gender: it is not a prerequisite for the teaching as such to follow the dress-code the school is demanding, therefore it is discrimination on grounds of religion; and the dress-code is specifically targeting women, hence discrimination on grounds of gender.

4. Would this constitute direct or indirect discrimination?
Indirect, as it is a seemingly “neutral criteria” that is mostly targeting non-believers. Direct from the fact that you need to ask for exemption from the rule, it only targets women and it targets her on the fact that she is a Muslim.

5. Does an exception as mentioned in Article 4 (2) of Directive 2000/78/EC exist in your country and would it apply in this case?
No, this exemption is not incorporated into Swedish law.

6. If you find this case would lead to direct or indirect discrimination, would there be an objective justification?
Maybe if the school was strictly teaching religious matters and the teacher was

[26] groups…. the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other… .There must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it…

supposed to perform some kind of sermon or other strictly religious activity or the teacher in some other way could be regarded as someone close to the clergy.

7. How would you balance these conflicting basic human rights: the freedom of religion and the prohibition of discrimination.

The freedom of religion may not encroach upon the prohibition of discrimination other than in rare cases, as in situations described under 6.

Annex 3
Case study on positive action

Austria

Ombud for Equal Treatment

1. Would the Arts foundation advertisement or the competition fall within the scope of anti-discrimination law in your country? Would competitions run by a public authority be regulated by your anti-discrimination law? Would the advertisement or competition constitute direct or indirect racial discrimination? Would it make any difference if the organisation running the competition was from the private sector?

Neither the Austrian Equal Treatment Act nor the laws adopted by the nine federal provinces in implementation of the Racial Equality Directive are explicit in this regard. Furthermore neither the Courts nor the Equal Treatment Commission have had to deal with similar matters yet. Consequently the following analysis remains rather vague and speculative.

Under the condition that the Art Foundation is a public authority established on the federal level, the Austrian Equal Treatment Act (ETA) would in principle be the applicable law. In a second step one has to consider whether a competition in the literature sector is covered by the scope of the ETA.

Two areas come into consideration, applying the ETA on our test case:

One could argue that the competition falls within part III of the ETA, regulating (on the federal level) those areas, which are not associated with employment and occupation – titled "anti-racism". Sec 30 no 4 ETA would deserve in regard to our case a deeper look; it regulates access to and supply of goods and services, available to the public, including housing. Unfortunately there were not yet enough cases decided which would allow us at this point to define "goods" and "services" in a more concrete manner. In the following paragraph, we summarize the existing literature and case law to sec 30 no 4 ETA in order to illustrate how unfamiliar and undeveloped this area of the ETA still is.

Senate III of the Equal Treatment Commission confirmed the applicability of sec 30 no 4 ETA in regard to access to a courthouse, to a pastry shop[27], to the rental of an apartment [28] and one in regard to the service in a snack bar[29]. Pursuant to our knowledge, there was as yet only one judicial case decided in regard to sec 30 no 4 ETA. It concerned a case of direct discrimination and harassment on grounds of ethnic origin in a clothing store.

[27] GBK III/2
[28] GBK III/3
[29] GBK III/4.

The explanatory comments to the relevant provision of the government bill to the ETA are very brief and not at all relevant for our case. To keep things short, it is nearly impossible to come to a final conclusion about the scope of "goods and services" at this stage, where there exists hardly any case law and also only very few profound convincing academic arguments. Looking into part II of the ETA might bring us more satisfactory results.

One could argue that the competition falls within the scope of part II of the ETA establishing the principle of equal treatment in employment with regard to ethnic origin, religion, belief, age and sexual orientation, in particular under sec 18 no 3 ETA, regulating the conditions for access to self-employment. *Rebhan* argues that this is the case if a measure intends to regulate access to the market and stresses that this will in any case apply to acts of the state, in regard to the conditions of access but as well in regard to the conditions in order to exercise a certain profession. *"Concerning acts of companies or private persons, this will only apply where contracts form a precondition for a longer self-occupation, as e.g. a franchise contract."* In our case one might argue that the competition and subsequent publication of the winning short stories grant access to a career as a (self–employed) poet. We consider this argument quite convincing, in so far as making a living as a poet and being considered as such in the publishing industry very much depends on whether the person has already won a prize or whether somebody else has already considered his/her work worth publishing.

If one comes to the conclusion that the competition falls within the scope of the ETA, the exclusion of all applicants who have no African or Asian background might be an act of direct discrimination on the ground of ethnic origin in access to self-employment pursuant to sec 18 no 3 ETA or in access to or supply of goods and services according to sec 31 para 1 no 4 ETA.

In a third step, the question to be analysed must be whether the discrimination is justified by any exceptions provided by law (please read more under question 3).

2. Which Court, Organisation would be competent (please specify the level of the court in the court system)?

The refused applicants can lodge their complaints before the Equal Treatment Commission.

In any case it is also possible to sue the Arts foundation for compensation of damages before the courts. If the applicant argues on the basis of part II ETA, the labour court would be competent; if part III ETA is the basis then the applicant has to take legal action before the

civil court. The claimant has the choice of 1) going first to the Commission and then to the court or 2) lodging proceedings before the court and the Commission at the same time or 3) going to only one of the two.

3. If the advertisement or competition does constitute discrimination, in your country do you have any positive actions provisions under anti-discrimination law? And if so what is the test for positive action measures? Do you have a test of proportionality of the measures and whether the means used meets the need? Do the facts here satisfy the test in your country?
Both part II and part III of the ETA foresee exceptions to the principle of Equal Treatment when implementing positive measures.

Sec 22 ETA (part II ETA) regulates the implementation of positive measures with regard to all grounds covered by Part II of the ETA (ethnic origin, belief, religion, age, sexual orientation in employment). It holds:

> *"Specific measures foreseen in laws, decrees, in collective agreements or in general regulations of the employer for the promotion of equal opportunities in professional life compensating or preventing discrimination on one of the grounds listed in § 17 shall not be considered as discrimination in terms of the law".*

The wording of sec 22 ETA was – presumably unintentionally – formulated very narrowly. Our test case would only fall under this provision if the competition was either foreseen by law, by a decree, by a collective agreement or by general regulations of an employer. Therefore we think that the case would not satisfy the test in Sec 22 ETA and would be qualified as discrimination.

Contrary to sec 22 ETA, the formulation of Part III sec 33 of the ETA is formulated much more broadly. It holds:

> *"Measures foreseen in laws, decrees or in any other form for the promotion of equal opportunities, preventing or compensating for discrimination on ground of ethnic origin shall not be considered to be discrimination according to this law."*

If we therefore argue that the case falls under Part III ETA it presumably would not be qualified as discrimination.

4. In your country, how would the provision in article 5 of the Racial Equality Directive (which permits positive action by Member states) be applied to the facts and would that affect the lawfulness of the competition?
We do not believe that Art 5 of the Racial Equality Directive affects the legitimacy of our test case. The Austrian legislator used the option for foreseeing (under certain conditions) positive measures in Austrian Equal Treatment Law. There is no possibility for the state, after having transferred Art. 5 into national law, to ignore the corresponding regulations and refer to a non-obligatory part of a directive.

5. In your country would the relevant court or organisation consider other international instruments which contain provision on positive actions, such as article 1 (4) of the ICERD and how would those provision to be applied?
In Austria only very few international treaties are directly applicable; this is e.g. the case with regard to the European Convention of Human Rights. In all other cases the regulations of the convention have to be transferred into Austrian law. This is also the case with regard to the International Convention on the Elimination of all forms of Racial Discrimination (ICERD). Nevertheless public authorities have to refer to the international treaties when interpreting national law.

Belgium

Centre for Equal Opportunities and Opposition to Racism

1. Would the Arts Foundation's advertisement or the competition fall within the scope of anti-discrimination law in your country? Would competitions being run by a public authority be regulated by your anti-discrimination law? Would the advertisement or competition constitute direct or indirect racial discrimination? Would it make any difference if the organisation running the competition was from the private sector?
Yes.

Preliminary remarks:
Belgium is a federal state where the powers and responsibilities are divided between the federal government, 3 Communities and 3 Regions. Each of them has the competence – or even sometimes the legal duty - to provide, within the reach of their powers, anti-discrimination legislation.

The competence of culture lies with the Communities. This is the reason why the French, Flemish and German communities have their own cultural system and legislation concerning culture. In this case, we presume that the Arts Foundation is a national organisation.

The Arts Foundation's advertisement or the competition would fall within the scope of the Act of 30 July 1981 on the punishment of certain acts motivated by racism or xenophobia and the Act of 25 February 2003 pertaining to the combat of discrimination.

Act of 25 February 2003 - civil provision art. 2 § 4:

> *Any and all forms of direct or indirect discrimination is prohibited with respect to the access to and participation in, as*

well as any and all other exercise of an economic, social, cultural or political activity accessible to the public.

Act of 30 July 1981 - criminal provision:
If competitions are run by a public authority, they would be regulated by Art. 4 which runs as follows:

"Any civil servant or public official, any bearer or agent or public authority or public power, who in the exercise of his duties commits discrimination against a person on account of his so-called race, colour, descent, origin or nationality, or who arbitrarily denies any person the exercise of a right or liberty that he may claim, shall be punished by a prison sentence of two months to two years."

But if competitions are run by a private firm, they would be regulated by Art. 2 which runs as follows:

"Whoever, in supplying or offering to supply a service, a good or the enjoyment of it, commits discrimination against a person on account of his so-called race, colour, descent, origin, or nationality shall be punished by a prison sentence of one month to one year and by a fine of fifty francs to one thousand francs, or by one of these punishments alone.

The same punishments shall apply when the discrimination is committed against a group, a community or the members of it, on account of the race, colour, descent, origin, or nationality of its members, or some of them."

The advertisement or competition could be considered direct racial discrimination.

Act of 30 July 1981- criminal provision:
Art. 1 gives a general definition:

"By "discrimination" in this Act is meant any form of distinction, exclusion, restriction or preference, whose purpose or whose result is or could be to destroy, compromise or limit the equal recognition, enjoyment or exercise of human rights and the fundamental freedoms on a political, economic, social or cultural level, or in any other area of social life".

Act of 25 February 2003 - civil provision:
Art. 1 § 1 defines direct discrimination as follows:

"Direct discrimination occurs if a difference in treatment that is not objectively or reasonably justified is directly based on sex, a so-called race, skin colour, ancestry, origin or nationality, sexual orientation, marital status, birth, fortune, age, beliefs or philosophy of life, current and future state of health, a disability or physical characteristic.

2. Which court, organisation would be competent? (please specify the level of the court in the court system)
Criminal action: controversial matter.
People can take legal action by asking the criminal court to apply the anti-racism law. But this law deals with intent, the explicit intention to discriminate by refusing the other candidates because of their race, nationality or origin and in this case the Arts Foundation stressed "that the intention of the competition is to increase the number of African and Asian writers' works being published". For us, it would be a difficult position because the burden of proof is on the claimant; the best approach would be civil action.

Civil action: Act of 25 February 2003 pertaining to the combat of discrimination (art.19 § 1):

" At the request of the victim of discrimination or of one of the groups referred to in Article 31, the president of the court of first instance or, depending on the nature of the act, the president of the industrial tribunal or the commercial court, shall rule on the existence of an act that falls even under penal law, whereby the provisions of this act are violated, and shall order the cessation thereof.

The president of the court can order the lifting of the cessation as soon as proof is provided that the violation of this act has been terminated."

The State Council: people can file a complaint asking this Council to cancel this rule.

Mediation: According to the Centre, this case could be solved through mediation. In fact, the aim is to "*decrease disadvantage linked to racial and ethnic origin in the publishing industry*". The aim could be reached by other means without resulting in racial or ethnic exclusion. (see examples answer 5)

3. If the advertisement or competition does constitute discrimination, in your country do you have any positive action provisions under anti-discrimination law? And if so what is the test for positive action measures? Do you have a test of proportionality of the measure and whether the means used meets the need? Do the facts here satisfy the test in your country?
In Belgium any positive action provision falls under anti-discrimination law but in this law, which is currently being revised, there will be specific provisions regulating positive action.

Given that positive action is a system which derogates from equality principles, our Constitutional Court recognises in its Judgment of 9/94 the legality of positive action by a public authority under four strict conditions:

a) these measures are applied only in those cases when there is obvious inequality;

b) that ending this inequality has been stated by the legislator as an objective to promote;
c) these measures are temporary and must come to an end as soon as this objective is reached;
d) they don't unnecessarily restrain other people's rights;

The facts would not satisfy condition (d).

We have a test of proportionality of the measure and whether the means used meets the need. Our Constitutional Court elaborated three conditions to determine if a difference in treatment is objectively or reasonably justified:
a. Legitimacy test: is the goal of the measure legitimate (valid)? In this case, it seems that the Arts Foundation has a valid aim: '*to increase the number of Africans and Asian writers' works being published and decrease disadvantage linked to racial and ethnic origins in the publishing industry.'*
b. Relevance test: do the means that have been employed help to reach the set goals? We think this is not the case because one should also verify whether there are other, less radical means, possible. We would say that the Arts Foundation could reach the aim otherwise, with for example a 'priority system' that seems less radical.
c. Proportionality test: are the means that have been employed proportionate to the goal? It might be considered as disproportionate because this policy can prejudice the constitutional equality right and this policy might hence be considered as discrimination

4. In your country, how would the provision in article 5 of the Racial Equality Directive (which permits positive action by Member States) be applied to the facts and would that affect the lawfulness of the competition?
The planned reform of the Anti-discrimination Act aims to match more closely Directives 2000/43 and 2000/78 and would amongst other things contain provisions on positive action to allow private companies to set up such actions under specific conditions which are still to be defined.

The King shall define, by decree deliberated on in the Council of Ministers, the subsequent rules for the implementation of positive action.

5. In your country would the relevant court or organisation consider other international instruments which contain provisions on positive action, such as article 1(4) of the ICERD, and how would those provisions be applied to the facts?

The Anti-racism Act of July 30, 1981 constitutes the implementation of the International Convention Eliminating all forms of Racial Discrimination drawn up in New York on 1966

But so far there are no explicit provisions in the Anti-racism Act on positive action though some interpret this Act as implicitly recognising positive action. But this Act is currently undergoing reform (see 4).

In actual fact, most policies prefer to encourage diversity without exclusion.

There are interesting examples:
- The Belgian police developed a plan to diversify the origin of their applicants. The police launched a campaign to encourage the recruiting of Belgian people from different origins in collaboration with associations working with this target audience.

- A Flemish decree has adopted a priority system for Flemish schools aimed at certain groups whereby pupils belonging to these groups have priority to enrolment during a well-defined pre-period (max. 6 weeks) before the official enrolment. After the pre-period and during the official enrolment, the school must accept all pupils unless all the places are filled up.

Estonia

Office of the Chancellor of Justice

1. Would the Arts Foundation's advertisement or the competition fall within the scope of anti-discrimination law in your country?

The advertisement would fall within the scope of the advertising law, but not the employment provisions as they only relate to direct or indirect discrimination in employment or when applying for employment which is not the case here. The Estonian Advertising Act stipulates:

> *„§ 5. Offensive advertising*
>
> *(1) An advertisement is offensive if it is contrary to good morals and customs, calls on people to act unlawfully or to violate prevailing standards of decency, or if it contains such activities. Offensive advertising is prohibited.*
>
> *(2) An advertisement is considered offensive in particular if the advertisement:*
>
> *presents, incites or endorses discrimination on the grounds of nationality, race, colour, sex, age, language, origin, religion, political or other opinion, and financial or social status or other circumstances; […]*
>
> *§ 23[2]. Violation of general requirements for advertising*
>
> *(1) Misleading, offensive, denigrating or surreptitious advertising, advertising which violates the inviolability of private life or ownership, and violation of the*

requirements for comparative advertising or advertising directed at children is punishable by a fine of up to 300 fine units.

(2) The same act, if committed by a legal person, is punishable by a fine of up to 50 000 kroons."

1a. Would competitions being run by a public authority be regulated by your anti-discrimination law?
All provisions of the Advertising Act are obligatory for public authorities as well.

1b. Would the advertisement or competition constitute direct or indirect racial discrimination?
The advertisement would be unlawful direct discrimination.

1c. Would it make any difference if the organisation running the competition was from the private sector?
No.

2. Which court, organisation would be competent? (please specify the level of the court in the court system)
1) Within the competence of administrative courts of Estonia falls the adjudication of disputes in public law. Everyone has the right of recourse to the administrative court if he/she feels that a public authority has broken the law.

2) Also, everyone has the right of recourse to the Chancellor of Justice:
- in order to have his or her rights protected by way of filing a petition to request verification as to whether or not a state agency, local government agency or body, legal person in public law, natural person or legal persons in private law performing public duties adheres to the principles of observance of fundamental rights and freedoms and to the principles of sound administration; or
- for conducting a conciliation procedure if he or she finds that a natural person or a legal person in private law has discriminated against him or her on the basis of:1) sex; 2) race; 3) nationality (ethnic origin); 4) colour; 5) language; 6) origin; 7) religion or religious beliefs; 8) political or other opinion; 9) property or social status; 10) age; 11) disability; 12) sexual orientation, or 13) other attributes specified by law.

3. If the advertisement or competition does constitute discrimination, in your country do you have any positive action provisions under anti-discrimination law?
The Constitution of the Republic of Estonia stipulates:

"Everyone is equal before the law. No one shall be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds." (§ 12)

The supreme court of Estonia has in a judgment of 03.04.2002 (3-4-1-2-02) said that according to this principle not every inequality falls under, or violates, the equality of treatment requirement.

According to the Constitution and judgment of the Supreme Court positive action measures are possible, but only where there is reasonable cause.

3a. And if so what is the test for positive action measures?
No law describes special tests for positive action measures.

3b. Do you have a test of proportionality of the measure and whether the means used meets the need?
The Constitution of the Republic of Estonia stipulates:

"Rights and freedoms may be restricted only in accordance with the Constitution. Such restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted."(§ 11).

The Supreme Court of Estonia has on 06.03.2002 in judgment 3-4-1-1-02 explained that the court will examine conformity with the principle of proportionality consecutively on three levels: first the suitability of the measure, then the necessity and then, if necessary, the proportionality in a strict sense i.e. whether it is reasonable.

3c. Do the facts here satisfy the test in your country?
Since Estonia has not as yet described the situation concerning Africans or Asians it seems highly probable that the facts would not satisfy the test and justify unequal treatment.

4. In your country, how would the provision in article 5 of the Race Directive (which permits positive action by Member States) be applied to the facts and would that affect the lawfulness of the competition?
As already explained in answer 3, the positive actions and the inequality are, according to the Estonian constitution, possible, given reasonable cause.

5. In your country would the relevant court or organisation consider other international instruments which contain provisions on positive action, such as article 1(4) of the ICERD, and how would those provisions be applied to the facts?
The Constitution of the Republic of Estonia stipulates:

- "Generally recognised principles and rules of international law are an inseparable part of the Estonian legal system." (§ 3);

- "If laws or other legislation of Estonia are in conflict with international treaties

ratified by the Riigikogu, the provisions of the international treaty shall apply." (§ 123).

The United Nations International Convention on the Elimination of All Forms of Racial Discrimination came in to force for Estonia on 19.01.1992.

Estonian courts, the Chancellor of Justice and all other public authorities are obligated to consider all principles of the United Nations International Convention on the Elimination of All Forms of Racial Discrimination.

Great Britain

Commission for Racial Equality

1. Would the Arts Foundation's advertisement or the competition fall within the scope of anti-discrimination law in your country? Would competitions being run by a public authority be regulated by your anti-discrimination law? Would the advertisement or competition constitute direct or indirect racial discrimination? Would it make any difference if the organisation running the competition was from the private sector?

The advertisement and competition would on its face fall within the anti-discrimination legislation of the UK.

Section 20 of the Race Relations Act 1976 (RRA) states that it is unlawful for any person concerned with the provision of goods, facilities and services to the public to discriminate against a person who seeks to obtain those goods, facilities or services. The competition would most probably be interpreted as falling within the bounds of section 20.

Further, section 29 of the RRA makes it unlawful to publish any advertisement which indicates an intention to discriminate, whether under section 19B or 20. Interestingly, it is only the Commission for Racial Equality that can proceed with a claim of a discriminatory advertisement, not a member of the public (it would be interesting to look at this in relation to other countries).

Alternatively, as the Arts Foundation is a public authority, section 19B of the Race Relations Act 1976 (RRA) makes it unlawful for any public authority in carrying out any of its functions to perform an act of discrimination. The competition would fall within the functions of a public authority. However section 19B(6) states that section 19B is only engaged if no other provision is engaged so it would probably be unnecessary to rely on it.

The act of discrimination here would be direct discrimination under section 1(1(a) of the RRA as only those persons of African or Asian background can enter the competition.

It would not make any difference in the UK whether the organisation running the competition was from the private sector as, although section 19B only applies to public authorities, section 20 applies to any organisation (public or private) providing services to the public. Further, section 29 applies to any advertisement, whether it is placed by a public or private organisation.

2. Which court, organisation would be competent? (please specify the level of the court in the court system)

Actions involving the provision of goods, facilities or services and discriminatory advertisements[30] must be commenced in the county court.

Alternatively, if it was decided that section 20 did not apply (which is unlikely), a claim could be commenced under section 19B, but that would need to be commenced in the High Court. However, the discriminatory advert claim would still need to be brought in the county court and only by the CRE.

3. If the advertisement or competition does constitute discrimination, in your country do you have any positive action provisions under anti-discrimination law? And if so what is the test for positive action measures? Do you have a test of proportionality of the measure and whether the means used meets the need? Do the facts here satisfy the test in your country?

There are positive action provisions in the UK under sections 35 to 38 of the RRA which have been in force since the Act commenced in 1976. These measures are lawful exceptions to discrimination to provide persons of a particular racial group facilities and services to meet their special needs or with opportunities to better compete with other racial groups in employment situations.

There are three main categories of positive action measures which are lawful under the RRA:

- Section 35 permits the affording of facilities or services to meet the special needs of persons of that group in regard to their "educational, training or welfare or any ancillary benefits";

- Section 37 permits in relation to employment affording persons training or encouraging them to apply for work where there is an under-representation of persons of a particular racial group in Great Britain or an area of Great Britain;

- Section 38 permits the same as section 37, but focuses on whether there is an under-representation within a particular establishment.

[30] Under section 63 of the RRA.

In the present facts sections 37 and 38 have no application as this is not an employment situation. Although the indirect goal of the Pulsart programme may be to increase the number of African and Asian writers in employment, the competition is not a measure relating to particular work as required by sections 37 and 38.

The only issue is therefore whether the section 35 exception applies. This section is different from sections 37 and 38 as it focuses on the special needs of particular racial groups in relation to education, training or welfare. An example could be a charity home providing welfare and ancillary services to elderly Bangladeshis to meet their special language, dietary and religious needs.

It is unlikely that the running of the competition would be interpreted as being a measure to meet the special educational, training or welfare needs of African and Asian communities within the ordinary meaning of those words.

In addition, a court is also likely to apply a test of proportionality in determining whether the means used meet the stated aim. The evidence was that the publishing industry in general (whether it is writers or otherwise) is not ethnically diverse and that the numbers of ethnic minorities on publishers' lists is not high. It is unlikely that this evidence would be specific enough as it does not focus on the particular racial groups to which the competition is restricted (African and Asians). It is therefore unlikely that it can be shown that this measure is necessary and proportionate.

4. In your country, how would the provision in article 5 of the Racial Equality Directive (which permits positive action by Member States) be applied to the facts and would that affect the lawfulness of the competition?
The provisions of the RRA regarding positive action must be interpreted consistently with positive action measures under the EU Racial Equality Directive. This provides under article 5 that:

> *"…the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin."*

However as this provision is permissive and not compulsory as well as being much broader in scope than the positive action provisions under the RRA, article 5 does not itself assist in the interpretation of section 35 of the RRA. Case law at ECJ level in relation to positive action with respect to gender would however be of assistance as it establishes that positive action measures must be for a legitimate aim and proportionate. It is likely that section 35 would be interpreted consistently with that case law and this would probably lead to the same result of the competition being unlawful as not complying with section 35 of the RRA.

5. In your country would the relevant court or organisation consider other international instruments which contain provisions on positive action, such as article 1(4) of the ICERD, and how would those provisions be applied to the facts?
The County Court or the High Court could consider international instruments which contain provisions on positive action such as article 1(4) of the UN Convention on the Elimination of Racial Discrimination. It is important to bear in mind that the UK domestic law will be sought to be interpreted consistently with obligations under international treaties, however they will generally not be binding on domestic courts. Obligations under international treaties are binding on governments but not on parliament that enacts law.

Article 1(4) could be referred to but is, similarly to article 5 of the EU Race Directive, permissive and broader in scope than section 35 of the RRA. It emphasises the need for proportionality in positive action measures in that they do not lead to separate rights for different racial groups and are not continued after the objective for which they were taken has been achieved.

Similarly to article 5 of the EU Racial Equality Directive, article 1(4) of ICERD would not on the present facts add much in the specific interpretation of section 35 of the RRA, however interpreting section 35 consistently with article 1(4) of ICERD would mean it is likely the competition is unlawful, as the competition does not fall within the scope of allowed positive action and is likely to be disproportionate.

Greece

Greek ombudsman

1. Would the Arts Foundation's advertisement or the competition fall within the scope of anti-discrimination law in your country?
Yes. Law 3304/2005. Although it does not fall within the scope of access to goods and services, we may consider it as related to access to employment.

1a. Would competitions being run by a public authority be regulated by your anti-discrimination law? Would the advertisement or competition constitute direct or indirect racial discrimination? Would it make any difference if the organisation running the competition was from the private sector?
Both public and private entities fall within the scope of Greece's anti-discrimination law.

The Arts Foundation's advertisement and the competition itself directly discriminate against non-African and non-Asian writers as it excludes them from participating. However, the advertisement and competition fall within the scope of article 6 of Law 3304/2005 according to which positive action to redress a discriminatory imbalance is permitted.

It would make a difference only, in terms of which public authority or court would be competent.

2. Which court, organisation would be competent? (please specify the level of the court in the court system)
The Supreme Administrative Court. The Greek Ombudsman (non-binding decisions).

3. If the advertisement or competition does constitute discrimination, in your country do you have any positive action provisions under anti-discrimination law? And if so what is the test for positive action measures? Do you have a test of proportionality of the measure and whether the means used meets the need? Do the facts here satisfy the test in your country?
The advertisement and competition fall within the scope of article 6 of Law 3304/2005 according to which positive action to redress a discriminatory imbalance is permitted.

A test for positive action is not specified in Law 3304/2006.

In the Greek legal system the application of the principle of proportionality could be applied as an interpretive criterion.

The competition seems to be justified, as having a legitimate aim (redressing the discriminatory imbalance) and as being an appropriate and necessary means to achieving that aim.

4. In your country, how would the provision in article 5 of the Racial Equality Directive (which permits positive action by Member States) be applied to the facts and would that affect the lawfulness of the competition?
The provision in article 5 of the Racial Equality Directive is reflected in article 6 of Greek Law 3304/2005, and thus wouldn't affect the lawfulness of the competition.

5. In your country would the relevant court or organisation consider other international instruments which contain provisions on positive action, such as article 1(4) of the ICERD, and how would those provisions be applied to the acts?
According to the Greek constitution a supra-national law, such as article 1(4) of the United Nations International Convention on the Elimination of Racial Discrimination, has a superior binding effect in the Greek legal system.

Hungary

Equal Treatment Authority

1. Would the Arts Foundation's advertisement or the competition fall within the scope of anti-discrimination law in your country? Would competitions being run by a public authority be regulated by your anti-discrimination law? Would the advertisement or competition constitute direct or indirect racial discrimination? Would it make any difference if the organisation running the competition was from the private sector?
This case is within the scope of our Authority. Nationality and racial belonging are protected characteristics in Hungarian legislation and there appears to be a disadvantage. If the complainant possesses the characteristic and suffers the disadvantage the authority can start an investigation. The Equal Treatment Act does not directly regulate competitions but public authorities and even local governments and the state have to comply with the principle of equal treatment in every respect. The advertisement constitutes formal discrimination against people of white ethnic origin, but according to Hungarian rules it is a positive action. It would not be different because the private sector has to apply the principle of equal treatment if it is financed by the state.

2. Which court, organisation would be competent? (please specify the level of the court in the court system)
The client has the right to turn to the local civil court or the ETA. If the competition was advertised by a state authority the complainant can even turn to the Minorities Ombudsman.

3. If the advertisement or competition does constitute discrimination, in your country do you have any positive action provisions under anti-discrimination law? And if so what is the test for positive action measures? Do you have a test of proportionality of the measure and whether the means used meets the need? Do the facts here satisfy the test in your country?
In the Equal Treatment Act there are 3 conditions for positive actions, as follows: it has to be based on an act, or government decree, or a collective agreement, for a definite term, or definite conditions have to be met. The positive action shall not violate any basic rights, shall not provide unconditional advantage, and shall not exclude the consideration of individual circumstances. The answer of the last question of this group: Yes, they do, because the law on supporting NGOs provides these conditions.

4. In your country, how would the provision in article 5 of the Racial Equality Directive (which permits positive action by Member States) be applied to the facts and would that affect the lawfulness of the competition?
The government, when aiming for the elimination of inequality, has to meet the measures of positive actions as set forth in the Constitution, and without breaching the principle of equal treatment.

5. In your country would the relevant court or organisation consider other international instruments which contain provisions on positive action, such as article 1(4) of the United Nations International Convention on the Elimination of Racial, and how would those provisions be applied to the facts?
To support our decisions the provisions of international organisations e.g. UN agreements, charters, case law of the ECJ. are widely used and referred.

Hungary

Parliamentary Ombudsman

1. Would the Arts Foundation's advertisement or the competition fall within the scope of anti-discrimination law in your country? Would competitions being run by a public authority be regulated by your anti-discrimination law?
Yes, the scope of the Act on Equal Treatment and Promotion of Equal Opportunities (hereafter: AET) extends to all legal relationships of public foundations (except the question of membership). (paragraph 4. AET)

1a. Would the advertisement or competition constitute direct or indirect racial discrimination?
See point 3 below.

1b. Would it make any difference if the organisation running the competition was from the private sector?
No, the requirement of equal treatment also has to be fulfilled by those "*who make an offer or invite offers for conclusion of a contract to persons not defined in advance."* (paragraph 5 AET)

2. Which court, organisation would be competent? (please specify the level of the court in the court system)
The Equal Treatment Authority, the Parliamentary Commissioner for Civil Rights, county courts (these courts have exclusive jurisdiction in personal rights cases). Also the Parliamentary Commissioner for the Rights of National and Ethnic Minorities if in the hypothetical case the minority group ("residents of Fantasia from African or Asian background") were listed among the 13 national and ethnic minorities in the Act on Minorities (hereafter AM).

3. If the advertisement or competition does constitute discrimination, in your country do you have any positive action provisions under anti-discrimination law? And if so what is the test for positive action measures? Do you have a test of proportionality of the measure and whether the means used meets the need? Do the facts here satisfy the test in your country?
A.) If the hypothetical minority group falls within the personal scope of the AM, i.e. the 13 listed national and ethnic minorities, then the whole question belongs to the issue of the minority-protection system. The AM declares:

> *"A public foundation shall be established to help preserve the identity of minorities, foster and pass on their traditions, preserve and develop their mother tongues, preserve their intellectual and material monuments, and promote activities aimed at diminishing the cultural and political disadvantages which derive from the fact that they belong to minorities." (section 6 paragraph 55 AM)*

On the basis of this provision, two public foundations have been established, both with the aim of promoting the integration of national and ethnic minorities. These foundations permanently provide fellowships and scholarships in order to foster integration. They assist in publishing and distributing literary and other artistic works by members of the 13 minority groups listed. The competition set up by these public foundations with the intention of increasing the number of works by national and ethnic minority writers being published would not constitute discrimination.

B.) If the given minority group were composed of migrants or minorities not falling within the scope of the AM, the outcome would be different. In paragraph 11, the AET regulates the case of preferential treatment:

> *"(1) The action aimed at liquidation of unequal opportunities of a specified social group based on an objective consideration shall not qualify as infringement of the requirement for equal treatment provided that it is based on law or on a government decree issued upon authorization of law or a collective agreement and lasts for a determined period of time or until occurrence of a definite condition*
> *The action defined in Subsection (1) shall not infringe any fundamental right, shall not provide any unconditional preference, and shall not exclude consideration of individual aspects."*

In our opinion the advertisement would not pass this test. Even if it were based on law the additional requirements would not be met. The competition would allow unconditional preference and would exclude the consideration of individual aspects. In this case the advertisement would infringe the equal treatment provision.

The last two conditions of the cited article were taken from the case law of the European Court of Justice which developed these standards in gender relations and in regard of employment relationships (cases Marschall, Badeck). The Hungarian AET used these terms and extended them to all spheres (education, housing, services…) which, by narrowing the possibility of legal positive actions, may inspire us to reconsider this provision.

4. In your country, how would the provision in article 5 of the Racial Equality Directive (which permits positive action by Member States) be applied to the facts and would that affect the lawfulness of the competition?
The cited section of the AET (paragraph 11 AET) is the implementation of article 5 of the Racial Equality Directive.

5. In your country would the relevant court or organisation consider other international instruments which contain provisions on positive action, such as article 1(4) of the United Nations International Convention on the Elimination of Racial, and how would those provisions be applied to the facts?
The Constitution states in article 7 that:

> *"[t]he legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law."*

This means that Hungary undertook the obligation to incorporate international conventions, which then become part of the legal system. Courts could invoke the provisions of these incorporated conventions since they have the same status as domestic law. However, in reality, Hungarian courts are rather reluctant to apply international instruments, and they base their decisions mostly on "domestic law".

The Netherlands

Equal Treatment Commission

1. Would the Arts Foundation's advertisement or the competition fall within the scope of anti-discrimination law in your country?
The competition would fall under the Dutch Equal Treatment Act. Section 7(1) of the act says it shall be unlawful to discriminate, among other things, in offering or permitting access to goods or services, and in concluding, implementing or terminating agreements on the subject if such acts of discrimination are committed by the public service (section 7(1) (b)) or by institutions which are active, among other things, in the field of cultural affairs (section 7 (1) (c)). In the Netherlands a public authority for promoting the arts would probably fall under section 7(1)(c) since it is not something like, for example, a ministry or municipality. It would be a semi-public authority. Organising a writers' competition would be validated as offering goods or services.

The competition could probably also fall under section 6 of the Act, which says it shall be unlawful to discriminate, among other things, with regard to the conditions for and access to the liberal professions and opportunities to pursue the liberal professions or for development within them. The competition would fall under this section since the intention of the competition is, amongst other things, to increase the number of African and Asian writers' works being published.

This may be beyond the case, but if the prize for the competition would for example be a subsidy, one could imagine that the case could possibly fall under section 7a of the Dutch Equal Treatment Act. This section says that - without prejudice to section 7 of the act - it shall be unlawful to discriminate on the ground of race in social protection, including social security and social advantages.

1a. Would competitions being run by a public authority be regulated by your anti-discrimination law?
The Dutch Equal Treatment Act does not regulate treatment which follows from a purely governmental task (except for the sphere of employment and social protection). Often, public authorities, as well as semi-public institutions, have governmental tasks as well as other, private, tasks. E.g. in a prison, detaining the prisoners is a purely governmental task, but hiring the security is a private task. The government then takes part in society. Organising a writing competition cannot be seen as a purely governmental task and is thus regulated by the Dutch Equal Treatment Act, irrespective of whether the competition is organised by a public, semi-public or private authority.

1b. Would the advertisement or competition constitute direct or indirect racial discrimination? Would it make any difference if the organisation running the competition was from the private sector?
Under to section 1(b) of the Dutch Equal treatment, direct discrimination: discrimination between persons on the grounds of religion, belief, political opinion, nationality, race, sex, heterosexual or homosexual orientation or civil status. Under section 1(c) of this Act, indirect discrimination is discrimination on the grounds of other characteristics or behaviour than those referred to under 1 (b) resulting in direct discrimination. Since the advertisement indicated that the competition was only open to "residents of Fantasia from African or Asian background" it refers directly to the ground of race. According to the definition in the International Convention on the Elimination of All Forms of Racial Discrimination and in accordance with established case-law of the Dutch Supreme Court the term race must be interpreted broadly and includes: skin colour, descent, and national or ethnic origin. Therefore the competition constitutes direct racial discrimination. No different answer would be given in the case of an organisation from the private sector.

2. Which court, organisation would be competent? (please specify the level of the court in the court system)
The Dutch Equal Treatment Commission is competent and can give a non-binding opinion on this case. This procedure is without costs. Parties do not need to have a lawyer. A district court will also competent and can give a binding opinion on this case. For this procedure, legal charges must be paid. A lawyer is not obligatory.

3. If the advertisement or competition does constitute discrimination, in your country do you have any positive action provisions under anti-discrimination law? And if so what is the test for positive action measures? Do you have a test of proportionality of the measure and whether the means used meets the need? Do the facts here satisfy the test in your country?
Under to section 2(3) of the Dutch Equal Treatment Act the prohibition on discrimination contained in this Act shall not apply if the discrimination concerns a specific measure which has the aim of placing women or persons belonging to a particular ethnic or cultural minority group in a privileged position in order to eliminate or reduce *de facto* disadvantages in relation to the grounds of race or sex and the discrimination is reasonably proportionate to that aim. A comparable section exists for the ground of disability in the Dutch Act on Equal Treatment on the grounds of disability or chronic illness.

The Dutch Equal Treatment Commission's view is that (in the employment sphere) positive action policies on the grounds of race must be assessed as much as possible by applying the same ECJ tests that are applied to the ground of sex, with this difference that the Dutch Equal Treatment Commission is also bound by the norms of the International Convention on the Elimination of All Forms of Racial Discrimination, in particular section 2(2) of this Convention (CGB 19 April 1999, opinions 1999-31/32). Under section 2(2) of this Convention, States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

The Dutch Equal Treatment Commission has consistently held (see CGB 2 February 2004, opinion 2004-10 and CGB 31 March 2004, opinion 2004-36) that it follows from the case law of the ECJ that a positive action policy for women (in the employment sphere) must be tested by the following criteria:

- The disadvantaged situation of the group targeted by the positive action policy must have been proved to exist and must be related to the available labour supply.
- The arrangement must safeguard the objective assessment of the applications of all candidates, taking all criteria applying to each individual candidate into account.
- The discrimination must be reasonably proportionate to the aim. The positive action measure must be justifiable by the degree of disadvantage.

The Dutch Equal Treatment Commission has likewise consistently held that it follows from the case law of the ECJ that the strict test of the ECJ applies specifically to positive action policies in regard to access to employment or promotion, more particularly to the reservation of jobs, in which case the efforts are aimed at achieving fair proportional results (see CGB 25 June 1997, opinion 1997-77 and CGB 23 November 2005, opinion 2005-225). In the opinion of the ECJ, positive action aimed at setting right the inferior opportunities of women to gain access to the labour market and a career and aimed at improving their competitive position on the labour market may be tested less strictly.

The Dutch Equal Treatment Commission has not yet given an opinion on positive action in relation to the field of goods and services or self-employment. It is therefore difficult to tell what kind of test would be used. In the past, the Dutch Equal Treatment Commission has given opinions (regarding the ground of sex) on children's day care in the sphere of employment (see e.g. CGB 14 May 1996, opinions 1996-34 and 1996-35; CGB 28 May 1996, opinion 1996-44; these opinions can be found in Dutch on the CGB-site: www.cgb.nl). In these opinions the Dutch Equal Treatment Commission assessed children's day care as a term of employment. Children's day care could perhaps also be assessed in the sphere of goods and services. The Dutch Equal treatment Commission used in the cases mentioned above a less strict test then when dealing with cases of recruitment.

This was in line with the case law of the European Court of Justice (see e.g. ECJ 19 March 2002, *Lommers,* case C-476/99), which says that measures (in the employment sphere) which are aimed at creating equal chances, are less strictly tested than measures, which aim at guaranteeing equal outcomes.

Taking *Lommers* into account, the Dutch Equal Treatment Commission would probably also use a less strict test in the case of self-employment, now that the case concerns setting right the inferior opportunities of African

and Asian writers to gain access to the labour (self-employment) market and a career and aimed at improving their competitive position on the labour (self-employment) market. For the test it will be important to know the percentage of Africans or Asians as well as their supply. The figures seem to give reason for permitting a positive action policy.
For a case on positive action in the employment sphere, see CGB 6 April 2006, opinion 2006-61, which can be found on the Equinet website: www.equineteurope.org.

4. In your country, how would the provision in article 5 of the Racial Equality Directive (which permits positive action by Member States) be applied to the facts and would that affect the lawfulness of the competition?
Article 5 of the Racial Equality Directive has been implemented in Dutch law through section 2(3) of the Dutch Equal Treatment Act. The answer to this question will therefore be the same as the answer to question 3.

5. In your country would the relevant court or organisation consider other international instruments which contain provisions on positive action, such as article 1(4) of the United Nations International Convention on the Elimination of Racial Discrimination, and how would those provisions be applied to the facts?
As explained under question 3, the Dutch Equal Treatment Commission has earlier referred to section 2(2) of the United Nations International Convention on the Elimination of Racial Discrimination. The Commission also refers to the case law of the European Court of Justice (see also under 3).

Norway

Equality and Anti-Discrimination Ombud

*1. Would the Arts foundation advertisement or the competition fall within the scope of anti-discrimination law in your country?
Would competitions run by a public authority be regulated by your anti-discrimination law?
Would the advertisement or competition constitute direct or indirect racial discrimination? Would it make any difference if the organisation running the competition was from the private sector?*
Both the advertisement and the competition would fall within the scope of the Norwegian Anti-Discrimination Act, even if the competition was being run by a public authority. The advertisement and the competition would constitute direct discrimination, since the criterion for entering the competition was ethnic background. It would not make any difference if the organisation running the competition was from the private sector.

2. Which Court, Organisation would be competent (please specify the level of the court in the court system)?
The Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Appeal Board, as well as the city courts/district courts would be competent in deciding on the lawfulness of the advertisement/competition. The decision of the Appeal Board on lawfulness could be brought before a city court or a district court. Furthermore, the city courts/district courts decide on matters of compensation in discrimination cases.

3. If the advertisement or competition does constitute discrimination, in your country do you have any positive actions provisions under anti-discrimination law? And if so what is the test for positive action measures? Do you have a test of proportionality of the measures and whether the means used meets the need? Do the facts here satisfy the test in your country.
Section 8 of the Norwegian Anti-discrimination Act is a positive action provision. Positive action is allowed when the relevant measure is considered reasonable and suitable to ensure equal opportunities and to promote equality.

There is a test of proportionality of the measure in relation to its objective. One must consider the need for positive action for the group in question, the suitability of the measure, the possible negative consequences of the measure in relation to other persons/groups, and whether there are alternative measures which could serve the purpose. The case in question would probably be considered legal under Norwegian law, bearing in mind that this specific measure is not very radical, and the negative consequences for other writers probably would be small. There is a requirement for positive action measures that the measures shall only apply until the objective of the measure is achieved. Maintenance of separate rights for different racial groups would be considered illegal if such measures would give these groups better opportunities compared to other groups.

4. In your country, how would the provision in article 5 of the Racial Equality Directive (which permits positive action by Member states) be applied to the facts and would that affect the lawfulness of the competition?
The Racial Equality Directive is not binding for Norway. The proportionality test as described above would be applied upon deciding on the lawfulness of the competition. Having said that, Norway has from 2004 been an associated member of the EU Community Action Programme to Combat Discrimination (2001-2006) and has accepted an obligation to implement legislation meeting the minimum standards of the Racial Equality Directive. Thus, practice of the ECJ will be relevant for Norwegian courts and the Equality and Anti-Discrimination Ombud in their decision-making processes in such matters.

5. In your country would the relevant court or organisation consider other international instruments which contain provision on positive actions, such as article 1 (4) of the CERD and how would those provision to be applied?

Norway is a party to the ICERD, and the ICERD has been implemented in Norwegian law, having the same status as formal acts. Article 1(4) could be applied directly by the Equality and Anti-Discrimination Ombud and the courts. If Section 8 of the Anti-Discrimination Act is applied, Article 1 (4) and international practice with regard to this article would be important factors upon the construction of Section 8. In this particular case application of Article 1 (4) would result in banning of such competitions once African and Asian writers are represented on publishers' lists of accepted writers in accordance with their percentage of the population in Fantasia.

Slovakia

National Centre for Human Rights

1. Would the Arts Foundation's advertisement or the competition fall within the scope of anti-discrimination law in your country?
An advertisement or a competition as described do not fall within the scope of the Slovak anti-discrimination law.

Perhaps, on the condition that the competition was intended to increase the number of published African and Asian writers' work and decrease disadvantage linked to racial and ethnic origin, it could be taken as a positive action in the meaning of Art.2 par. 1 of the Anti-discrimination Act.

> *(Art. 2 par. 1) Compliance with the principle of equal treatment shall consist in the prohibition of discrimination on any grounds, in the exercise of rights and responsibilities in compliance with good morals, and in the adoption of anti-discrimination measures insofar as the adoption of such measures is necessary in view of the specific circumstances and possibilities of the person who has an obligation to comply with the aforesaid principle.*

1a. Would competitions being run by a public authority be regulated by your anti-discrimination law?
A public competition is regulated in Art. 847-849 of the Civil Code, not by the Anti-discrimination Act.

1b. Would the advertisement or competition constitute direct or indirect racial discrimination?
No discrimination, but as mentioned above it may be considered as a positive action for the benefit of members of national minorities. Positive action is a special measure that might be called for to compensate for disadvantages arising from a person's racial or ethnic origin or other characteristics which might lead to them being treated unfairly.

The winners of the competition are to be published in a well known private publishing company's anthology in 2006. The advertisement / competition is a temporary measure aimed at supporting diversity and decreasing disadvantage linked to racial or ethnic origin. Such a measure is a legitimate one in a democratic society and cannot be in our opinion regarded as a disproportionate restriction of rights of other members of a society.

1c. Would it make any difference if the organisation running the competition was from the private sector?
No

2. Which court, organisation would be competent? (please specify the level of the court in the court system)
Level of the court: competent district court
Other organisation: Slovak National Centre for Human Rights, other NGOs dealing with racial discrimination.

3.If the advertisement or competition does constitute discrimination, in your country do you have any positive action provisions under anti-discrimination law? And if so what is the test for positive action measures? Do you have a test of proportionality of the measure and whether the means used meets the need? Do the facts here satisfy the test in your country?
Art. 8 par. 8 of the Anti-discrimination Act states:

> *"With a view to ensuring full equality in practice and compliance with the principle of equal treatment, specific positive actions to prevent disadvantages linked to racial or ethnic origin may be adopted."*

In October 2005 the Constitutional Court decided (PL. ÚS 8/04) that Art. 8 par. 8 of the Anti-discrimination Act was incompatible with Art. 1(1) and Art.12(1) first sentence and paragraph 2 of the Constitution (see more in European Anti-Discrimination Law Review, Issue No. 3, April 2006, s. 81)

4. In your country, how would the provision in article 5 of the Racial Equality Directive (which permits positive action by Member States) be applied to the facts and would that affect the lawfulness of the competition?
See question 3

5. In your country would the relevant court or organisation consider other international instruments which contain provisions on positive action, such as article 1(4) of the ICERD, and how would those provisions be applied to the facts?
The Slovak Republic is a contracting party of the International Convention on Elimination of All Forms of Racial Discrimination. This international treaty is a part of the Slovak legal order and is binding for all state authorities including courts.

Art. 144 of the Constitution stipulates that judges, in the performance of their function, shall be independent and, in decision making shall be bound by the Constitution, by constitutional law, by international treaties pursuant to Art. 7, paras. 2 and 5, and by law.

According to the jurisdiction of the Constitutional Court the constitution and laws must be interpreted in compliance with international treaties on human rights and freedoms signed and ratified by the Slovak Republic (PL. ÚS 15/98, I. ÚS 3/2001).

Sweden

Ombudsman against Ethnic Discrimination

1. Would the Arts Foundation's advertisement or the competition fall within the scope of anti-discrimination law in your country?
No, it wouldn't as it would not be regarded as access to services because under Swedish anti-discrimination law the provisions on goods and services only apply where the complainant has paid for the good or service, which is not the case here.

Would competitions being run by a public authority be regulated by your anti-discrimination law? Would the advertisement or competition constitute direct or indirect racial discrimination? Would it make any difference if the organisation running the competition was from the private sector?
It does not have any relevance which kind of organisation organizes it. In relation to advertisements, this is an area that is barely regulated as regards its impact on customers. There is only a self-regulating board which is appointed by the branch itself and to some extent the Consumer Ombudsman who can take the advert to The Swedish Market Court for an injunction against the advertiser. However it is unlikely that any of these institutions will regard any ground apart from gender.

2. Which court, organisation would be competent? (please specify the level of the court in the court system)
Any organisation can regard itself as competent if it states so, and the proper court would be the District Court.

3. If the advertisement or competition does constitute discrimination, in your country do you have any positive action provisions under anti-discrimination law? And if so what is the test for positive action measures? Do you have a test of proportionality of the measure and whether the means used meets the need? Do the facts here satisfy the test in your country?
Sweden does have some provisions allowing positive actions but they do not fall within anti-discrimination law and they are limited to gender in working life and to ethnicity in the area of labour market actions.

4. In your country, how would the provision in article 5 of the Racial Equality Directive (which permits positive action by Member States) be applied to the facts and would that affect the lawfulness of the competition?
It has no effect.

5. In your country would the relevant court or organisation consider other international instruments which contain provisions on positive action, such as article 1(4) of the United Nations International Convention on the Elimination of Racial, and how would those provisions be applied to the facts?
In the Swedish legal system you can only invoke those international instruments that are incorporated as Swedish laws and in Sweden only the European Convention on Human Rights and the EU-directives are incorporated as laws. Hence no other international instrument can, or would, be considered here or otherwise.

All responses

Answers to question 6 are presented in table format in the following pages

6. In relation to the six different grounds of discrimination (race, sex, disability, religion, age, sexual orientation and age) what is the scope of your national legislation permitting positive action?
In other words what different sectors do the positive action measures cover and are there differences depending on the grounds?

For example in relation to race, are positive action measures permitted across the full range of coverage of the race directive (employment, access to and supply of goods and services, education, social protection such as social security or healthcare, social advantages) or only some of those.

Austria	Employment	Membership of organisations (e.g. Trade Unions)	Social protection (e.g. social security and healthcare)	Social advantages	Education	Access to and supply of goods and services
Race	Yes	No	Yes	Yes	Yes	Yes
Gender	Yes	No	No	No	No	No
Disability	Yes	Yes	No	No	No	Yes
Religion	Yes	No	No	No	No	No
Sexual Orientation	Yes	No	No	No	No	No
Age	Yes	No	No	No	No	No

Belgium	Employment	Membership of organisations (e.g. Trade Unions)	Social protection (e.g. social security and healthcare)	Social advantages	Education	Access to and supply of goods and services
Race	Yes	Yes	Yes	Yes	Yes	Yes
Gender	Yes	Yes	Yes	Yes	Yes	Yes
Disability	Yes	Yes	Yes	Yes	Yes	Yes
Religion	Yes	Yes	Yes	Yes	Yes	Yes
Sexual Orientation	Yes	Yes	Yes	Yes	Yes	Yes
Age	Yes	Yes	Yes	Yes	Yes	Yes

- In Belgium, any positive action provisions fall expressly under federal anti-discrimination law. The provision referring to this possibility does not provide details. The law is currently being revised so there will be a specific provision with the terms for positive action.
- Under this bill the authorities can take positive action; for the private sector the possibilities should be further defined in a Royal Decree.
- Belgium is a federal state where the powers and responsibilities are divided between the federal government, 3 Communities and 3 Regions. Each of them has the competence to provide, within the reach of their powers, anti-discrimination legislation, e.g. education lies with the Communities. All those entities have enacted, at the time of writing, anti-discrimination legislation but it is not known whether there will be specific provisions ruling positive action.

Great Britain	Employment	Membership of organisations (e.g. Trade Unions)	Social protection (e.g. social security and healthcare)
Race	Yes – training and encouragement in particular work but does not permit for selection unless a GOR applies (Sections 37 -38)	Yes – training and encouragement for particular posts (section 38)	Yes, if it meets a special need of a particular racial group in relation to their welfare e.g. specialist dietary and nutritional advice to South Asians who have high incidence of death due to coronary heart disease (Section 35)
Gender	Yes – training and encouragement in particular work but does not permit selection unless a GOR applies Sections 47-48 Also permits organizations to provide specialist training to persons who have been out of employment because they have been discharging domestic or family responsibilities (Section 47(3))	Yes, provisions similar to Section 38 under Race (section 48). Also allows for reservation of seats on executive bodies of professional bodies and trade unions (section 49).	Yes, allows any action in relation to women if undertaken to comply with a requirement of a statutory provision concerning the protection of women e.g. health and safety for pregnant women (section 51).
Disability	Strictly speaking, there are no provisions for positive action under the DDA in the same way as the other grounds. However, because of the wording of the legislation it appears to permit positive discrimination in all spheres. There is a duty on employers to make 'reasonable adjustments' to enable applicants and employees to work.	Yes	Yes
Religion	Yes, provisions are made for training and encouragement in particular work (section 25 The Employment Equality (Religion and Belief) Regulations 2003.	Yes, provision of training to hold posts in membership organisations.	In the near future, the prohibition on discrimination in the provision of goods, facilities and services will extend to religion and belief. There will be a positive action provision meeting special needs similar to the provision for race (section 61 The Equality Act 2006).
Sexual Orientation	Yes, provisions are made for training and encouragement in particular work (section 25, the Employment Equality (Sexual Orientation) Regulations).	Yes, provision of training to hold posts in membership organisations	No
Age	Yes, provisions are made for training and encouragement in particular work.	Yes, provision of training to hold posts in membership organisations	No

Great Britain	Social advantages	Education	Access to and supply of goods and services
Race	Possibly section 35 which allows actions to be undertaken for a particular racial group to meet special needs with regards to education, training or welfare or other ancillary benefits which could be invoked here e.g. public funding for supplementary schooling for African-Caribbean children who have disproportionate rates of attainment.	Yes – to meet 'special – cultural – needs' with regard to education and training e.g. English language classes for Polish pupils (Section 35)	Yes – to meet special needs with regard to welfare e.g. it is possible to provide residential care housing for Orthodox Jewish elders (Section 35)
Gender	There do not appear to be any provisions covering social advantages in the same way as under race (no equivalent provision to section 35). However, there are provisions which allow political parties to select women to address inequality in the numbers of men and women (section 42A). Also, under separate legislation, political parties can adopt women only candidates short-lists to achieve greater representation of women in national politics (The Sex Discrimination (Election Candidates) Act 2002)	Yes, there are limited provisions which allow for example same sex schools but it is not clear whether there is any provision that would permit separate classes for a particular sex where that it is necessary to improve educational performance.	No clear provisions that permit positive action in provision of goods, facilities and services.
Disability	Yes	Yes	Only duty is to make reasonable adjustments to enable access to services. See under employment heading.
Religion	See opposite	See opposite	See opposite
Sexual Orientation	No	No	No
Age	No	No	No

Greece	Employment (+ professional training etc)	Membership of organisations (e.g. Trade Unions)	Social protection (e.g. social security and healthcare)	Social advantages	Education	Access to and supply of goods and services
Race[31]	Yes	Yes	Yes	Yes	Yes	Yes
Gender[32]	Yes	Yes	No	No	No	No
Disability[33]	Yes	Yes	No	No	No	No
Religion	Yes	Yes	No	No	No	No
Sexual Orientation	Yes	Yes	No	No	No	No
Age	Yes	Yes	No	No	No	No

[31] Since the relevant provision (Art. 6 of Law 3304/2005) which provides that "Taking or keeping in force special measures aiming at the prevention or the compensation of disadvantages, due to race or ethnic origin does not constitute discrimination" does not make any exceptions as for the various fields that the Racial Equality Directive covers.

[32] Art.4 (4) of Law 3488/2006 that transposed into the Greek legal system Directive 2002/73/EC reads: "Taking or keeping in force special or positive measures aiming at the elimination of any existing discrimination to the detriment of the less represented sex and the achievement of substantial equality in the sectors included in the field of application of the present law, as specialized in the following provisions, do not constitute discrimination."
Note that Art. 116 (2) of the Greek Constitution as revised in 2001 provides that: "Adoption of positive measures for promoting equality between men and women does not constitute discrimination of grounds of sex. The State shall take measures for the elimination of inequalities already existing, in particular to the detriment of women."

[33] Art. 12 (1) of Law 3304/2005 that reads: "Taking or keeping in force special measures aiming at the prevention or the compensation of disadvantages, due to religious or other convictions, disability, age or sex orientation does not constitute discrimination."

Hungary	Employment	Membership of organisations (e.g. Trade Unions)	Social protection (e.g. social security and healthcare)	Social advantages	Education	Access to and supply of goods and services
Race	Yes,	No	Yes	No	Yes	No
Gender	Yes,	No	Yes	No	No	No
Disability	No	No		Yes	Yes	No
Religion	Yes	No	No	No	Yes	No
Sexual Orientation	No	No	No	No	No	No
Age	Yes	No	No	No	No	No

The Netherlands	Employment	Membership of organisations (e.g. Trade Unions)	Social protection (e.g. social security and healthcare)	Social advantages	Education	Access to and supply of goods and services
Race	Yes	Yes	Yes	Yes	Yes	Yes
Gender	Yes (only women, not men)	Yes	No	No	Yes	Yes
Disability	Yes	Yes	No	No	Yes (vocational training)	No
Religion	No	No	No	No	No	No
Sexual Orientation	No	No	No	No	No	No
Age	No	No	No	No	No	No

Sweden	Employment	Membership of organisations (e.g. Trade Unions)	Social protection (e.g. social security and healthcare)	Social advantages	Education	Access to and supply of goods and services
Race	Yes, somewhat	No	No	No	No	No
Gender	Yes, at equal merits	No	No	No	No	No
Disability	No	No	No	No	No	No
Religion	No	No	No	Non	No	No
Sexual Orientation	No	No	No	No	No	No
Age	Not implemented yet					

Annex 4
Country responses to the case study on disability discrimination
Asperger's Syndrome
Mental Impairment

Estonia

Office of the Chancellor of Justice

1. Does the case fall within the scope of anti discrimination law in you country – in particular, would Mr. B be disabled under your anti-discrimination law? Please explain how or why not.

a. The case falls within the scope of anti-discrimination law in Estonia. Republic of Estonia Employment Contracts Act § 10 (2) says that employers shall not discriminate against employees on any of the grounds specified in subsection (3) of this section with regard to remuneration, promotion in employment or office, giving instructions, termination of employment contracts, access to retraining or in-service training or otherwise in employment relations.

b. No special definition of a disability exists in anti-discrimination law. The Social Benefits for Disabled Persons Act (DPA) § 2 (1) 1 – 3 stipulates that a disability is the loss of or an abnormality in an anatomical, physiological or mental structure or function of a person. For the purposes of that Act there are three degrees of severity of disabilities: 1) profound disability is the loss of or an abnormality in an anatomical, physiological or mental structure or function of a person as a result of which the person needs constant personal assistance, guidance or supervision twenty-four hours a day; 2) severe disability is the loss of or an abnormality in an anatomical, physiological or mental structure or function of a person as a result of which the person needs personal assistance, guidance or supervision in every twenty-four hour period; 3) moderate disability is the loss of or an abnormality in an anatomical, physiological or mental structure or function of a person as a result of which the person needs regular personal assistance or guidance outside his or her residence at least once a week. As these degrees of severity of disabilities have an importance only when a disabled person applies for social security benefits, they are of no importance for finding out whether a person has a disability or not.

Asperger's Syndrome is a developmental disorder. It is an autism spectrum disorder, neurological condition characterized by a greater or lesser degree of impairment in language and communication skills, as well as repetitive or restrictive patterns of thought and behaviour.

According to DPA § 2 (1) 1st sentence disability is the loss of or an abnormality in an anatomical, physiological or mental structure or function of a person. As Asperger's Syndrome is a developmental disorder, a neurological condition, it can be taken as an abnormality in mental structure or function of a person. Therefore, such a disability as Asperger's Syndrome could constitute a disability under the definition of a disability in DPA § 2 (1) first sentence.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)

- Chancellor of Justice, the conciliator in discrimination matters between private parties.
- Labour dispute committee (labour dispute committees are extra-judicial independent individual labour dispute resolution bodies; If the parties do not agree with a decision of a labour dispute committee, the parties to the dispute have recourse to county courts for hearing of the same labour dispute; the form of recourse to the court is a statement of claim, not an appeal against a decision of a labour dispute committee).
- County Court (1st level), after that District Court (appeal), after that the civil law chamber of the Supreme Court (cassation).

3. Which ground(s) would apply here? Please explain.

As no other special features of Mr B have been given, the ground that applies here is disability (in general, social status could also be considered, but in this case most likely it would also be linked with the disability). The reason for that is that, in comparison, the other employee who was also accused of sexual harassment has no such a characteristic. It is disability that makes Mr B, compared to the other employee, special.

4. Would the dismissal of Mr. B constitute direct discrimination, indirect discrimination or no discrimination at all?

It could be direct discrimination as according to REECA § 10^2 (2) direct discrimination shall be taken to occur where one person applying for employment or an employee is treated less favourably than another person applying for employment or another employee is, has been or would be treated in a comparable situation, on any of the grounds specified in § 10 (3). If the facts established show that compared with the other employee Mr B was dismissed due to his special features it would be direct discrimination.

In this case it could have been indirect discrimination. One could argue that the effect of the rule in question is different for a person with Asperger's Syndrome than for a person without such a syndrome, as persons with the syndrome may act in sexually inappropriate ways.

It could also be no discrimination on the ground of disability if the facts show that the differential treatment had taken place for other reasons (i.e. usually any person is dismissed because of sexual harassment, but the employee moved to another store had exceptionally good selling records etc.).

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.

In the case of direct discrimination it cannot be justified according to REECA § 10^2 (2).

In the case of indirect discrimination, one should find out the aim of the dismissal provision in the disciplinary code of the employer. After that one should assess, whether the aim is achieved via such a provision. Then one should see if the provision is necessary to achieve the aim sought (one should look for other less restrictive means, which also could achieve the aim). If the means are necessary, then one should find out, if the provision is proportionate in the stricter sense (question of weighing and balancing of the interests).

6. Would there be a failure to make reasonable accommodation in this case (particularly in relation to the mentor)? How would this part of the claim be dealt with under your legislation?

No. As Mr B had worked for 3 years without any such conduct that would have alarmed the employer it is difficult to establish whether the misconduct took place due to the lack of a mentor (no such facts in the case that he had any behavioural difficulties or that the other employees had problems with him). It is highly unlikely, that the mentor would have been appointed for such a long period.

Occupational Health and Safety Act § 10 (4) states that the work and workplace of a disabled worker shall be adapted to his or her physical and mental abilities. Of course, the directive Art 5 could also be applicable, if it satisfies the conditions needed.

7. How would the shifting of the burden of proof apply in this case?

REECA § 144^1 (1) 2^{nd} sentence stipulates the shared burden of proof in discrimination disputes. According to that provision, if on the basis of the application submitted by an employee or a person applying for employment it may be presumed that direct or indirect discrimination has occurred, the employer shall be required, at the request of the labour dispute resolution body or the Chancellor of Justice, to explain the reasons for his or her conduct or decision; the refusal by an employer to give explanations shall be deemed to be equal to acknowledgement of discrimination.

So, if the application shows that there might have been direct or indirect discrimination, the shift of burden proof moves to the employer's side. In the current case, on the basis of the facts, it is a bit difficult to say whether the burden would shift (the claimant should establish more facts that indicate that disability could be the ground for dismissal).

8. How would you balance the prohibition on gender and on disability discrimination in this case?

If understood correctly, the question is whether the sexual harassment towards a female employee (or was it a client?) outweighs the indirect discrimination on the ground of disability. The question is therefore whether the conduct was unintentional (he argues that it was unintentional but other facts would have to support that claim), and whether in the future the possibility of such conduct remains.

If it is possible to prevent such conduct and the female employee can be expected to tolerate the presence of the disabled person in question, then balancing is possible (i.e. the female employee could undergo training, also Mr B). Also, it should be considered, whether there is a possibility of giving Mr B another job, not related to communicating with others.

If it is likely that the misconduct will happen again, then balancing is difficult. It would probably be unreasonable to expect the female employee to tolerate sexual harassment also in the future, even though the other person has a disability. The possibility of harassing other employees under the disguise of a disability should be limited. Also, the possibility that Mr B would be dismissed just because a female employee has an idea that she could be harassed again should not be used against Mr B.

Remedies

There are no special remedies for disability discrimination provided by the law. Therefore general remedies for discrimination for all discrimination grounds are applicable.

§ 10^3 (1) of the Republic of Estonia Employment Contracts Act (REECA) stipulates that an employee or a person applying for employment against whom the employer discriminated on any of the grounds specified in § 10 (3) has the right to demand from the employer compensation for the proprietary and non-proprietary damage caused by the discrimination. Under § 10^3 (2) REECA a person with whom the employer refused to enter into an employment contract on any of the grounds specified in § 10 (3) shall not have the right to demand entry into an employment contract. § 10 (3) REECA prohibits discrimination on grounds of sex, racial origin, age, ethnic origin, level of language proficiency, disability, sexual orientation, duty to serve in defence forces, marital or family status, family-related duties, social status, representation of the interests of employees or membership in workers' associations, political opinions or membership in a political party or religious or other beliefs.

In general, in other cases, such as if the employer has terminated the contract on the basis of a person's health condition, it is possible to invoke § 117 REECA, which regulates the liability of employers upon illegal termination of employment contract. Under § 117 (1) REECA, upon illegal termination of an employment contract by an employer, the employee has the right to demand reinstatement in his or her position, amendment of the statement of the basis for termination of the employment contract and payment of his or her average wages for the time of compelled absence from work. Under §117 (2) if an employee waives reinstatement in his or her position, the employer is required to pay compensation to the employee in the amount of his or her six months' average wages.

This would probably mean that if the case can be dealt with under general contract termination clauses it could be more beneficial for the employee not to allege discrimination on the specified grounds and be satisfied with the remedies provided under § 117, not with § 10[3]. However, this interpretation of the law is under dispute due to the current sate of the employment law in Estonia. The basic principle is that the remedy has to be reasonable and the employee should not enrich him/herself due to discrimination.

Great Britain

Disability Rights Commission

1. Does the case fall within the scope of anti discrimination law in your country – in particular, would Mr. B be disabled under your anti-discrimination law? Please explain how or why not.

In order for Mr B to have a disability under our Disability Discrimination Act, he would have to have a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. This basic definition is supplemented by Schedules and regulations and there is extensive guidance on this issue. It is likely that he would be covered by the definition (and in this particular real-life case he was).

The definition of disability in the UK, whilst potentially quite broad (particularly because any treatment or corrective measures, other than glasses, which a person is receiving is disregarded for the purposes of determining whether or not an effect is adverse or substantial) does cause significant problems for disabled people. The DRC has made recommendations to the government on a new definition which would be based purely on having a physical or mental impairment.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)

At first the case would be heard in the employment tribunal which is the first level of complaint for an employment issue in the UK.

3. Which ground(s) would apply here? Please explain.

Mr. B would bring a claim under the Disability Discrimination Act – on the basis of his disability i.e. it would be disability which is the ground.

4. Would the dismissal of Mr. B constitute direct discrimination, indirect discrimination or no discrimination at all?

Mr. B's treatment would constitute direct discrimination – given that someone else in similar circumstances i.e. who has committed harassment has not been dismissed but has been moved. There could also be disability related discrimination (we don't have indirect discrimination but we do have disability related discrimination) – as the reason for the harassment could be said to relate to his disability i.e. his difficulties in communication issues.

Although disability related discrimination, and the duty on employers to make reasonable adjustments, do deal with most aspects of what would be covered by indirect discrimination, the DRC does have some concerns about the omission of indirect discrimination from the legislation, and this is something which we have raised with the government.

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.

There is no justification possible with direct discrimination, and in this case there was a finding of direct discrimination. There is a justification for disability related discrimination – where the reason for the treatment is material and substantial.

6. Would there be a failure to make reasonable accommodation in this case (particularly in relation to the mentor)? How would this part of the claim be dealt with under your legislation?

There would be a claim for a failure to make reasonable adjustments and in this case there was a finding that the employers had failed in this respect.

7. How would the shifting of the burden of proof apply in this case?

Once the claimant had shown that there was a difference of treatment between him and the other person who had not been moved – facts from which it could be inferred in the absence of an adequate explanation that he has been treated less favourably on the ground of his disability than the comparator – then the employer would have to show that disability

was not any part of the reason for the treatment in question.

8. How would you balance the prohibition on gender and on disability discrimination in this case?
The case here would focus purely on the treatment which he had experienced as a result of his disability. The gender aspect would only come into it if the woman brought a claim on the basis that he had not been dismissed – but so long as they had taken some action this would probably not be upheld, although it would depend on the circumstances (and we don't know enough of those).

Remedies
An individual could claim compensation for the loss of their job but would not be entitled to reinstatement or reengagement unless they also had a claim for unfair dismissal – it is only under general employment law that this remedy is available.

Greece

Greek ombudsman

1. Does the case fall within the scope of anti discrimination law in you country – in particular, would Mr. B be disabled under your anti-discrimination law? Please explain how or why not.
Yes according to national Law 3304/2005 that has incorporated relevant EU directives. (It should be noted that in Greek anti-discrimination law there is no definition of disability; therefore, each case would be considered ad hoc. Asperger's Syndrome as described above seems unlikely not to be considered as a disability). Finally, it should be noticed that, in the absence of specific definition of disability in the anti-discrimination law, there is a possibility that courts may resort to definitions used in a social security context.)

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)
Court of 1st Instance (One member chamber)
There is also an administrative procedure. Complaints are investigated by a special body of the Ministry of Labour and Employment (SEPE) and the Equal Treatment Commission of the Ministry of Justice.

3. Which ground(s) would apply here? Please explain.
Discrimination based on disability. Lack of affirmative measures for the prevention of discrimination.

4. Would the dismissal of Mr. B constitute direct discrimination, indirect discrimination or no discrimination at all?
The employer's disciplinary code may be considered as constituting an apparently neutral practice, which, however, puts people having a disability, as described above, at a substantial disadvantage. In that line of argument the dismissal of Mr. B under the specific circumstances would constitute an indirect discrimination. (It could be considered direct discrimination if the circumstances that led to the relocation to another store, rather than dismissal, of the other employee that was accused of sexual harassment, were similar)

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.
The employer's disciplinary code, which provides for the penalty of dismissal for any gross misconduct (such as sexual harassment) seems to be justified, as having a legitimate aim (respect of dignity of other employees) and as being an appropriate and necessary means (to dissuade employees from misconduct).

6. Would there be a failure to make reasonable accommodation in this case (particularly in relation to the mentor)? How would this part of the claim be dealt with under your legislation?
The employer's refusal to provide a mentor - insofar as either such a measure would not have imposed a disproportionate burden to the company, or if it would have caused such a burden that that burden would be remedied to a sufficient extent by existing measures which are elements of disability policy - seems to constitute a failure to provide reasonable accommodation as laid down in Article 5 of the Framework Directive.

The employee could claim compensation either by appealing to the Court of 1st Instance or through the administrative procedure.

7. How would the shifting of the burden of proof apply in this case?
The employer has to prove that his failure to provide reasonable accommodation is due to the disproportionate burden which an eventual compliance would have imposed on the company and, on the other hand, that there are no existing remedies e.g. elements of disability policy covering such a cost.

It is also essential to compare the two cases of sexual harassment and the employer's response to them. The employer would have to justify the different disciplinary course of action.

8. How would you balance the prohibition on gender and on disability discrimination in this case?
In this case the employer's failure to make reasonable adjustments – such as providing a mentor - put the disabled employee at a substantial disadvantage and possibly led to the sexual harassment. Had the employer taken the necessary measures he would have

protected the other employees from such an occurrence.

In any case, when considering a case of sexual harassment the possible contribution to said behaviour of a specific disability should be taken into account.
Law 3304/2005 and Law 3485/2006 should be applied equally.

Remedies
Note: Whenever reference is made to a law without any further specification, it is Law 3304/2005 by which both Directives 43/2000/EC and 78/2000/EC were transposed in the Greek legal system that is meant.

If a disabled person considers that he/she suffers from discriminatory behaviour emanating from a public administrative body, he/she can use all administrative remedies that are generally provided against any illegal action or omission according to articles 24 to 27 of Law 2690/1999 (see art. 13 of Law). He/she can also file a complaint with the Greek Ombudsman (Article 19 (1)), who can examine complaints for any acts of the public administration.

If a disabled person is employed in the private sector and considers that he/she suffers from discrimination emanating from his/her employer, he/she can file a complaint to the Employment Inspectors Body according to Article 19 (3) of the Law. It is worth noting that the Greek Ombudsman has received and is currently examining a complaint against the Employment Inspectors Body claiming that the Body had not fully examined a complaint against a private employer in a disability discrimination case. It is obvious that the Greek Ombudsman is dealing with this case by applying its general competence that enables it to review the conduct of the public administration on grounds of illegal behaviour or maladministration in general.

In any case, the victim of disability discrimination can seek compensation for and/or the annulment of his/her dismissal on the basis of general provisions of civil and labour law. Such demands can only be put forward before civil courts (or administrative courts in the case of public employees).

If a disabled person considers that he/she is discriminated against by anyone apart from a private employer or any public body, he/she can file a complaint to the newly founded (by law) Equal Treatment Committee of the Ministry of Justice, according to Articles 19 (2) and 22 of the Law.

Finally, Article 16 of the Law introduces a special criminal offence for those who provide goods or supply services if they discriminate against disabled persons.

Hungary

Equal Treatment Authority

1. Does the case fall within the scope of anti discrimination law in you country – in particular, would Mr. B be disabled under your anti-discrimination law? Please explain how or why not.
The case falls within the scope of our Authority. Mr. B. would be disabled under the Equal Treatment Act. The Authority can also deal with cases where the protected characteristic is the state of health.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)
The client has the right to turn to the local civil court or the Equal Treatment Authority (ETA).

3. Which ground(s) would apply here? Please explain.
Mr. B would bring a claim under the Disability Discrimination Act – on the basis of his disability i.e. it would be disability which is the ground. The proceedings can be started on the ground of protected characteristics.

4. Would the dismissal of Mr. B constitute direct discrimination, indirect discrimination or no discrimination at all?
It would be direct discrimination in our country.

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.
If the employer had not known about his disease, he could have been exempted from discrimination, but because he was aware of Mr B's mental condition, he would have to prove that dismissal was the only solution.

6. Would there be a failure to make reasonable accommodation in this case (particularly in relation to the mentor)? How would this part of the claim be dealt with under your legislation?
If the employer had found a mentor for Mr B. he could have met the principle of equal treatment. We think that without an expert opinion this case cannot be solved. If this expert opinion says that Mr B. cannot meet the conditions of his job description even with the assistance of a mentor, the employer could be exempted from the violation of equal treatment.

7. How would the shifting of the burden of proof apply in this case?
The claimant has to prove that he possesses the protected characteristic and suffered this disadvantage (he was dismissed) and the other facts mentioned above have to be proved by the employer.

8. How would you balance the prohibition on gender and on disability discrimination in this case?

We do not need to balance disability and gender discrimination because under our Act this case is solely based on disability.

The Netherlands

Equal Treatment Commission

1. Does the case fall within the scope of anti discrimination law in you country – in particular, would Mr. B be disabled under your anti-discrimination law? Please explain how or why not.

The case would fall under the Dutch Act on equal treatment on the grounds of disability or chronic illness. Under section 4 of the Act, discrimination on the ground of disability or chronic illness is prohibited in entering into and terminating an employment relationship. The Act does not provide a definition of disability or chronic illness. In the history of the bill it appears that disability and chronic illness can be physical, mental or psychological; that a disability is in principle irreversible; and that a chronic illness does not have to be irreversible, but at least lengthy. Due to section 1 (b) of the Act, the disability or chronic illness can be real or alleged. This corresponds with the ECJ Navas-case (ECJ 11 July 2006, Navas, nr. C-13/05). The Dutch Equal Treatment Commission always brackets disability and chronic illness together. In this case, the Asperger's Syndrome will be a disability or chronic illness under the Act (as was decided in CGB 12 May 2006, opinion 2006-95).

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)

The Dutch Equal Treatment Commission is competent and can give a non-binding opinion on this case. This procedure is without costs. Parties do not need to have a lawyer. A district court will also be competent and can give a binding opinion on this case. For this procedure, legal charges must be paid. In employment cases before a district court a lawyer is not obligatory.

3. Which ground(s) would apply here? Please explain.

Chronic illness. See under 1.

4. Would the dismissal of Mr. B constitute direct discrimination, indirect discrimination or no discrimination at all?

Under section 1(b) of the Dutch Act on equal treatment on the grounds of disability or chronic illness direct discrimination is discrimination between people on the grounds of a real or alleged disability or chronic illness. Under section 1 (c) of the act, indirect discrimination is discrimination on the grounds of traits or behaviour other than those described at section 1 (b) which results in direct discrimination.

Mr. B's employer dismissed him because of unintentional sexual harassment. Mr B. however said that he might, owing to his impairment, have caused unintentional sexual harassment. The Dutch Equal Treatment Commission usually easily concludes that there is a direct link with disability or chronic illness when it becomes plausible that the dismissal was linked to a person's disability or chronic illness (often respondents do not deny there is a link). Reconstructing indirect discrimination would often be too hypothetical. Therefore this case would probably lead to direct discrimination on the ground of chronic illness when it should become clear that Mr. B's chronic illness, which leads to an impairment of social interaction, social communication and social imagination, caused the unintentional sexual harassment. One argument that leads to this direction is that the employer dismissed Mr. B for unintentional sexual harassment. The employer must thus be asked if he considered Mr. B's sexual harassment as unintentional because of his chronic illness. Also an expert could be asked whether Mr. B's chronic illness could have caused unintentional sexual harassment. Another argument could be that another employee who worked at the same place as Mr B, who does not have Asperger's Syndrome, was accused of sexual harassment and general harassment but was not dismissed, but rather was moved to another store.

This goes beyond this case, but normally the Dutch Equal Treatment Commission would, before answering the question whether discrimination has taken place, consider whether Mr. B. would – apart from his disability or chronic illness - be eligible for his job. This corresponds with Recital 17 in the preamble of directive 2000/78/EC.

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.

Only indirect discrimination on the ground of disability or chronic illness can be justified. However, in three cases the prohibition of direct discrimination on the ground of disability or chronic illness (direct or indirect) does not apply (there is thus no justification, since there is no discrimination in these cases):

a. the discrimination is necessary to protect health and safety (section 3(1)(a) of the Dutch Act on equal treatment on the grounds of disability or chronic illness);

b. the discrimination relates to a regulation, standard or practice which is aimed at creating or maintaining specific provisions and facilities for the benefit of persons with a disability or chronic illness (section 3(1)(b) of the Act);

c. if the discrimination concerns a specific measure which has the aim of granting persons with a disability or chronic illness a privileged position in order to neutralise or ameliorate existing disadvantages and the discrimination is proportionate to the objective (section 3(1)(c) of the Act).

The Dutch Equal treatment Commission can imagine the employer would appeal to section 3(1)(a), since the safety of his employees is at stake.

The question then however is whether the employer can be said to be credible if it is true that another employee, who worked at the same place as Mr B, who does not have Asperger's Syndrome and who was accused of sexual harassment and general harassment was not dismissed but moved to another store. (for a case in which an employer appealed to section 3(1)(a) see case CGB 7 June 2006, opinion 2006-18)

6. Would there be a failure to make reasonable accommodation in this case (particularly in relation to the mentor)? How would this part of the claim be dealt with under your legislation?
Due to section 2 of the Dutch Act on equal treatment on the grounds of disability or chronic illness, the prohibition of discrimination also means that the persons on whom this prohibition is imposed are obliged to make effective modifications according to need, unless this would impose a disproportionate burden on them.

It should therefore be clarified whether providing Mr. B. with a mentor under the employer's mentoring scheme would have been an effective modification and whether such a modification would have imposed a disproportionate burden on the employer.

Since a mentor could have assisted Mr. B in understanding how his behaviour might affect others and could have provided a way in which other employees could raise concerns regarding his behaviour towards them, it could well be argued that this for example could have prevented the unintentional sexual harassment. The modification would then be effective.

Since the employer already had a mentoring scheme this could support the argument that the modification would not impose a disproportionate burden on the employer.

7. How would the shifting of the burden of proof apply in this case?
Section 10 (1) of the Dutch Act on equal treatment on the grounds of disability or chronic illness says that if a person who believes that they are or will be discriminated against to their disadvantage as described in this Act produces facts in court which can give grounds for suspecting that such discrimination exists, the counter party must prove that they have not acted contrary to the law.

Section 10(2) of the Act says that if a person who believes that they have been disadvantaged by acts contrary to section 2 (effective modification) produces facts in court which can give grounds for suspecting that there has been a failure to make effective modifications, the counter party must prove that they have not acted contrary to this provision.

The difference in action taken by the employer with regard to the sexual harassment of Mr. B and of his colleague in combination with the negative answer to Mr. B's request for a mentor, could well lead to a suspicion that discrimination exists. The Dutch Equal Treatment Commission would in this regard try to find out whether the employer has at any moment linked illness and dismissal.

8. How would you balance the prohibition on gender and on disability discrimination in this case?
This question could be taken into account when dealing with the exception to direct discrimination on the ground of safety. The obligation of the employer not to discriminate against Mr. B. on the ground of his chronic illness should be balanced against the obligation of the employer to free his employees from sexual harassment (this is a form of safety).

Remedies
Regarding the question on what remedies are available for disability discrimination under the partners' national legislation, whether compensation can be awarded and whether or not someone is entitled to their job back, we refer to section 9 and 11 of the Act on Equal treatment on the grounds of disability or chronic illness:

> *"Section 9*
>
> *1. Termination of the employment relationship by the employer contrary to section 4 (discrimination in the employment sphere) or because of the fact that the employee has invoked section 4 at law or otherwise is subject to annulment.*
>
> *2. Without prejudice to chapter 8 of the General Administrative Law Act, an employee's right to invoke (before a district court, not before the Equal Treatment Commission) the grounds for annulment described in the first paragraph lapses two months after the termination of the employment relationship. Section 55 of Volume 3 of the Civil Code does not apply.*
>
> *3. A legal action relating to the annulment will be barred after a period*

of six months following the day on which the employment relationship has ended.

4. The termination described in the first paragraph does not make the employer liable to pay damages.

Section 11

Contractual terms which contradict this Act are invalid."

Norway

Equality and Anti-Discrimination Ombud

1. Does the case fall within the scope of anti-discrimination law in Norway- in particular, would Mr. B be disabled under your anti-discrimination law? Explain why or why not.
People with disabilities have in their working life a general protection against discrimination under the Working Environment Act §13-1 (1).

Disabilities are not defined by the law but according to the green paper ("travaux préparatoires") there has to be a physical or mental disability that requires a need for adjustment of the working situation in order to ensure the employee the same degree of functionality as other working colleagues in the same position.

Mr. B has a kind of disability where his level of dysfunctionality is not obvious. Some people with Asperger's will require a substantial amount of appropriate measures to ensure a working situation on an equal basis, whereas others will hardly need any adjustments at all.

At the same time it seems clear that the main features of Mr. B's condition and his job as a customer adviser would require certain measures to ensure an equal basis for his working situation. This was also Mr. B's own understanding when he requested a mentor to ensure and prevent his behaviour would raise concerns both from others in general and from his working colleagues. His dismissal was directly related to problems arising from his impairment.

Mr. B's case therefore falls within the scope of the law.

2. Which court, organisation would be competent?
In Norway there are two ways to address cases like Mr. B:
The ombudsman for equality and discrimination who handles complaints on discrimination against disabled people in their working life,
To consider the lawfulness of his dismissal through the Working Environment Act and his legal protection against unlawful dismissals

The ombudsman will ask for both sides' opinion and information before making a statement as to whether the anti-discrimination law has been violated or not. This statement can be appealed. Questions concerning compensation if a violation has been found to have taken place must however be considered by a legal court which also can order the payment of such compensation.

3. Which ground (s) would apply here? Please explain.
Regarding Mr. B there will be discrimination on the basis of disability. It could also be discrimination on the basis of gender. The reason for this is that men are in general the focus of attention regarding sexual harassment. This behaviour could therefore often be considered to be bad male behaviour, even if the reason for the behaviour could be an underlying disability as in this case. If a woman however should start acting in a similar way, it is more likely that her behaviour would be understood as a problem which has to do with her disability rather than something she should be made responsible for. This leads to the conclusion that men in this situation are more likely than women to suffer consequences because they are men.

4. Would the dismissal of Mr. B constitute direct discrimination, indirect discrimination or no discrimination at all?
Direct and indirect discrimination are not defined in Working Environment Act. The green paper ("travaux préparatoires") however defines direct discrimination as actions where people because of their disability are treated in a different way from the way others have been. Indirect discrimination is described as treatment, practices etc that result in a situation where people with a disability are put in a less favourable situation than people without disabilities.

We find that there are reasons to consider the treatment of Mr. B as directly related to his disability and therefore constituting direct discrimination.

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification. Please elaborate on the objective justification test.
There are exceptions to the prohibition against discrimination under the Working Environment Act §13-3 (1). If there are justifiable reasons, if it can be accepted by the people that will be involved and also can be seen as necessary during the course of employment, it will not be discrimination according to the law.

Is it possible for Mr. B to perform his work in a manner acceptable to both customers and colleagues? We find that too little has been tried to see if Mr. B could perform his work in an acceptable way and find therefore that the

company has been discriminating against Mr. B.

There are exceptions to the prohibition against discrimination. If Mr. B's behaviour cannot be controlled by employing a mentor as requested by Mr. B and it should prove to have no or little effect on the unwanted behaviour, then the conclusion would be different. Please also see question 6 on this matter.

6. Would there be a failure to make reasonable accommodation in this case (particularly in relation to the mentor)? How would this part of the claim be dealt with under your legislation?
Under Working Environment Act the company would have to as far as possible make necessary reasonable accommodation for Mr. B. It has to be considered whether such accommodation would enable Mr. B to perform his work and it would have to be considered whether his colleges would suffer in an unacceptable way.

The fact that Mr. B was employed as a customer adviser could also result in difficulties concerning the way he treats customers. Having a mentor would not necessarily reduce incidents totally. The treatment of the customers is crucial to the company. Nevertheless, the company should be expected to find solution that does not result in Mr. B's dismissal. He could be given other duties than direct contact with customers; he could be given a completely different position in the company, as in the case of the other man who had been accused of sexual harassment.

7. How would the shifting of the burden of proof apply in this case?
Mr. B was dismissed because of unintentional sexual harassment which was classified as gross misconduct. There are therefore no doubts that his behaviour was related to his impairment.

According to Working Environment Act §13-8 the burden of proof shifts as long as there are reasons to believe that a person has been treated differently because of their disability.

8. How would you balance the prohibition on gender and on disability discrimination in this case?
Gender discrimination could apply towards Mr. B who suffers because he is treated in a far more strict way by the company than what is likely had it been a woman in his situation. Gender discrimination would also apply towards his female colleagues who have to accept sexual harassment during working hours if the company is unable to control the situation completely.

By considering the consequences both to Mr. B (dismissal from his job) and his colleagues (suffering under unintentional sexual harassment) we find that discrimination of Mr. B because of his impairment has to be given priority.

Slovakia

National Centre for Human Rights

1. Does the case fall within the scope of anti discrimination law in you country – in particular, would Mr. B be disabled under your anti-discrimination law? Please explain how or why not.
This case will fall within the scope of the Slovak anti-discrimination law.

The Constitution of the Slovak Republic represents the framework and basis of all other laws, no law can be in conflict with the Constitution. The general constitutional principle of prohibition of discrimination in the Slovak legal order is established in Art. 12 par. 2 of the Constitution, that stipulates:

> *"Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favoured on any of these grounds."*

According to Art. 6 par. 1 of Act Nr. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination (hereinafter referred as "Anti-discrimination Act") in conformity with the principle of equal treatment, any discrimination shall be prohibited in employment relations, similar legal relations and related legal relations on grounds of sex, religion or belief, racial, national or ethnic origin, disability, age and sexual orientation.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)
- level of the court: competent district court
- other organisation: Slovak National Centre for Human Rights, National Council of Disabled People.

3. Which ground(s) would apply here? Please explain.
Ground: disability
There is no general legal definition of disability in the legal order of the Slovak Republic.
The term "health disability" is defined by social security and health care regulations for purposes of each of these legal norms. In most cases "a disabled person" is defined as a natural person with a permanent impairment of physical or psychological health. A functional impairment is a lack of physical, sensual and mental abilities of a person exceeding, from the point of view of a disability prognosis, a period

of one year. The level of functional impairment is determined in a percentage.

"Asperger's Syndrome: is a neurobiological disorder. Individuals with AS can exhibit a variety of characteristics and the disorder can range from mild to severe. Persons with AS show marked deficiencies in social skills, have difficulties with transitions or changes and prefer sameness. They often have obsessive routines and may be preoccupied with a particular subject of interest. They have a great deal of difficulty reading nonverbal cues (body language) and very often the individual with AS has difficulty determining proper body space. Often overly sensitive to sounds, tastes, smells, and sights, the person with AS may prefer soft clothing, certain foods, and be bothered by sounds or lights no one else seems to hear or see. It's important to remember that the person with AS perceives the world very differently. Therefore, behaviour that seems odd or unusual is due to those neurological differences and not the result of intentional rudeness or bad behaviour, and most certainly not the result of "improper parenting". By definition, those with AS have a normal IQ and many individuals (although not all), exhibit exceptional skills or talents in a specific area. Because of their high degree of functionality and their naiveté, those with AS are often viewed as eccentric or odd and can easily become victims of teasing and bullying. While language development seems, on the surface, normal, individuals with AS often have deficits in pragmatics and prosody. Vocabularies may be extraordinarily rich and some children sound like "little professors." However, persons with AS can be extremely literal and have difficulty using language in a social context" [34]

4. Would the dismissal of Mr. B constitute direct discrimination, indirect discrimination or no discrimination at all?

In the case of Mr B his employer was aware that Mr B has Asperger's Syndrome and of the difficulties and consequences resulting from this disease. Despite this fact the employer employed Mr B in his furniture company as a customer adviser.

After three years Mr B was dismissed. The reason for his dismissal was unintentional sexual harassment that was classified in the employer's disciplinary code as gross misconduct.

On the other hand, another employee who worked at the same place as Mr B and did not suffer from Asperger's Syndrome, was accused of sexual harassment and general harassment, but was not dismissed.

In our opinion the conduct in question constitutes direct discrimination on the grounds of disability, because Mr B was treated less favourably than his colleague in a comparable situation.

Both men worked at the same place, under the same conditions. They were employees of the same employer, who published a general internal disciplinary code binding for all employees. According to provisions of this code sexual harassment is defined as gross misconduct.

The employer must have been aware, that Mr B's harassment was not intentional, but was caused by his disease. If the employer decided to dismiss Mr B for the single reason that he committed unintentional sexual harassment, the employer should have acted in the same way in the case of the other employee who committed sexual as well as general harassment and should have dismissed him too.

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.

a) LEGITIMATE AIM: protection of rights and interests of others.
b) APPROPRIATE MEASURE: dismissal was not appropriate, because the employer could have provided Mr B with a mentor, which he asked for several times, who could have assisted Mr B and prevented Mr B's impropriate, odd and unusual reactions resulting from his neurological disorder.
c) NECESSARY MEASURE: only if there was no alternative non-discriminatory measure at the disposal of Mr B's employer (e.g. if the committed sexual harassment could not have been, with regard to Mr B's disease, prevented in another way).

6. Would there be a failure to make reasonable accommodation in this case (particularly in relation to the mentor)? How would this part of the claim be dealt with under your legislation?

According to Art. 7 of the Anti-discrimination Act the employer has a legal obligation to take some appropriate measures in relation to a disabled employee.
(Art. 7 par. 1) Refusal or omission of the employer to take appropriate measures to enable a person with a disability to have access to employment, to work of a certain type, to promotion or other advancement or to training shall also be deemed to constitute indirect discrimination based on disability; this does not apply if the adoption of such measures would impose a disproportionate burden on the employer.
Mr B could have been provided with a mentor or transferred to another more suitable position for him with regard to his impairment, by his employer.

[34] http://www.udel.edu/bkirby/asperger/aswhatisit.html

7. How would the shifting of the burden of proof apply in this case?
Mr B should demonstrate he was dismissed because he was disabled. His conduct in question (sexual harassment) was not intentional, but was caused by his disease and he was treated less favourably as his colleague who was also accused of sexual harassment.
(Art. 11 par. 2) The defendant has the obligation to prove that there was no violation of the principle of equal treatment if the evidence submitted to the court by the plaintiff gives rise to a reasonable assumption that such violation indeed occurred.

Sweden

Ombudsman against Ethnic Discrimination

1. Does the case fall within the scope of anti discrimination law in you country – in particular, would Mr. B be disabled under your anti-discrimination law? Please explain how or why not.
Yes. The definition of disability in Swedish legislation prohibiting discrimination because of disability in working life is wide. The definition is in 2§: Disability means every permanent physical, mental or intellectual limitation of a person's functional capacity that is a consequence of an injury or illness, that existed at birth, arose thereafter or may be expected to arise. The answer is yes, the case falls within the scope of anti-discrimination law in Sweden

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)
The Labour Tribunal - if the complainant is a member of a labour union or the Disability Ombudsman takes the case to court; the decisions cannot be appealed. Otherwise it is the district court and its decision can be appealed to the Labour Court.

3. Which ground(s) would apply here? Please explain.
Dismissal only as the Swedish legislation only requires reasonable accommodation when employing and not for somebody already employed.

4. Would the dismissal of Mr. B constitute direct discrimination, indirect discrimination or no discrimination at all?
Direct discrimination.

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.
In Swedish labour law the illness/disability as such is not a justifiable ground for dismissal. Only if a person is so ill that he/she cannot perform work of any use to the employer can a dismissal be justifiable as such. Hence it could be regarded as an objective justification if B's disability means that he cannot socially interact with his co-workers. But if B's disability does not constitute such a problem one can argue just the opposite. The fact that another co-worker has not been dismissed cannot be taken for granted as an example as the cases are not necessarily comparable.

6. Would there be a failure to make reasonable accommodation in this case (particularly in relation to the mentor)? How would this part of the claim be dealt with under your legislation?
No, see above the answer to question 3.

7. How would the shifting of the burden of proof apply in this case?
If Mr B can make it probable that he has been dismissed because of his impairment the burden of proof will shift to the employer.

8. How would you balance the prohibition on gender and on disability discrimination in this case?'
The main part of the case seems to be about disability and hence that would have the most prominent part of an argumentation in the case.

Remedies
As the legislation, as regards the working life directive, on <u>all</u> grounds, is built upon the existing labour legislation, it is those rules that apply whether discrimination or not. Hence the normal "compensation" is damages and yes, you can get your job back under very special conditions. But then the employer can "buy you out" afterwards. Otherwise no other remedies are available.

Annex 5
Country responses to the case study on disability discrimination
Physical Impairment

Estonia

Office of the Chancellor of Justice

1. Does the case fall within the scope of anti discrimination law in you country – in particular, would Ms. T be disabled under your anti-discrimination law? Please explain how or why not.

a. The case falls within the scope of anti-discrimination law in Estonia. The Republic of Estonia Employment Contracts Act § 10 (2) says that employers shall not discriminate against employees on any of the grounds specified in subsection (3) of this section upon remuneration, promotion in employment or office, giving instructions, termination of employment contracts, access to retraining or in-service training or otherwise in employment relations.

b. No special definition of disability exists in anti-discrimination law. Social Benefits for Disabled Persons Act (DPA) § 2 (1) 1 – 3 stipulates that a disability is the loss of or an abnormality in an anatomical, physiological or mental structure or function of a person; for the purposes of that Act, there are three degrees of severity of disabilities: 1) profound disability is the loss of or an abnormality in an anatomical, physiological or mental structure or function of a person as a result of which the person needs constant personal assistance, guidance or supervision twenty-four hours a day; 2) severe disability is the loss of or an abnormality in an anatomical, physiological or mental structure or function of a person as a result of which the person needs personal assistance, guidance or supervision in every twenty-four hour period; 3) moderate disability is the loss of or an abnormality in an anatomical, physiological or mental structure or function of a person as a result of which the person needs regular personal assistance or guidance outside his or her residence at least once a week. As the degrees of severity of disabilities have an importance only when a disabled person applies for social security benefits, they are of no importance when finding out whether a person has a disability or not.

According to DPA § 2 (1) 1st sentence disability is the loss of or an abnormality in an anatomical, physiological structure or function of a person. Visual impairment is a loss of physiological function. Therefore, visual impairment could constitute a disability under the definition of a disability in DPA § 2 (1) first sentence.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)

- Chancellor of Justice, the conciliator in discrimination matters between private parties.
- Labour dispute committee (labour dispute committees are extra-judicial independent individual labour dispute resolution bodies; If the parties do not agree with a decision of a labour dispute committee, the parties to the dispute have recourse to county courts for hearing of the same labour dispute; the form of recourse to the court is a statement of claim, not an appeal against a decision of a labour dispute committee).
- County Court (1st level), after that District Court (appeal), after that the civil law chamber of the Supreme Court (cassation).

3. Which ground(s) would apply here? Please explain.

Disability as it is a feature that makes Ms T special.

4. Would the dismissal of Ms. T constitute direct discrimination, indirect discrimination or no discrimination at all?

There were two nursing assistants performing the same tasks at the practice. One of them got visually impaired and was dismissed soon after learning of the disability.

According to the Republic of Estonia Employment Contracts Act (REECA) § 10^2 (2) direct discrimination shall be taken to occur where one person applying for employment or an employee is treated less favourably than another person applying for employment or another employee is, has been or would be treated in a comparable situation, on any of the grounds specified in § 10 (3). The grounds specified in § 10 (3) are: sex, racial origin, age, ethnic origin, level of language proficiency, disability, sexual orientation, duty to serve in defence forces, marital or family status, family-related duties, social status, representation of the interests of employees or membership in workers' associations, political opinions or membership in a political party or religious or other beliefs.

As the case entails no other facts which could give other reasons for dismissal it is likely that Ms T was dismissed due to her disability, as the other employee, not having a disability, was not dismissed.

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.

REECA § 10^2 (2) sets no justification for direct discrimination. REECA § 10^1 4 stipulates that for the purposes of REECA, taking account of the sex, level of language proficiency, age or disability upon employment of a person, or upon giving instructions or enabling access to retraining or in-service training, if this is an essential and determinative professional requirement arising from the nature of the

professional activity or related conditions, shall not be deemed to be discrimination.
Therefore, if clear vision is an occupational requirement, then it is deemed that no discrimination has taken place.

6. Would there be a failure to make reasonable accommodation in this case? How would this part of the claim be dealt with under your legislation?
Moreover, § 10^1 4 stipulates that for the purposes of REECA, taking account of the sex, level of language proficiency, age or disability upon employment of a person, or upon giving instructions or enabling access to retraining or in-service training, if this is an essential and determinative professional requirement arising from the nature of the professional activity or related conditions, shall not be deemed to be discrimination. That means that if such an occupational requirement exists, that cannot be adapted to a certain disability, the employer shall not be deemed discriminating the employee when dismissing the employee. On the other hand, if it is possible to accommodate the work with the needs of the disabled, the employer is under a general obligation to do so. So, first of all, it should be clarified whether Ms T can carry out her tasks at work without any accommodation. If the answer is "no", then it should be clarified whether her disability is incompatible with the occupational requirement and whether it is possible to adapt her disability with the work in question i.e. it is possible to arrange things so that Ms T is at the reception desk only and the other nurse does nursing and if this would not be a disproportionate burden to the employer (apparently also to the other nurse), then accommodation should be made possible. If not, then no accommodation can be provided.

7. How would the shifting of the burden of proof apply in this case?
The burden of proof will shift to the employer as the facts suggest that Ms T was dismissed due to her visual impairment.

Great Britain

Disability Rights Commission

1. Does the case fall within the scope of anti discrimination law in you country – in particular, would Ms. T. be disabled under your anti-discrimination law? Please explain how or why not.
Yes it would fall under the definition contained in s.1 of the DDA (and she did). Anyone who is registered blind or partially sighted or certifiable as such is automatically covered under the Act.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)
It would be held first in the employment tribunal.

3. Which ground(s) would apply here? Please explain.
Disability grounds.

4. Would the dismissal of Ms. T constitute direct discrimination, indirect discrimination or no discrimination at all?
Direct discrimination and possibly also disability related discrimination (although in this case it was direct discrimination specifically).

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.
Direct discrimination is not capable of justification. Disability related discrimination can be justified on the basis that the treatment is for a material and substantial reason.

6. Would there be a failure to make reasonable accommodation in this case? How would this part of the claim be dealt with under your legislation?
There was in this case a failure to make reasonable accommodation in that the surgery could have made changes to Ms. B's work practices to enable her to continue working even with a visual impairment.

7. How would the shifting of the burden of proof apply in this case?
Once the claimant had shown that there was a difference of treatment between her and another person in the same circumstances (and in this case the comparator was someone with a broken leg who, if they told the employer of this would not have been dismissed) – facts from which it could be inferred in the absence of an adequate explanation that she has been treated less favourably, on the ground of her disability, than the comparator – then the employer would have to show that disability was not any part of the reason for the treatment in question – which in this case they failed to do.

Greece

Greek Ombudsman

1. Does the case fall within the scope of anti discrimination law in you country – in particular, would Ms T be disabled under your anti-discrimination law? Please explain how or why not.
In Greek anti-discrimination law there is no definition of disability; therefore, each case would be considered ad hoc. Partial sight may be considered as a disability to the extent that it may cause discriminatory behaviour by the employer.

Finally, it should be noted that in the absence of specific definition of disability in the anti-discrimination law, there is a possibility that courts may resort to definitions used in a social security context.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)
The Court of First Instance.
There is also an administrative procedure. Complaints are investigated by a special body of the Ministry of Labour and Employment (SEPE) and the Equal Treatment Commission of the Ministry of Justice.

3. Which ground(s) would apply here? Please explain.
Discrimination on the grounds of disability.

4. Would the dismissal of Ms T constitute direct discrimination, indirect discrimination or no discrimination at all?
It seems to be a case of direct discrimination.

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.
If the employer dismissed the employee as soon as she was informed about the disability, it seems very unlikely that any justification could be found – unless full visual ability was a widely acknowledged prerequisite for this job. In effect, in order to assess whether visual ability is a legitimate and proportionate job requirement focus must be placed on the specific duties that Ms T had to carry out.

6. Would there be a failure to make reasonable accommodation in this case? How would this part of the claim be dealt with under your legislation?
Under the Framework Directive (and under the Greek anti-discrimination law) the reasonable accommodation duty arises in relation to an existing or potential employee. In this case, Mrs T was not a disabled person until the stroke took place and she was dismissed as soon as her employer learnt about her disability, i.e. there was a direct and not justifiable discrimination and the question of failure to make reasonable accommodation seems immaterial.

7. How would the shifting of the burden of proof apply in this case?
The employer of Mrs T will have to prove that the dismissal was not linked to her disability.

The Netherlands

Equal Treatment Commission

1. Does the case fall within the scope of anti discrimination law in you country – in particular, would Ms. T be disabled under your anti-discrimination law? Please explain how or why not.
The case would fall under the Dutch Act on equal treatment on the grounds of disability or chronic illness. Due to section 4 of the Act, discrimination on the ground of disability or chronic illness is prohibited in entering into and terminating an employment relationship. The Act does not provide for a definition of disability or chronic illness. In the history of the bill it appears that disability and chronic illness can be physical, mental or psychological; that a disability is in principle irreversible; and that a chronic illness does not have to be irreversible, but at least lengthy. Due to section 1 (b) of the Act, the disability or chronic illness can be real or alleged. This corresponds with the ECJ Navas-case (ECJ 11 July 2006, *Navas*, nr. C-13/05). The Dutch Equal Treatment Commission always brackets disability and chronic illness together. In this case, the visual impairment as diagnosed at the hospital will probably be – if lengthy or irreversible - a disability or chronic disease under the Act.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)
The Dutch Equal Treatment Commission is competent and can give a non-binding opinion on this case. This procedure is without costs. Parties do not need to have a lawyer. A district court will also competent and can give a binding opinion on this case. For this procedure, legal charges must be paid. In employment cases before a district court a lawyer is not obligatory.

3. Which ground(s) would apply here? Please explain.
Disability. See under 1.

4. Would the dismissal of Ms. T constitute direct discrimination, indirect discrimination or no discrimination at all?
Under section 1(b) and of the Dutch Act on equal treatment on the grounds of disability or chronic illness direct discrimination is discrimination between people on the grounds of a real or alleged disability or chronic illness. Due to section 1 (c) of the act, indirect discrimination is discrimination on the grounds of traits or behaviour other than those described under section 1 (b) which result in direct discrimination.

Ms. T's employer dismissed her immediately after the call of her mother informing the employer she had a visual impairment. The dismissal is thus probably related to Ms. T's visual impairment. The employer should therefore be asked why he dismissed Ms. T. so suddenly after hearing the news. This should be asked of the employer. If the answer is positive or if in a different way it becomes plausible that the dismissal is related to Ms. T's

visual impairment there will be direct discrimination on the ground of disability.

This goes beyond this case, but normally the Dutch Equal Treatment Commission would, before answering the question of whether discrimination has taken place, consider whether Ms. B. would – apart from her disability or chronic illness - be eligible for her job. This corresponds with Recital 17 in the preamble of Directive 2000/78/EC. However, since Ms. B's employer dismissed her immediately after the call of her mother informing the employer she had a visual impairment, it would be difficult for the employer to keep up the argument that Ms. B. would not be eligible for the job.

If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.
Only indirect discrimination on the ground of disability or chronic illness can be justified. However, in three cases the prohibition on direct discrimination on the ground of disability or chronic illness (direct or indirect) does not apply (there is thus no justification, since there is no discrimination in these cases):

a. the discrimination is necessary to protect health and safety (section 3(1)(a) of the Dutch Act on equal treatment on the grounds of disability or chronic illness);
b. the discrimination relates to a regulation, standard or practice which is aimed at creating or maintaining specific provisions and facilities for the benefit of persons with a disability or chronic illness (section 3(1)(b) of the Act);
c. if the discrimination concerns a specific measure which has the aim of granting persons with a disability or chronic illness a privileged position in order to neutralise or ameliorate existing disadvantages and the discrimination is proportionate to the objective (section 3(1)(c) of the Act).

The Dutch Equal Treatment Commission has not yet given an opinion in a case where section 3(1)(a) was used, but it is probable that the employer would appeal to this section, arguing that the safety of animals is at stake since Ms. B does nursing duties for operations. In this case the Dutch Equal Treatment Commission would probably not accept the argument, since the employer immediately dismissed Ms. B after her mother phoned. The employer has probably not examined how bad the visual impairment of Ms. T was and whether reasonable accommodation could be made (see also under 6). Without having done that the employer could hardly say something about safety.

7. Would there be a failure to make reasonable accommodation in this case? How would this part of the claim be dealt with under your legislation?
Due to section 2 of the Dutch Act on equal treatment on the grounds of disability or chronic illness, the prohibition on discrimination also means that the persons on whom this prohibition is imposed are obliged to make effective modifications according to need, unless this would impose a disproportionate burden on them.

Given that the employer directly dismissed Ms. T, the employer probably did not want to examine how bad the visual impairment of Ms. T was and whether reasonable accommodation could be made. This would constitute a failure to make reasonable accommodation. Although it normally is the disabled or chronically ill person that has to ask for reasonable accommodation, the employer in this case has not given Ms. B. the opportunity to ask for one by dismissing her immediately.

7. How would the shifting of the burden of proof apply in this case?
Section 10 (1) of the Dutch Act on equal treatment on the grounds of disability or chronic illness says that if a person who believes that they are or will be discriminated against to their disadvantage as described in this Act produces facts in court which can give grounds for suspecting that such discrimination exists, the counter party must prove that they have not acted contrary to the law.

Section 10(2) of the Act says that if a person who believes that they have been disadvantaged by acts contrary to section 2 (effective modification) produces facts in court which can give grounds for suspecting that there has been a failure to make effective modifications, the counter party must prove that they have not acted contrary to this provision.

Ms. B's employer dismissed her immediately after the call of her mother informing the employer she had a visual impairment. This could well lead to a suspicion that discrimination exists.

Norway

Equality and Anti-discrimination Ombud

We assume that the case at hand is about an employee who has suffered eyesight impairment. The extent and durability of the impairment is not specified. We assume however that the impairment is such that it negatively impacts on Ms T's ability to perform her professional duties.

1. Does the case fall within the scope of anti discrimination law in you country – in particular,

would Ms. T be disabled under your anti-discrimination law? Please explain how or why not.
This case would fall within the scope of the Norwegian legal protection against discrimination for reasons of disability. Direct and indirect discrimination on the grounds of disability, amongst others, is prohibited pursuant to the provisions of the Working Environment Act. In accordance with §13-1(1) and §13-2 (1)-d of the Act the prohibition applies to all aspects of the employment relationship, including termination of employment.

The Act does not contain a definition of the concept "physical handicap". The "travaux préparatoires" however refer to the need, as a condition for the existence of such disability, of a physical or mental impairment, that commands or brings about an adjustment that will permit the person to function on a par with other persons in a similar situation.

According to the "travaux préparatoires" for the Act, a disability must be of permanent character in order to be deemed as such. Temporary impairments are the subject of other duties on the part of an employer pursuant to § 4-6 of the Act, which pertain to the employer's obligations to make adjustments for employees with reduced working abilities.

Additionally we refer to a new forthcoming Norwegian law for the protection against the discrimination of persons with disabilities, which is currently underway. The law will apply to all spheres, including employment relationships. The legislative committee, in tune with the "travaux préparatoires" for this law, does not distinguish between temporary and permanent disability, except strictly short-term impairments which are not to be encompassed by the protection established by the law.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)
Norway provides for a dual system for handling such cases. A case of this kind would raise a discrimination issue pursuant to anti-discrimination laws and an issue concerning whether the termination was legal and based on objective grounds, in accordance with applicable rules and regulations regarding employment and employment protection.

Procedure according to anti-discrimination laws: A case about discrimination or failure to comply with the duty to make necessary adjustments may be brought before the Equal Opportunity and Anti-Discrimination Ombud. After having examined arguments from both parties, the Ombud renders an opinion on whether the termination constitutes discrimination in violation of the laws. The Ombud´s opinion may be appealed to the board of appeals, the Equal Opportunity and Anti-Discrimination Tribunal. Neither the Ombud nor the Tribunal has the authority to impose financial compensation or restoration of employment in the event that the termination is deemed to have happened in contravention of the discrimination rules.

The case may also be brought before an ordinary court of law, which in turn may impose the payment of financial compensation in case of violation of the law.

Procedure according to employment regulations: The case will be handled as an employment termination/dismissal case. The appropriate authority is an ordinary court of law, consisting of several co-judges who have special expertise in labour and employment law (a.k.a. local labour jurisdiction). The court will pronounce itself on the issue regarding the validity/legality of the termination/dismissal. Part of the court's assessment will cover issues regarding protection against discrimination and a duty to make appropriate adjustments on the part of the employer.

3. Which ground(s) would apply here? Please explain.
The relevant legal grounds would be the protection against discrimination for reasons of physical impairment/handicap as mentioned in point 1) above.

4. Would the dismissal of Ms T constitute direct discrimination, indirect discrimination or no discrimination at all?
Following an amendment the Employment Environment Act no longer makes a distinction between direct and indirect discrimination. According to the "travaux préparatoires" for said Act, direct discrimination is to be understood as the fact that a person, due to a handicap, is being treated in a worse manner than others have been, would be or are being treated, in a similar situation. Indirect discrimination is to be understood as an apparently neutral decision, condition, practise, action or omission, the specific effect of which is to put the person in a worse situation due to his or her handicap.

Our assumption is that Ms. T's employment was terminated as a direct consequence of her eyesight impairment, so that there is to be no doubt as to the cause of the employment severance. Such event would accordingly constitute an act of direct discrimination.

It is to be noted that the draft currently underway for the upcoming law on anti-discrimination for reasons of handicap, makes

a distinction between direct and indirect discrimination.

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.
The Employment Environment Act, pursuant to its §13-3 (1), provides for an exception to the prohibition against discrimination. Differential treatment whose objective is reasonably justifiable, that does not have an overly radical effect on the person/persons being affected, and which is necessary for the achievement of a work task or a profession, does not constitute discrimination according to the law.

Accordingly the issue is whether Ms T's eyesight impairment implies that she is unable to carry out her work tasks. If such is the case, differential treatment in her respect would be legal. This question however is directly linked to that of the duty to make adjustments, as discussed under point 6) hereafter.

6. Would there be a failure to make reasonable accommodation in this case? How would this part of the claim be dealt with under your legislation?
According to § 13-5 of the Employment Environment Act an employer shall to the extent possible adopt such measures that are necessary in order for employees with an impairment/handicap to maintain their employment. A failure to see to the necessary adjustments implies discrimination in violation of the law.

In the case at hand one must assess whether adjustment measures would imply that Ms. T would be able to retain her employment, either by performing the same tasks or other tasks of a similar level. Such measures could be the assignment of different tasks or the redistribution of tasks, for example a reassignment regarding reception work and assistance during operations (one of her colleagues had similar assignments), or the procurement of physical facilities if accessible.

However the law provides for a limitation to the employer's adjustment duty to the extent that such measures may imply an inordinate burden for the employer. This is subject to a specific assessment of relevant factors such as the company's size, its financial status, the extent of the person's impairment, and his or her needs.

Additionally, this limitation is to be applied in accordance with general employment/labour law provisions, which provide that adjustments for one employee may not bring about an increased burden for other employees. This may imply for instance a limitation regarding a redistribution of assignments between Ms. T and her colleagues.

7. How would the shifting of the burden of proof apply in this case?
Burden of proof leading to the establishment of the illegality of the termination/dismissal:
Ms T's employment was terminated immediately after a telephone call from her mother. According to § 13-8 of the Employment Environment Act, the burden of proof shifts over to the employer if the employee provides information that gives reason to believe that there has been direct or indirect discrimination in contravention of the provision of the act. The employer must then prove on a balance of probabilities that such differential treatment did not take place. The burden of proof lies therefore with the employer.

Slovakia

National Centre for Human Rights

1. Does the case fall within the scope of anti discrimination law in you country – in particular, would Ms. T be disabled under your anti-discrimination law? Please explain how or why not.
This case will fall within the scope of the Slovak anti-discrimination law.

The Constitution of the Slovak Republic represents the framework and basis of all other laws, no law can be in conflict with the Constitution. The general constitutional principle of prohibition of discrimination in the Slovak legal order is established in **Art. 12 par. 2 of the Constitution**, that stipulates:

> *"Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favoured on any of these grounds."*

According to Art. 6 par. 1 of the **Act Nr. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination** (hereinafter referred as "Anti-discrimination Act") in conformity with the principle of equal treatment, any discrimination shall be prohibited in employment relations, similar legal relations and related legal relations on grounds of sex, religion or belief, racial, national or ethnic origin, disability, age and sexual orientation.

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)

Every person who considers themselves wronged in their rights or interests protected by law and/or freedoms because the principle of equal treatment has not been applied to them may according to § 9 of the Anti-discrimination Act pursue their claims by judicial process. They may, in particular, 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. The amount of non-pecuniary damages in cash shall be determined by the court, taking account of the extent of non-pecuniary damage and all underlying circumstances.

Level of the court: competent district court
Other organisations: Slovak National Centre for Human Rights

3. Which ground(s) would apply here? Please explain.
Ground: disability
There is no general legal definition of disability in the legal order of the Slovak Republic. The term "health disability" is defined by social security and health care regulations for purposes of each of these legal norms. In most cases "a disabled person" is defined as a natural person with a permanent impairment of physical or psychological health. A functional impairment is a lack of physical, sensual and mental abilities of a person exceeding, from the point of view of a disability prognosis, a period of one year. The level of functional impairment is determined in percentage.

The ability of Ms T to perform her job has been impaired because of a stroke she suffered. According to the above-mentioned accepted definition of disability, Ms T has a functional impairment.

4. Would the dismissal of Ms T constitute direct discrimination, indirect discrimination or no discrimination at all?
In the opinion of the Centre this case must be seen from two points of view:

a) Ms T's work at a reception desk:
On the condition that her visual impairment has no effect on the performance of her duties and she is able to do her work as well as before, the immediate dismissal can be defined as direct discrimination of Ms T because of her disability.

b) Ms T's work as a nurse for operations:
The special character of this work requires additional requirements an employee must fulfil. These professional and health requirements may be considered as legitimate also according to Art. 8 par. 1 of the Anti-discrimination Act, which regulates admissible different treatment.

> *"Differences of treatment shall not constitute discrimination if they are objectively justified by the nature of occupational activities or the circumstances under which such activities are carried out, provided that the extent or form of such differences of treatment are legitimate and justified in view of these activities or circumstances under which they are carried out."*

Under these circumstances the dismissal from the position as a nurse can be objectively justified by the nature of occupational activities and therefore it does not constitute any discrimination.

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.
a) Legitimate aim: protection of health and rights of others.
b) Appropriate measure: a dismissal from a position of a nurse may have been appropriate but if Ms. T could have performed her work at the reception desk then a dismissal was not appropriate and the employer could have accepted other methods to enable her to do her job at the reception.
c) Necessary measure: only if there was no alternative non-discriminatory measure at the disposal of Ms T's employer (e.g. he had no work for her anymore) could the measure be considered as necessary and justified.

6. Would there be a failure to make reasonable accommodation in this case? How would this part of the claim be dealt with under your legislation?
According to Art. 7 of the Anti-discrimination Act the employer has a legal obligation to take some appropriate measure in relation to a disabled employee:

> *(Art. 7 par. 1) Refusal or omission of the employer to take appropriate measures to enable a person with a disability to have access to employment, to work of a certain type, to promotion or other advancement or to training shall be also deemed to constitute indirect discrimination based on disability; this does not apply if the adoption of such measures would impose a disproportionate burden on the employer.*

It is difficult to answer this question unambiguously because from the wording of the case we don't know what kind of measure

would be appropriate for Ms T with regard to her disability.

The Anti-discrimination Act stipulates that the above-cited legal obligation of the employer is not absolute.

> *(Art. 7 par. 2 and 3) "To determine whether the measures referred to in paragraph 1 give rise to a disproportionate burden, account shall be taken of*
>
> *a) the benefit that the adoption of the measure would mean for the disabled person,*
>
> *b) financial resources of the employer, including the possibility of obtaining funding or any other assistance for the adoption of the measure, and*
>
> *c) the possibility of attaining the purpose of the measure referred to in paragraph 1 in a different, alternative manner.*
>
> *The measure shall not be considered as giving rise to disproportionate burden if its adoption by the employer is mandatory under separate legal provisions.*

7. How would the shifting of the burden of proof apply in this case?
Ms T must submit evidence proving her employer fired her only because of her disability and he did not take into consideration any alternative ways to solve the problem. Subsequently the employer must rebut Ms T's allegations and explain reasonably his conduct.

> *(Art. 11 par. 2) The defendant has the obligation to prove that there was no violation of the principle of equal treatment if the evidence submitted to court by the plaintiff gives rise to a reasonable assumption that such violation indeed occurred.*

Sweden

Ombudsman against Ethnic Discrimination

1. Does the case fall within the scope of anti-discrimination law in you country – in particular, would Ms. T be disabled under your anti-discrimination law? Please explain how or why not.
Yes, the definition of disability in the Swedish legislation prohibiting discrimination because of disability in working life is wide. The definition is in 2§: Disability means every permanent physical, mental or intellectual limitation of a person's functional capacity that is a consequence of an injury or illness that existed at birth arose thereafter or may be expected to arise. The answer is yes, the case falls within the scope of anti-discrimination law in Sweden

2. Which court, organisation would be competent? (Please specify the level of the court in the court system)
The Labour Tribunal - if the complainant is a member of a labour union or the Disability Ombudsman takes the case to court; the decisions cannot be appealed. Otherwise it is the district court and its decision can be appealed to the Labour Court.

3. Which ground(s) would apply here? Please explain.
Dismissal only as the Swedish legislation only requires reasonable accommodation when employing and not for somebody already employed.

4. Would the dismissal of Ms. T constitute direct discrimination, indirect discrimination or no discrimination at all?
Direct discrimination.

5. If you find that this case leads to direct or indirect discrimination, would there be an objective justification? Please elaborate on the objective justification test.
In Swedish labour law the illness/disability as such is not a justifiable ground for dismissal. Only if a person is so ill that he/she cannot perform work of any use to the employer can a dismissal can be justifiable as such. It depends on how much the visual impairment affects Ms T's ability to work. If she cannot do her work, she may not be in a comparable situation and thus not discriminated against. But if T's disability does not constitute such a problem one can argue just the opposite. Although the employer has to try to rehabilitate Ms T first and then find that her impairment is a severe hindrance to her work and there is no other work available for her with that employer. The fact that there was another receptionist at the company is of no relevance in this case.

6. Would there be a failure to make reasonable accommodation in this case? How would this part of the claim be dealt with under your legislation?
No, see above the answer to question 3.

7. How would the shifting of the burden of proof apply in this case?
If Ms T can make it probable that she has been dismissed because of her impairment the burden of proof will shift to the employer.