

# Dynamic Interpretation European Anti-Discrimination Law in Practice IV

Case Studies 2009

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**Equinet members:** Ombud for Equal Treatment, **Austria** | Centre for Equal Opportunities and Opposition to Racism, **Belgium** | Institute for Equality between Women and Men, **Belgium** | Commission for Protection against Discrimination, **Bulgaria** | Office of the Ombudsman, **Croatia** | Government Council for Human Rights, **Czech Republic** | Office of the Commissioner for Administration, **Cyprus** | Board of Equal Treatment, **Denmark** | Danish Institute for Human Rights, **Denmark** | Gender Equality Commissioner, **Estonia** | Ombudsman for Equality between Women and Men, **Finland** | Office of the Ombudsman for Minorities, **Finland** | High Authority against Discrimination and for Equality, **France** | Federal Anti-Discrimination Agency, **Germany** | Equality and Human Rights Commission, **Great Britain** | Office of the 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** | Office of the Ombudsman, **Latvia** | Equal Opportunities Ombudsman, **Lithuania** | Centre for Equal Treatment, **Luxembourg** | National Commission for the Promotion of Equality, **Malta** | Equal Treatment Commission, **Netherlands** | Equality Commission for Northern Ireland, **Northern Ireland** | Equality and Anti-Discrimination Ombud, **Norway** | Commission for Citizenship and Gender Equality, **Portugal** | National Council for Combating Discrimination, **Romania** | National Centre for Human Rights, **Slovakia** | Council for the Promotion of Equal Treatment and Non-Discrimination on the Grounds of Racial or Ethnic Origin, **Spain** | Defensoria - Gender Equality Ombud of the Basque Autonomous Community, **Spain** | Equality Ombudsman, **Sweden**

Equinet Secretariat | Rue Royale 138 | 1000 Brussels | Belgium  
info@equineteurope.org | www.equineteurope.org  
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# Preface

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

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

In 2009, the working group members decided to focus on cases relating to discrimination in the provision of goods, facilities and services, with particular emphasis put on the grounds of race/ethnic origin, religion or belief, sexual orientation and age<sup>1</sup>. The reason for this focus is to link to Equinet's work on the Proposed Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in the provision of goods, facilities and services<sup>2</sup>. It serves to highlight (a) why a new Directive is essential to improve and harmonise protection from discrimination in relation to goods and services; (b) where there is coverage or more importantly gaps in protection from discrimination in Member States in relation to goods, facilities and services; and (c) which equality bodies can or cannot provide assistance to victims of discrimination in these fields.

The cases examine three key issues: racial profiling by airlines for security or terrorism related reasons; discrimination in the provision of reproductive services to same-sex couples; and age discrimination in the provision of financial services. All of these cases raise fundamental issues about circumstances in which service providers can discriminate against particular groups.

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

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

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

Peter Reading  
Working Group Moderator

Krzysztof Śmiszek  
Policy Officer, EQUINET

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<sup>1</sup> Members of the working group were asked to respond to several questions prepared by WG Moderator and Equinet Policy Officer. The Group met on 29th June 2009 in Brussels and 18th September 2009 in Copenhagen to review their inputs and finalise the final shape of the report. The information contained in this report reflects the state of affairs on 22nd December 2009.

<sup>2</sup> 2.7.2008 COM(2008) 426 final

# Contributors

**Peter Reading** (*Moderator*)

Equality and Human Rights Commission, Great Britain

**Ulrike Salinger**

Ombud for Equal Treatment, Austria

**Michiel Bonte**

Centre for Equal Opportunities and Opposition to Racism, Belgium

**Calixe Lumeka**

Centre for Equal Opportunities and Opposition to Racism, Belgium

**George Kakotas**

The Office of the Commissioner for Administration (Ombudsman), Cyprus

**Nanna Margrethe Krusaa**

Danish Institute for Human Rights, Denmark

**Yrsa Nyman**

Office of the Ombudsman for Minorities, Finland

**Tamás Kádár**

Equal Treatment Authority, Hungary

**Marije Graven**

Equal Treatment Commission, the Netherlands

**May Schwartz**

Equality and Anti-Discrimination Ombud, Norway

**Margrethe Søbstad**

Equality and Anti-Discrimination Ombud, Norway

**Daniela Gemerska**

Slovak National Centre for Human Rights, Slovakia

**Miroslava Matejcikova**

Slovak National Centre for Human Rights, Slovakia

**Marie Nordström**

Equality Ombudsman, Sweden

# Chapter 1

## Case study on racial discrimination

### Case

The complainant was unable to use XYZ Airline's self-service check-in desk in relation to his trip from the country Tula to Great Britain in 2007. He was referred to manual check-in for a combination of reasons: firstly, because XYZ wanted to check whether he had the necessary travel documents and secondly, because XYZ wanted to determine the purpose of his trip, since the trip was paid with a credit card which did not belong to the complainant and thirdly because of his name which was not a well-known Scandinavian or British name of origin, but of an Arabic/Middle Eastern origin.

The complainant felt this was discriminatory towards him and he filed a complaint with a complaints committee.

XYZ stated that it as a practice profiles the reservations (at an unspecified date before flights) using various criteria, which XYZ for security reasons cannot reveal in details, since these criteria are also applied in matters of crime prevention.

XYZ relied on two letters in its defence to a discrimination claim, dated 14 January 2008 and 16 June 2008. In its letter dated 16 June 2008, XYZ stated that passengers' name, along with date of ticket purchase, payment conditions, travel patterns and reservation all are included among the factors which influence the decision of the airline company on who should be referred to the manual check-in. XYZ also informed the complaints committee that in that period the British government requested the airline to subject passengers seeking to travel to the United Kingdom to increased security checks.

In a previous similar case which had been before the complaints committee, XYZ stated that when selecting passengers to be referred to the manual check-in, XYZ focuses on whether or not travellers have a well-known Scandinavian or British name. The similar case concerned a travel that took place in 2006. In the present case, XYZ did not supply information which could give the complaints committee cause to believe that the selection criteria in this case differed from the ones used in the previous case.

XYZ indicated that not all travellers to Great Britain, who paid the ticket with credit card belonging to someone else, are referred to the manual check-in. However, the issues are sometimes investigated further, and that in these situations the decision on who will be referred to the manual check-in is based on an overall assessment. XYZ did not contest the information given by the complainant that the staff behind the counter asked him who paid the ticket, but there is no information on whether XYZ further investigated the fact that the ticket was paid by a credit card belonging to another person.

The complainant informed the complaints committee that XYZ's staff behind the counter did not just check the complainant's travel documents, but also stated to a person over the phone that the complainant spoke fluent Tula, after which the check-in was completed and the complainant was allowed to board the airplane. This information was not contested by XYZ.

XYZ has indicated, as in the previous case, that the main purpose of the decision to single out the complainant so that he would have to go to the manual check-in was to check his travel documents.

## Questions

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

1. Does this case fall within the scope of any or all of the following:

- the Race Directive 2000/43/EC and your domestic racial discrimination law implementing the Directive;
- the Proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services (in terms of religious discrimination);
- any domestic legislation on religious discrimination in your country?

*In your answer please consider what is the effect, if any, of article 3(2) of the Race Directive which provides that "This Directive does not cover difference of treatment based on nationality...and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals.... on the territory of Member States".*

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

3. Is there direct or indirect discrimination on the ground of race/ethnic origin or religion (according to your national legislation)?

*In relation to religious discrimination if you have no domestic legislation prohibiting religious discrimination in relation to services, please also answer the question based on whether religious discrimination would be established under the Proposed Directive.*

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

*In your answer please consider what would be the effect of any national legislation such as counter-terrorism legislation relating to threats to national security or article 2(8) of the Proposed Directive permitting discrimination where measures are "necessary for public security" on whether or not racial or religious discrimination would be established.*

5. Would any other form of discrimination be established under your domestic law – for example instructions to discriminate, or harassment on grounds of either race or religion?

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

## Legislation

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

Article 2

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

2. For the purposes of paragraph 1:



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

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

3. *Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.*

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

#### Article 3.2

*This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.*

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

#### Article 2

1. *For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination on any of the grounds referred to in Article 1.*

2. *For the purposes of paragraph 1:*

(a) *direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;*

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

3. *Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.*

4. *An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.*

(...)

8. *This Directive shall be without prejudice to general measures laid down in national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and the protection of the rights and freedoms of others.*

## Summary of issues and findings

The case concerns the increasing practice of racial profiling which may be used either by public or private bodies in the provision of services or exercising public functions such as border control. Most recently with threats of terrorism racial profiling has been used in a number of contexts such as security checks by airline companies and 'stop and search' activities of police forces.

Racial profiling is often discriminatory and has been defined by the European Network Against Racism (ENAR) as:

*"the use by the police, security, immigration or customs officials of generalisations based on race, ethnicity, religion or national origin – rather than individual behaviour or objective evidence – as the basis for suspicion in directing discretionary law enforcement actions. It is most often manifest in police officers' decisions about who to stop for identity checks, questioning, searches and sometimes arrest. Ethnic profiling can also be used to "mine" or undertake computerised searches of database for potential terrorist suspects or in targeting surveillance and anti-radicalisation policies"*<sup>3</sup>.

Racial profiling has been the subject of a number of recent reports, for example by the Open Society Initiative<sup>4</sup>. It was also the subject of a recent decision by the United Nations Human Rights Committee under the individual petition procedure and found a breach of the United Nations International Convention on Civil and Political Rights<sup>5</sup>. The case involved Spanish Police forces stopping an ethnic minority Spanish women suspected of being an illegal immigrant.

This case raises important questions about the extent to which airlines can subject persons of different racial or ethnic origin to greater security checks, the relationship between the actions of airlines and national governments in protecting national security, and whether such action constitutes racial or religious discrimination under the Equality Directives and relevant national discrimination legislation.

### **1. Does this case fall within the scope of any or all of the following:**

- the Race Directive 2000/43/EC and your domestic racial discrimination law implementing the Directive;**
- the Proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services (in terms of religious discrimination);**
- any domestic legislation on religious discrimination in your country?**

**In your answer please consider what is the effect, if any, of article 3(2) of the Race Directive which provides that "This Directive does not cover difference of treatment based on nationality... and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals... on the territory of Member States".**

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<sup>3</sup> Fact sheet 4 June 2009

<sup>4</sup> Ethnic Profiling in the European Union: Pervasive, Ineffective and Discriminatory, May 2009

<sup>5</sup> Lecraft v Spain Communication 1493/2006, CCPR/C/96/D/1493/2006, August 2009

All of the respondents thought that the facts would fall within the scope of both the Race Directive and the Proposed Directive. The Race Directive provides protection from discrimination on grounds of race or ethnic origin in a number of sectors, including under article 3(1)(h) access to and supply of goods and services available to the public. Similarly, the Proposed Directive as currently drafted, provides for protection from discrimination on grounds of religion or belief in access to and supply of goods and services available to the public.

In relation to domestic protection from discrimination, all of the responses indicated that the facts would also fall within the scope of relevant domestic legislation providing protection from racial discrimination. This is because all Member States were required to fully implement the Race Directive into domestic law, which has now been completed by all Member States.

In relation to potential religious discrimination, interestingly a number of responses indicated that they already have domestic legislation protecting persons from discrimination on grounds of religion or belief despite there not being any EU legislation (the Proposed Directive not being in force). This was the case for nine of the eleven responses, including Norway which is not an EU member. Two of the Member States (Austria and Finland) do not currently have domestic legislation providing protection from discrimination from religious discrimination in the provision of goods and services. In Austria, there are discussions of amendments to the Equal Treatment Act to provide protection from religious discrimination. In Finland, the Equality Act does not provide protection from religious discrimination in the provision of goods and services so the only possibility would be to bring a criminal claim under the Penal Code, however that would require proof to a higher criminal standard.

This highlights the importance of an agreement being reached on the Proposed Directive in order to provide harmonised protection from religious discrimination across the EU, particularly since religious discrimination against religious groups such as Muslims is a significant problem.<sup>6</sup>

The Equality Directives contain provisions that indicate that they do not apply to differences of treatment based on nationality and are "without prejudice to provisions and conditions relating to the entry into and residence of third country nationals...on the territory of Member States". The relevant provisions are article 3(2) of the Race Directive and its equivalent in the Proposed Directive is article 3(5). This exception is intended to apply to situations where Member States discriminate against person based on nationality, for example in conducting immigration control and deciding who and in what circumstances persons can enter a Member State.

All of the responses indicated that this exception did not apply in this case for several of reasons. Firstly, the person was not treated differently on grounds of his nationality but rather his name was not of a well-known Scandinavian or British origin. Secondly, the actions of the airline company were also not relating to the acceptance or refusal of entry of third country national to Great Britain, but rather in order to subject persons to increased security checks at the request of the British government.

#### **Conclusion:**

**The facts of the case do fall within the scope of both the Race Directive and the Proposed Directive with respect to discrimination on grounds of religion or belief.**

#### **Lessons learnt:**

**As several Member States do not currently have domestic protection from discrimination on grounds of religion or belief in the provision of goods and services,**

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<sup>6</sup> One in three Muslims said that they had experienced discrimination in the last 12 months. See EU-MIDIS Report, Data in Focus Report: Muslims, Fundamental Rights Agency, 2009

**it is important to secure agreement on the Proposed Directive as soon as possible in order to provide better and harmonised protection from religious or belief discrimination.**

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

All of the responses indicated that their equality body would be able to provide assistance in some form in relation to the race discrimination claim. The nature of the form of assistance varies depending on the structure and powers of the organisation. Some can provide advice and seek to mediate any dispute as well as sometimes providing non-binding decisions. These are traditionally ombudsman style equality bodies such as in Austria, the Ombudsman for Equal Treatment and in Norway, the Equality and Anti-Discrimination Ombudsman. Other bodies can provide legal assistance to individuals in discrimination claims before relevant tribunals or courts. These include the Slovak National Centre for Human Rights, the Equality and Human Rights Commission in Great Britain and the Swedish Equality Ombudsman.

In relation to bringing discrimination claims, the relevant tribunal or court will vary depending on the national legal systems.

In relation to any religious discrimination claim, it is important to note that the Ombudsman for Equal Treatment and the Equal Treatment Commission in Austria and the Ombudsman for Minorities and the Discrimination Tribunal in Finland do not have jurisdiction to consider claims as there is currently no national legislation prohibiting religious discrimination in the provision of goods and services.

The Proposed Directive will require the establishment of an equality body to provide assistance to individuals experiencing such discrimination and for adequate remedies to be provided in cases where discrimination is proved. As a result it is important that the Proposed Directive is agreed as soon as possible, both in order that there are equality bodies that are required to provide assistance on grounds covered by the Directive and that persons who may have been discriminated against have a forum in which to bring such discrimination claims.

### **Lessons learnt:**

**As several Member States do not currently have domestic protection from discrimination on grounds of religion or belief in the provision of goods and services, it is important to secure agreement on the Proposed Directive as soon as possible in order that:**

- **an equality body can be designed to provide individuals assistance with such discrimination claims; and**
- **that relevant tribunals or courts can be designated to hear the discrimination claims and provide remedies where appropriate.**

## **3. Is there direct or indirect discrimination on the ground of race/ethnic origin or religion (according to your national legislation)?**

**In relation to religious discrimination if you have no domestic legislation prohibiting religious discrimination in relation to services, please also answer the question based on whether religious discrimination would be established under the Proposed Directive.**

### Racial Discrimination

In relation to race discrimination, most of the responses (nine of the eleven responses) indicated that it was likely that this was a case of direct discrimination. This was for a number of different reasons. Firstly, in a number of Member States the definition of race is broader than the Race Directive which only refers to race and ethnic origin. Many of the Member States include other aspects connected to race such as language, national origin, colour and believed that the selection of the person based on his name was so closely linked with his racial, ethnic or national origins so as to amount to direct race discrimination. In addition, a number of responses raised the fact that in their opinion, the use of the origin of a person's name was not a neutral criterion so that it would probably not constitute indirect discrimination.

Eight of the eleven responses also indicated that this could be a case of indirect race discrimination with two responses (Norway and Slovakia) stating that this was only a case of indirect race discrimination.

They considered that it could be a case of indirect race discrimination as the criteria of selecting persons for manual check-in based on the origins of a person's name was neutral. A person could have a non-Scandinavian name or British name and still be of Scandinavian or British ethnic origin, for example if they married a person of another ethnic origin and took their name. Alternatively, a person could have a traditional Scandinavian or British name and be of another ethnic origin, for example if they had lived in Scandinavia or Great Britain for generations and where of mixed ethnic origin.

The criteria would however put persons of Arabic ethnic origin at a particular disadvantage as a disproportionate percentage of such persons would not have well-known Scandinavian or British names of origin and would therefore be subjected to the manual check in and further security checks.

The advantage of arguing that the case is one of direct discrimination is that generally there can be no justification whereas for indirect discrimination there can be.

### Religious Discrimination

In relation to religious discrimination, interestingly five of the responses indicated that they would deal with the case as one of direct religious discrimination and six indicated that they would deal with it as indirect religious discrimination.

In relation to direct discrimination, some responses considered that the criteria for manual check in, not having a well-known Scandinavian or British name of origin but one of Arabic/Middle Eastern origin was so closely linked to a person's religion as to amount to direct religious discrimination.

On the other hand, other responses indicated that it could not be a case of direct religious discrimination as the person was not treated differently on the basis of his religion, particularly as this was not a matter raised during the check in. Rather, they indicated that it would be treated as indirect religious discrimination as a disproportionate number of Muslims would be put at a particular disadvantage by the policy.

### **Conclusions:**

**The facts could be argued either as direct or indirect racial discrimination. However, there is an advantage of arguing direct discrimination as generally it cannot be justified.**

**Direct race discrimination can be established when the basis on which someone is treated less favourably is so closely linked to their race or ethnic origin that it amounts to treatment on grounds of race or ethnic origin.**

**In relation to religious discrimination there was a split in responses with approximately half indicating it would be a case of direct religious discrimination and the other half indicating it would be a case of indirect religious discrimination. Again, there would be an advantage of attempting to argue direct religious discrimination as it cannot normally be justified but it may be more difficult to prove in this case.**

#### **Lessons learnt:**

**In order to provide better and clearer protection from racial discrimination in the European Union, it may be appropriate to make it express in the Race Directive that it provides protection from discrimination on grounds of aspects such as national origin, language, or colour.**

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

**In your answer please consider what would be the effect of any national legislation such as counter-terrorism legislation relating to threats to national security or article 2(8) of the Proposed Directive permitting discrimination where measures are "necessary for public security" on whether or not racial or religious discrimination would be established.**

#### Racial Discrimination

In relation to direct race discrimination, there is no exception that applies under the Race Directive to these facts. Importantly there is no equivalent to article 2(8) of the Proposed Directive permitting discrimination where the measures are laid down in national law and are necessary for public security, public order, prevention of criminal offences and for the protection of the rights and freedoms of others. However, such provisions may exist under domestic constitutional human rights law that implement the European Convention of Human Rights.

As there are no exceptions applicable, all the responses indicated that it is likely that a case of direct racial discrimination would be made out in this case.

In relation to indirect racial discrimination, the crucial issue is whether there is a legitimate aim and whether the means to achieve that aim are proportionate. Although a number of responses indicated that the aim of ensuring security and the protection of persons from criminal activity such as terrorism was a legitimate aim, all responses on indirect discrimination indicated that the means used were not proportionate. For example, the response of the Belgium Centre for Equal Opportunity and Opposition to Racism indicated that the activity was similar to racial profiling relying on stereotypes and stigmatising those groups. The response of the Dutch Equal Treatment Commission and the British Equality and Human Rights Commission emphasised that the airline could have used alternative means to ensure security, for example by subjecting all persons to the same security checks.

As the facts demonstrate on their face racial discrimination, article 8 of the Race Directive requires a shift in the burden of proof. The airline would need to prove that the means used were proportionate and in this case it is unlikely that this has been established.

### Religious discrimination

Article 2(8) of the Proposed Directive provides a general exception to the both direct and indirect religious discrimination which is similar to article 2(5) of the Employment Directive 2000/78/EC. In addition, indirect religious discrimination can be justified where it is a proportionate means of achieving a legitimate aim.

In relation to article 2(8), this exception is similar to exceptions under the European Convention on Human Rights and national laws implementing the Convention. Most responses indicated that the exception would not be applicable to these facts as they do not involve national legislation and the actions of a national government, rather that they are the actions of a private airline pursuant to a request of a national government, and that it would be unlikely that the measures would be established as necessary.

However, several responses (Norway and the Netherlands) indicated that the domestic equality legislation would not apply if there was national legislation relating to public security and the actions were taken pursuant to that legislation. In the Netherlands, equality legislation does not apply to acts by the public administration, other than the field of labour (but only in relation to racial discrimination) and social protection. This appears broader than the exception under article 2(8) and raises a potential concern that the exceptions in the Netherlands regarding the provision of goods and services are broader than permitted by the Equality Directives.

In relation to indirect religious discrimination, all of the responses indicated that it was unlikely that the measures used were proportionate and therefore likely that indirect religious discrimination would be established.

### **Conclusions:**

**In relation to exceptions to discrimination based on public security, the Race Directive does not provide such an express exception but article 2(8) of the Proposed Directive does so long as the measures are laid down in national law and are necessary.**

**The article 2(8) exception relating to public security should be interpreted strictly and it is unlikely that the exception would apply to the current facts. The actions of the airline do not appear to be pursuant to national laws and in any event it is unlikely that they would be established as necessary.**

**In relation to indirect race or religious discrimination, although it is likely that the measures were for a legitimate aim of providing public security it is unlikely that the measures were proportionate and necessary.**

### **Lessons learnt:**

**It would be important that its exceptions in national equality legislation relating acts of public administration with respect to the provision of the goods and services are assessed for compliance with the Race Directive.**

### **5. Would any other form of discrimination be established under your domestic law – for example instructions to discriminate, or harassment on grounds of either race or religion?**

In relation to instructions to discriminate, seven of the ten responses that considered the issue believed that a case of instructions to discriminate could be made out. This related to the

conduct of the airline in instructing its staff to use the manual check-in for people with non Scandinavian or non-British names.

In relation to racial or religious harassment, only three of the ten responses that considered the issue believed that harassment either was made out or might be able to be established. The reasons for this is that most responses do not believe that the severity of the conduct would violate the dignity of the person and create an intimidating, hostile, degrading humiliating or offensive environment.

In relation to Great Britain and Denmark, it is important to note that for religion and belief there is currently no protection from harassment in the provision of goods and services. This indicates the importance of the Proposed Directive which would provide better and harmonised protection in this field.

#### **Conclusion:**

**The majority of responses indicated that it is likely that a case of instructions to discriminate would be made out.**

#### **Lessons learnt:**

**As several Member States do not currently have domestic protection from harassment on grounds of religion or belief in the provision of goods and services, it is important to secure agreement on the Proposed Directive as soon as possible in order to provide better and harmonised protection from religious and belief discrimination.**

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

The range of sanctions and remedies vary depending on the national legal systems. However, there are several core possible remedies. These include damages for injury to feelings, an order prohibiting the conduct from reoccurring, and a requirement of publishing the decision (for example Belgium and Hungary).

As described previously, for those Member States that do not currently have protection from religious discrimination in the provision of goods and services no sanctions or remedies currently exist.



## Chapter 2

# Case study on sexual orientation discrimination

### Case

#### Background information

On 1 July 2005, the Swedish legislation on assisted procreation was amended to make lesbian couples eligible to receive this type of treatment. Under the current legislation assisted procreation (in the form of donor insemination or in vitro fertilisation) may be given to a woman that is living in a stable relationship (either heterosexual or lesbian) if the other person in the relationship has given his or her written consent. The couple must further undergo a psychological assessment and be deemed suitable as parents.

Certain more specific matters, such as the upper age-limit at which treatment is offered (having regard to the reduction in fertility with age) as well as the amount and type of treatments that are offered, are not regulated by legislation. Instead, these matters are decided by the administrative entities responsible for medical treatment within a certain geographic area – the County Councils.

According to the policies applied by the County Council in the instant case, assisted procreation is offered in the form of six donor insemination treatments for each couple (or alternatively, four donor insemination treatments and one IVF-treatment). If this treatment is successful (i.e. if a child is born), a further cycle of treatments is offered (referred to as a “sibling” cycle of treatments). Treatment is only offered to women below 40 years of age. In the case of lesbian couples, only one of the women in the couple is eligible for treatment. Treatment is essentially offered free of charge, with only a nominal fee being charged.

#### The circumstances of the case

Very shortly after the entry into force of the amended legislation a lesbian couple (A and B) contacted the county health authorities and requested treatment in the form of assisted procreation. According to the couple, they were at this time, and in their subsequent contacts with the health authorities, informed of the age-limit applied, but not of the policy that the offer of treatment was limited to one of the women in a lesbian couple.

As one of the women (A) was very close to the age-limit, the couple decided that she would be the first to receive treatment. The couple was aware that A would reach the age of forty before the full set of six donor inseminations could be completed, and intended for the treatment to be transferred to B when this occurred.

After three unsuccessful insemination attempts A reached the age of forty, whereupon treatment was discontinued. The couple then requested that B receive treatment. This request was denied by the county health authorities with reference to its policy that treatment was limited to one of the women in a lesbian couple.

The couple made a complaint to the Ombudsman against Discrimination on grounds of sexual orientation, which subsequently brought a claim for damages on behalf of the complainants before the competent District Court.

In its submissions before the court, the Ombudsman asserted that the refusal to provide treatment in the form of assisted procreation to B constituted discrimination on the ground of sexual orientation in the provision of health care.

In support of its position, the Ombudsman argued that the County had created a policy which had negative effects (no chance of becoming parents) only for lesbian couples but no

negative effects at all for heterosexual couples. Furthermore, the policy specifically referred to couples of a certain sexual orientation (i.e. women living a lesbian relationship), thereby making it directly discriminatory. This assertion was denied by the County Council, which submitted that the consequence of the policy was that lesbian couples in fact were being treated in the same way as heterosexual couples in the relevant respect and that therefore the policy was not discriminatory.

In the alternative, the Ombudsman submitted that the policy constituted indirect discrimination as it put lesbian couples at a disadvantage compared with heterosexual couples. In this regard, the Ombudsman observed that the rule that only one of the persons in a couple were offered treatment in the form of donor insemination or in vitro fertilisation had no negative effect at all for heterosexual couples, whereas it for lesbian couples had the effect of denying the couple treatment which may have led to conception. Furthermore, in response to the County Council's claim that the rule pursued a legitimate aim (namely the preservation of medical resources), the Ombudsman emphasised that the facts of the case did not call for the Court to rule on whether the County Council was obliged to allocate more resources to a lesbian couple than to a heterosexual couple. Instead, what was at issue in the case was whether the county health authorities' refusal to allow the couple to "share" the total number of donor inseminations allocated to all couples whether heterosexual or lesbian (i.e. a set of six donor inseminations) had been discriminatory.

In its judgment issued on 22 October 2008, the District Court held that the decision of health authorities to refuse B treatment had been directly discriminatory and ordered the County Council to pay damages to B in the amount of SEK 50,000 (approximately EUR 5,000). However, the Court did not accept that also A was a victim of discrimination. The judgment has been appealed to the Court of Appeals. A hearing in the case is scheduled for 30 September 2009.

## Questions

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

- 1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so, which legislation?*
- 2. Alternatively, would this case fall within the scope of the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?*

*In answering questions 1 and 2, please consider your national legislation, the Treaty of the European Community (Consolidated) and case law of the European Court of Justice (Geraets-Smits [2001] C-157/99) as to whether assisted procreation be treated as a service and/ or health care?*

*For questions 3 to 5 below, if you have national anti-discrimination legislation within the scope of the case, please answer the questions in two parts, firstly how the questions would be answered under you existing legislation and secondly how they would be answered under the Proposed Directive.*

- 3. Which court, tribunal, equality body or organisation would be competent?*
- 4. Is there direct or/and indirect discrimination against A and B on the ground of sexual orientation? In relation to indirect discrimination, could applying the criterion of treating same-sex spouses and opposite-sex spouses equally lead to indirect discrimination?*

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

*In answering this question please consider what would be the effect of recital 17 and article 3(2) of the Proposed Directive. Recital 17 states that the Directive is "without prejudice to national laws on marital or family status, including on reproductive rights"?*

*Please also consider the effect of the following decisions: Maruko C-267/06 in the European Court of Justice and Karner v Austria; KB v France in the European Court of Human Rights.*

6. *In the alternative to a claim being brought under anti-discrimination law, would a claim be able to be brought under your national human rights legislation pursuant to articles 8 and 14 of the European Convention of Human Rights and is it likely that the claim would be successful? Would your organisation be able to support the claimant in those proceedings or intervene to provide submissions?*

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

## Legislation

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

#### *Recital 17*

*While prohibiting discrimination, it is important to respect other fundamental rights and freedoms, including the protection of private and family life and transactions carried out in that context, the freedom of religion, and the freedom of association. This Directive is without prejudice to national laws on marital or family status, including on reproductive rights. It is also without prejudice to the secular nature of the State, state institutions or bodies, or education.*

#### *Article 1*

*This Directive lays down a framework for combating discrimination on the grounds of religion or belief, disability, age, or sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment other than in the field of employment and occupation.*

#### *Article 2*

1. *For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination on any of the grounds referred to in Article 1.*

2. *For the purposes of paragraph 1:*

*(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;*

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

#### *Article 3.2*

*This Directive is without prejudice to national laws on marital or family status and reproductive rights.*

## **EC Treaty**

### *Article 50*

*Services shall be considered to be 'services' within the meaning of this Treaty where they are normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.*

*'Services' shall in particular include:*

- (a) activities of an industrial character;*
- (b) activities of a commercial character;*
- (c) activities of craftsmen;*
- (d) activities of the professions.*

*Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.*

## **Summary of issues and findings**

The case raises fundamental issues concerning discrimination and possible breaches of human rights in relation to family life and reproductive rights on grounds of sexual orientation. This raises a number of controversial issues: the ability of Member States to exclude family life and reproductive rights from the scope of EU discrimination legislation; the degree to which same-sex couples have any entitlements to assisted procreation; and if they do have such entitlements, the degree to which assisted procreation is provided on different terms and conditions to same-sex couples compared to heterosexual couples.

### **1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

Although in six of the Member States the facts are within the scope of current domestic anti-discrimination legislation, in four Member States (Austria, Cyprus, Denmark, Finland and Norway) there is no civil legislation prohibiting sexual orientation discrimination in the provision of services or health care. This highlights the fact that securing agreement on the Proposed Directive will be crucial to provide better and harmonised protection from discrimination on grounds of sexual orientation.

In relation to entitlements to assisted procreation treatment for same-sex couples, Belgium seems to have the most advanced rights. All women under the age of 43, irrespective of whether they are in a relationship, would be entitled to treatments so in this case both women would be entitled to six treatments.

By contrast, in four of the Member States (Austria, Slovakia, Cyprus and Hungary) there is no entitlement of same-sex female couple to assisted procreation under their national laws. As a result, there would be no possibility of bringing a discrimination claim based on their national equality legislation. This reflects the reason why "reproductive rights" have sought to be excluded from the scope of the Proposed Directive.

This raises two issues. Firstly, whether the refusal to provide assisted procreation treatment to same-sex female couples may breach their human rights to family life and non-discrimination under articles 8 and 14 of the European Convention of Human Rights using similar arguments as in the *EB v France* decision.<sup>7</sup> This is discussed further under Question 6.

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<sup>7</sup> Application no. 43546/02, 28 January 2008

Secondly, it could be argued that in order to deliver true equality for persons based on their sexual orientation, lesbian couples should be entitled to assisted procreation treatment in the same way as heterosexual couples and in some cases single females should have such entitlements. This would also be important to ensure that same-sex couples are able to fully enjoy their right to family life. As a result, the European Council should consider removing the provisions relating to family status and reproductive rights in the exception under article 3(2) of the Proposed Directive, or making article 3(2) subject to a requirement of non-discrimination on any of the grounds within the Directive.

**Lessons learnt:**

**As in several Members States there is currently no protection in civil legislation from sexual orientation discrimination in the provision of services and health care, it is important to secure agreement on the Proposed Directive as soon as possible in order to provide better and harmonised protection from sexual orientation discrimination.**

**Problems could arise under the Proposal Directive where family status and reproductive rights are not protected under sexual orientation ground.**

**2. Alternatively, would this case fall within the scope of the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?**

**In answering questions 1 and 2, please consider your national legislation, the Treaty of the European Community (Consolidated) and case law of the European Court of Justice (Geraets-Smits [2001] C-157/99) as to whether assisted procreation be treated as a service and/or health care?**

All of the responses indicated that the facts would fall within the scope of the Proposed Directive (as on the facts assisted procreation was provided for same-sex couples). However, it is important to point out as described above that, given under article 2(8) of the Proposed Directive is without prejudice to national laws on reproductive rights, where Member States do not permit same-sex couples to have assisted procreation treatment the Directive will not apply to the facts in those Member States. Four of the Member States do not permit such assisted procreation treatment.

The responses indicate that the facts are within the scope of the Proposed Directive for two reasons. Firstly, assisted procreation would constitute a service as defined by Article 50 of the EC Treaty and as interpreted by the European Court of Justice in the case of Geraets-Smits [2001] C-157/99. In the Geraets judgment, it was held that medical treatment could be a service even where it is not required to be paid for. This is important as in this case there was only a nominal fee charged for the treatment. Secondly, the treatment could also be considered within the scope of health care under article 3(1)(a) of the Proposed Directive.

**Conclusion:**

**The facts of the case are within the scope of the Proposed Directive as the assisted procreation treatment would either constitute a service or health care.**

**For questions 3 to 5 below, if you have national anti-discrimination legislation within the scope of the case please answer the questions in two parts, firstly how the questions would be answered under your existing legislation and secondly how they would be answered under the Proposed Directive.**

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

In relation to the five countries where there is no protection from discrimination on grounds of sexual orientation in the provision of goods and services, neither the equality bodies nor any tribunal or court would be competent to consider a discrimination claim. In Finland, a discrimination case based on sexual orientation could be taken forward as a criminal case. However, this would be harder to prove as it would require proof to a criminal standard.

The Proposed Directive would require the establishment of an equality body to provide assistance to individuals experiencing such discrimination and for adequate remedies to be provided in cases where discrimination is proved. As a result, it is important that the Proposed Directive is agreed as soon as possible, both in order that there are equality bodies that are required to provide assistance on grounds covered by the Directive and that persons who may have been discriminated against have a forum in which to bring such discrimination claims.

In relation to the six countries that do have jurisdiction, the nature of the form of assistance varies depending on the structure and powers of the organisation. Some can provide advice and seek to mediate any dispute as well as providing non-binding decisions. The Dutch Equal Treatment Commission is an example of such an equality body. Other bodies can provide legal assistance to individuals in discrimination claims before relevant tribunals or courts. These include the Slovak National Centre for Human Rights and the Equality and Human Rights Commission in Great Britain and the Swedish Equality Ombudsman.

In relation to bringing discrimination claims, the relevant tribunal or court will vary depending on the national legal systems.

**Lessons learnt:**

**As several Member States do not currently have domestic protection from discrimination on grounds of sexual orientation in the provision of goods and services, it is important to secure agreement on the Proposed Directive as soon as possible in order that:**

- an equality body can be designed to provide individuals assistance with such discrimination claims; and
- that relevant tribunals or courts can be designated to hear the discrimination claims and provide remedies where appropriate.

**4. Is there direct or/and indirect discrimination against A and B on the ground of sexual orientation? In relation to indirect discrimination, could applying the criterion of treating same-sex spouses and opposite-sex spouses equally lead to indirect discrimination?**

The case raises difficult questions of how you conceptualise the nature of the discrimination, who is the appropriate comparator and whether in some circumstances there is a requirement to treat persons differently to avoid discrimination.

A crucial factor is whether or not the same-sex couple is considered together or separately for the purpose of determining whether there was discrimination.

#### Direct Discrimination

A number of responses indicated that if the same-sex couples are considered from the perspective of two persons in a relationship, it is arguable that they have been treated in the same way as a heterosexual couple, as any couple are only entitled to six treatments. It is therefore arguable that there was no direct discrimination on the grounds of sexual orientation.

However, this approach has difficulties as it is also arguable that same-sex couples and heterosexual couples are not in comparable situations as for same-sex female couples both partners can (at least in theory) give birth to children. In addition, it could also be argued that discrimination must be considered from the perspective of the individuals not as couples.

In relation to a consideration of the treatment of A and B as individuals, A received three treatments before she turned 40 (the maximum age limit) but they were unsuccessful. It may therefore be unlikely that she was directly discriminated against. As for B, she was denied any treatments and this was on the basis of the policy of the Council that only one of the women in a lesbian couple is eligible for any treatment. Seven of the responses indicated that this was as a result direct discrimination against B as a lesbian woman, as the less favourable treatment was on the sole grounds of her being a lesbian.

#### Indirect Discrimination

If one considers A and B as a couple or individuals, ten of the eleven responses indicated that even if this was not a case of direct sexual orientation discrimination, it would be indirect discrimination. The reasons for this is that although it could be argued that the practice of providing six treatments was neutral as it applied to all couples irrespective of sexual orientation, it put same-sex lesbian couples or individuals at a particular disadvantage as they were not able to have extra treatments or at least to share the treatments (three treatments each).

#### **Conclusions:**

**Seven of the eleven responses indicated that this was or could be a case of direct sexual orientation discrimination.**

**Ten of the eleven responses indicated that this was or could be a case of indirect sexual orientation discrimination.**

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

**In answering this question please consider what would be the effect of recital 17 and article 3(2) of the Proposed Directive. Recital 17 states that the Directive is "without prejudice to national laws on marital or family status, including on reproductive rights"?**

**Please also consider the effect of the following decisions: Maruko C-267/06 in the European Court of Justice and Karner v Austria; KB v France in the European Court of Human Rights.**

The effect of article 3(2) and recital 17 of the Proposed Directive are similar in some ways but go further than recital 22 of the Employment Directive which provides that the Directive is "*without prejudice to national laws on marital status and the benefits dependent thereon.*" This provision was subject to interpretation by the European Court of Justice in the Maruko judgment that concerned sexual orientation discrimination in employment (entitlement to survivor benefits).

The judgment found that the effect of recital 22 was that Member States may determine under national laws whether or not same-sex couples have the same or similar rights to heterosexual couples. However, where the national law does provide "comparable" rights, the Member State cannot discriminate against persons on grounds of sexual orientation.

On this issue the responses indicated that as A and B are provided comparable rights regarding reproductive rights and assisted procreation, article 3(2) and recital 17 would not provide an exception to the principle of non-discrimination.

In relation to direct sexual orientation discrimination, for those responses that indicated there was direct discrimination, all indicated that there cannot be justification for such discrimination.

In relation to indirect discrimination, discrimination can be justified where it is a proportionate means of achieving a legitimate aim. The County Council indicated that the justification of the policy regarding lesbian couples was the "preservation of medical resources". It is not exactly clear what this means but it is likely that it relates to the fact that to permit both lesbian women to have treatments would cost more money, for example with tests being required.

The responses raised a number of reasons why this approach did not constitute justification:

- mere financial disadvantages are not sufficient to justify discrimination (responses of Austria and Sweden)<sup>8</sup>;
- as the Karner v Austria and EB v France cases indicate in the context of human rights discrimination law, where sexual orientation is involved "*there is a need for particularly convincing and weighty reasons to justify a difference in treatment*" (Denmark and Great Britain, Cyprus, Belgium);
- the policy was not proportionate as they could have, for example, permitted the couple to share the six treatments which should only have very minimal extra cost implications (Great Britain, Belgium).

As a result all of the responses indicated that as the same-sex couples were entitled to comparable rights regarding assisted procreation treatment, the Council indirectly discriminated against B and the policy was not justified.

**Conclusions:**

**The effect of article 3(2) and recital 17 of the Proposed Directive is that although Member States retain the right as to whether they provide comparable rights to same-sex couples regarding marital and family status as well as reproductive rights, where comparable rights are provided policies and practices cannot discriminate against persons on grounds of sexual orientation.**

**For responses that indicated it was a case of direct sexual orientation discrimination, no justification is permitted.**

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<sup>8</sup> See the Dekker Case 177/88 in relation to pregnancy discrimination, Kutz-Bauer Case 187/00



For the responses that indicated that there was indirect sexual orientation discrimination there was no justification. Particularly convincing and weighty reasons are required to justify a difference in treatment and mere financial disadvantage is insufficient.

**6. In the alternative to a claim being brought under anti-discrimination law, would a claim be able to be brought under your national human rights legislation pursuant to articles 8 and 14 of the European Convention of Human Rights and is it likely that the claim would be successful? Would your organisation be able to support the claimant in those proceedings or intervene to provide submissions?**

All of the responses indicated that as the European Convention on Human Rights (ECHR) is directly incorporated into their national laws a human rights claim could also be brought by B in relation to a possible breach of article 8 and 14 of the ECHR.

It is not clear whether such claims would be successful. However in the light of the decision in *EB v France* regarding the right of a lesbian woman to adopt a child which found a breach of articles 8 and 14, it may be more likely than not that such claims will be successful. Whether national laws regarding reproductive rights breach article 8 and 14 is an important area to test in national courts or the European Court of Human Rights.

In relation to the powers of equality bodies, none of the equality bodies (except for the Equality and Human Rights Commission in Great Britain) would be able to represent individuals bringing a human rights claim either because their powers do not permit them to act on behalf of individuals in any proceedings and/ or their powers only extent to anti-discrimination law.

In relation to the Equality and Human Rights Commission, it would only be able to represent an individual where there is also a discrimination claim but it would be able to intervene in human rights proceedings.

Given the overlap between a discrimination claim and a human rights claim in these types of cases, it may be helpful for equality bodies' mandate to be expanded to provide assistance in human rights claims.

#### **Conclusion:**

**A human rights claim on grounds of articles 8 and 14 of the European Convention of Human Rights (ECHR) could be brought in national courts as the ECHR has been directly incorporated in all Member States.**

#### **Lessons learnt:**

**The issue of whether national laws on reproductive rights breach the right to private life and non-discrimination on grounds of sexual orientation should be tested in national courts or the European Court of Human Rights.**

**In most Members States, equality bodies do not have the power to provide assistance or intervene in human rights claims.**

**Equality bodies should consider whether such cases might fall under remit. Otherwise consideration could be given to expand the powers of equality bodies, at least in cases involving breaches of article 14 of the ECHR.**

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

In relation to a discrimination claim, the range of sanctions and remedies vary depending on the national legal systems. However, there are several core possible remedies. These include damages for injury to feelings, an order prohibiting the conduct from reoccurring, and a requirement of publishing the decision (for example Belgium and Hungary).

In relation to human rights claims, the remedy is normally a declaration of a breach of the particular rights and possibly damages in the case of serious breaches.

As described previously, for those Member States that do not currently have protection from sexual orientation discrimination in the provision of goods and services no sanctions or remedies currently exist.

## Chapter 3

### Case study on age discrimination

#### Case

The complainant applied for hire purchase credit from a credit provider to purchase two household appliances from a shop in the sum of HUF 169,980 (approx. EUR 650). The complainant was 69 years old when they applied for the credit, they were successful and they repaid the money within time and without defaulting.

Three months later the complainant turned 70 and from the same shop applied for another hire purchase credit agreement from the same financial institution. On this occasion, the complainant sought to buy a washing machine in the sum of HUF 75,000 credit (approx. EUR 290). After having completed and presented all the necessary documents and having sent them electronically, the employee of the credit institution refused their credit application saying that they was over 70 years old. The complainant raised her concerns with the decision on the basis that their financial standing should have provided sufficient security for the repayment of the loan. To prove this, the complainant referred to the regular net income indicated in the loan application form and to the fact that they had properly repaid the loan borrowed earlier, which had actually been a larger amount than the one applied for the second time.

In its evidence in defence the financial institution argued that the statutory regulation pertaining to credit institutions (Hpt.) [Act CXII of 1996 on Credit Institutions and Financial Enterprises] contained strict requirements on loan arrangements to ensure effective banking operations. It argued that since elderly people typically had low incomes that created too high risk levels for credit institutions offering credit or loans to elderly people. They further argued that a rise in the number of loans provided to elderly people had recently led to raising the risk level of the credit institution and as a result it was justified for them to exclude clients over 70 years old from being granted credit or loans.

The Equal Treatment Authority did not accept this argument since the general rise in the risk level could not be used to justify the exclusion of the complainant. The representative of the financial institution did not dispute either that the complainant's regular monthly income far exceeded the typical income of persons of their age, and as a result that the conclusion of contract with the complainant would not have meant excessive risk. The Equal Treatment Authority found that the financial institution's contract should focus primarily on the particular client's financial standing. It is not lawful to follow a practice where conclusion of contract with a client having proper financial background and otherwise not representing special risk is refused merely due to their age. This form of generalisation or stereotype gravely harms the human dignity of elderly clients, by excluding them without exception from the service, which is available to persons under 70 with similar financial standing.

In view of the above the Authority declared that the party subjected to proceedings had violated the requirement not to discriminate against persons on grounds of age, prohibited it from continuing unlawful conduct, ordered it to make the Authority's resolution declaring the violation of law public for 60 days, and imposed a fine of HUF 700,000 (approx. EUR 2,500).

#### Questions

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

1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?

2. Alternatively, would this case fall within the scope of the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?

For questions 3 to 6 below, if you have national anti-discrimination legislation within the scope of the case please answer the questions in two parts, firstly how the questions would be answered under your existing legislation and secondly how they would be answered under the Proposed Directive.

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

4. Is there direct or/and indirect discrimination on the ground of age? In relation to age discrimination, could applying the criterion of treating all people over 70 equally lead to indirect discrimination?

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

In answering this question please consider whether under your current national legislation or under article 2(7) and recital 15 of the Proposed Directive, the age criterion would be treated as a "key factor in the assessment of risk" to justify the age discrimination?

What is the relevance of the fact that there was not any "relevant and accurate actuarial or statistical data" relied on by the financial institution as required by article 2(7)?

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

## Legislation

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

#### *Recital 15*

*Actuarial and risk factors related to disability and to age are used in the provision of insurance, banking and other financial services. These should not be regarded as constituting discrimination where the factors are shown to be key factors for the assessment of risk.*

#### *Article 1*

*This Directive lays down a framework for combating discrimination on the grounds of religion or belief, disability, age, or sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment other than in the field of employment and occupation.*

#### *Article 2*

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

*(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;*

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

(...)

*7. Notwithstanding paragraph 2, in the provision of financial services Member States may permit proportionate differences in treatment where, for the product in question, the use of age or disability is a key factor in the assessment of risk based on relevant and accurate actuarial or statistical data.*

## Summary of issues and findings

This case raises several key issues. Firstly, the extent to which protection from age discrimination in the provision of goods and services is provided for in Member States and as a result the degree to which the Proposed Directive would have a significant impact.

Secondly, the facts themselves raise the issue of the extent to which age discrimination is or should be permitted in the financial services industry in areas such as insurance or credit facilities in order to ensure that the costs and risks of those services is reduced. In particular, it involves analysis of the extent to which statistical evidence must or can be used to justify direct age discrimination against older persons. This is a field where there is a tension between the right of persons not to be discriminated against on grounds of age, and the legitimate aim of finance providers to ensure their services are financially viable. The vital factor in resolving this tension is the proportionality of the actions of financial providers.

### **1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

Of great significance, in only three (Belgium, Hungary and Slovakia) of the eleven countries is there currently domestic discrimination law providing protection from discrimination on grounds of age in the provision of goods and services.

In Great Britain, there is currently no protection from such discrimination but there is a new Equality Bill passing through parliament which will reform all equality law and will provide for protection from discrimination on grounds of age in the provision of goods, facilities and services. This Bill is not likely to come into effect until October 2010 and in any event the Regulations relating to age discrimination in the provision of goods, facilities and services will not come into effect until 2012. In relation to Finland, although there is no civil discrimination law in the field, the response indicated that a criminal law action could be brought under the Penal Code. However, it would be much more difficult to prove the discrimination as there is a higher standard of proof required in criminal cases.

As the Proposed Directive does propose protection from discrimination on grounds of age in the provision of goods and services (including in relation to financial services), it is important that the European Council secure an agreement on the Proposed Directive at the earliest opportunity.

**Conclusion:**

As only three of the eleven countries currently have national laws providing protection from discrimination on grounds of age in the provision of goods and services, it is important to secure agreement on the Proposed Directive as soon as possible in order to provide better and harmonised protection from age discrimination.

**2. Alternatively, would this case fall within the scope of the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?**

All of the eleven responses indicated that the facts would fall within the scope of the Proposed Directive as the credit applied for would constitute a service available to the public under article 3 and the Directive provides for protection in relation to age discrimination under article 1.

**Conclusion:**

The facts of the case would clearly fall within the scope of the Proposed Directive.

**For questions 3 to 6 below, if you have national anti-discrimination legislation within the scope of the case please answer the questions in two parts, firstly how the questions would be answered under your existing legislation and secondly how they would be answered under the Proposed Directive.**

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

In relation to the eight countries where there is no protection from discrimination on grounds of age in the provision of goods and services, neither the equality bodies nor any tribunal or court would be competent to consider a discrimination claim.

The Proposed Directive will require the establishment of an equality body to provide assistance to individuals experiencing such discrimination and for adequate remedies to be provided in cases where discrimination is proved. As a result it is important that the Proposed Directive is agreed as soon as possible, both in order that there are equality bodies that are required to provide assistance on grounds covered by the Directive and that persons who may have been discriminated against have a forum in which to bring such discrimination claims.

In relation to the three countries that do have jurisdiction, the nature of the form of assistance by equality bodies varies depending on the structure and powers of the organisation. Some can provide advice and seek to mediate any dispute as well as providing non-binding decisions. Other bodies can provide legal assistance to individuals in discrimination claims before relevant tribunals or courts.

In relation to bringing discrimination claims, the relevant tribunal or court will vary depending on the national legal systems. In Finland, as it would be possible to bring a criminal claim, this would be brought in a district court. However, it is important to note that as a criminal matter

discrimination would need to be proved beyond reasonable doubt so it would be more difficult to prove a claim.

A number of responses (Denmark, Belgium) indicated that it may be possible to bring a complaint with the relevant banking services authority that regulates the conduct of banking services. However, there are difficulties with this as they do not issue binding decisions and would not be able to provide damages in the same way as a court or tribunal.

**Lessons learnt:**

**As most Member States do not currently have domestic protection from discrimination on grounds of age in the provision of goods and services, it is important to secure agreement on the Proposed Directive as soon as possible in order that:**

- an equality body can be designed to provide individuals with assistance with such age discrimination claims; and
- that relevant tribunals or courts can be designated to hear the age discrimination claims and provide remedies where appropriate.

**4. Is there direct or/and indirect discrimination on the ground of age? In relation to age discrimination, could applying the criterion of treating all people over 70 equally lead to indirect discrimination?**

All of the responses indicated that this would be a case of direct discrimination on the ground that age was used as a criterion in the bank's decision to refuse credit because the person had turned 70. It could not be indirect discrimination as the criterion of being under 70 was not neutral.

Several of the responses (Belgium and the Netherlands) also highlighted the fact that even if there were other reasons for the treatment beyond age, so long as age is one of the reasons for the less favourable treatment this is sufficient to establish age discrimination.

**Conclusion:**

**The facts would establish direct age discrimination, even if there were other reasons for the less favourable treatment.**

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

**In answering this question please consider whether under your current national legislation or under article 2(7) and recital 15 of the Proposed Directive, the age criterion would be treated as a "key factor in the assessment of risk" to justify the age discrimination?**

**What is the relevance of the fact that there was not any "relevant and accurate actuarial or statistical data" relied on by the financial institution as required by article 2(7)?**

All the responses highlighted that unlike other grounds of discrimination, such as race and sexual orientation in the other cases of the report, direct age discrimination can be justified and this is provided for in the Proposed Directive.

There are two provisions which relate to justification of direct age discrimination. Firstly, article 2(6) of the Proposed Directive provides a general exception that direct age discrimination can be justified where it is a proportionate means of achieving a legitimate aim.

Secondly, under article 2(7), in the provision of financial services in particular, Member States may permit *“proportionate differences in treatment where, for the product in question, the use of age or disability is a key factor in the assessment of risk based on relevant and accurate actuarial or statistical data”*.

All of the responses indicated that the aims of the bank to reduce the risk level of their institution and ensure compliance with requirements under the relevant credit institutions legislation was a legitimate aim. However, all of the responses also indicated that the means used to achieve that aim were not proportionate, appropriate or necessary and therefore the bank had unlawfully discriminated against the person.

There were a number of reasons advanced as to why the bank had not acted proportionately:

- in relation to article 2(7) there was insufficient evidence to prove that age was a key factor in the assessment of risk;
- there was no actuarial or statistical data to support a claim that age was a key factor in assessing risk;
- they had not considered alternatives such as third party guarantee of the credit being repaid or some other facility;
- credit services offer less risk regarding age than other financial services such as life insurance.

In addition, even if there had been such evidence, responses indicated that that would not be sufficient to establish that the discrimination was justified as the person's individual circumstances would need to be assessed to avoid generalisations and stereotypes. The evidence was that the person:

- had previously purchased by credit household appliances in the sum of EUR 650 when she was 69 and repaid the money within time and without defaulting;
- had a regular income;
- the amount of credit sought on the second occasion when she was 70 was only EUR 290, much less than previously and unlikely to constitute a substantial risk.

It is therefore important to note that article 2(7) would not provide a justification merely if evidence indicated that, in general, persons of a particular age are a higher risk. The individual circumstances of a person should still be taken into account.

The response of the Belgian Centre for Equal Opportunities and Opposition to Racism also highlighted the difficulties with article 2(7) as currently drafted. Firstly it does not specify the sectors that it applies too which could cause uncertainty. Secondly, unlike the Gender Goods and Services Directive, the Proposed Directive does not require the actuarial or statistical data to be published. The European Economic and Social Committee in reviewing the Proposed Directive recommended that the provision be amended to require publication and periodic review of the data to ensure that age discrimination is still justified.

#### **Conclusions:**

**The direct discrimination was not justified although it was for a legitimate aim, it was not proportionate as it did not rely on relevant actuarial or statistical data, and in any**



event the financial institution failed to consider the individual circumstances of the person.

**Lessons learnt:**

**It should not be possible to interpret article 2(7) should not be able to justify direct age discrimination merely on the basis of data that indicated particular age groups were a greater risk. The individual circumstances of the person should always be considered. If the Proposed Directive is agreed, this is an appropriate issue to clarify by a preliminary ruling in the European Court of Justice.**

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

In relation to a discrimination claim, the range of sanctions and remedies vary depending on the national legal systems however there are several core possible remedies. These include damages for injury to feelings, an order prohibiting the conduct from reoccurring, and a requirement of publishing the decision (for example Belgium and Hungary).

As described previously for those Member States that do not currently have protection from age discrimination in the provision of goods and services no sanctions or remedies currently exist.

# Annex 1

## Country responses to the case study on racial discrimination

### Austria

*Answers provided by the Ombud for Equal Treatment*

**1. Does this case fall within the scope of any or all of the following:**

- **the Race Directive 2000/43/EC and your domestic racial discrimination law implementing the Directive;**
- **the proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services (in terms of religious discrimination);**
- **any domestic legislation on religious discrimination in your country?**

***In your answer please consider what is the effect, if any, of article 3(2) of the Race Directive which provides that "This Directive does not cover difference of treatment based on nationality...and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals....on the territory of Member States".***

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

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

According to the allocation of competences between the federal state and the Länder, this case would fall within the scope of the federal equal treatment legislation. The Equal Treatment Act on federal level prohibits discrimination on grounds of ethnic origin in employment and occupation as well as in the field of goods and services (according to the implementation of the directives 2000/78/EC and 2000/43/EC).

The XYZ Airline offers the service of transporting people by plane from one place to another. The checking-in has to be considered as part of this service. Discrimination on grounds of ethnic origin in access to or supply of services is covered by the scope of the Equal Treatment Act.

Austria did however not go any further than implementing the already existing directives. The Equal Treatment Act therefore – in the field of goods and services – only prohibits discrimination on grounds of ethnic origin and sex, but not on grounds of religion.

At the moment, there are ongoing negotiations in Austria about an amendment of the Equal Treatment Act, which would inter alia cover a provision on equal treatment on grounds of religion in the field of goods and services.

The Proposed Directive covers a provision on equal treatment on grounds of religion in the field of goods and services. Services of airlines – like the checking-in procedure – have to be considered as services in the meaning of Article 50 EC Treaty. In case the complainant's name could have led to the assumption that he is for example a Muslim, one might also think of religious discrimination.

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

The Ombud for Equal Treatment is competent – as far as racial discrimination is concerned – to provide advice, support and information and can further on intervene, negotiate, try to find a friendly settlement or any other out of court solution. The Ombud can also submit the case to the Equal Treatment Commission, but cannot file a law suit at the court.

The Equal Treatment Commission is responsible – as far as racial discrimination is concerned – to decide upon a violation of the Equal Treatment Act in proceedings free of charge after hearing both sides separately. The alleged victim can submit the case by him/herself or via the Ombud for Equal Treatment or other representatives (like NGOs). The Equal Treatment Commission is not competent to grant damages; it only delivers a (non-binding) decision upon the violation of the prohibition of discrimination and gives recommendations on how to apply the right to equality.

The Civil Court is competent to deliver a binding judgement and to grant damages in case of a violation of the Equal Treatment Act.

For the time being, neither the Ombud for Equal Treatment nor the Equal Treatment Commission is responsible for discrimination on grounds of religion in the field of goods and services. In case the Proposed Directive will be put into force and implemented into the Austrian law system, the competent organisations in case of discrimination on grounds of religion will probably be the Ombud for Equal Treatment and the Equal Treatment Commission with the same competences as described above.

## **3. Is there direct or indirect discrimination on the ground of race/ethnic origin or religion (according to your national legislation)?**

There seem to be three main reasons why the complainant was referred to the manual desk, but at the end the decision is based on an overall assessment. The fact that the complainant's name is directly and first of all mentioned as a factor for the decision to refer somebody to the manual check-in, as well as the taking into account and reporting to some one else that the complainant speaks fluent Tula seem to be hints for a direct discrimination on grounds of ethnic origin.

In the Equal Treatment Act, the term "ethnic belonging" is used. The explanatory remarks state that this term covers criteria like origin, skin colour, religion, language, culture, morals, etc. In a more general way it can be said that the Equal Treatment Act addresses persons being considered as foreign compared to the regional majority.

The reason why the complainant was referred to the manual check-in seems to be strongly connected to the fact that he somehow differs from the majority, especially because his name is different from those of the majority. Moreover, it made a big difference for the airline when they found out that the complainant spoke fluent Tula. The criteria of the name and the language spoken are directly linked with the ethnic origin of the complainant. Therefore it seems that the complainant was treated less favourable on grounds of his ethnic origin compared to somebody with a well-known Scandinavian or British name where the airline would probably have assumed from the very beginning that he or she speaks fluent Tula. Concluding this case might be considered as one of direct discrimination on grounds of ethnic origin.

When reading the objective case, it is easy to imagine that 9/11 and the London bomb attacks in July 2005 had an impact on the airlines policy. These incidents seem to have created prejudices and fears against foreigners and especially Muslims (compare the report of the

EUMC from November 2005 on “The impact of July 7 2005 London bombs attacks on Muslim communities in the EU”).

If the name of the complainant in this objective case led to the assumption that he is a Muslim and was referred to the manual check-in (inter alia) for this reason, it would also be possible to think of discrimination on grounds of religion under the Proposed Directive. The case does not show any direct hint that the complainant was discriminated against on grounds of his religion compared to another passenger who does not have the same religion than the complainant. But the name could be seen as a hint for indirect religious discrimination.

In this case, it could also be thought of whether this practice might be defined as racial profiling. The Austrian Equal Treatment Act does not explicitly cover a provision concerning racial profiling and therefore does not provide any definition of that phenomenon.

According to recommendation number 11 of the European Commission against Racism and Intolerance (ECRI) from June 2007 “on combating racism and racial discrimination in policing”, racial profiling for the purpose of the recommendation means the following: “The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation offices”.

The Open Society Justice Initiative states in its publication from 2006 titled “addressing ethnic profiling by police” that “the term ethnic profiling refers to the use of race, ethnicity, religion, or national origin rather than individual behaviour as the basis for making law enforcement decisions about who may be involved in criminal activity. Ethnic profiling appears most frequently in law enforcement officers’ decisions about who to stop and ask for identify papers, question, search, and sometimes arrest.”

The European Network Against Racism (ENAR) defines ethnic profiling in its fact sheet 40 from June 2009 as “the use by the police, security, immigration or customs officials of generalisations based on race, ethnicity, religion or national origin – rather than individual behaviour or objective evidence – as the basis for suspicion in directing discretionary law enforcement actions. It is most often manifest in police officers’ decisions about who to stop for identity checks, questioning, searches and sometimes arrest. Ethnic profiling can also be used to “mine” or undertake computerised searches of database for potential terrorist suspects or in targeting surveillance and anti-radicalisation policies.”

Although there is no consistent definition and provision on ethnic profiling, this practice seems to be strongly connected with the police and other law enforcement officers. In the objective case the personnel of a private company acted as a public authority. Could that be reason enough to use the term ethnic profiling in this objective case?

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

***In your answer please consider what would be the effect of any national legislation such as counter-terrorism legislation relating to threats to national security or article 2(8) of the Proposed Directive permitting discrimination where measures are "necessary for public security" on whether or not racial or religious discrimination would be established.***

Neither the Directive nor the Equal Treatment Act knows an objective justification when it comes to direct discrimination on grounds of ethnic origin or race. But article 3(2) of the Directive as well as Section 31 (2) of the Austrian Equal Treatment Act lay down an exception from the general equal treatment provision. The explanatory remarks to the Austrian Equal Treatment Act state that differential treatment on grounds of nationality may not be forbidden as long as it is based on objective reasons and not to pursue a racist

approach. Moreover, it is said in the commentaries that the aim of this exception can be seen as maintaining entrance limitations by the state such as laws relating to aliens and laws on the employment of foreigners.

Keeping in mind that exceptions have to be interpreted in a narrowly and due to the above mentioned aim of article 3(2) of the directive, it seems that this case is not covered by the exception and therefore falls within the scope of the directive and the Equal Treatment Act.

The Proposed Directive permits general measures laid down in national law which are necessary inter alia for public security and the prevention of criminal offences (art. 2(8)). In case such general measures would be laid down in national law it has to be questioned whether a private company (like the XYZ Airline) would be able to rely on that provision. It seems that this provision is directed to public authorities only. Although the airline acted as a public authority, it will therefore not be able to rely on art. 2 8 of the Proposed Directive when justifying its practice.

**5. Would any other form of discrimination be established under your domestic law – for example instructions to discriminate, or harassment on grounds of either race or religion?**

The British government requested the airline to subject passengers seeking to travel to the UK to increased security checks. There is no hint to discrimination on grounds of ethnic origin or race in this request because all passengers seeking to travel to the UK should be checked more carefully. Moreover, the relation between the airline and the British government does not seem to be close enough to be able to constitute instruction to discrimination in terms of the Directive and the Equal Treatment Act.

From the facts of the objective case, it seems that the head of the airline had instructed the personnel to refer certain passengers to the manual check-in. This could be considered as instruction to discriminate against according to the Equal Treatment Act as well as to the Proposed Directive.

As from the summary of the case it does not seem that any unwanted conduct in the form of verbal or written comments, gestures or behaviour has taken place that was serious enough to create an offensive environment. The objective case therefore does not seem to constitute racial or religious harassment in the meaning of the Equal Treatment Act.

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

The sanctions would be paying damages (immaterial and material damages).

## Belgium

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

Preliminary remarks regarding the Belgian anti-discrimination legislation:

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

The Centre for Equal Opportunities and Opposition to Racism (CEOOR) is an independent federal public institution. According to the 15 February 1993 CEOOR Establishment Act, its mission is to promote the equality of opportunities and to combat all forms of distinction,

exclusion, restriction or preference based on the grounds covered by the Anti-racism and Anti-discrimination Acts (except for the ground of language). In order to achieve this mission, the CEOOR has been given a broad legal mandate, including the competence to issue policy advice and recommendations, inform individuals on their rights and obligations, receive and deal with discrimination complaints, engage in mediation, litigate in matters regarding the federal Anti-racism and Anti-discrimination Acts.

In 2007, the federal Belgian Parliament adopted three new acts in order to harmonise the existing anti-discrimination legislation and to refine the implementation of the EC directives on the federal level:

- 10 May 2007 Anti-discrimination Act

This act replaces the 25 February 2003 Anti-discrimination Act and (re-)adds the following grounds to those covered by the 2000/78/EC directive (religion or belief, disability, age and sexual orientation): civil status, birth, fortune, political conviction, language, future or present health condition, physical or genetic characteristic and social origin. The CEOOR's legal mandate covers all of these grounds, except for language.

- 10 May 2007 Anti-racism Act

This act modifies the 30 July 1981 Anti-racism Act and broadens the implementation of the 2000/43/EC directive grounds by covering not only "so-called" race and ethnic origin, but also skin colour, descent, national origin and – newly added – nationality. The CEOOR's legal mandate covers all of these grounds.

- 10 May 2007 Gender Act

This act replaces the 7 May 1999 Gender Act. Please note that the issue of gender discrimination is excluded from the CEOOR's legal mandate, as it falls within the exclusive competence of the Belgian Institute for Equality between Men and Women.

The scope of this legislation – which is identical for all three acts – is broader than demanded by the EC directives, and includes the following areas: access to and supply of goods and services accessible to the public; social protection, including social security and health care; social advantages; additional schemes to social security; employment, including access to employment, working conditions, dismissal; membership of and participation in trade unions and professional organisations; statements in official documents and minutes; access to and participation in economic, social, cultural and political activities accessible to the public.

**1. Does this case fall within the scope of any or all of the following:**

- ***the Race Directive 2000/43/EC and your domestic racial discrimination law implementing the Directive;***
- ***the Proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services (in terms of religious discrimination);***
- ***any domestic legislation on religious discrimination in your country?***

***In your answer please consider what is the effect, if any, of article 3(2) of the Race Directive which provides that "This Directive does not cover difference of treatment based on nationality...and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals.... on the territory of Member States".***

a. Race directive and domestic racial discrimination law / race

The XYZ's "profile practice" can fall within the scope of goods and services available to the public under the Directive 2000/43/EC (art. 3) and our anti-racism federal legislation (art. 5).

However, art. 3(2) 2000/43 provides that "this Directive does not cover difference of treatment based on nationality...and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals...on the territory of Member States", but this exception can not be applicable because this article refers to the nationality and the airline profile practice is based of name origin regardless the nationality of the passenger.

b. Proposed Directive (goods and services) / religion

This case can fall within the scope of the Proposed Directive (art. 3) and our anti-discrimination act (art. 5) which covers the discrimination on ground of religion.

The definitions of direct and indirect discriminations under the Belgian anti-discrimination are in line with the Proposed Directive.

c. Other legislation / ethnic profiling

This XYZ Company's practice uses the name origin for security reason; this practice has some features common to the ethnic profiling by relying on ethnic, racial, or religious stereotypes.

The ethnic profiling is a form of discrimination because it breaches basic human rights norms for instance the European Convention on Human Rights, the Treaty on the European Union states.

However, the ethnic profiling is often used by the police or the authorities; there are similarities between the profiling used by XYZ Company and the ethnic profiling used by the police.

Yet, the CEOOR underlines that all profiling practices are not illegal. For example, if the XYZ Company had concrete physical description of terrorist and the complainant corresponded to this description, ethnic profiling would not be involved. But in this case, there is no evidence indicating that the complainant presents any threat for the security.

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

- Criminal jurisdiction

The plaintiff can take legal action by asking the criminal court to apply the anti-racism law. But this criminal law deals with the explicit intention to discriminate because of race or origin; the burden of proof is for the plaintiff; the best approach would be the civil action. (art. 24 the anti-racism legislation)

Yet, if we consider this airline practice as discrimination based on religion, there is no criminal action under the anti-discrimination legislation for discrimination in the field of goods and services.

- Civil jurisdiction

The legislation confers the civil jurisdiction the competence in discrimination disputes (art. 17 anti-racism law and art. 20 anti-discrimination law).

The Centre for Equal opportunity and opposition to racism (CEOOR), the specialised equality body in Belgium is competent.

The CEOOR can give legal advice to the complainant pertaining to his rights in regard to anti-racism and anti-discrimination legislation. The CEOOR can propose a mediation between the complainant and the XYZ company. The solution is up to the parties to come to an agreement. The CEOOR can also propose recommendation to the XYZ company but the

CEOOR's recommendation is not compulsory. The CEOOR can take legal action against the YYZ company under the application of the Equality Acts, if the others actions fall.

Our approach would be to mediate with the airline company and the complainant in order to combine the legitimate security goal with the respect of equality. The CEOOR would propose general recommendations for all airline companies.

- the European Consumer Centre (Ombudsman). It is located in Brussels and "has been established by the European Commission to: assist the European consumer in case of cross-border consumer disputes and provide a link between the consumer and the Alternative Dispute Resolution (ADR) bodies."

**3. Is there direct or indirect discrimination on the ground of race/ethnic origin or others (according to your national legislation)?**

Racial discrimination

Direct and indirect discrimination under the Belgian anti-racism legislation are in line with the Directive 2000/43. These concepts are applicable on basis of the following conditions:

"Ethnic" or neutral practice: the XYZ Company's "profile reservations practice" consists of referring selective passengers to the manual check-in. This profile practice is based on a combination of several criteria.

It seems that among these practices, the non British and non-Scandinavian origin of the name really determines XYZ Company's "profile reservation practice". For example, "the credit card practice" is not relevant for the profile reservation because "XYZ indicated that not all travellers to Great Britain, who paid the ticket with credit card belonging to someone else, are referred to the manual check-in".

The "language practice" confirms that the "profile reservations practice" targets non-British and non-Scandinavian passengers because it helps to determine the level of integration.

This case could lead to direct discrimination because the problematic criterion used by the airline company in regard to the European directive and our domestic legislation is explicitly the non-Scandinavian and non-British origin of the name; in this case the Arabic/Middle Eastern origin of the claimant's name.

A distinction which is directly based on a so-called race, colour, or ethnic origin can never be justified outside the scope of employment so it could be a direct discrimination.

This case could lead to indirect discrimination (except justification) because there is no always correlation between origin of the name and the ethnicity for example in cases of adoption, mixed marriage...But it remains difficult to consider the origin of the name as a neutral criterion.

An indirect racial discrimination is not allowed unless it can be objectively justified by legitimate aim and by appropriate and necessary means (see answer 4).

Religious discrimination

Our domestic anti-discrimination law prohibits discrimination based on religion (art. 5) under the following conditions:

Religious ground or neutral practice: XYZ's practice does not refer directly to the Muslim religion or any religion. It is subject to more investigation in order to collect evidence to consider this case as direct discrimination on ground of religion.



However, the name origin can give indication about the origin and in some case the religion of a person; the Arabic/ Middle Eastern origin of the claimant's name can help to identify his Arabic origin and his religion because most of the Arabic persons are Muslim.

Furthermore, it is important to take into account that the counter-terrorism measures affect particularly the Muslim persons due to stereotypes which associate Muslim persons to terrorism in Western countries (bombs attacks in Great Britain, USA and Spain).

So it could lead to indirect discrimination based on Muslim religion unless objective justification (see answer 4); but this interpretation of indirect discrimination could be not in line with our Belgian jurisprudence.

Multiple discrimination

The "name origin practice" could be multiple discrimination, in this case the Arabic origin name covers the ethnic origin and the Muslim religion. When the CEOOR experiences multiple discrimination, we choose the ground with the high level of protection, in this case the origin ground.

Ethnic profiling

Ethnic profiling is involved because the XYZ Company's practice is based on generalisations about the supposed religious beliefs, national origin, or ethnicity of the passenger regardless the behaviour of the person or objective evidence.

Yet, our domestic legislation does not explicitly address the illegal profiling but that could be included in the concept of direct discrimination based on origin or religion.

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

**In your answer please consider what would be the effect of any national legislation (or article 2(8) of the Proposed Directive permitting discrimination where measures are "necessary for public security") such as counter-terrorism legislation, on whether or not racial or religious discrimination would be established.**

The security measures at the airport reflect the fear context after 11 September attacks, 7/7 London bombings or Madrid bombings.

Some counter-terrorism measures used as preventive actions are based on stereotypes linking Muslims or immigrants to terrorism.

So the conflict between security and racial or religion equality is the centre of the discussion.

Under the anti-racism law, a distinction which is directly based on a so-called race, colour, or ethnic origin can never be justified outside the scope of employment.

So in this case, the question of justification is relevant only in regard to the religious "discrimination" and the racial indirect discrimination.

The Proposed Directive contains provision permitting discrimination where measures are necessary for public security such as counter-terrorism legislation.

However, this measure must respect the objective justification (proportionality) test in order to determine if a distinction (difference of treatment) is objectively or reasonably justified. This objective justification test is inspired by the jurisprudence of our constitutional Court and the European Court of Luxembourg.

This “profile reservation practice” must satisfy the following objective (proportionality) justification test:

a. Reaching a legitimate goal:

The XYZ company’s practice is used for security reason; the company uses “various criteria, which XYZ for security reasons cannot reveal in details, since these criteria are also applied in matters of crime prevention”. (...) The British government requested the airline to subject passengers seeking to travel to the United Kingdom to increased security checks”. The security reason is valid. Furthermore, it could be difficult to obtain more information about the justification because the company could refuse this request for security reason.

b. Using adequate and necessary means:

To the CEOOR, this controversial practice is not relevant in order to reach efficiently the security goal: “In terms of protecting European citizens from terrorism, not only is there little evidence that ethnic profiling is effective, but there is cause for concern that it is in fact counterproductive. A 2005 French parliamentary report concluded that there is no terrorist profile. (...) the vast majority of the people who fall into the category (terrorist ethnic profile) are entirely innocent (...) there are other terrorists and other criminals who do not fit the profile and who would escape attention if the profile were strictly applied”.<sup>9</sup>

In addition, this practice violates the rights of targeted communities to be treated equally because it targets them for extra attention and differential treatment regardless their attitude. It affects people’s perceptions about minority communities. “Large numbers of people are directly and indirectly affected by ethnic profiling and victims are often deeply humiliated”. One of the most serious effects of ethnic profiling is its contribution to stigmatizing members of targeted ethnic, religious, or national groups. When the authorities single out members of certain groups for monitoring and surveillance, and particularly when these actions are given extensive media coverage, the message is sent that the entire ethnic or religious group presents a danger to society. Negative stereotypes are fostered and reinforced, exacerbating existing social and political tendencies toward racism and xenophobia.<sup>10</sup>

In this case, the “profile reservation practice” is not objectively justified and it is similar to the controversial ethnic profiling.

**5. Is there any other form of discrimination – instruction to discrimination, harassment?**

The harassment definition under Belgian Acts is common to the Directive 2000/43 (art. 4,10) anti-racism and anti-discrimination legislations).

In this case, it is about measure security and not individual behaviour of XYZ company’s attendance. This method is questionable because it tends to stigmatize minority community presenting them as a threat, so their members experience more controls by the staff of the company based on their name origin disregarding their attitude. It could lead to harassment in the chief of XYZ company.

Instruction to discriminate is also considered under the Belgian anti-racism (art. 4,12) and anti-discrimination legislations (art. 4, 13<sup>9</sup>) as discrimination in line with the Equality Directive.

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<sup>9</sup> Thus, it was reported that, prior to the July 2005 attacks on the London public transport system, the leader of the bombers “had come to the attention of the intelligence services as an associate of other men who were suspected of involvement in a terrorist bomb plot. But he was not pursued because he did not tick enough of the boxes in the pre-July profile of the terror suspect.” The most authoritative report to date on the 7/7 London bombings concludes that “there is not a consistent profile to help identify who may be vulnerable to radicalization. Secondly, the company could use alternatives as explained by European Commission against Racism and Intolerance (ECRI) which are inspiring from police initiatives “ECRI notes that increasingly, the police developed means such training and other initiatives aimed at addressing the problem of racial profiling in close partnership with civil society and in particular with representatives of the minority groups concerned”; ECRI report, 2008, p. 12

<sup>10</sup> Ethnic profiling in the European: pervasive, ineffective and discriminatory, p. 109-110, 2009

This concept could be applicable to XYZ company because the company has given instruction to its staff to apply an illegal profiling.

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

Criminal provision

Anti-racism Act provides “that whoever, commits discrimination in supplying or offering to supply a service, a good or the enjoyment of it, 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 EUR 50 to EUR 1000, 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 so-called race, colour, descent, origin, or nationality of its members, or some of them” (art. 24 Anti-racism Act).

But we have some reservation due to the lack of explicit intention to discriminate.

In a criminal procedure, if the XYZ company is convinced of breaking the criminal law, the victim could ask financial damage.

But if we consider this XYZ company’s practice as discrimination based on religion, there is no criminal action under the anti-discrimination legislation

Civil provision<sup>11</sup>

By virtue of “equality” legislation, the discriminatory provision in “the reservation practice” could be considered as void: “Terms and conditions of an agreement which run contrary to the provisions (...), shall be null and void”.

At the request of the victim of discrimination or of one of the groups referred to in Article 31 as the CEOOR, 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 new legislation introduces a system of fixed-rate compensation for non-pecuniary damages in case of discrimination. The XYZ company could be sentenced by paying a lump sum damage (EUR 650 or EUR 1,300) upon the request of the damaged party (the complainant).

XYZ argued in its defence to a discrimination claim that “passengers’ name, along with date of ticket purchase, payment conditions, travel patterns and reservation all are included among the factors which influence the decision of the airline company on who should be referred to the manual check-in. XYZ also informed the complaints committee that in that period the British government requested the airline to subject passengers seeking to travel to the United Kingdom to increased security checks”.

In the light of our legislation, “the amount of the damages may equally be increased if the defendant cannot show that the less favourable treatment would also have occurred had there been no discrimination. It is difficult to see why the law varies the amount of compensation for non-pecuniary damages depending on whether or not the offender had the possibility of justifying the decision with a non-discriminatory motive. The non-pecuniary damage which extends from the refusal is justified because a discriminatory motive was

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<sup>11</sup> Art. 13 to 18 of Anti-racism Act / art. 15 to 20 Anti-discrimination Act

among the elements taken into account. But there are some critics “ECRI recalls that for racial discrimination to have taken place, it is not necessary that ethnic origin should constitute the only factor or the determining factor in the difference in treatment. It is enough that this ground is among the factors leading to such difference in treatment amount of damage should not vary according to whether or not the decision might have been justified for other reasons”.

The Court could also order to publish the judgement in newspaper in the charge of the XYZ Company.

## Great Britain

*Answers provided by the Equality and Human Rights Commission*

### **1. Does this case fall within the scope of any or all of the following:**

- the Race Directive 2000/43/EC and your domestic racial discrimination law implementing the Directive;**
- the Proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services (in terms of religious discrimination);**
- any domestic legislation on religious discrimination in your country?**

The facts of the case would suggest that the case fell within the scope of the Directive insofar as the ‘principle of equal treatment’ prohibiting both direct and indirect discrimination, whatsoever on any of the grounds referred to in Article 1.

The purpose of the Council Directive (2000/43/EC) (“the Directive”), which implements the principle of equal treatment between persons irrespective of racial or ethnic origin, is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States, the principle of equal treatment.

For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1. For the purposes of the question, direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation.

Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

- (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 persons with a particular disability, the employer or any other 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 disadvantages entailed by such provision, criterion or practice.

In terms of national legislation, s.20(1) of the Race Relations Act, (1976), as amended, 2000, provides that it is unlawful for any person concerned with the provision of goods, facilities and services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities and services:

- (a) by refusing or deliberately omitting to provide him with any of them; or

(b) by refusing or deliberately omitting to provide him with goods, facilities and services of the like quality, in the like manner and on the like terms as are normal in the first mentioned person's case in relation to other members of the public or (where the person so seeking belongs to a section of the public) to other members of that section.

S. 20(2)(f) provides examples of the facilities and services mentioned in subsection (1) including facilities for transport or travel.

S. 41 of the RRA (1976) provides general exceptions to acts which would normally be regarded as discriminatory but with certain provisos.

S. 41(1) provides that nothing in Parts II to IV of the Act shall render unlawful any act of discrimination done under statutory authority. There is no statutory provision that currently permits the actions of XYZ Airlines. S. 41(1)(A) also provides that for acts of discrimination to be lawful, such acts must be in pursuance of an enactment or Order in Council. As a result this section will not apply. This section only applies where the discrimination deals with race and ethnic origin. In any case, this section is going to be repealed in the forthcoming Equality Act 2009, so currently could apply to anyone on account of colour. This section also applies to nationality but there is no piece of legislation which allows airlines to commit the treatment in question.

In addition, S. 41(2), particularly provides that nothing in Parts II to IV shall render unlawful any act whereby a person discriminates against another on the basis of that person's nationality or place of ordinary residence or the length of time for which he has been present or resident in or outside the UK or an area within the UK, if that act is done;

(a) In pursuance of any enactment made by or with the approval of, or for the time being approved by, a Minister of the Crown, or,

(b) In order to comply with any condition imposed by a Minister of the Crown.

This exception will not apply to render the act of discrimination by XYZ Airlines on the claimant lawful. This applies if the enactment is made by a Minister of State, and there is currently no enactment which would permit the discrimination in this case. In addition, the person was not discriminated against on grounds of nationality but claimant's Middle-Eastern name. In other words, this criterion will not apply anyway.

S. 42 is an exception which renders acts of discrimination lawful if it is done for the purpose of safeguarding national security. By virtue of this provision, therefore, XYZ Airlines could claim that their act of discrimination was motivated by another government requiring them to subject passengers seeking the travel to their country to increased security checks. Acts relating to national security, however, would need to be actions expressly provided for in legislation or some express written agreement. Here, there does seem to be any such legislation or written agreement therefore no justification for their acts.

Further, though XYZ Airlines would insist that selection was based on an overall assessment of different factors, they may find it difficult to justify the criteria of selecting based on a purchase of a ticket by someone else other than the claimant, as not all travellers to the UK, who paid their tickets with credit cards belonging to someone else are referred to the manual check-in.

In relation to the effect of Article 3(2) of the Race Directive, that exception only applies to nationality and this was not a case of nationality discrimination as nationality was never an issue raised by the airline, only the person's name. As a result the exception is not relevant to the facts of this case cannot be relied upon by the airline.

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

A claimant can bring proceedings in the County Court. The EHRC could support a claimant or intervene to provide submissions but is not able to decide cases on discrimination.

**3. Is there direct or indirect on the ground of race/ethnic origin or religion (according to your national legislation)/discrimination?**

Definition of discrimination

S. 1(1) of the Race Relations Act 1976 provides that a person discriminates against another in any circumstances relevant for the purposes of any provision of the Act:

(a) on racial grounds he treats that other less favourably than he treats or would treat other persons; or

(b) he applies to that other a requirement or condition which applies or would apply equally to persons not of the same racial group as that other but

(i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it and

(ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and

(iii) which is to the detriment of that other because he cannot comply with it.

In S. 3 of the Act, “racial grounds” means any of the following grounds, namely colour, race, nationality or ethnic or national origins.

“Racial group” means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person’s racial group refer to any racial group into which it falls. These provisions are similar to the definitions under the Race Directive.

Articles 1 and 2 of the Race Equality Directive prohibit both “direct” and “indirect” discrimination. The definition of *direct discrimination* taken from Council Directive 97/80 EC provides that *direct discrimination* occurs “where a person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin”. Unlike in US case law, there is no express requirement here that a claimant show intent to discriminate. The test is unequal treatment.

According to the Directive, *indirect discrimination* occurs “where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”.

The Commission believes that the scenario at hand presents a clear case of direct discrimination as the claimant’s treatment was based on her nation or ethnic origin. The differential checking procedures of XYZ may be unlawful under the Race Relations Act (RRA) for the very fact that there are two separate check-in procedures the use of which are determined by certain characteristics, one of which is based on origins of a name. Direct discrimination, again, occurred where like the case of *R (on the application of European Roma Rights Centre and Others v Immigration Officer at Prague Airport and Another*<sup>12</sup>, where the entry clearance procedure operated by British Immigration officers at Prague Airport unlawfully discriminated against Roma attempting to travel to the UK by treating them less favourably on racial grounds than a non-Roma. The Roma Rights case made clear that no form of discrimination could be tolerated in the exercise of Immigration functions. Indeed the case also makes plain that any form of disadvantage suffered by an individual as a result of stereotyping (whether for good reason or otherwise) constitutes unlawful discrimination. On the whole the UK has dealt with cases like the Roma Rights with similar issues, e.g. the Monarch case and the Ryanair case.

The unfavourable treatment meted out to the Middle Easterner could also be indirect discrimination as this practice will put persons of a racial or ethnic origin at a particular

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<sup>12</sup> [2004]

disadvantage compared to other persons and cannot be shown to be a proportionate means of achieving a legitimate aim.

The requirement that passengers with names that are neither Scandinavian or British or those whose tickets were bought with credit cards bearing names other than the passengers' go through a manual check is likely to indirectly discriminate against persons of Arabic ethnic origin, because they would be disproportionately disadvantaged by the criteria as they are less likely to meet the requirements.

In relation to religious discrimination, this is not a case of direct religious discrimination as they were not treated differently because of their religious beliefs. However it is possible that this is a case of indirect religious discrimination against the person as a Muslim, as a disproportionately higher number of persons of Muslim belief are likely to be disadvantaged by the criteria

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

**In your answer please consider what would be the effect of any national legislation (or article 2(8) of the Proposed Directive permitting discrimination where measures are "necessary for public security") such as counter-terrorism legislation, on whether or not racial or religious discrimination would be established.**

Direct discrimination on grounds of race or religion cannot normally be justified except in rare circumstances. One of the possible exceptions which might be sought to be relied on is relating to national security under domestic law or pursuant to the provision under article 2(8) of the Proposed Directive.

XYZ could argue that their treatment of the claimant was lawful because the Scandinavian government had requested the airline to subject passengers seeking to travel to the Scandinavia to increased security checks and therefore that the exception for national security applies. However this exception applies to the actions of the national government so there would need to be some form of legislation or formal agreement permitting the treatment and the risk would have to be something of a sufficient degree of concern to threaten the security of the nation. Article 2(8) of the Proposed Directive specifically requires that the measures be laid down in national law. As no such law or agreement appears to exist in this case it is unlikely that such an exception would apply.

In relation to both race and religious indirect discrimination this sort of discrimination could also be lawful if the conduct was otherwise a proportionate means of achieving a legitimate aim. Although the aim of providing better protection from criminal activity such as acts of terrorism may be a legitimate aim, it is unlikely the means were a proportional means of achieving a legitimate aim. The airline could have for example subjected all persons travelling to the UK to increased security checks.

**5. Is there any form of discrimination-instruction to discrimination, harassment?**

S 30 of the RRA provides that it is unlawful for a person who has authority over another person; or in accordance with those wishes that other person is accustomed to act, to instruct him to do any act which is unlawful by virtue of Part II or Part III, or procure or attempt to procure the doing by him of any such act.

For unlawful instructions the instructor must have authority over the person subjected to the instructions or the latter must be accustomed to act in accordance with his wishes - *CRE v Imperial Society of Teachers of Dancing*<sup>13</sup>.

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<sup>13</sup> [1983]

In this scenario, another form of discrimination – instruction to discriminate is possible. Since the airline workers would have been acting on instructions from their management to do the work in the manner they did, this would amount to instruction to discriminate, which is unlawful. Also the actions of the employees will be treated as actions of the employer, creating the ground for holding the employers vicariously liable.

Would the treatment of the claimant amount to an act of harassment? The actions must have the purpose or effect of violating the dignity of the person and creating an intimidating, hostile, degrading, humiliating or offensive environment. In Great Britain, domestic case law has established that one act of harassment may be sufficient to establish harassment; all will depend on the facts of the case. In this case, given that the person was not subjected to extensive questioning or delayed for a significant period, and was allowed to board the plane. It is therefore unlikely that the conduct was sufficient to amount to racial or religious harassment.

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

Under the Directives, the national courts must ensure violations of the principle of equal treatment are satisfactorily remedied. Sanctions against discriminators must be effective i.e. achieve the desired outcome, proportionate, i.e. adequately reflect the gravity and nature of loss and/or harm suffered and dissuasive, i.e. deter future acts of discrimination.

The UK traditionally imposed sanctions for most forms of discrimination. Financial compensation may include compensation for past and future loss and injury to feelings, damages for personal injury such as psychiatric damage or exemplary damages to punish the discriminator. The victim is accordingly directly compensated.

Other remedies include interim relief to stop the discrimination and obliging the discriminator to take action to prevent or reduce the effects of discrimination on the victim, such as an order to reinstate him or her in their jobs or to adopt a particular mode of practice. Sometimes there are specific sanctions on companies or organisations which differ from those imposed on individuals.

## Cyprus

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

**1. Does this case fall within the scope of any or all of the following:**

- ***the Race Directive 2000/43/EC and your domestic racial discrimination law implementing the Directive;***
- ***the Proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services (in terms of religious discrimination);***
- ***any domestic legislation on religious discrimination in your country?***

We believe that this case falls within the scope of the 2000/43/EC Directive. Albeit it can be argued that issues of religion or belief may be involved, we feel that the case mainly concerns discrimination based on race/ethnic origin.

We do not think that article 3(2) of the Race Directive can be applied here. Based on the facts of the case, the difference in treatment was not related to the complainant's nationality/citizenship or as to whether he met the conditions relating to the entry in the territory of the European Union. Besides, the competency to examine such matters lies with



the immigration authorities of the Member States, at the points of entry in the European Union, and not with airlines flying from/to the Union.

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

The District Court and the Equality Body.

**3. Is there direct or/and indirect discrimination on the ground of race/ethnic origin or religion (according to your national legislation)?**

The Directive 2000/43/EC was transposed into national legislation with Law N.59(I)/2004. The provisions of Law N.59(I)/2004 which refer to the concept of discrimination - including the definitions of direct, indirect discrimination and objective justification - as well as the scope of the law, are almost word-for-word translation of the relevant corresponding provisions of the race Directive.

Our approach is that, in this case, the criterion of whether the passenger had a name of "Arabic/or Middle Eastern origin", cannot be considered as an "apparently neutral provision", but rather as a criterion that is directly and indistinguishably related to his/her ethnic origin. Therefore we tend to the opinion that the discrimination that the complainant suffered was direct.

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

Since we find that the discrimination that the complainant suffered was direct, there is no objective justification or exception.

[Independently of the above and for the sake of argument, had this case been approached under the notion of indirect discrimination, we have the view that such measures could only be considered as justified in very exceptional circumstances under a very strict application of the principle of proportionality.]

**5. Would any other form of discrimination be established under your domestic law – for example instructions to discriminate, or harassment on grounds of either race or religion?**

In our opinion there was instruction to discriminate against persons on the grounds of their ethnic origin from the management of XYZ airline to its airport personnel.

Even though discrimination may constitute in certain circumstances degrading treatment, we feel that the treatment towards the complainant, as it is described in the case, cannot be considered as "harassment". Referring the complainant to the manual check-in desk and checking his travel documents, falls short of harassment as it is described in article 2.4 of the Directive (i.e. "violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment").

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

Law N.59(I)/2004 states that, if, in a case before it, the District Court rules that unlawful discrimination occurred, it awards "just and reasonable" compensation/damages. Further to the above, the Law provides that unlawful discrimination is an offence and the parties committing this offence are subject to a fine up to GBP 4,000 (EUR 6,840) and/or imprisonment up to six months.

# Denmark

Answers provided by the Danish Institute for Human Rights

## **1. Does this case fall within the scope of any or all of the following:**

- **The Race Directive 2000/43/EC and your domestic racial discrimination law implementing the Directive;**
- **the Proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services (in terms of religious discrimination);**
- **any domestic legislation on religious discrimination in your country?**

**In your answer please consider what is the effect, if any, of article 3(2) of the Race Directive which provides that "This Directive does not cover difference of treatment based on nationality...and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals.... on the territory of Member States".**

The case in question falls within the scope of the 2000/43/EC Directive. However it does not fall within the scope of the Proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation since this directive does not cover race or ethnic origin. However, if one was to find that it was a case on indirect discrimination due to religion it would be covered.

Article 3, paragraph 2 is of no relevance in this case. The complainant is not being discriminated against due to his nationality but due to his ethnic origin.

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

From 1 January 2009, it is the newly established Board of Equal Treatment that is competent to handle the case in question (<http://www.ast.dk/artikler/default.asp?page=1013>). Another option would be to file a lawsuit with the ordinary courts.

## **3. Is there direct or indirect discrimination on the ground of race/ethnic origin or religion (according to your national legislation)?**

It is a difficult case when it comes to establishing whether it is a case of direct or indirect discrimination. One of the reasons the complainant was referred to manual check-in was because of his name which is not a well-known Scandinavian or British name of origin. Furthermore, it follows from the case that when the airline staff found out that the complainant spoke fluent Tula he was allowed to board the aircraft. A practice that includes a number of criteria such as date of ticket purchase, payment conditions, travel patterns and reservation as well as origin of name has a lopsided result for persons with a not well-known Scandinavian or British sounding name and thereby with persons of a different ethnic origin than Scandinavian or British.

The now closed Complaints Committee for Equal Treatment found that this was a case of indirect discrimination. The reason for this was that the airline's differential treatment of its customers was based on their names and their language qualifications and that to a higher degree effected persons of a different ethnic origin than Danish.

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

***In your answer please consider what would be the effect of any national legislation such as counter-terrorism legislation relating to threats to national security or article 2(8) of the Proposed Directive permitting discrimination where measures are "necessary for public security" on whether or not racial or religious discrimination would be established.***

Since the case was found to be a case of indirect discrimination, justification is possible (cf. article 2, paragraph 2(b)). The Complaints Committee for Ethnic Equal Treatment found that the airline's wish to carry out control of its passengers' travel documents was a legitimate aim, but that the airline had not chosen an appropriate and necessary method to achieve that aim. The Committee noted that the airline could instead request information regarding citizenship and visa requirement when the customer made his or her reservation which would then give a truer and fair basis to carry out the visa control on.

It follows from article 2, paragraph 8 of the Proposed Directive that the directive shall be without prejudice to general measures laid down in national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and the protection of the rights and freedoms of others. Here it is important to keep in mind that the case in question does not follow within the scope of the Proposed Directive, since the directive does not cover race or ethnic origin. If one was to find that it was a case of either direct or indirect discrimination due to religion then the Proposed Directive would be applicable.

If we assume that the Proposed Directive was applicable to the case in question I believe it would be difficult to determine whether article 2, paragraph 8 would have an effect. The provision is very similar to the exceptions that are found within the human rights for instance article 8, paragraph 2 in the European Convention on Human Rights that states that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The question is if article 2, paragraph 8 should be interpreted in accordance with, for instance article 8, paragraph 2 of the ECHR.

Article 8 paragraph 2 sets out three conditions that all have to be fulfilled in order for an interference by the state to be legal. In the case in question, there is no information on whether the practice of the airline stems from any national legislation. Furthermore, it would have to be assessed whether it in a democratic society is necessary for public security to have a practice as the one the airline has. And it would have to be assessed whether the interference safeguards one or more of the listed considerations such as e.g. public security and public order.

**5. Would any other form of discrimination be established under your domestic law – for example instructions to discriminate, or harassment on grounds of either race or religion?**

The Complaints Committee found that the airline had instructed its personnel to discriminate by preventing passengers with certain not clearly defined names from using the self-service check-in desk.

Harassment was not an issue in the Complaints Committee handling of the case. Harassment occurs when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. The assessment of whether harassment has

occurred depends on both a subjective and an objective assessment. In my opinion the incident is - objectively seen - not coarse enough to fall within the scope of harassment.

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

It follows from section 9 in the Danish Act on Ethnic Equal Treatment that persons who have been exposed to either discrimination or victimization can be awarded compensation for non-financial damages.

## Finland

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

**1. Does this case fall within the scope of any or all of the following:**

- *the Race Directive 2000/43/EC and your domestic racial discrimination law implementing the Directive;*
- *the Proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services (in terms of religious discrimination);*
- *any domestic legislation on religious discrimination in your country?*

a) 2000/43/EC Directive

Yes, the case falls within the scope of the 2000/43/EC Directive (Article 1, grounds covered, Article 3.1h, the scope of application includes access to and supply of goods and services which are available to the public).

Article 3(2) of the Race directive is not relevant in this case, because the airline company did not directly refer to the nationality of the person who was referred to manual check-in. The airline specifically mentioned only things such as "his name was not a well-known Scandinavian or British name, but of Arabic/Middle Eastern origin". They did not refer to requirements by British officials to stop certain nationalities from taking the flights due to reasons relating to entry into the State. The referring to manual check-in was motivated partly by crime prevention, not by reasons relating to the right of a certain national to enter a certain state. The company did claim that they wanted to check that the person had the necessary travel documents, which means that nationality was relevant in an indirect way. However, it was not about actions by the border guards for example, but about the methods/activities of the airline company, that is by a service provider. It was mainly about getting services (flights and smooth check-in services)/entering a flight, not about the right to enter a country.

b) The Proposed Directive

Yes, the case would fall under the Proposed Directive (Article 3.1d: the scope covers access to and supply of goods and other services), but only as a discrimination case based on religion. Religion is among the discrimination grounds mentioned in Article 1.

The Proposed Directive does not cover the discrimination ground ethnicity, since this ground in relation to the provision of goods and services is already covered by the 2000/43/EC Directive.

c) The Finnish Equality Act

Religion

The case would not fall under the national Equality Act as direct or indirect discrimination based on religion, because the scope of application of the Act covers goods and services only in relation to ethnic discrimination. The Equality Act prohibits discrimination based on religion, but not when it comes to the provision of goods and services.

The case could be tested as a criminal case, because Section 11 of Chapter 11 in the Penal Code covers discrimination based on religion and ethnic origin "without a justified reason" (for example, "refuses someone service in accordance with the generally applicable conditions").

Ethnicity

The national Equality Act is applicable in cases of ethnic discrimination when it comes to the provision of goods and services. The case could be tested as direct discrimination based on ethnicity (and implicitly indirect discrimination based on religion) or as indirect ethnic discrimination (and implicitly direct discrimination based on religion).

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

The Ombudsman for Minorities and the Discrimination Tribunal would be competent to handle the case as ethnic discrimination. A compensation claim concerning ethnic discrimination could be put before a district court. A compensation claim could also be put forward by the prosecutor in connection with a criminal case.

The Discrimination Tribunal or the Ombudsman for Minorities would not be competent to act referring to religion. It is not totally clear whether a compensation claim on discrimination based on religion could be put before a district court by the victim. The scope of application of the Equality Act covers the provision of goods and services only when it comes to ethnic discrimination. However, in Section 9.1 of the Act it is stated that: "A supplier of work, movable or immovable property, or services, education or benefits as referred to in section 2 who has infringed the provisions of section 6 or section 8 on the basis of age, ethnic or national origin, nationality, religion, belief, opinion, state of health, disability or sexual orientation shall pay the injured party compensation for the suffering caused by such discrimination or victimization..."

**3. Is there direct or indirect discrimination on the ground of race/ethnic origin or religion (according to your national legislation)?**

There is direct discrimination on the ground of ethnicity. One of the reasons for referring the person to manual check-in was the name of the person. The name often reflects the ethnic or national origin of the person, even if the person in question would have become a Tula national.

The case could be handled under the Proposed Directive as direct discrimination on the ground of religion, if the applicant's name was typical for persons with a specific religion.

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

***In your answer please consider what would be the effect of any national legislation such as counter-terrorism legislation relating to threats to national security or article 2(8) of the Proposed Directive permitting discrimination where measures are "necessary for public security" on whether or not racial or religious discrimination would be established.***

I would handle the case as direct discrimination based on ethnic or national origin. Therefore, there is no possibility to justify the actions by the company. None of the exceptions mentioned in the Equality Act are applicable either (on justifications, see Section 7 of the Act). According to Section 3 on the limitation of the scope of application of the Equality Act, the act does not apply to the "...application of provisions governing the entry into and residence in the country by foreigners, or the placing of foreigners in a different position for a reason deriving from their legal status under the law". This case, however, is not about applying the "Alien's Act"; it is not about entry into Tula or Great Britain and it is not about treating someone differently because of his legal status. The person is treated differently in the provision of services, in the check-in, because of his name. As far as I know, there is no national counter-terrorism legislation that could be relevant in this case.

Only if the case was handled as a criminal case (of ethnic or religious discrimination), the court would need to make an assessment on whether there were justified reasons for the airline to act the way they did. The justifications put forward by the airline are not very convincing. (See also response 1a.) However, I doubt whether the differential treatment would be considered grave enough to constitute a crime.

According to the Proposed Directive there is no justification possible when it comes to direct discrimination based on religion. The situation in question is not covered by any exception of the Proposed Directive either.

The exception in Article 2.8 of the Proposed Directive is not applicable, because it refers to "general measures laid down in national law, which...are necessary for public security..." the measures would need to arise from national law, but this was not the case in Tula. In Finland there is (as far as I know) no counter-terrorism legislation in place that could be seen as legislation mentioned in the Proposed Directive, Article 2.8 (in cases on religion). Also, the exception in the Proposed Directive can hardly be used to justify acts by private companies, but mainly by officials.

**5. *Would any other form of discrimination be established under your domestic law – for example instructions to discriminate, or harassment on grounds of either race or religion?***

According to the Finnish Equality Act, an instruction to discriminate as well as harassment are forms of discrimination. These forms of discrimination could be relevant in relation to ethnicity only, since discrimination based on religion in the provision of services falls outside the scope of the Equality Act.

It can be presumed that there was also an instruction to discriminate, since the differential treatment was the practice of the airline company. Most probably the company instructs its employees on the practice used. The burden of proof would shift.

The situation might not be grave enough to constitute harassment. It depends on whether other passengers noticed what was going on etc.

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

The Discrimination Tribunal could prohibit the airline company to continue or repeat the treatment in question (discrimination based on ethnicity). If necessary, the tribunal can impose a conditional fine. The victim could claim compensation at least based on ethnicity before a district court.

Alternatively, the victim could try to take the case forward as a criminal case (in this case there would be a justification test). My guess is that the differential treatment would not be considered grave enough to constitute a crime. The unlikely sanctions would be a fine or imprisonment for at the most six months.

# Hungary

Answers provided by the Equal Treatment Authority

## **1. Does this case fall within the scope of any or all of the following:**

- **the Race Directive 2000/43/EC and your domestic racial discrimination law implementing the Directive;**
- **the Proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services (in terms of religious discrimination);**
- **any domestic legislation on religious discrimination in your country?**

I suspect that the case primarily falls under the Race Directive as the complainant's name of a Middle Eastern/Arabic origin makes it highly probable that she was referred to manual check-in due to her Arabic ethnic origin. Any discrimination on this ground is prohibited by Article 2 of the race Directive.

However, although we have no secure data as regards the religion of the claimant, it can be easily argued that the complainant's actual or presumed religion played a part in the differentiation as well. Namely, the complainant's name of a Middle Eastern/Arabic origin makes it also probable that she was referred to manual check-in due to her presumed Muslim religion. In this case, certainly one could turn to the Proposed Directive, citing Articles 2 and 3, arguing that any such discrimination shall be prohibited.

The Hungarian Equal Treatment (ET) Act covers both protected characteristics and prohibits discrimination on these grounds under Article 8.

Article 3(2) of the Race Directive most likely has no effect in this case as arguably the airline's aim was not to pursue a routine check of a passenger with a different nationality, but other aspects (her name and the conclusions drawn from this) dominated its conduct. However, we do not know the nationality of the complainant.

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

According to Section 76 of the Civil Code and Section 23 of the Civil Procedure Code, any breach of the principle of equal treatment shall be considered as a violation of inherent rights and the geographically competent county civil courts or the Metropolitan Court is competent to investigate any such claims if the case happened in the territory of Hungary.

The Equal Treatment Authority is competent to look into the matter according to Articles 14-15 of the ET Act if the case happened in the territory of Hungary.

## **3. Is there direct or indirect discrimination on the ground of race/ethnic origin or religion (according to your national legislation)?**

Having accepted that the company probably uses the Arabic/Middle Eastern name as a factor, we cannot talk about an apparently neutral provision. Therefore, this is a direct discrimination (or harassment) case under the effective Hungarian legislation and it would qualify so under the Proposed Directive as well. The ETA would investigate the case with regards to both ethnic origin and religion. Although the direct discrimination on the ground of race seems easier to argue, in fact, the discrimination on the ground of Muslim origin is also direct as at the end it lacks any apparently neutral provisions and employs a similar level of abstraction.

Article 2(1)(a) of the Race Directive reads as follows: 'direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin'.

Article 2(2)(a) of the Proposed Directive stipulates: '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'.

Article 8 of the Hungarian ET Act: 'All dispositions as a result of which a person or a group is treated or would be treated less favourably than another person or group in a comparable situation because of his/her

- b) racial origin,
  - c) colour,
  - e) origin of national or ethnic minority,
  - i) religious or ideological conviction
- are considered direct discrimination'.

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

***In your answer please consider what would be the effect of any national legislation such as counter-terrorism legislation relating to threats to national security or article 2(8) of the Proposed Directive permitting discrimination where measures are "necessary for public security" on whether or not racial or religious discrimination would be established.***

I suspect that there can be situations where the measure – not inflicting any material losses, but constituting a considerable violation of human dignity – could be acceptable as a relevant, necessary and proportionate one under public security rules enabled by Article 2 (8) of the Proposed Directive. In the Hungarian ET Act, Article 7(1)(b) allows proportional differentiation if a reasonable explanation is given in connection with the case in question. Nevertheless, one can argue that to qualify as an objective justification under Article 7(1)(b) of the ET Act, or Article 2(8) of the Proposed Directive there must be a reasonable suspicion against the person in question.

However, all this is only true if direct discrimination on the grounds of religion is in question as direct discrimination on the grounds of ethnic origin can not be justified (see Race Directive and Hungarian ET Act Article 7(3): 'The above Paragraph (2) [objective justification] shall not be applicable for cases of direct discrimination and unlawful segregation based on the characteristics defined in points (b)-(e) of Article 8 below').

**5. Would any other form of discrimination be established under your domestic law – for example instructions to discriminate, or harassment on grounds of either race or religion?**

In the given case it was the self-service check-in desk which refused processing the client's boarding. As a machine, it simply executed the instructions of the company's representatives but this does not make this an instruction to discrimination case. Neither turns the case into an instruction to discriminate case the fact that the British Government requested the airline to subject passengers seeking to travel to the UK to increased security checks. This request in itself seems to be a perfectly neutral and general one, lacking any provisions of a discriminatory nature.

Under the Hungarian law, the company has to answer the accusations of direct discrimination and harassment (for arguably violating the dignity of the complainant and creating an intimidating, degrading and humiliating environment) and is responsible for the conduct of its employees. Moreover, even under the Proposed Directive one could argue for a harassment case, again, with regards to the fact that the harm the complainant experienced was purely of a non-material nature.

Article 2(3) of the Proposed Directive reads as: 'Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment'.



Article 10 of the Hungarian ET Act stipulates that: 'Harassment is a conduct of sexual or other nature violating human dignity related to the relevant person's characteristics defined in Article 8 with the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment around the particular person'.

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

According to Article 16(1) of the ET Act: 'If the Authority has established that the provisions ensuring the principle of equal treatment laid down herein have been violated, they may

- a) order that the situation constituting a violation of law be eliminated,
- b) prohibit the further continuation of the conduct constituting a violation of law,
- c) order that its decision establishing the violation of law be published,
- d) impose a fine,
- e) apply a legal consequence determined in a special act'.

## The Netherlands

*Answers provided by the Equal Treatment Commission*

**1. Does this case fall within the scope of any or all of the following:**

- **the Race Directive 2000/43/EC and your domestic racial discrimination law implementing the Directive;**
- **the proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services (in terms of religious discrimination);**
- **any domestic legislation on religious discrimination in your country?**

If looked at as a case of racial discrimination, this case falls both within the scope of the Dutch anti-discrimination legislation (article 7 of the Equal Treatment Act, prohibiting discrimination in relation to the provision of goods and services on the grounds of religion, belief, political opinion, nationality, race, sex, heterosexual or homosexual orientation or civil status) and within the scope of the Race Directive (article 3(1)(h)).

If this case is (also) looked at from the perspective of discrimination on the ground of religion, it also falls within the scope of the abovementioned article 7 of the Dutch Equal Treatment Act. It does not fall within the scope of any European Directive in force at the moment. However, it does fall within the scope of the proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services.

The exceptions for a difference in treatment based on nationality and for a difference in treatment relating to the legislation on the entry into and residence of third country nationals in a Member State, are laid down in Dutch equality law in article 2(5) of the Equal Treatment Act.

This exception reads as follows:

The prohibition on discrimination on the grounds of nationality contained in this Act shall not apply:

- (a) if the discrimination is based on generally binding regulations or on written or unwritten rules of international law; and
- (b) in cases where nationality is a determining factor.

This exception relates to the rules of Member States on who can and cannot stay in or travel through its countries and on sports teams in international competitions. This is not what this case is about; this case concerns the airlines' policy on which passengers can use manual check-in facilities and which passengers need to go to manual check-in desks. Also, the complainant has bought a ticket with XYZ. Therefore, the complainant and XYZ have a contractual relation. This means that XYZ has a responsibility towards the complainant not to discriminate him and to prevent him from being discriminated by others under XYZ's authority.

XYZ has contended that the referral of certain passengers to the manual check-in desk is - at least partly - the result of the request by the British administration to subject foreign travellers to the UK to increased security checks.

If this had been not just a request, but a legal obligation to which XYZ is subjected, the observance of this legal obligation may constitute an objective justification of a discriminatory act. Whether this is the case, depends on the margin of appreciation that is given to XYZ to comply with the legislation and on the possibilities that XYZ to observe the legislation without causing discrimination on the grounds of race and religion.

If the legislation would leave XYZ no room to formulate its own policy – thus giving it no possibility to act in accordance with the anti-discrimination legislation – the CGB will probably conclude that XYZ for this particular part of its policy carries out a public administration task. As the Dutch equality legislation is not applicable to the acts by the public administration other than in the field of labour and in relation to racial discrimination and social protection, the CGB would not be able to assess this part of the policy of XYZ (Example: 2008-122, not translated into English).

If the legislation leaves the airline company the possibility to formulate its own policies, as long as it fulfils its legal obligations, the CGB is competent to assess the policy of the airline. For instance, in the Netherlands, a case was brought before the CGB by a man who has his passport copied by his airline. He was black and he saw that only black persons were taken from the line of people waiting to board, to have their passport copied. The airline later explained that it is obliged by Dutch immigration legislation to copy all the passports of non Dutch nationals travelling to the Netherlands from certain 'risk destination'. As the airline did not want to discriminate amongst its passengers and as it also had some bad experiences with Dutch passports disappearing during the flight, it copies the passports of all the passengers. That the complainant saw that only black persons were told to have their passport copied was just a coincidence; most of the other passengers were transfer passengers and had had their passports copied at the transfer desk. The complainant however had no evidence that this statement of the airline was false; the CGB found that he had not established facts from which it may be presumed that discrimination had taken place (decision 2009-60, not available in English).

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

In Dutch law as well as under the Proposed Directive, the Dutch Equal Treatment Commission as well as any district court is/will be competent.

## **3. Is there direct or indirect discrimination on the ground of race/ethnic origin or religion (according to your national legislation)?**

### **Race**

XYZ has stated that one of the criteria for referral to the manual check-in is the passenger's surname. Persons who do not have a well-known British or a Scandinavian name are selected to go to manual check-in.

The Dutch CGB has decided (e.g. decision 2009-64, not available in English) that a persons surname is closely connected to ones national origin. National origin falls, like ethnical origin, within the scope of the concept of race as defined by the CERD Committee.

As the origin of the name of the passenger is relevant and only persons with a non-British and non-Scandinavian name have to go to manual check-in, this criterion constitutes direct discrimination on the basis of race/national origin.

If it were so that persons with a British or Scandinavian name could be sent to manual check in too, it would be different; in that case there would be indirect discrimination if persons with a non-British or non-Scandinavian name would be sent to manual check in more often.

In this particular case, the Dutch CGB may also conclude that although a name does not always tell what ethnicity a person has – someone may be married to a person with a foreign name – in this particular case XYZ had clearly attached a certain expectation on the persons ethnicity and/or religion to the persons name (see also below, the last paragraph of this section, on discrimination on the grounds of religion). The Dutch CGB however would only come to such a conclusion after having received a confirmation of XYZ that this was indeed its expectation in a hearing.

Next to the relevance of the passenger's name, it was not contested by XYZ that the staff behind the counter considered the fact that the complainant speaks fluent Tula relevant for the check-in.

As we do not know why the staff considered his speaking of Tula fluently relevant, however, it is hard to say if this information reveals that XYZ considers ones knowledge of a certain language, which is often connected to ones national or ethnical origin - as a relevant criterion. What does his fluency in Tula say to XYZ? Does it for example say that the complainant is really a Tula citizen and not an illegal immigrant seeking access to the UK? As long as it is not clear why the staff – and XYZ – thinks fluency in Tula is relevant, it is hard to say if selecting on this criterion amounts to direct or indirect discrimination.

#### Religion

The fact that the complainant was told that all persons with names of Arabic/Middle Eastern origin were selected to manual check-in would be regarded as relevant by the Dutch CGB in determining whether the selection method constitutes discrimination on the ground of religion. It would depend on the answers of XYZ during a hearing to what conclusion the CGB would come.

Given the attention that is paid to Muslim terrorism since 2001 and also given that the manual check-in is part of XYZ's security policy, it is not totally unlikely that XYZ's goal is not to refer persons with an Arabic or Middle Eastern background for manual check-in, but to refer Arabic Muslims to manual check-in.

If the airline would state that it is not there intention just to select Muslim passengers for manual check-in, but a larger group of passengers (namely all those with an Arabic-Eastern name), the Dutch CGB may conclude that the selection criterion used by XYZ constitutes indirect discrimination on the ground of religion (as well as on the ground of race). This is because not all persons with a Middle Eastern or Arabic name are necessarily (Arabic/Middle Eastern) Muslims, but many persons with an Arabic or Middle Eastern name will be. The selection criterion will thus have a discriminatory effect on Muslim passengers.

If on the contrary, XYZ would affirm that in the context of the security of an airline company, ethnic background and religion are seen by XYZ as interconnected or even interchangeable, the CGB might come to the conclusion that in this case there is direct discrimination on the ground of religion (as well as on the ground of race).

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

In the Dutch Equal Treatment Act, direct discrimination cannot be objectively justified. If the selection method would have to be classified as direct discrimination, no objective justification

is therefore possible. There is no exception for counter-terrorism legislation or as described in article 2(8) of the Proposed Directive.

However, if such legislation places obligations on airline companies like XYZ and these obligations leave XYZ no freedom to act on its own at all (in relation to e.g. the persons it has to refer to manual check-in), the CGB is not competent to assess the acts of this airline, as this would de facto mean an assessment of acts of the public administration and the CGB is not competent to assess such acts (see above, question 1).

It is not yet possible to say if, and if so how, article 2(8) of the proposed Directive will be implemented in Dutch equality legislation.

If the policy of XYZ constitutes indirect discrimination, an objective discrimination is possible. In that case, the selection of passengers for manual check in must pursue a legitimate aim: that is probably the case as XYZ has indicated that the purpose of this selection is to check travel documents and/or for security reasons.

The means used to achieve this aim – selection of passengers on the basis of their names – appears to go out from a generalised and stereotypical image of persons of an Arabic or Middle Eastern origin. XYZ would have to come up with a very good argument why this group of persons in particular is likely to pose a security threat and why it is not possible to determine in a more refined, less discriminating way who should and who should not go to the manual check-in. What XYZ does resembles the racial profiling that police and governmental agencies sometimes use. There are many reports on how racial profiling adds to the feeling of being discriminated while it does not prove to be an efficient tool in combating crime of preventing terrorism. The Dutch CGB may refer to these reports in its decisions.

**5. Would any other form of discrimination be established under your domestic law – for example instructions to discriminate, or harassment on grounds of either race or religion?**

The Dutch Equal Treatment Act contains a provision on harassment that applies to both grounds (article 1a). This form of discrimination is not easily established as it applies to direct discrimination which has the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment. This is not established in this case.

The Dutch Equal Treatment Act contains an explicit provision on instructions to discriminate in article 1a. The CGB has often decided that the prohibition to discriminate in the access to goods and services is not just directed to those organisations/enterprises that are in a contractual or other relation to the complainant, but also to the companies/organisations that instruct these goods and service providers. Both organisations have an independent obligation to act in accordance with the equality legislation.

However, this is not the case here, as XYZ does not carry out instructions of any other private enterprise.

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

The Dutch anti-discrimination legislation does not provide for any sanctions or remedies to be imposed by the national equality body. If the case is brought before a court, sanctions and remedies are possible, but the anti-discrimination legislation has no system of sanctions and remedies 'of its own', like the criminal legislation does.

# Norway

Answers provided by the Equality and Anti-discrimination Ombud

## **1. Does this case fall within the scope of any or all of the following:**

- **the Race Directive 2000/43/EC and your domestic racial discrimination law implementing the Directive;**
- **the Proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services (in terms of religious discrimination);**
- **any domestic legislation on religious discrimination in your country?**

The case falls within the scope of both the Race Directive (see article 1(h)), the Proposed Directive and Norwegian anti-discrimination legislation, both in terms of race and religion. For the Directives to apply, the country of Tula must be an EU member, or otherwise it must have adopted the Directives. Article 3(2) of the Race Directive refers to immigration legislation, meaning that such legislation will prevail. If the complainant is an EU citizen, one would not think that his travel to Great Britain would fall within the scope of article 3(2).

Please note that Norway has adopted the Race Directive, but is not obliged to do so since Norway is not an EU Member. Accordingly, there are some differences between the Race Directive and Norwegian anti-discrimination legislation – one being that under Norwegian law direct discrimination on the basis of race can be objectively justified. However, this possibility is to be interpreted in a restrictive manner.

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

The Equality and Anti-Discrimination Ombud.

## **3. Is there direct or indirect discrimination on the ground of race/ethnic origin or religion (according to your national legislation)?**

The alleged discriminatory act was to select the complainant for manual check-in. Normally one would say that to be forced to go to the manual check-in instead of the self-service check-in would be a negative thing – it takes more time and can be more stressful. Furthermore, the way the complainant was referred to the manual check-in could also add to the negative experience. For example, if there was just a message on the computer screen telling him to go to the manual check-in, or if there were security guards or ground crew who physically guided him the manual check-in, the latter being more stigmatizing. However, the facts of the case are silent on that point.

There were several grounds for selecting him, including his name. His name is part of his identity and the name was of Arabic/Middle Eastern origin. A name can give an indication as to a person's national or ethnic origin, but this will be an assumption only. Therefore, a practice based on names as a selection criterion will constitute indirect discrimination, and in this case there is a probability that a majority of people with such names are of Arabic/Middle Eastern origin. There is also a factor that people with similar names may have different ethnicity and national origin (i.e. people of Iranian and Arabic descent). Therefore a selection by name will not constitute direct but rather indirect discrimination.

When it comes to religion, there is no explicit reference to religion in the facts. One would assume that the security checks were required due to the fear of terrorist attacks, more specifically by Islamic fundamentalists. Furthermore, most people of Arabic/Middle Eastern origin are Muslims, and therefore selecting travellers with names originating from these areas could accordingly mean that more muslims than people of other faiths would be referred to manual check-in.

However, in order to establish indirect discrimination the criterion is that a person of a particular religion or belief is put at a particular disadvantage, both under the Proposed Directive and under Norwegian law. To be referred from self-service check-in to manual check-in might not meet that criterion, and it could also be said that as long as you could consider the case as a case of indirect discrimination on the grounds of ethnicity, one would maybe not consider the indirect discrimination aspects relating to religion, especially since the ethnicity aspects of the case are easier to prove/argue.

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

Providing security for airline passengers would be a legitimate aim. It would be difficult for an equality body to put aside the terror risk assessment made by national intelligence agencies, so a consideration of the appropriateness and the necessity of the means of achieving the aim of security would be hard to make. The Government might not, for security reasons, give out the relevant facts and assessments.

Under Norwegian law a more recently adopted act prevails over an earlier adopted act, and if there is insufficient evidence to establish a breach of the complainant's human rights, we might conclude that new anti-terrorism legislation would prevail. Thus, we could conclude that there is an objective justification or that there is an exception due to other legislation.

The exception pursuant to Article 2(8) of the Proposed Directive would apply if one considers the case as a case of indirect discrimination on the ground of religion. The criterion is that the measures are laid down in national law. General requests from the government would not meet that criterion unless they have a legal basis.

National measures based on public security and prevention of criminal offences falls outside the competence of the Community, and therefore we would assume that such measures and regulations would override the Race Directive, even if it does not have the same exception as the Proposed Directive, see Article 3: "Within the limits of the powers conferred upon the Community...".

**5. Would any other form of discrimination be established under your domestic law – for example instructions to discriminate, or harassment on grounds of either race or religion?**

If there is an objective justification or an exception, an instruction would likewise not be prohibited.

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

If the conclusion was that discrimination had taken place, the Equality and Anti-Discrimination Ombud would issue a statement to that effect and ask the airline to give the complainant compensation. If the airline denied responsibility the complainant could file a lawsuit.

# Slovakia

Answers provided by the Slovak National Centre for Human Rights

## **1. Does this case fall within the scope of any or all of the following:**

- **the Race Directive 2000/43/EC and your domestic racial discrimination law implementing the Directive;**
- **the Proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services (in terms of religious discrimination);**
- **any domestic legislation on religious discrimination in your country?**

The case would fall within the scope of the Race Directive 2000/43/EC and also within the scope of the Act No 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination amending and supplementing certain other law (the Anti-discrimination Act) which has implemented the Race Directive into national law. The Anti-discrimination Act prohibits discrimination on grounds of sex, religion or belief, racial, national or ethnic origin, disability, age, sexual orientation, marital status and family status, colour of skin, language, political or other opinion, national or social origin, property, descent or other status.

In terms of religious discrimination and subsequent application of the Proposed Directive, the stronger link between the reasons for referring to manual check-in and complainant's religion (or negative effect on persons of a particular religion or belief) would have to be presented.

Providing the only reason for referring to manual check-in was to check complainant's travel document, with reference to article 3 (2) of the Race Directive the case would fall outside the scope of this Directive. However, the conduct of XYZ's staff behind the counter together with argumentation that complainant's name was of an Arabic/Middle Eastern origin indicate that this was not the cardinal reason.

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

The Slovak National Centre for Human Rights (SNCHR) would be competent to give expert opinion, provide complainant with legal assistance, represent complainant before the court or provide mediation service.

In case of legal action the district court is competent to handle the case.

Parties to the proceedings concerning the violation of the principle of equal treatment may also be represented by legal entities

- a) who have such authority under a separate law, or
- b) whose activities are aimed at or consist in the protection against discrimination.

## **3. Is there direct or indirect discrimination on the ground of race/ethnic origin or religion (according to your national legislation)?**

The answer to this question depends on the consideration of the criterion concerning passenger's name. Is it apparently neutral criterion or is a person's name so closely connected with race and ethnic origin of the person to constitute direct discrimination? And how closely is name connected with person's nationality?

As we do not know if every person with name of Arabic/Middle Eastern origin is refused from using self-service check-in desk and after taking into account the multiculturalism of nowadays society the case would be considered as an indirect discrimination. The complainant was not refused primarily because of his race/ethnic origin or religion but the existing criteria used in profiling the reservations (passenger's name not being a well-known

Scandinavian or British name, but of an Arabic/Middle Eastern origin, travel patterns, payment conditions and date of ticket purchase) put persons of particular race/ethnic origin or particular belief or religion at a disadvantage (not being able to use XYZ airline's self service check-in desk) compared with other persons (XYZ itself indicated that not all travellers to Great Britain, who paid the ticket with credit card belonging to someone else are referred to the manual check-in).

Criteria used would represent an apparently neutral provision, criterion or practice which applies equally to every passenger travelling to Great Britain with XYZ Airline but have likely more negative effect on passengers of particular race/ethnic origin or particular religion or belief.

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

Art. 2a (3) of the Anti-discrimination Act states out: "Indirect discrimination shall mean an apparently neutral provision, decision, instruction or practice which put a person at a disadvantage compared with the other person; indirect discrimination shall not mean provision, decision, instruction or practice objectively justified by a legitimate aim if such provision, decision, instruction or practice is appropriate and necessary for achieving of such aim."

Fighting terrorism and crime prevention may be regarded as a legitimate aim but we would still have to question the proportionality and necessity of the measures used in profiling the reservations. We only have partial information on real reasons for referring to manual check-in as well as on criteria used but if a reasonable assumption of discrimination is established, the XYZ airline will have to prove that there was no violation of the principle of equal treatment.

**5. Would any other form of discrimination be established under your domestic law – for example instructions to discriminate, or harassment on grounds of either race or religion?**

Harassment according to art. 2a (4) of the Anti-discrimination Act, shall mean conduct which creates or may create an intimidating, hostile, shameful, humiliating, degrading, disrespectful or offensive environment and whose intention or consequence is or may be the violation of person's freedom or human dignity. In the complainant's case, we can presume that the conduct of the XYZ Airline's staff was unwanted but there are no other information suggesting any violation of his freedom or human dignity.

Instruction to discriminate shall mean an action laying in the abuse of subordinate position of a person for the purpose of discrimination against a third person (art. 2a par. 6 of the Anti-discrimination Act). As it is not specified how the profiling and subsequent overall assessment for referring to manual check-in is carried out the case in question does not meet condition required for establishing this form of discrimination.

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

According to art. 9 of the Slovak Anti-discrimination Act, the complainant may seek that the person violating the principle of equal treatment be made to refrain from such conduct and, where possible, rectify the illegal situation or provide adequate satisfaction. Should adequate satisfaction prove to be not sufficient, especially where the violation of the principle of equal treatment has considerably impaired the dignity, social status and social functioning of the victim, the victim may also seek non-pecuniary damages in cash.



# Sweden

Answers provided by the Equality Ombudsman

## **1. Does this case fall within the scope of any or all of the following:**

- **the Race Directive 2000/43/EC and your domestic racial discrimination law implementing the Directive;**
- **the Proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services (in terms of religious discrimination);**
- **any domestic legislation on religious discrimination in your country?**

The case falls within the scope of the Race Directive 2000/43 article 2 par. 2 a and article 3 par. 1 h as well as within the Swedish Discrimination Act (Swedish Code of Statutes 2008:567, Chapter 1, Section 1 and Chapter 2 Section 12).

It also possibly falls within the Proposed Directive since the reference XYZ made to the Arabic/middle Eastern origin of the complainant could be linked to the religion of Islam. The Swedish Discrimination Act (Chapter 1, Section 1 together with Chapter 2 Section 12) covers the grounds of "religion or other belief".

The man's ethnicity or religion is not apparent from the question but this is not so important since even an inaccurate assumption about a person in regard to a specific ground of discrimination is protected is a violation of the directive as well as the Swedish legislation. Since the XYZ has not directly referred to nationality when the complainant is treated less favourably than others, it could be argued that the exception in article 3(2) should not be applied.

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

The Member States shall designate a body/bodies for the promotion of equal treatment but also for providing independent assistance to victims of discrimination (Art. 7, art. 12 the Proposed Directive, art. 7 and art. 13 the Race Directive).

In Sweden, the Equality Ombudsman supervises compliance with the Discrimination Act (as well as according to the Act concerning the Equality Ombudsman). The Ombudsman has the right, as a party, to bring a lawsuit for damages on behalf of an individual for violations of the discrimination legislation. The lawsuits are to be filed in the district court.

Non-profit organisations and employees' organisations as well may bring an action to court, as a party, on behalf of an individual according to the Discrimination Act, Chapter 6 Section 2. An individual also has the possibility to file a lawsuit on his or her own behalf in the district court for violations of the discrimination legislation.

## **3. Is there direct or indirect discrimination on the ground of race/ethnic origin or religion (according to your national legislation)?**

If it gets that far, this case would be tried in court. However, it is probable that the DO would determine that this is a case of direct discrimination on the grounds of ethnicity as well as religion. It is also probable that the courts would come to the conclusion that this behaviour violated Swedish law.

An opposing party would probably primarily object by asserting that the behaviour did not constitute a less favourable treatment. This objection could possibly be successful if the less favourable treatment is formulated in the manner posed in the question, i.e. that he was forced to use the manual check-in instead of self-service. It is possible that a court would conclude that the situation did not involve the type of discomfort that would constitute less favourable treatment within the meaning of the law.

If the less favourable treatment however had consisted of additional security controls, this type of objection would probably be unsuccessful.

This is not about indirect discrimination since the rule that results in the additional security controls can hardly be called apparently neutral.

It is possible that an opposing party would assert that the rules are neutral in that all suspected terrorists (regardless of ethnicity) must go through the additional security controls. Given that a Muslim-sounding name results in an automatic suspicion, it is nevertheless doubtful that a court would consider the rule to be neutral.

The DO however is currently pursuing a somewhat similar case on the basis of indirect discrimination. The opposing party in the case is Western Union, a company that implements the use of additional security controls in regard to customers who (when transferring money to persons in another country) provide a name that wholly or in part corresponds with names on a list of persons who are suspected of cooperating with terrorists.

Since a large portion of the names are "western" sounding in the Western Union case, the DO has not asserted that this is an issue of direct discrimination. On the other hand, the DO has determined that the treatment involved in the case constitutes indirect discrimination since, in practice; a disproportionate number of those affected are or are presumed to be Muslims. Ethnic discrimination is asserted as well. The DO also points out that while there may be a legitimate aim, i.e. combating terrorism, it is doubtful that the procedures at issue are suitable or necessary.

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

There is no objective justification unless the acts of the XYZ company can be determined to be suitable and necessary for achieving the purpose pointed out by the company, i.e. among other things "security reasons". The company has not presented a study or other proof that demonstrates this. It is very doubtful that the application of less favourable behaviour solely on the basis of a person's name could be considered appropriate or necessary for security reasons.

Concerning article 2(8) in the Proposed Directive; XYZ has the burden of proof concerning showing that their practice is "necessary for public security" and that their means are appropriate and necessary.

There is no exception within the rule banning direct discrimination.

The importance of a hypothetical Swedish law that falls within the paragraph concerning exceptions in article 2(8) of the Proposed Directive is difficult to explain without knowledge of the specifics of what the hypothetical law states.

However, if we assume that the law explicitly states that all persons with a Muslim-sounding name shall be subject to additional security controls in regard to airplane flights, it is probable that the company would not be found to be liable under the law.

It is highly improbable that such a law would be passed by the Swedish parliament since it would violate the constitutional ban on discrimination. If the law was nevertheless passed, it should be possible to sue the state on the basis of the assertion that the law constitutes an "instruction to discriminate".

More generally, formulated laws that regulate the duty to undertake increased security measures should not be sufficient to free the company from liability when such controls are based almost solely on the presumption of a particular ethnicity or religion.

**5. Would any other form of discrimination be established under your domestic law – for example instructions to discriminate, or harassment on grounds of either race or religion?**

It is possible that this type of action by the government can be seen to be an instruction to discriminate (see above). The treatment at issue can also constitute harassment if the XYZ company, for example, at the check-in desk states that an extra security control is needed because of his Muslim name.

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

According to the Swedish discrimination legislation, a person who discriminates will be liable to pay damages for the violation of integrity that the discrimination involves. The Equality Ombudsman has the possibility to claim damages on behalf of the complainant in the district court. Firstly, the Equality Ombudsman has a duty to try to reach a settlement with the opposite party.

On 1 January 2009, the possibility of suing for discrimination compensation became part of the legislation. This was to some extent to replace the concept of traditional damages. The idea behind the new discrimination compensation is to make it possible to award larger amounts as compensation for violations of the discrimination legislation.

## Annex 2

# Country responses to the case study on sexual orientation discrimination

## Austria

*Answers provided by the Ombud for Equal Treatment*

**1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

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

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

According to the allocation of competences between the federal state and the Länder this case would fall within the scope of the federal equal treatment legislation. The Equal Treatment Act on federal level however only prohibits discrimination on grounds of sexual orientation in employment and occupation (according to the directive 2000/78/EC), but not in other areas such as goods and services. At the moment, there are ongoing negotiations about an amendment of the Equal Treatment Act, which would inter alia cover a provision on equal treatment on grounds of sexual orientation in the field of goods and services.

**2. Alternatively, would this case fall within the scope of the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?**

***In answering questions 1 and 2, please consider your national legislation, the Treaty of the European Community (Consolidated) and case law of the European Court of Justice (Geraets-Smits [2001] C-157/99) as to whether assisted procreation be treated as a service and/ or health care?***

The case would fall within the scope of the Proposed Directive, because the Proposed Directive covers social protection (including health care) as well as services (art. 3 of the Proposed Directive) and prohibits discrimination on grounds of sexual orientation in both of these areas.

The Proposed Directive refers to goods and services in the meaning of the EC-Treaty. Services in the meaning of article 50 EC Treaty are services which are normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

According to the case law of the European Court of Justice (C-157/99 Smits, C-45/93 European Commission v Spain, C-263/86 Humbel, C-109/92 Wirth) the meaning of the term services is not limited to the private sector, but covers also services by a state as long as the state offers these services in an economic sense and the services could be offered similarly

by private companies. The state has at least to intend to keep house – in a cost-covering way – when offering these services.

On the other hand, it might not be considered a service in the meaning of the EC Treaty as far as a state fulfils social, cultural and educational duties and these services are mainly financed by public means.

In the case of Smits, the European Court of Justice stated that “the fact that medical treatment is financed directly by the sickness insurance funds on the basis of agreements and pre-set scales of fees is not such as to remove such treatment from the sphere of services within the meaning of article 50 EC Treaty. Firstly it should be borne in mind that that provision does not require that the service be paid for by those for whom it is performed and, secondly, the payments made by the sickness insurance funds under the contractual arrangements between them and the providers of health treatment, albeit set at a flat rate, are indeed the consideration for the hospital services and unquestionably represent remuneration for the hospital which receives them and which is engaged in an activity of an economic character.”

Procreation is a kind of medical treatment, that – in the objective case – was offered free of charge with only a nominal fee being charged. Bearing in mind the arguments of the European Court of Justice in the case of Smits, procreation might be considered as a service as well.

***For questions 3 to 5 below, if you have national anti-discrimination legislation within the scope of the case please answer the questions in two parts, firstly how the questions would be answered under you existing legislation and secondly how they would be answered under the Proposed Directive.***

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

The authority of the Ombud for Equal Treatment to deal with discrimination cases is limited to deal with discrimination cases within the scope of the federal law (Equal Treatment Act). In case the Proposed Directive will be put into force and implemented into the Austrian legal system, the competent organisations will probably be the following (art. 12 proposed Directive):

The Ombud for Equal Treatment can – as a first step – provide advice, support and information and can further on intervene, negotiate, try to find a friendly settlement or any other out of court solution. The Ombud can also submit the case to the Equal Treatment Commission, but cannot file a law suit at the court.

The Equal Treatment Commission on the other hand is responsible to decide upon a violation of the Equal Treatment Act in proceedings free of charge after hearing both sides separately. The alleged victim can submit the case by him/herself or via the Ombud for Equal Treatment or other representatives (like NGOs). The Equal Treatment Commission is not competent to grant damages; it only delivers a non-binding decision upon the violation of the prohibition of discrimination and gives recommendations on how to apply the right to equality.

The Civil Court delivers a binding judgement and is competent to grant damages in case of a violation of the Equal Treatment Act.

### **4. Is there direct or/and indirect discrimination against A and B on the ground of sexual orientation? In relation to indirect discrimination, could applying the criterion of treating same-sex spouses and opposite-sex spouses equally lead to indirect discrimination?**

It seems to be a crucial question whether you look at this objective case from an individual perspective or from the perspective of couples. In case of direct discrimination, it is essential to define the comparable situation. Can you compare heterosexual and homosexual couples when it comes to assisted procreation? Do you have to compare individual women although women who do not have a stable partnership are not eligible to receive assisted procreation

at all? Thinking of case law in the field of sex discrimination, discrimination on grounds of pregnancy is clearly considered to be direct discrimination on grounds of sex. Could this argument be used in the objective case? Do you have to look for a hypothetical comparator in this objective case?

On the other hand the policy seems to refer to couples as such, but does not directly refer to lesbian couples as it states that assisted procreation may be given to a woman who is living in a stable relationship (either heterosexual or lesbian) if the other person in the relationship has given his or her written consent. Furthermore the couple must undergo a psychological assessment and be deemed suitable as parents. This policy seems to be an apparently neutral provision that puts lesbian couples at a particular disadvantage, as the specific County Council states that only one of the women in a lesbian couple is eligible for treatment. From a biological perspective both women in a lesbian couple are able to get pregnant, whereas it is a matter of fact that only one of the partners in a heterosexual couple can get pregnant. Therefore lesbian couples get disadvantaged by that policy.

According to the provision of indirect discrimination it has to be checked – in a second step – whether that provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The County Council argued that the aim was to preserve medical resources. County Councils being competent in other geographic areas do not seem to limit assisted procreation to one of the two women in a lesbian couple. The European Court of Justice argued for example in the case of Dekker that discrimination on grounds of sex cannot be justified by financial disadvantages the employer might face in case of pregnancy. The argument of costs by itself might not be enough to consider an aim as a legitimate one. It therefore seems to be difficult to look at the argument of preserving medical resources as a legitimate aim.

Concluding the objective case might be considered as one of indirect discrimination on grounds of sexual orientation.

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

***In answering this question please consider what would be the effect of recital 17 and article 3(2) of the Proposed Directive. Recital 17 states that the Directive is "without prejudice to national laws on marital or family status, including on reproductive rights"?***

***Please also consider the effect of the following decisions: Maruko C-267/06 in the European Court of Justice and Karner v Austria; KB v France in the European Court of Human Rights.***

Austria has a Marriage Act being applicable solely for heterosexual couples. Only recently a law on civil union (for homosexual couples) was drafted and will probably come into force in the beginning of the year 2010. The result would then be two different laws for heterosexual (Marriage Act) and homosexual couples (Civil Union Act), which would still not lead to a full de-facto equality because the law on civil unions will probably not be totally comparable to the one on marriage for heterosexual couples.

According to the law on reproductive rights (Fortpflanzungsmedizingesetz) only married couples and couples living in a relationship similar to a marriage have – under certain conditions – access to assisted procreation, whereas single women and lesbian couples are in general excluded.

According to Article 3(2) of the Proposed Directive this directive is without prejudice to national laws on marital or family status and reproductive rights. In case the Proposed Directive will be put into force and implemented into the Austrian law system this exception would be applicable so that the objective case might not be considered as a case of discrimination in the meaning of the national anti-discrimination law.

**6. In the alternative to a claim being brought under anti-discrimination law, would a claim be able to be brought under your national human rights legislation pursuant to articles 8 and 14 of the European Convention of Human Rights and is it likely that the claim would be successful? Would your organisation be able to support the claimant in those proceedings or intervene to provide submissions?**

The European Convention on Human Rights has the status of a constitutional law in Austria. A complaint to the ECHR would only be admissible after having exhausted all domestic remedies. Austria has not yet signed Protocol 12, which would make Article 14 a free-standing right that could be relied upon separately.

The right to respect for private and family life under the European Convention on Human Rights is a qualified right, which can be interfered as long as the interference is lawful, for a legitimate purpose, proportionate and necessary in a democratic society.

The Ombud for Equal Treatment does not have the competence to file law suits at the court. We would not be able to support the claimant in those proceedings or intervene to provide submissions.

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

There would be no sanctions or remedies because the exception in Article 3(2) of the Proposed Directive is applicable in this objective case.

## Belgium

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

**1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

Yes. The Belgian 10 May 2007 Anti-discrimination Act prohibits – inter alia – direct and indirect discrimination on the ground of sexual orientation in the area of access to and supply of goods and services which are available to the public (art. 5, §1, 1<sup>o</sup>) and social protection, including social security and health care (art. 5, §2, 2<sup>o</sup>).

In the Swedish case, there is some ambiguity as to whether the County Council's policy actually limits access to the hospital service of assisted procreation or “merely” determines the conditions for direct payment or reimbursement of the medical expenses related to such treatment under the public health care system (see answer to question 2).

**2. Alternatively, would this case fall within the scope of the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?**

***In answering questions 1 and 2, please consider your national legislation, the Treaty of the European Community (Consolidated) and case law of the European Court of Justice (Geraets-Smits [2001] C-157/99) as to whether assisted procreation be treated as a service and/ or health care?***

Yes. The Proposed Directive prohibits – inter alia – direct and indirect discrimination on the ground of sexual orientation in the area of access to and supply of goods and other services which are available to the public (art. 3(1) sub d) and social protection, including social security and health care (art. 3(1), sub a).

It follows from the ECJ preliminary ruling in the Geraets-Smits case (C-157/99) that the fact that a certain medical treatment is covered by public health care does not automatically remove such treatment from the sphere of services within the meaning of art. 50 EC Treaty (Consolidated). The European Economic and Social Committee (EESC) regards access to reproductive services as an integral part of health services.<sup>14</sup>

However, since the case at hand does not regard a restriction on the freedom to provide services within the European Community (art. 49 EC Treaty (Consolidated)), the County Council's policy might as well need to be looked at from a social protection (health care) perspective.

The Proposed Directive is without prejudice to (i) the competences of Member States in the areas of education, social security and health care, as well as the essential role and wide discretion of Member States in providing, commissioning and organising services of general economic interest (Recital 11), and (ii) national laws on marital or family status, including on reproductive rights (Recital 17 and art. 3(2)). The consequences for this case will be examined under question 5.

***For questions 3 to 5 below, if you have national anti-discrimination legislation within the scope of the case please answer the questions in two parts, firstly how the questions would be answered under you existing legislation and secondly how they would be answered under the Proposed Directive.***

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

The Belgian Council of State has the power to suspend and annul administrative acts (individual or statutory) that are contrary to the legal rules in force. As to civil jurisdiction, disputes regarding the rights and obligations under most social protection schemes fall within the competence of the Labour Tribunal. The Tribunal of First Instance has a residuary competence (damage claims).

The CEOOR's broad legal mandate as an independent non-judicial body includes to receive and follow-up on discrimination complaints, inform, advise, mediate and litigate (within the scope of the federal Anti-discrimination and Anti-racism Acts). In this type of case, the CEOOR would probably opt for a policy recommendation.

**4. Is there direct or/and indirect discrimination against A and B on the ground of sexual orientation? In relation to indirect discrimination, could applying the criterion of treating same-sex spouses and opposite-sex spouses equally lead to indirect discrimination?**

Please note that the following assessment makes abstraction of the maximum age limit for assisted procreation, since this element is – as such – not contested in the case at hand.

Assisted procreation in Belgium

In Belgium, according to the 6 July 2007 Act on Medically Assisted Procreation, all women under the age of 43 – single or engaged in a relationship – have access to medically assisted procreation. Belgian fertility centres can only refuse demands on medical grounds or by invoking the so-called “conscience clause”. In its Advice n°27, the Consultative Committee on Bio-Ethics argued that such refusal is justified when the fertility centre considers that the future risk for the child of being confronted with “serious obstacles” is too high.

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<sup>14</sup> Opinion of the European Economic and Social Committee on the ‘Proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation’ (2009/C182/04).



Importantly, a conservative party's amendment suggesting that assisted procreation should only be available for "male/female couples that share a child wish within a stable, affective relationship of at least two years" was turned down. The Minister of Social Affairs and Public Health stated that the act was not intended to limit assisted procreation to heterosexual couples and referred to the evolution in society that today also allows homosexual couples to adopt. The Minister continued to argue that the condition of having a stable, affective relationship is discriminatory because it is subjective and offers no legal certainty.

As a result, theoretically, all women under the age of 43 – regardless whether they are single or engaged in an opposite-sex or same-sex (lesbian) relationship (provided of course partner consent) – have access to assisted procreation in Belgium. In practice, some fertility centres are known to refuse applications from lesbian couples because of the "conscience clause". However, under the Medically Assisted Procreation Act, they are obliged to refer to another fertility centre.

Regarding the element of medical expenses, all applicants for assisted procreation covered by the Belgian public health care system are entitled to a lump-sum allowance for up to six IVF/ICSI treatments (6 October 2008 Royal Decree). In conclusion, the discrimination issue presented in the Swedish case does not arise in Belgium. Quite on the contrary even: rather than having to try and share six treatments, the two female partners of a lesbian couple (under the age of 43) are each legally entitled to six treatments or a combined total of twelve treatments covered by the State.

#### Direct discrimination?

The Belgian Anti-discrimination Act defines "direct distinction" as the situation which occurs when a person is treated less favourably than another is, has been or would be treated in a comparable situation on the ground of sexual orientation or one of the other grounds protected by this Act (art. 4, 6°). A direct distinction which cannot be justified under the provisions of the Anti-discrimination Act implies (forbidden) direct discrimination (art. 4, 7°). The Belgian definition is de facto identical to art. 2(2) sub a) Proposed Directive.

In principle, the concept of direct discrimination only applies to the unequal treatment of equal or comparable situations<sup>15</sup>. One could argue that since the County Council's policy (according to which only one partner in a lesbian couple is eligible for assisted procreation, e.g. coverage of the related medical expenses by the public health care system) reflects the obvious biological reality for opposite-sex couples, there is "formal" equal treatment.

On the other hand, the Aristotelian principle of equality implies not only that equal situations are to be treated equally (formal equality), but also that unequal situations are sometimes to be treated unequally (material equality). The fact that in a lesbian couple both partners are biologically able to conceive makes the procreation issue very different from the heterosexual comparator. Hence, the respective situations may require differential treatment. But then again, this approach is not sustained by the existing EC non-discrimination case law, which invariably focuses on the unequal treatment of comparable situations.

Yet, another angle is to assess the alleged discrimination on the ground of sexual orientation through the comparison of individual lesbian and heterosexual women. However, given the Swedish legal pre-condition of a stable relationship, the case needs to be examined from a couple's perspective. Neither the European Community law (including the Proposed Directive) nor the European Convention on Human Rights demands that Member States adopt an individual rights' approach to assisted procreation (cf. infra question 5).

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<sup>15</sup> Although the ECJ has mentioned on several occasions that discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations, it has not attached this adage to direct or indirect discrimination. Only in two exceptional cases, both regarding discrimination on the ground of pregnancy (gender), the ECJ held that the concept of direct discrimination did include a prohibition of treating unequal situations equally (Brown, C-394/96, 30 June 1998; Gomez, C-342/01, 18 March 2004).

### Indirect discrimination?

The Belgian Anti-discrimination Act defines “indirect distinction” as the situation which occurs when an apparently neutral provision, criterion or practice would put persons, characterised by one of the grounds protected by this Act (including sexual orientation), at a particular disadvantage compared with other persons (art. 4, 8<sup>o</sup>). An indirect distinction which cannot be justified under the provisions of the Anti-discrimination Act, implies (forbidden) indirect discrimination (art. 4, 9<sup>o</sup>). The Belgian definition is de facto identical to art. 2(2) sub b) Proposed Directive.

In the Swedish case, there is formal equal treatment between opposite-sex and same-sex (lesbian) couples, yet there is also a strong argument that the respective situations require differential treatment in order to achieve material equality (cf. supra). Several authors have drawn a parallel between the concept of direct discrimination and formal equality on the one hand, and the concept of indirect discrimination and material equality on the other hand. Nevertheless, it appears that, even in cases of indirect discrimination, the ECJ usually limits its assessment to the unequal treatment of comparable situations. Today this remains a point of legal controversy.

However, it also follows from the case law regarding indirect discrimination that the ECJ tends to skip the question whether the situations are comparable and focus on the result of the apparently neutral provision (i.e. the existence of a particular disadvantage). Consequently, in the case at hand it could be sufficient to argue that – in abstract theory of course – only 50% of all lesbian women engaged in a “stable relationship” are eligible for assisted procreation (e.g. public health care coverage), as opposed to 100% of all heterosexual women engaged in a “stable relationship”.

Although in the light of the Belgian example (cf. supra) the above-mentioned line of reasoning remains somewhat unsatisfactory, it might indeed sustain the thesis that the Swedish County Council's policy leads to indirect discrimination on the ground of sexual orientation.

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

***In answering this question please consider what would be the effect of recital 17 and article 3(2) of the Proposed Directive. Recital 17 states that the Directive is "without prejudice to national laws on marital or family status, including on reproductive rights"?***

***Please also consider the effect of the following decisions: Maruko C-267/06 in the European Court of Justice and Karner v Austria; KB v France in the European Court of Human Rights.***

### Objective justification test

The Belgian Anti-discrimination Act holds that an indirect distinction on the ground of sexual orientation in the area of social protection (health care) or goods and services implies (forbidden) indirect discrimination, unless such distinction is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (art. 7). This corresponds with the justification scheme under art. 2(2) sub b) Proposed Directive.

According to the facts of the Swedish case, the County Council is concerned with the preservation of medical resources. In the light of the Proposed Directive's Recital 11, which safeguards the Member States' competences in the areas of social security and health care and confirms their wide discretion regarding services of general economic interest, this concern is likely to qualify as a legitimate aim within the meaning of art. 2(2) sub b) Proposed Directive. The County Council considers it to be appropriate to pursue this aim by means of formal equality between same-sex (lesbian) couples and opposite-sex couples, thus by

limiting assisted procreation (e.g. coverage of the related medical expenses) to one of the two female partners.

However, there appear to exist no weighty reasons why two same-sex (lesbian) partners should not be allowed to share the six treatments. Unless accepting repartition of treatments would prove to have disproportionate (financial) consequences for the public health care system or lead to an unfair balance between the medical resources invested in same-sex and opposite-sex couples, the County Council's policy is not appropriate or at least not necessary to achieve the above-mentioned aim. Hence, there is no objective justification.

#### Recital 17, art. 3(2) Proposed Directive and the ECJ Maruko judgement (C-267/06)

According to Recital 17 and art. 3(2), the Proposed Directive is without prejudice to national laws on marital or family status and reproductive rights. The detailed explanation of art. 3 Proposed Directive confirms that the Member States remain free to decide whether or not to institute and recognise legally registered partnerships (for same-sex partners), but also refers to the ECJ ruling in *Maruko v. Versorgungsanstalt der deutschen Bühnen (C-267/07)*; once national law recognises such relationships as comparable to that of spouses then the principle of equal treatment applies.

Similarly, Recital 17 and art. 3(2) Proposed Directive imply that Community law does not detract from the Member States' competence to legislate on family status and reproductive rights. But – by analogy with the Maruko judgement (§59) – in the exercise of that competence the Member States must comply with the EC principle of non-discrimination. Under Swedish law, opposite-sex couples and same-sex couples have (formal) equal access to assisted procreation. It follows that the County Council in the case at hand should refrain from any policy that results in direct or indirect discrimination on the ground of sexual orientation.

On an additional note, in its opinion on the Proposed Directive (2009/C182/04), the European Economic and Social Committee (EESC) held that art. 3(2) Proposed Directive as a whole should be reconsidered, and that any final formulation should state that national laws relating to marital status, family status or reproductive rights must be implemented without discrimination against any persons on any of the grounds within the directive.

#### Relevance of the ECHR judgements in *Karner v. Austria* and *E.B. v. France*

The prohibition of discrimination under art.14 ECHR complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by those provisions. Although the application of art. 14 ECHR does not presuppose a breach of one or more of such provisions, and to this extent it is autonomous, there can be no room for its application unless the facts of the case fall within the ambit of one or more of the latter (*Petrovic v. Austria*, §22).

In *Karner v. Austria*, the Strasbourg Court examined a difference in treatment on the ground of sexual orientation which adversely affected the claimant's enjoyment of his right to respect for his home as guaranteed under art. 8 ECHR. The case concerned a national provision which entitled the "life companion" of a deceased tenant to succeed to the tenancy. The Austrian Supreme Court had found that the notion of life companion was to be interpreted as at the time it was enacted, and the legislature's intention in 1974 was not to include persons of the same-sex. While the Court accepted that protection of the family in the traditional sense is, in principle, a very weighty reason (§40), it ruled that there had been a violation of art.14 ECHR taken into conjunction with art. 8 ECHR because the government had offered no convincing and weighty reasons justifying the difference in treatment (§42).

Now the elementary question is whether national laws on family status and reproductive rights (and assisted procreation in particular) fall within the ambit of the right to respect for private life and family life under art. 8 ECHR. In principle, this is not the case, since art. 8 ECHR does for example not guarantee the right to adopt nor does it safeguard the mere desire to found a

family (Fretté v. France, §32; E.B. v. France, §41). However, in E.B. v. France, the Strasbourg Court held that a State which has gone beyond its obligations under art. 8 ECHR – i.e. by granting single persons the right to apply for adoption – cannot, in the application of that right, take discriminatory measures within the meaning of art. 14 (§49). The Court decided that, in rejecting E.B.'s file for adoption, the domestic authorities had made an unacceptable distinction based on considerations regarding her sexual orientation (§96).

By analogy, a State which allows for same-sex (lesbian) couples to apply for assisted procreation, cannot, in the application of that right, take discriminatory measures within the meaning of art.14 ECHR. Bearing in mind the Strasbourg Court's recent decisions regarding indirect discrimination (including D.H. and others v. Czech Republic) , the Swedish County Council's policy may indeed be in breach with art. 14 juncto art. 8 ECHR.

#### In conclusion

There is an argument for indirect discrimination on the ground of sexual orientation in the case at hand, and there appear to exist no weighty reasons why two same-sex (lesbian) partners should not be allowed to share the six treatments for assisted procreation.

However, in the light of the Belgian Act on Medically Assisted Procreation, this argument remains somewhat unsatisfactory because it fails to unfold the underlying individual rights' issue.

In accordance with the viewpoint defended by the former Minister of Social Affairs and Public Health, the CEOOR believes that the legal prerequisite of a "stable relationship" is a subjective criterion which offers no legal certainty. But today neither the European Community law nor the European Convention on Human Rights demands that the Member States adopt the same individual rights' approach to assisted procreation as did Belgium.

***6. In the alternative to a claim being brought under anti-discrimination law, would a claim be able to be brought under your national human rights legislation pursuant to articles 8 and 14 of the European Convention of Human Rights and is it likely that the claim would be successful? Would your organisation be able to support the claimant in those proceedings or intervene to provide submissions?***

See answer to question 5. The CEOOR has no mandate to protect human rights as such, but may of course try and use this legal argument to strengthen a discrimination claim under the Belgian Anti-discrimination and Anti-racism Acts.

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

In Belgium, all provisions contrary to the 10 May 2007 Anti-discrimination Act, as well as clauses which stipulate that contracting parties waive the rights which are guaranteed under this act, are null and void. Note that the Anti-discrimination Act cannot be invoked against a difference of treatment which has been established by or in execution of another law (which does however not appear to be the case here).

When discrimination occurs outside the area of employment, victims may claim the prefixed sum of EUR 650 for moral damages, raised to EUR 1,300 depending on the severity or when the author fails to prove that the adverse treatment would also have occurred on non-discriminatory grounds. Alternatively, victims may try and prove the actual (material and moral) damages suffered.

In the case at hand, the complainants would probably first have to bring an action for annulment against the administrative body's decision before the Council of State.

# Great Britain

*Answers provided by the Equality and Human Rights Commission*

**1. Does the case fall within the scope of anti-discrimination law in your country and if so, which legislation?**

The principal legislation governing sexual orientation discrimination in Great Britain in relation to the provision of goods, facilities and services is the Equality Act (Sexual Orientation) Regulations 2007.

The case falls within the scope of anti-discrimination law in the UK, as domestically, S. 4 of the Equality Act (Sexual Orientation) Regulations 2007<sup>16</sup> provides protection against discrimination in the provision of, and access to goods, facilities and services on the grounds of sexual orientation. S. 46 of the Equality Act makes it unlawful for a person concerned with the provision to the public or a section of the public of goods, facilities and services to discriminate against a person who seeks to obtain or use those goods, facilities and services.

In the UK, there are no legislative or other “legal” prohibitions on unmarried individuals, gays or lesbians obtaining Assisted Reproductive Technologies (ART). The Human Fertilisation & Embryology Act 1990 is silent on the matter, but there are, however, two practical limitations. First, many clinics have policies of not offering treatment in all or some of these cases. The argument in the UK seems to be that all persons, regardless of sexual orientation or marital status, have the right to procreate and to use ARTs when necessary to achieve that goal. If so, the UK cannot deny access to gays and lesbians access to ARTs to have children. Whether they will have access to a particular technique turns on whether access is granted to married or unmarried homosexuals and whether private clinics are free to discriminate against gays and lesbians in accepting patients and in the UK access is granted to both married and unmarried, whilst discrimination against gays and lesbians in this sector is forbidden by law.

There is yet to be a legal challenge on ART on discriminatory grounds and therefore the prospects of success in such a challenge have not been tested and cannot therefore be guaranteed. Second, S. 13(5) of the 1990 Act requires clinics to have regard to the “welfare of the child” and sometimes justify non-treatment because of the social circumstances of the would-be parents, including their sexual orientation and/or marital status.

**2. Alternatively, would this case fall within the scope of the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods, facilities and services?**

***In answering questions 1 and 2, please consider your national legislation, the Treaty of the European Community(Consolidated) and case law of the European Court of Justice (Geraets-Smits [2001] c-157/99) as to whether assisted procreation be treated as a service/health care?***

According to the UK’s legislation, S. 29 of the Sex Discrimination Act 1975, the provision of services falls within this remit as well as some exceptions to this requirement not to discriminate against a woman in the provision of services of any profession or trade, or any local or public authority. Infertility treatments, characterised as medical treatments, are indeed services as defined in S. 4 of the Sex Discrimination Act, being of a kind provided by members of any profession or trade - S. 4(2)(f).

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<sup>16</sup> Equality Act (Sexual Orientation) Regulations 2007

In the *Geraets-Smits* judgment, medical treatment was, de facto, defined as being a service and by association, because infertility treatments are classified as medical treatments, assisted procreation, which is a medical treatment, would be deemed a service. In this case the ECJ accepted that Article 50 of the Treaty does not require that the service is paid for by those for whom it is performed.

It is also a settled case law that medical activities fall within the scope of Article 50, there being no need to distinguish in that regard between cares provided in a hospital environment and ones provided outside such environment.

The result of this ruling as in the case of *Jany*<sup>17</sup> is that provided it is lawful in Member States, a remunerated activity constitutes a service within the meaning of Articles 49-50 EC, although in other Member States, such activities remaining free does not prevent it from being a service.

***For questions 3-5 below, if you have a national anti-discrimination legislation within the scope of the case, please answer the question in two parts, firstly how the questions would be answered under your existing legislation and secondly how they would be answered under the proposed Directive?***

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

The Equality and Human Rights Commission (EHRC) of the UK provides legal assistance for individuals in sexual orientation discrimination claims and can represent individuals in sexual orientation discrimination cases before courts or tribunals. The EHRC also provides assistance in the form of support in taking legal action as well as investigating complaints of discrimination and usually can force compliance with their investigations by all persons involved.

The EHRC would not be able, however, to decide this claim as it is only tribunals or courts can decide discrimination claims. In this case, a County Court would have jurisdiction.

**4. Is there direct or/and indirect discrimination against A and B, on the ground of sexual orientation? In relation to indirect discrimination, could applying the criterion of treating same-sex spouses and opposite-sex spouses equally lead to indirect discrimination?**

Direct Discrimination?

The UK's Equality Act (Sexual Orientation) Regulations 2007 prohibit discrimination on the basis of a person's *actual* sexual orientation, the sexual orientation he/she is *thought to have* and/or; the sexual orientation of someone with whom he/she is *associated*.

S. 35 of the Equality Act 2006 defines "sexual orientation" to mean an individual's sexual orientation towards person's of the same-sex as him or her (gay or lesbian), persons of the opposite-sex (heterosexual) or people of both sexes (bisexual).

The Regulations outlaw both direct and indirect discrimination on the grounds of sexual orientation. S. 3 of the 2007 Regulations provides that direct discrimination takes place when someone is treated less favourably than other people are/would be treated. This is where there is no material difference in the relevant circumstances and the reason for the treatment is the sexual orientation the victim holds or is thought to hold or that of someone associated with them.

One argument is that the refusal to provide ART treatment to B could not have constituted direct discrimination as all couples were treated the same, that is they were only entitled to six attempts. However, more careful analysis of the situation is required. It is arguable that a

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<sup>17</sup> Case C-268/99

heterosexual couple and a same-sex couple are not in comparable situations and in any event that consideration must be given as to whether each individual was discriminated against.

A does not appear to have been directly discriminated against as she was provided treatment up to the age limit of 40. It is arguable that B was directly discriminated against as she was denied any treatment on the grounds of her sexual orientation as the express policy of the County Council was that only one person in the lesbian couple could receive the treatment. But for her sexual orientation, and assuming she was under 40, she would have been entitled to the treatment.

#### Indirect Discrimination?

This case is more likely to succeed on grounds of indirect discrimination. S.3(3) of the Regulations 2007 defines indirect discrimination to mean where a person (A) discriminates against another (B) if he/she applies to B a provision, criterion or practice which he applies or would apply equally to persons not of B's sexual orientation, which puts persons of B's sexual orientation at a disadvantage compared to some or all others (where there is no material difference in the relevant circumstances), and which A cannot reasonably justify by reference to matters other than B's sexual orientation. This applies even if the negative impact is unintentional.

B is put at a particular disadvantage as she is not permitted to have any treatments or share the six treatments with her partner.

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

***In answering this question, please consider what would the effect of Recital 17 and Article 3(2) of the Proposed Directive. Recital 17 states that the Directive is "without prejudice to national laws on marital or family status, including on reproductive rights"?***

Direct discrimination, if there was one, cannot be justified in any way or form. However, if the case is one of indirect discrimination, then it must be objectively justified. In the present scenario, the health authority's justification for a legitimate aim would seem to be the preservation of medical resources. This justification would not appear as cogent or necessary ground to deny access to a medical treatment, particularly when it concerns a life-enhancing episode of procreation in most courts. It is unlikely a court would feel that paucity of medical resources would be a strong enough reason for the refusal, particularly as no evidence of what extra medical costs were provided, it is unlikely to be sufficient.

Recital 17 of the Proposed Directive is expressed to be "without prejudice to national laws on marital or family status including on reproductive rights". This means that it remains the jurisdiction of Member States to decide the extent of the rights of same-sex couples to have rights similar to marriage and to reproductive rights. In the UK, civil partnership is similar to marriage is permitted and the Embryology Act permits gay couples to have this treatment. Since the domestic laws actually protected same-sex couples and the policy was made by the health authority which will be seen as a public body in the UK, they would be bound by any domestic anti-discrimination laws.

In the UK, the Sexual Orientation Regulations 2007 do not change the existing legal position regarding where or how civil partnerships (in the case of same-sex marriages) can be formed. Under the regulations, businesses and public authorities will not be able to discriminate between marriage persons and civil partners on grounds of their sexual orientation. The Regulations make it very clear that, the fact that one person is in a civil partnership and another married does not represent a "material difference" (S. 3(4)) in their circumstances and therefore does not justify unequal provision of goods, facilities or services.

***Please also consider the effect of the following decisions. In addition, is this provision consistent with case law from the European Court of Justice (Maruko-C-267/06 and the European Court of Human Rights (Karner v Austria; KB v France?)***

### **Maruko Case**

The Maruko case is consistent with the provision, not insofar as whether the denial of the pension scheme could be seen as applying a neutral requirement (being married) for access to the pension gave rise to a particular disadvantage for same-sex couples, who could not get married and whether this constituted an infringement of the principle of non-discrimination and a form of indirect discrimination. Here the Court found that denying pension rights available to spouses in respect of a transsexual partner was sexual orientation discrimination because the homosexual partner could not marry under national law: the fact that only spouses could get pension benefits was therefore indirectly discriminatory. In terms of the reasoning in this case, it would mean that any legal system denying to gay partners, benefits traditionally given to spouses, would discriminately unlawfully, though the case may have been won on account that it was first and foremost a case of direct discrimination, where a rule giving pension to a surviving spouse but not to a "life-long partner" an equivalent of a civil partnership in the UK is direct sexual orientation discrimination as German law essentially treats a life partnership as equivalent to marriage.

The other essential similarity of this case with the provision is Recital 22 which says "the Directive is without prejudice to national laws on marital status and the benefits dependent thereon". Here the Court said civil status is a matter of national competence, but in exercising that competence if Member States provide comparable rights for same-sex couples then they must comply with the principles of non-discrimination.

In this case, the entitlement of the same-sex couples to fertility treatment does appear to be comparable so such treatment cannot be provided in a discriminatory manner.

### **Karner V Austria**

The applicant complained under Article 14 taken together with Article 8 of the Convention that he had been a victim of discrimination on the ground of sexual orientation. The Court found that, as the applicant's complaint related to the adverse effect of the alleged difference in treatment on the enjoyment of his right to respect for his home, Article 14 was applicable.

The Court made the assertion that differences based on sexual orientation required particularly serious reasons by way of justification. This was after the Government had made the point that the aim of the statutory provision in question was the protection of the traditional family unit. Though the Court accepted that this was in principle a cogent and legitimate reason which could justify a differential treatment, it was rather an abstract aim which a wide variety of measures could be used to implement. The judgment went on to reiterate that the Contracting State's margin of appreciation was narrow, as in this case, the principle of proportionality between the means employed and ultimate aim to be realised did require the measures chosen to be suitable for realising that aim; it also had to be shown that it was necessary to exclude homosexual couples from the scope of the legislation in order to achieve that aim. Since the Court felt the government had not advanced any arguments that would support such a conclusion and in the process therefore, had not advanced convincing and weighty enough reasons justifying the narrow interpretation of the provision at issue. The Court found that the particular Austrian tenancy law was discrimination on the grounds of sexual orientation.

### **EB v France**

The judgment here, which is in line with the *Karner* case, said that the exclusion of individuals from the application process for adoption of children simply because of their sexual orientation is discriminatory and in breach of the European Convention of Human Rights. The Government's argument that the case fell outside the scope of Article 8 and subsequently Article 14 and was inadmissible failed.



The Court observed that the Government carried the burden of proof and their inability to produce statistical evidence on adoption applicant's known or declared sexual orientation, necessary to discharge this burden meant that it failed to establish an accurate picture of their administrative practices and establish an absence of discrimination.

In rejecting the suggestion that the discrimination was a consequence of a pursuit of a legitimate aim, the Court reiterated that where sexual orientation is involved "there is a need for particularly convincing and weighty reasons to justify a difference in treatment" as in the Karner case.

In relation to justification in this case, as B only wanted to share the six treatments it is difficult to see why the policy that she could not have any treatments is justifiable and proportionate. Sharing treatments would not appear to increase costs in a substantial manner, as the only likely increased costs would be for B to be checked to ensure she is medically fit to have the treatment. Human rights judgments indicate that weighty reasons are required to justify the discrimination and no clear evidence for justification is apparent, it is therefore likely that the discrimination was not justified.

**6. In the alternative to a claim being brought under anti-discrimination law, would a claim be able to be brought under your national human rights legislation pursuant to Articles 8 and 14 of the European Convention of Human Rights and is it likely that the claim would be successful? Would your organisation be able to support the claimant in those proceedings or intervene to provide submissions?**

The subject matter falls within Article 14, insofar as the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any grounds, including sexual orientation and under Article 8, as regards to the right to respect private and family life. It is likely that the claim would be successful both in relation to a breach of article 8 and 14 as it is unlikely that the difference in treatment was justified.

A claim alleging a breach of the UK Human Rights Act could be brought by B. However, it is important to note that the EHRC does not have the power to support individuals in human rights claims unless there is also a discrimination law claim. The Commission could however apply to intervene in the proceedings to provide submissions.

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

The sanctions, here as in the age and race discrimination cases, must adequately reflect the gravity and nature of loss and/or harm suffered and be able to deter future acts of discrimination.

Remedies are therefore mostly in terms of financial compensation which may include compensation for injury to feeling or exemplary damages.

## Cyprus

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

**1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

Currently, there is no anti-discrimination legislation under which this case could directly fall. Discrimination on the grounds of sexual orientation is directly prohibited, by legislation, only in the field of employment.

There is no legislation to assist procreation either. However, there is a special scheme, approved by the Council of Ministers, under which couples can receive financial assistance for purposes of undergoing in vitro fertilisation. The plan makes no reference to homosexual couples and its wording suggests that only heterosexual couples would be eligible.

**2. Alternatively, would this case fall within the scope of the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?**

***In answering questions 1 and 2, please consider your national legislation, the Treaty of the European Community (Consolidated) and case law of the European Court of Justice (Geraets-Smits [2001] C-157/99) as to whether assisted procreation be treated as a service and/ or health care?***

Taking into account the explanation/clarification given in the “explanatory memorandum” of the Proposed Directive, and the fact that our national legislation does not recognise marriages or registered partnerships of same-sex couples, our preliminary view is that, in Cyprus, this case would not fall within the scope of the directive.

Specifically, we refer to the explanation of Article 3 in paragraph 5 of the memorandum, which states the following: “The text makes it clear that matters related to marital and family status, which includes adoption, are outside the scope of the directive. This includes reproductive rights. Member States remain free to decide whether or not to institute and recognise legally registered partnerships. However once national law recognises such relationships as comparable to that of spouses then the principle of equal treatment applies.”

***For questions 3 to 5 below, if you have national anti-discrimination legislation within the scope of the case please answer the questions in two parts, firstly how the questions would be answered under you existing legislation and secondly how they would be answered under the Proposed Directive.***

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

The District Court and the Equality Body.

**4. Is there direct or/and indirect discrimination against A and B on the ground of sexual orientation? In relation to indirect discrimination, could applying the criterion of treating same-sex spouses and opposite-sex spouses equally lead to indirect discrimination?**

a) Our view is that there is indirect discrimination against A and B.

b) Yes, treating same-sex spouses and opposite-sex spouses equally, in practice, might lead to indirect discrimination against same-sex couples.

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

***In answering this question please consider what would be the effect of recital 17 and article 3(2) of the Proposed Directive. Recital 17 states that the Directive is "without prejudice to national laws on marital or family status, including on reproductive rights"?***

***Please also consider the effect of the following decisions: Maruko C-267/06 in the European Court of Justice and Karner v Austria; KB v France in the European Court of Human Rights.***

As already stated in our answer to Question 2, our national legislation does not recognise marriages or registered partnerships of same-sex couples. In light of this and also having regard to the ECJ Decision on the Maruko Case C-267-06, we have the preliminary view that, in Cyprus, this case would probably be viewed as falling out of the scope of the Proposed Directive.

In the case Karner v Austria, the European Court of Human Rights ruled that the “aim” of the “protection of the family unit”, which the Austrian Government posed for treating differently homosexual as opposed to heterosexual “life companions” was a rather abstract aim and a broad variety of measures could be used to implement it. At the same time, in paragraph 41 of the case, it was stated that “... the principal of proportionality does not merely require that the measure chosen is in principal suited for realising the aim sought. It must also be shown that it was necessary to exclude persons leaving in a homosexual relationship from the scope of the application of section 14 of the Rent Act...”

In the same line, in L&V v. Austria, par. 45, the Court stated that, “... differences based on sexual orientation require particularly serious reasons by way of justification.”

Furthermore, in the case EB v. France the European Court of Human Rights ruled that in any event, particularly convincing and weighty reasons have to be made out in order to justify difference in treatment on the basis of sexual orientation.

Taking the above into consideration, we tend to the view that the controversial provision – i.e. that only one of the persons in a couple could be offered treatment for assisted procreation – which results in indirect discrimination against same-sex couples, is not objectively justified. Firstly, we think that the aim of “preserving medical resources” is too abstract and is not a weighty reason which justifies a difference in treatment. Secondly, we have reservations as to whether the means used to achieve the aim are consistent with the principal of proportionality as explained by the ECJ in Karner v Austria.

***5. In the alternative to a claim being brought under anti-discrimination law, would a claim be able to be brought under your national human rights legislation pursuant to articles 8 and 14 of the European Convention of Human Rights and is it likely that the claim would be successful? Would your organisation be able to support the claimant in those proceedings or intervene to provide submissions?***

No answer provided.

***6. If there is no justification or exception, what would be the sanctions or remedies under your national anti-discrimination or human rights legislation?***

There are provisions for sanctions or remedies in our national legislation. As stated above, currently, there is no anti-discrimination legislation under which this case could directly fall.

[However, the Commissioner heading the Equality Body, in cases for which she rules that a discriminatory behaviour/practice has occurred or is occurring, she may impose fines. These fines vary depending on whether they are imposed for discriminatory behaviour that is prohibited by the Law or for noncompliance with the Commissioner’s Recommendations or Orders/Decrees (e.g. for non compliance with a Decree to end a discriminatory practice (within the deadline that the Commissioner sets), the fine is up to a maximum of GBP 350 (about EUR 600). Furthermore the Law provides for a fine of GBP 50 (about EUR 85), for each day thereafter for which non-compliance continues.]

# Denmark

*Answers provided by the Danish Institute for Human Rights*

**1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

The case in question does not fall within the scope of the Danish anti-discrimination legislation. If however it concerned a strictly private company in form of a medical clinic that did not receive any reimbursement from the state then it might fall within the scope of the act on prohibition against differential treatment due to race etc. This act prohibits anyone within occupational or non-profit making activity to refuse to serve or attend to a person due to his or her race, skin colour, national or ethnic origin, belief or sexual orientation on the same terms as others.

**2. Alternatively, would this case fall within the scope of the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?**

***In answering questions 1 and 2, please consider your national legislation, the Treaty of the European Community (Consolidated) and case law of the European Court of Justice (Geraets-Smits [2001] C-157/99) as to whether assisted procreation be treated as a service and/or health care?***

The case would fall within the scope of the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation article 3 paragraph 1(a). It follows from this provision that the prohibition of discrimination shall apply in relation to social protection, including social security and health care. Whether it falls within goods and services is therefore secondary.

In Denmark, assisted procreation will be seen as part of the health care system especially since it in Denmark – as in other Member States - is paid for by the state if certain criteria are met. However one can also argue that it falls under the scope of goods and services especially if it is a case where one is directly charged for the service. If this is not the case, one can argue that there should be no difference in the level of protection against discrimination if the service is paid for by the state through taxes or directly by the consumer. According to the case of Geraets-Smits C-157/99 para. 57, article 50 (previously article 60) of the Treaty of the European Community does not require that the service be paid for by those for whom it is performed. It further follows from para. 53 that medical activities fall within the scope of article 50 of the Treaty (previously article 60).

***For questions 3 to 5 below, if you have national anti-discrimination legislation within the scope of the case please answer the questions in two parts, firstly how the questions would be answered under you existing legislation and secondly how they would be answered under the Proposed Directive.***

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

Since the case in question does not fall within the scope of the Danish anti-discrimination legislation the following questions - questions 3 to 7 - will be answered as if the Proposed Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation has entered into force.

In Denmark, only the courts would be competent to handle such a case.

**4. Is there direct or/and indirect discrimination against A and B on the ground of sexual orientation? In relation to indirect discrimination, could applying the criterion of treating same-sex spouses and opposite-sex spouses equally lead to indirect discrimination?**

It is a difficult case when it comes to determining whether it is a case of direct or indirect discrimination. I would however argue that the case in question would be a case of indirect discrimination. The reason for this is that every couple regardless of sexual orientation will be offered six donor inseminations meaning that the rule regarding six donor inseminations is a neutral rule that applies to all. However a heterosexual woman in a heterosexual relationship who wishes to become a mother will always get offered six inseminations unless she falls for the age limit. A lesbian woman on the other hand who is in a lesbian relationship and who wishes to become the biological mother to a child will only be offered the six donor inseminations if her partner is willing to renounce insemination. This means that one of the women in a lesbian relationship will not have the possibility of being inseminated because of her sexual orientation.

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

***In answering this question please consider what would be the effect of recital 17 and article 3(2) of the Proposed Directive. Recital 17 states that the Directive is "without prejudice to national laws on marital or family status, including on reproductive rights"?***

***Please also consider the effect of the following decisions: Maruko C-267/06 in the European Court of Justice and Karner v Austria; KB v France in the European Court of Human Rights.***

The county health authority denied the couple's request of switching the treatment from "A" to "B" with reference to its policy that treatment was limited to one of the women in a lesbian couple. Later in the case the reason for the rejection is made more specific when there is a reference to the preservation of medical resources. What exactly is meant by this is unclear. Supposedly there are additional costs in preparing two women for treatment instead of just one woman but this is speculation. It is however important to keep in mind that discrimination based on sexual orientation requires particularly serious reasons by way of justification (cf. Karner v. Austria para. 37).

Since a case like this would not be covered by the Danish anti-discrimination legislation there is no case law in the area. How it would fall out within the Danish legal system is therefore difficult to say. I would assume that the preservation of medical resources would be considered a legitimate aim but whether the means of achieving that aim are appropriate and necessary are another matter.

Recital 17 and article 3, paragraph 2 of the Proposal for Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation will not have any effect on the given case since a criteria for being offered insemination is not that the couple is married. Did a state only offer insemination to couples who were married then both recital 17 and article 3, paragraph 2 would come into play.

It follows from the Maruko case that where an EU Member State recognises same-sex partnerships under national law and provide such partnerships with a similar legal status as married couples, it is discriminatory not to provide the same-sex partnerships with the same rights as married opposite-sex couples. On the other hand, where an EU Member State does not provide for that same-sex couples can enter into a partnership comparable to marriage, it is not illegal to treat same-sex couples less favourably than opposite-sex couples joined in matrimony.

The text makes it clear that matters related to marital and family status, which includes reproductive rights, are outside the scope of the directive. Member States remain free to decide whether or not to institute and recognise legally registered partnerships. However once national law recognises such relationships as comparable to that of spouses then the principle of equal treatment applies.

**6. In the alternative to a claim being brought under anti-discrimination law, would a claim be able to be brought under your national human rights legislation pursuant to articles 8 and 14 of the European Convention of Human Rights and is it likely that the claim would be successful? Would your organisation be able to support the claimant in those proceedings or intervene to provide submissions?**

In theory a claim in relation to the case in question could be brought under the Danish human rights legislation pursuant to articles 2 and 14 of the European Convention on Human Rights. ECHR is the only human rights document which has been incorporated into Danish law, by Act no. 285 of 29 April 1992; thus constituting a part of Danish legislation. Whether it would be a successful claim is difficult to determine. Being a specialised equality body on race and ethnic origin is part of the mandate of the Danish Institute for Human Rights. There is no specific mandate in relation to the other discrimination grounds. As a national human rights institution, the institute has had no practice when it comes to supporting a claimant in a case or intervening in a case.

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

The sanctions under anti-discrimination legislation would most likely be compensation as well as it would be under human rights legislation. In a judgment from 2006 - U.2006.2766/20 - that concerned financial crime the Western High Court found that article 6 in the European Convention on Human Rights had been violated in relation to the defendant's right to a fair trial within a reasonable time. Compensation for the violation of the convention was awarded.

## Finland

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

**1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

The case does not fall within the scope of the Equality Act, because the Act covers discrimination in health care services and in the provision of other services only when it comes to discrimination based on ethnic origin.

The Act on the Status and Rights of Patients includes the right of a patient to get health care without discrimination. Section 3 paragraph 1 says: "Every person who stays permanently in Finland is without discrimination entitled to health and medical care required by his state of health within the limits those resources which are available to health care at the time in question..." Para. 2: "The patient has a right to good health care and medical care. The care of the patient has to be arranged so and he/she shall also otherwise be treated so that his/her human dignity is not violated and that his/her conviction and privacy is respected". Para. 3: "The mother tongue, individual needs and culture of the patient have to be taken into account as far as possible in his/her care and other treatment." However, please see below on what is considered as health care.

The discrimination prohibition in the Penal Code also covers, among other areas, the service of the general public and the exercise of official authority or other public function. Discrimination is also prohibited in Chapter 2, Section 6 of the Constitution: "...No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person..."

Assisted fertility treatment is considered as health care or medical care only if given for medical reasons. In the preparatory works of the Assisted Fertility Treatment Act I found a statement against the proposal, according to which public health care (health care insurance) is given only for medical reasons. Treatment to single women or lesbian women could not be motivated by medical reasons, and therefore, the receivers of treatment would also after entry into force of the legislation pay for the treatment themselves. Treatment provided to lesbian women is in other words considered as service and as an "activity of a commercial character" (Article 50 EC).

The Act on Assisted Fertility Treatment uses the word "service provider" and defines the word as "a health care unit and physician holding a licence referred to in section 24". The meaning of "health care services" mentioned in the Equality Act (which is not applicable in this case as mentioned above) is very wide. In the preparatory works of the Act, many examples are given as to what is meant by health care services (statutory health care services, health care advice, special health care, etc.). This is the case also in view of the Treaty of the European Community and EC case law (the Geraets-Smits case), where it is established that hospital medical treatment financed directly by the sickness insurance funds is not such as to remove such treatment from the sphere of services within the meaning of Article 60 (now Article 50 EC). The Geraets-Smits case mentions that the treatment must be regarded as normal in the professional circles concerned. In Finland same-sex couples and single women receive treatment only from private companies offering treatment, since the public health care offers services only for "medical reasons". This means that these receivers of treatment pay for the service themselves.

***2. Alternatively, would this case fall within the scope of the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?***

***In answering questions 1 and 2, please consider your national legislation, the Treaty of the European Community (Consolidated) and case law of the European Court of Justice (Geraets-Smits [2001] C-157/99) as to whether assisted procreation be treated as a service and/ or health care?***

Yes, the case would fall within the scope of the Proposed Directive. The Proposed Directive covers both health care and access to and supply of services when it comes to discrimination on the ground of sexual orientation.

***For questions 3 to 5 below, if you have national anti-discrimination legislation within the scope of the case please answer the questions in two parts, firstly how the questions would be answered under you existing legislation and secondly how they would be answered under the Proposed Directive.***

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

The case could be put forward as a criminal case, but it would not necessarily succeed taking into account requirements on intent, etc.

The Patient Ombudsman of the health care unit in question can help a patient, who is not satisfied with the health care or medical care, to submit an objection to the director responsible for health care in the unit in question. Among the tasks of the Patient Ombudsman is to act for the promotion and implementation of patients' rights.

The Ombudsman for Minorities does not have the powers to deal with discrimination cases based on sexual orientation.

**4. Is there direct or/and indirect discrimination against A and B on the ground of sexual orientation? In relation to indirect discrimination, could applying the criterion of treating same-sex spouses and opposite-sex spouses equally lead to indirect discrimination?**

In Finland, the case does not fall within the scope of the Equality Act at the moment.

The Act on Assisted Fertility Treatment (1237/2006) entered into force on 1 September 2007. According to Section 2 (on definitions): "For the purpose of this Act, (1) a couple means a woman and a man living together in marriage or in a relationship comparable to marriage; (2) a person receiving treatment means a couple or a woman not living in a marriage or in a relationship comparable to marriage." This means that both women in a lesbian couple, both A and B, would separately be treated as "a person receiving treatment". The comparator would be a married woman or a woman living in a relationship comparable to marriage, not a heterosexual couple.

The Act treats people differently on the basis of their marital status and on the basis of their sexual orientation. The preconditions are a bit stricter for same-sex couples and unmarried women and women not living in a relationship comparable to marriage (regardless of sexual orientation), because according to section 16.2: "The gametes of a donor may be used in the assisted fertility treatment of persons other than couples only by the donor's consent". Also, treatment to "a person receiving treatment" (such as a lesbian woman in a couple) is usually not seen as medically motivated, which means that the person receiving treatment has to pay for it herself.

The Constitutional Law Committee (the Committee in the Parliament whose principal function is to issue statements on bills sent to it for consideration and on the constitutionality of other matters and their bearing on international human rights instruments) gave its statement on the constitutionality of the bill. Concerning equality, the Committee stated among other things, that the bill treats persons differently on the bases of their marital status and partly also on the bases of their sexual orientation. The outcome of the Committee was anyway, that the Constitution and in particular its Section 6 on equality does not hinder the regulation in question. The Committee motivated this outcome by saying the following: "...Taking into account that the medical purpose of assisted fertility treatment is to help persons suffering from involuntary childlessness, the bill cannot be seen as unconstitutional. The suggested differences (in treatment) that are closely linked to the value choices of the society, and compared to the long practice of interpretation by the Committee, the suggested differences are within the margin of discretion of the legislator..."

The Committee also referred to the preparatory works of the Constitution, according to which, the equality viewpoint is of relevance when it comes to giving legal benefits or rights to citizens. The Committee continued by saying that on the other hand, it is typical for legislation to treat persons differently for a generally accepted interest, for example in order to advance the best interest of the child. The equality principle cannot put strict boundaries to the discretion of the legislator, when trying to reach regulation called for by the society's current level. The Committee noted it being relevant, whether the differential treatment from the Constitutional viewpoint can be motivated in an acceptable way.

The Constitutional Law Committee did not mention, in what way the bill had been motivated and if it had been motivated in an acceptable way. The main point was that this was a question within the margin of discretion of the legislator. The motivation for the differential treatment should be found in the preparatory works of the Act itself, in the bill.

However, the bill itself (the proposal by the government) only specifies that 'couple' means a man and a woman living in a certain type of relationship and that 'person receiving treatment'



means a couple made of a man and a woman or a woman, who receives treatment outside such a couple. This means that a lesbian woman (single, in a relationship or in a registered partnership), could receive treatment as “a person receiving treatment”, with the somewhat stricter preconditions that do not concern heterosexual married couples or heterosexual couples “living in relationships comparable to marriage”.

In its second statement (after some changes were suggested to the bill by the Law Committee: the Law Committee suggested that women not in a stable relationship with a man should not at all have the right to receive treatment, because the legislation should firmly be based on the values in society at the time in question), the Constitutional Law Committee refers to earlier statements, where it has been of the opinion, that women living in a registered partnership and women not living in a relationship could be given treatment, even if on stricter preconditions than others. It also says that legislation related to registered partnerships, etc. is evolving internationally and that giving special rights to a man and a woman living in a marriage is motivated.

However, the Committee left the door open for changing its point of view by saying that “The interpretation of laws might change over time and the interpretation of the Constitution can actively change value viewpoints.” It also stated that the new suggestion goes even further in treating women differently and that the regulation is problematic from the point of view of Section 6 of the Constitution (on equality). It finds that the first suggestion was more in line with equality goals, but anyhow finds that the bill is not against the Constitution. The suggestions by the Law Committee were not successful.

The statements by the other parliamentary committees do not really include any motivations on why same-sex couples/single women are treated a bit differently.

My personal opinion is that the policy in the Swedish case could be seen as directly discriminatory, because there is the direct referral to lesbian couples, and the limitation in itself is totally irrelevant for opposite-sex couples. Also, the couple in question did not ask to receive more treatment than others. However, the definition of direct discrimination in the current Equality Act would not fit very well with the situation in question. According to the Act direct discrimination means: “the treatment of a person less favourably than the way another person is treated, has been treated or would be treated in a comparable situation.” The definition talks only about “comparable situations” and A and B are not in a comparable situation with heterosexual couples.

It is at least a case of indirect discrimination. The situation “unequal treatment of unequal situations” would also fit within the definition of indirect discrimination in the current Equality Act (“that an apparently neutral provision, criterion or practice puts a person at a particular disadvantage compared with other persons, unless said provision, criterion or practice has an acceptable aim and the means used are appropriate and necessary for achieving this aim”). The policy seems neutral: “only one of the persons in a couple receives treatment”, but the policy has negative effects only for lesbian couples and does not make any sense in relation to opposite-sex couples, it has no negative effects on opposite-sex couples.

The definitions of direct and indirect discrimination in the Proposed Directive are very similar to those of the national Equality Act (that does not cover the situation in question), which means that the same problem occurs if implementing the Proposed Directive to this case.

As mentioned by the European Court of Human Rights in *Thlimmenos v Greece* (16/04/2000, Application No. 34369/97), the prohibition to discriminate is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. However, the Court stated: “...in the present case the Court considered that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”

Whether the victim of discrimination was only B or also A and B as a couple is a difficult question. B was clearly a victim. But one could also claim that the couple as such was a victim, because the rules by the County Council affected A and B's possibilities as a couple to have a child.

If the scope of the Finnish Equality Act would cover sexual orientation discrimination in the provision of health care or other services, both women in a lesbian couple would be treated as "a person receiving treatment" because of the definitions in the Act on Assisted Fertility Treatment. This means that a same-sex couple would not be regarded as a couple but as two women receiving treatment in the same way as single women receive treatment.

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

***In answering this question please consider what would be the effect of recital 17 and article 3(2) of the Proposed Directive. Recital 17 states that the Directive is "without prejudice to national laws on marital or family status, including on reproductive rights"?***

***Please also consider the effect of the following decisions: Maruko C-267/06 in the European Court of Justice and Karner v Austria; KB v France in the European Court of Human Rights.***

Recital 17 and the exception in Article 3(2) of the Proposed Directive are not relevant for the case in question, because the policy was made by an authority; it was not established in national legislation. Regarding Article 3 of the Proposed Directive it is mentioned that: "However once national law recognises such relationships as comparable to that of spouses then the principle of equal treatment applies."

In my personal opinion, there is no objective justification or relevant exception.

In Finland, exception 3(2) of the Proposed Directive means that the national law on fertility treatments would perhaps not have to be changed, if the proposal gets accepted. The Act on Registered Partnerships entered into force already in March 2002. However, this Act does not in all situations recognise registered partners as comparable to spouses. The Act on Fertility treatments would have to be changed only if Section 8 of the Act on Registered Partnership is seen as "recognizing such relationships as comparable to that of spouses" (see above on Article 3(2) of the proposal).

Section 8:

(1) The registration of partnership shall have the same legal effects as the conclusion of marriage, unless otherwise provided.

(2) The dissolution of a registered partnership shall have the same legal effects as the dissolution of marriage, unless otherwise provided.

(3) A provision in an Act or a Decree applicable to marriage applies likewise to a registered partnership, unless otherwise provided.

(4) A provision in an Act or a Decree applicable to a spouse applies likewise to a partner in a partnership referred to in this Act, unless otherwise provided.

Partners who intend to register their partnership shall be subject to the provisions applicable to engaged persons, unless otherwise provided.

However, in accordance with ECtHR case law, a difference in treatment is discriminatory if it has no objective and reasonable justification, which means that it does not pursue "a legitimate aim" or that there is no "reasonable proportionality between the means employed and the aim sought to be realised". In the preparatory works of the Finnish Fertility Act there is no clear aim mentioned regarding the fact that the preconditions for receiving treatment is a bit stricter for others than heterosexual married couples or heterosexual couples living in relationships comparable to marriage. This I believe suggests that the legislation possibly

could be found discriminatory by the European Court of Human Rights, even if this area would not necessarily fall within the scope of EC legislation.

The effects of case law (Karner v Austria, E.B. v France and Maruko).

Karner v Austria: The court states (see para. 40) that “the Court can accept that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment...It remains to be ascertained whether, in the circumstances of the case, the principle of proportionality has been respected.” According to the proposal, as long as a state has no national law recognizing same-sex relationships as comparable to that of spouses, the area is not covered by the directive. This means that until then, in a specific case, no legitimacy test or proportionality test can be made. It could be argued that the proposal is not totally in line with ECHR case law, because the proportionality test can never be used and also because the legitimacy of the exception has not been motivated. In accordance with the judgment in Karner v Austria, an exception would need to be based on a weighty and legitimate reason.

E.B. v France: This judgment is in line with the Karner judgment. The court states (para. 91): “The Court reiterates that, for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, which means that it does not pursue “a legitimate aim” or that there is no “reasonable proportionality between the means employed and the aim sought to be realised”. In this case the European Court of Human Rights found a violation of Article 14 in conjunction with Article 8. The Court stated that “Where sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8.” In this case a homosexual woman wanted to adopt a child, even if her partner was not as committed as her to the adoption (etc.). The Court noted that under French law also a single woman can adopt. The court also stated that “the domestic authorities made a distinction based on considerations regarding her sexual orientation, a distinction which is not acceptable under the Convention”. This was the outcome of the case, even if the Court observed that States have a broad margin of appreciation in this area.

When looking at the Swedish case one could claim that here it also would be prohibited to make a distinction because of the sexual orientation of couple A-B. However, this is not the only form of discrimination recognised by the ECHR. In Thimmenos v Greece, the Court states that the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.

Tadao Maruko: I think that the Proposed Directive is consistent with this ruling, because the Court gives relevance to the fact whether “...under national law, life partnership places persons of the same-sex in a situation comparable to that of spouses.” The same is said in the text explaining exception 3(2) of the Proposed Directive: “However once national law recognises such relationships...”.

**6. In the alternative to a claim being brought under anti-discrimination law, would a claim be able to be brought under your national human rights legislation pursuant to articles 8 and 14 of the European Convention of Human Rights and is it likely that the claim would be successful? Would your organisation be able to support the claimant in those proceedings or intervene to provide submissions?**

The mandate of the Ombudsman for Minorities is very wide. The Ombudsman could possibly assist a person in bringing a human rights claim before the ECtHR as part of the mandate to safeguard the status and rights of ethnic minorities and foreigners (Section 1 of the Act on the Ombudsman for Minorities and the National Discrimination Tribunal of Finland, 1109/2008). However, because of limited resources it is very unlikely that the Ombudsman would decide to assist a victim in such a case. On the probability for such a case to be successful, please see answer 5. Also note that at the moment the Ombudsman does not have the power to deal

with issues of sexual minorities. This means that the Ombudsman could assist in a case as the one in question only if the claimant was a foreigner or a member of an ethnic minority.

However, on legal aid it is said in the Act on the Ombudsman, that the Ombudsman has the right to assist or order an employee to assist a victim of ethnic discrimination or a person who possibly is a victim of trafficking in human beings (in securing the rights of this person), or if necessary to get legal aid for the victim, if the Ombudsman finds that the issue is of special relevance for the prevention of ethnic discrimination or human trafficking. The specific mention in this Section on when the Ombudsman can assist might mean that the Ombudsman has the right to assist only in cases on ethnic discrimination or human trafficking.

A case regarding the human rights aspects of the legislation on fertility treatment could end up before the ECtHR as a result of an appeals process to a decision by a service provider to follow the stricter preconditions for fertility treatment in the case of a single and/or lesbian woman. The person not receiving treatment on the same conditions as a heterosexual married couple/a heterosexual couple living in a relationship comparable to marriage would need to exhaust national remedies before bringing the case before the ECtHR. Since only the person not receiving treatment on the same conditions has the right to appeal a negative decision, the Ombudsman could not intervene in the procedure, only perhaps assist the victim (but would probably not even assist). Also, in national proceedings the Ombudsman can be asked to give a statement before a court as an expert witness.

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

Because of the current national legislation, there would be no sanctions. It is hard to say what the outcome of a process before the ECtHR would be.

## Hungary

*Answers provided by the Equal Treatment Authority*

**1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

The case falls within the scope of the Equal Treatment (ET) Act, which under Article 4 stipulates: "The principle of equal treatment shall be observed by entities providing health care in the course of establishing relationships, in their relationships, in the course of their procedures and measures (hereinafter called collectively: relationships)". Article 8 guarantees protection against discrimination on the grounds of sexual orientation.

**2. Alternatively, would this case fall within the scope of the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?**

Yes, I reckon it would/will fall within the scope of the Proposed Directive as Article 2 (2) forbids discrimination on the ground of sexual orientation and Article 3 defines the scope as including social protection (social security and health care).

I believe that both under the Hungarian ET Act and the Proposed Directive assisted procreation in this case shall be treated as social protection, more precisely health care. Although according to Geraets-Smits [2001] C-157/99, health services (even if provided

without any prompt remuneration) are considered services, in the field of discrimination, health care is a more precise and appropriate definition.

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

According to Section 76 of the Civil Code and Section 23 of the Civil Procedure Code, any breach of the principle of equal treatment shall be considered as a violation of inherent rights and the geographically competent county civil courts or the Metropolitan Court is competent to investigate any such claims if the case happened in the territory of Hungary.

The Equal Treatment Authority is competent to look into the matter according to Articles 14-15 of the ET Act if the case happened in the territory of Hungary.  
The Ombudsman for Minorities does not have the powers to deal with discrimination cases based on sexual orientation.

**4. Is there direct or/and indirect discrimination against A and B on the ground of sexual orientation? In relation to indirect discrimination, could applying the criterion of treating same-sex spouses and opposite-sex spouses equally lead to indirect discrimination?**

There are two different and equally possible approaches to this case. If we accept a couple-based approach (referring to the collective element in becoming a fully-fledged family with children), we have to establish that there is no direct discrimination in the given case – to establish it, one would expect to have two comparable groups of couples, having sexual orientation as the only relevant difference between them. However, in this case there is an additional major difference, namely, that in the case of heterosexual couples it is naturally impossible to have two possible mothers. A simple reference in the policy to the lesbian couples cannot constitute direct discrimination.

As far as indirect discrimination is concerned in this case, this is the only possible way to proceed, as one can claim that the apparently neutral provision in fact means a disadvantage to lesbian couples. However, I reckon that giving both members of a lesbian couple the chance of becoming a mother would constitute positive action vis-à-vis the heterosexual couples and as such cannot be relied upon until it is declared and expected by law.

On the other hand, if we accept an individual approach, one can claim that lesbian women are disadvantaged as not all of them are entitled to receive the assisted procreation treatment. In this case one can easily argue that those not entitled are facing direct discrimination.

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

***In answering this question please consider what would be the effect of recital 17 and article 3(2) of the Proposed Directive. Recital 17 states that the Directive is "without prejudice to national laws on marital or family status, including on reproductive rights"?***

***Please also consider the effect of the following decisions: Maruko C-267/06 in the European Court of Justice and Karner v Austria; KB v France in the European Court of Human Rights.***

Accepting the couple-based approach, there is basically no need for objective justification with regard to the circumstances discussed above.

On the other hand, if we accept the individual approach, there is probably no convincing objective justification as a non-discriminatory conduct would have no detrimental financial, psychological effect nor would it lead to a significantly higher administrative burden.

Recital 17 and Article 3 (2) of the Proposed Directive has no effect in this case as according to the ECJ's judgment in the Maruko case, there is no requirement in the EC law to secure reproductive rights or a similar/equal legal status for same-sex couples, but if a Member State does so, they shall refrain from any discrimination on the basis of sexual orientation.

According to Article 3 (4) of the Hungarian Act 2009:29 on registered partnership the provisions concerning the specific procedures aiming human reproduction cannot be applied to the registered partners. Therefore, only spouses (by default different-sex according to the Hungarian law), different-sex partners and single women qualify for the reimbursement of the procedure.

**6. In the alternative to a claim being brought under anti-discrimination law, would a claim be able to be brought under your national human rights legislation pursuant to articles 8 and 14 of the European Convention of Human Rights and is it likely that the claim would be successful? Would your organisation be able to support the claimant in those proceedings or intervene to provide submissions?**

Under Hungarian law, the claimant could bring a human rights case in front of the civil court, claiming the violation of her inherent right to equal treatment. According to Section 76 of the Civil Code and Section 23 of the Civil Procedure Code, any breach of the principle of equal treatment shall be considered as a violation of inherent rights and the geographically competent county civil courts or the Metropolitan Court is competent to investigate such claims.

It is worth to mention that according to Article 14 (1) of the ET Act, the Authority pursuant to the right of *actio popularis*, may initiate a lawsuit with a view to protecting the rights of persons and groups whose rights have been violated.

According to Article 18 (1), unless otherwise stipulated by the law, the NGOs and interest representation organisations, as well as the Authority may act as a representative authorised by the party who suffered a violation of law in procedures instigated because of a violation of the principle of equal treatment.

Although the Equal Treatment Authority has the powers to represent claimants in individual discrimination cases (but only under the anti-discrimination legislation), in reality it can rarely make use of this opportunity due to the lack of resources.

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

According to Article 16 (1) of the ET Act: "If the Authority has established that the provisions ensuring the principle of equal treatment laid down herein have been violated, they may

- a) order that the situation constituting a violation of law be eliminated,
- b) prohibit the further continuation of the conduct constituting a violation of law,
- c) order that its decision establishing the violation of law be published,
- d) impose a fine,
- e) apply a legal consequence determined in a special act".

# The Netherlands

*Answers provided by the Equal Treatment Commission*

## **1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

Yes, it falls within the scope of article 1 of the Dutch Equal Treatment Act. This article prohibits discrimination on several grounds, among which is sexual orientation. This article must be seen in combination with article 7 of the Equal Treatment Act, which prohibits discrimination in relation to the access to or the supply of the provision of goods and services. Paragraph (1)(c) of this article explicitly mentions the provision of goods and services by organisation in the field of health care.

If the County Council that is mentioned in the case can be classified as a medical institution as mentioned in article 7 of the Dutch Equal Treatment Act, the access to medical treatment at and the provision of medical treatment, including IVF, by the County Council falls within the scope of the provision of goods and services. The Equal Treatment Commission (CGB) has stated this in e.g. its decision with number 2000-4 which followed an investigation on the initiative of the CGB into the provision of IVF treatments to lesbian couples and single women by different hospitals in the Netherlands.

If the County Council has to be regarded as a (local) authority, so not as a private actor, the Dutch CGB is not competent to deal with this case, as it cannot assess the policy and acts of state actors on national and local level (with an exception for race and social protection).

It is not entirely clear from the facts of the case, whether this case concerns the access to assisted procreation programmes or if it concerns the reimbursement of the costs of such treatment. For the CGB, this is a relevant question, as the reimbursement of or payment for medical treatment is to a large extent covered by legislation and the Dutch CGB cannot assess whether legislation is in accordance with the equality legislation (with an exception for race and social protection). See also the case of Smits-Geraets of the European Court of Justice on what does and does not fall within the scope of the provision of goods and services. (See question 5 for a more detailed answer.)

In the following, I will presume that what is involved here is the access to IVF treatment and not the reimbursement of the costs of such treatment.

## **2. Alternatively, would this case fall within the scope of the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?**

Yes it would. It would fall under article 3(1)(a), in combination with article 1 of the proposal for a Council Directive.

Article 3(1)(a) prohibits discrimination in relation to social protection, including social security and healthcare.

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

In the Netherlands, both the Dutch Equal Treatment Commission (CGB) would be competent as well as any district court.

The Dutch CGB does not give legally binding decisions and it cannot impose sanctions. There is no appeal possibility against its decisions, which should be regarded as the opinion of an expert body on the equality law aspects of a case.

Claimants can go both to the CGB and to Court. They may start the two procedures at the same time or they can go to one of the bodies first and then to the next one. The CGB cannot review a court's decision. However, if the discrimination aspect of a case is not taken into consideration in court, a claimant may still wish to have his claim that he was discriminated investigated by the CGB, even though the CGB cannot enforce any measures of the employer/provider of goods and services in case it comes to the conclusion that discrimination took place.

It is not likely that the CGB will lose its competence to deal with cases such as this one once the Proposal for a Council Directive has come into force, as the Proposal for a Council Directive foresees in a body for the promotion of equal treatment that may safeguard individuals' rights (in article 12).

**4. Is there direct or/and indirect discrimination against A and B on the ground of sexual orientation? In relation to indirect discrimination, could applying the criterion of treating same-sex spouses and opposite-sex spouses equally lead to indirect discrimination?**

There are several ways to approach this case, ranging from a strict couple perspective to a strict individual perspective.

If you compare lesbian couples with heterosexual couples and you do not focus on the rights of the individuals constituting the couples, there is no unfavourable treatment: both same-sex and mixed couples can designate one person who receives the treatment and both couples may receive the same number of treatments. If looked at in this way, there is no discrimination on the ground of sexual orientation.

However, you may also argue that although the two types of couples are treated in the same way, this has an adverse effect on the lesbian couple, as one of the two persons in this couple has no right to IVF treatments, even though this would biologically be possible. The mixed couples do not suffer from such a disadvantage. This may then constitute indirect discrimination on the ground of sexual orientation.

Lastly, you may also look at this case from a strict individual perspective, that of the individual women in the lesbian relationship. If you look at the case from that perspective, you may conclude that of all lesbian women in a stable relationship, every second woman does not have a right to IVF treatments, while all heterosexual women in a stable relationship have a right to receive IVF treatment. If you take this approach, there may be direct discrimination on the ground of sexual orientation.

The Dutch CGB has never given a decision on a similar case. It is difficult to say what the Dutch CGB would decide without knowing more details of the case.

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

***In answering this question please consider what would be the effect of recital 17 and article 3(2) of the Proposed Directive. Recital 17 states that the Directive is "without prejudice to national laws on marital or family status, including on reproductive rights"?***

***Please also consider the effect of the following decisions: Maruko C-267/06 in the European Court of Justice and Karner v Austria; KB v France in the European Court of Human Rights.***

In the Dutch Equal Treatment Act, there is no objective justification possible in case of direct discrimination on the ground of sexual orientation.



In case of indirect discrimination, it is possible to give an objective justification, which as to meet the criteria of a legitimate goal and necessity and proportionality.

It is difficult to say if the Dutch CGB would come to the conclusion that in this case – if it would decide that there is indirect discrimination on the ground of sexual orientation – the indirect discrimination would be objectively justified. It all depends on the arguments brought forward by the county council.

In the Maruko case, it was decided that if a Member State grants a similar status to homosexual couples as to heterosexual couples, this implies an equality of treatment on all levels. This means that homosexual and heterosexual couples should be treated in the same way everywhere. In the case of *EB v. France*, the European Court of Human Rights came to more or less the same conclusion.

However, if this affects this particular case depends on the perspective with which you look at it. If you take on a strict couple approach, there is no difference in treatment on that level as both couples have a right to receive 6 (or 12 in case of a success) IVF treatments, irrespective of the design of the couple. If you take on a more individual perspective, the answer may differ, as I have explained above.

In the case of *Karner v. Austria*, the European Court of Human Rights has decided that discrimination on the ground of sexual orientation can only be objectively justified by very weighty reasons, just like discrimination on the ground of sex.

In the present case, if the CGB would come to the conclusion that the policy of the County Council leads to indirect discrimination, that the County Council must bring forward very good arguments why it upholds such a policy. A cost argument, which the County Council seems to have brought forward, is not easily accepted by the Dutch CGB, especially in relation to public bodies such as health care institutes. According to the Dutch CGB, if the costs of measures implementing equality legislation were easily accepted as a reason not to grant equal treatment, much of the meaning of this legislation would be lost.

***6. In the alternative to a claim being brought under anti-discrimination law, would a claim be able to be brought under your national human rights legislation pursuant to articles 8 and 14 of the European Convention of Human Rights and is it likely that the claim would be successful? Would your organisation be able to support the claimant in those proceedings or intervene to provide submissions?***

In the Netherlands, it is possible to bring a claim under articles 8 and 14 of the European Convention on Human Rights. The Netherlands has incorporated this convention directly into its national law, without transposing it into a national human rights law. In fact, the Netherlands has no special law on human rights. This does not mean that the human rights listed in the ECHR are not safeguarded, as the ECHR is directly applicable in the Netherlands. And the rights listed in the ECHR are safeguarded by provisions in many different laws, such as the Constitution, criminal laws and equality legislation. Therefore, claimants can bring a claim under those articles directly.

It is not possible to bring such a claim before the Dutch Equal Treatment Commission, as the Dutch CGB can only investigate whether the Equality legislation was violated. It cannot investigate human rights claims. Claimants can however go to a District Court (and in appeal to an appeal Court and the Supreme Court).

The Dutch Equal Treatment Commission cannot support such a claim, as its mandate is (again) strictly limited to matters falling within the scope of the equality legislation. Further to that the Dutch CGB does not assist claimants, it only provides support in the form of independent expert opinions in (individual) cases brought before it.

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

The Dutch Anti-discrimination legislation does not provide for any sanctions or remedies to be imposed by the Dutch CGB. The CGB can only make recommendations of a non-binding nature. In such a recommendation, the CGB may for instance advise to change a policy in a certain way.

If a complainant goes to court, the court may of course impose remedies or sanctions. There is not a fixed set of remedies or sanctions foreseen in the Dutch anti-discrimination legislation, so the remedies or sanctions could be anything ranging from reimbursement of the treatments or other costs to the compulsory provision of treatment.

## Norway

*Answers provided by the Equality and Anti-discrimination Ombud*

**1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

No. Sexual orientation is a discrimination ground protected only in employment. However, the right to donor insemination for lesbian couples is explicitly stated in the Biotechnology Act, as of 1. January 2009.

The proposed comprehensive anti-discrimination act has sexual orientation within its scope of protection in all areas of society.

**2. Alternatively, would this case fall within the scope of the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?**

If Member States have national laws giving persons, irrespective of their sexual orientation, the right to assisted procreative orientation, the Proposed Directive would apply. Then the right should be exercised in a non-discriminatory manner. However, a right to assisted procreation cannot be derived from the Proposed Directive in itself.

Article 3, section 2 says: "This Directive is without prejudice to national laws on marital or family status and reproductive rights".

It is stated in the explanatory memorandum section 3, that i.e. recognition of family or marital status and reproductive rights are issues best decided at national level. "The Directive does not therefore require any Member State to amend its present laws and practices in relation to these issues."

Furthermore, under the explanatory remarks under article 3 it is stated that "the text makes it clear that matters related to marital and family status, which includes adoption, are outside the scope of the directive. This includes reproductive rights".

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

We do not have relevant anti-discrimination legislation (see above under question 1).

**4. Is there direct or/and indirect discrimination against A and B on the ground of sexual orientation? In relation to indirect discrimination, could applying the criterion of treating same-sex spouses and opposite-sex spouses equally lead to indirect discrimination?**

We do not have relevant anti-discrimination legislation (see above under question 1). If discrimination based on sexual orientation were prohibited in the field of health services, it would be necessary to decide who is the comparator. If heterosexual couples are the comparator, then homosexual couples would maybe not be considered to have a disadvantage as to number of assisted fertility treatments. However, at an individual level, lesbian women could be considered to be subject to indirect discrimination, since the neutral provision of number of attempts for couples would mean that a number of lesbian women would not be eligible for treatment at all if their partner was selected for treatment.

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

***In answering this question please consider what would be the effect of recital 17 and article 3(2) of the Proposed Directive. Recital 17 states that the Directive is "without prejudice to national laws on marital or family status, including on reproductive rights"?***

***Please also consider the effect of the following decisions: Maruko C-267/06 in the European Court of Justice and Karner v Austria; KB v France in the European Court of Human Rights.***

We do not have relevant anti-discrimination legislation (see above under question 1).

If a Member State in its national legislation does not make exceptions based on sexual orientation, it violates ECHR if it in fact makes distinctions based on sexual orientation.

For example, in the Maruko case the issue was that in Germany surviving spouses were eligible for survivor's pension, as well as lifelong partners. Then, the ECJ ruled that one could not make a distinction based on sexual orientation for homosexual lifelong partnerships, as the national legislation did not make that distinction.

In the Karner case, the right to continue a tenancy after homosexual partner's death was the question. Life companions have the right to continue tenancies under Austrian law, and the law made no explicit exception for same-sex companions. The interpretation made by the Austrian courts did not pass the objective justification test.

In E.B v. France, it was legal for single persons to adopt, and therefore the sexual orientation of E.B. was irrelevant. The authorities based its argumentation inter alia on sexual orientation at times, and therefore were in breach of the human rights of E.B.

When arguing on the basis of human rights one would have to decide who is the discriminated party: A, B or A and B as a couple? If the comparison is made between couples – heterosexual and homosexual - it would be difficult to claim discrimination. Heterosexual couples will be bound by the same age limit, and will also have only one person eligible for insemination.

However, if one looks at the right to insemination as a right for the woman herself it might be different. Then it would depend on national legislation, and whether its practice is discriminatory. One cannot derive a right to adopt or be artificially inseminated from articles 8 and 14 in the ECHR alone.

**6. In the alternative to a claim being brought under anti-discrimination law, would a claim be able to be brought under your national human rights legislation pursuant to articles 8 and 14 of the European Convention of Human Rights and is it likely that the claim would be successful? Would your organisation be able to support the claimant in those proceedings or intervene to provide submissions?**

ECHR is part of Norwegian law, and alleged violations of ECHR can be brought before the courts. The ECHR can also be referred to in legal arguments before the courts. However, we do not have a Human Rights body handling such claims, and the Norwegian Equality and Anti-Discrimination Ombud does not have the power to enforce the ECHR in Norway.

The Ombud can support a plaintiff in equality cases before the court, but cannot act as legal counsel. It is unlikely that the Ombud would be permitted to offer support in human rights cases if no reference was being made to anti-discrimination legislation.

It is difficult to foresee the outcome of a proceeding in this matter before a Norwegian court, but of course the international case law would be very important in this regard.

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

We do not have relevant anti-discrimination legislation (see above under question 1).

# Slovakia

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

## **1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

The case will fall within the scope of the Act No 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination amending and supplementing certain other law (the Anti-discrimination Act) which prohibits discrimination in the area of healthcare.

Art. 2 of the Anti-discrimination Act stipulates:

(1) Compliance with the principle of equal treatment shall consist in the prohibition of discrimination on grounds of sex, religion or belief, racial, national or ethnic origin, disability, age, sexual orientation, marital status and family status, colour of skin, language, political or other opinion, national or social origin, property, descent or other status.

According to § 5 of the Anti-discrimination Act the principle of equal treatment shall apply only with regards to the rights of persons laid down under separate laws regulating access to and provision of

- a) social assistance, social insurance, old age pensions, complementary old age pensions, state social security allowance and social benefits;
- b) healthcare;
- c) education;
- d) goods and services, including housing, provided to the public by legal entities and natural persons – entrepreneurs.

The principle of equal treatment in healthcare is also regulated in §11 of the Act No. 576/2004 Coll. on health care, services provided in context with health care and on amendments and supplements as amended by further law that stipulates:

“Right to healthcare is guaranteed to everyone in compliance with the principle of equal treatment in healthcare expressed in separate law (Anti-discrimination Act). In compliance with the principle of equal treatment, the discrimination on grounds of sex, religion or belief, marital status and family status, colour of skin, language, political or other opinion, trade union activity, national or social origin, disability, age, property, descent or other status.” The discrimination based on sexual orientation would come within the phrase “other status”.

Basic conditions for assisted procreation under national law are regulated in Measure of the Ministry of Health of the Slovak Republic No. 24/1983 laying down the conditions for artificial reproduction. According to this measure, artificial reproduction shall be carried out due to the medical reasons and on the request of married couple (written consent of both partners is necessary).

There is no legal recognition of same-sex couples in Slovakia. Proposal for an act on registered life partnerships of same-sex couples was introduced in 2001 but was rejected.

## **2. Alternatively, would this case fall within the scope of the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?**

Taking into consideration existing case law of the European Court of Justice (Geraets-Smits [2001] C-157/99, ...) together with Amendment 12 to the Proposal that states out: “...legislation should prohibit direct and indirect discrimination, multiple discrimination and discrimination by association based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation or gender in a range of areas outside the labour market, including

social protection, education and access to and supply of goods and services, such as housing, transport, associations and health...”, this case could fall also within the scope of the proposal in relation to the provision of goods facilities and services.

Consolidated Treaty of the European Community, case law of the ECJ:  
According to ECJ in Gaerets-Smits [2001] C-157/99 it is settled case law that medical activities fall within the scope of Article 60 of the treaty (now Article 50).

National legislation:

Act No. 576/2004 Coll. on health care, services provided in context with health care and on amendments and supplements as amended by further law defines health care as a complex of professional activities performed by health care providers including the provision of medication, and dietary foodstuffs in order to prolong the life of a natural person, improve the quality of his or her life, and ensure healthy development of future generations. Health care includes prevention, dispensation, diagnostics, treatment, bio-medical research, nursing care and midwifery.

In the context of other provisions of Act No. 576/2004 Coll. (especially par 12 concerning legal relationships in health care) assisted procreation would be treated as a health care.

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

The Slovak National Centre for Human Rights (SNCHR) would be competent to give expert opinion, provide complainant with legal assistance, represent complainant before the court or provide mediation service.

In case of legal action the district court is competent to handle the case.

Parties to the proceedings concerning the violation of the principle of equal treatment may also be represented by legal entities

- a) who have such authority under a separate law, or
- b) whose activities are aimed at or consist in the protection against discrimination.

The Health Care Surveillance Authority has been established by the Act No. 581/2004 Coll. on Health Care Insurance Companies and Surveillance over Health Care and on Amendment and Supplementation of Certain Acts as a legal person and is vested with performing surveillance over provision of health care and public health care insurance in the field of public administration. The Health Care Surveillance Authority supervises whether the health care was provided properly and in accord with legal norms, imposes sanctions, supervises the implementation of the Act No. 581/2004 on Health Insurance Companies, Supervision of Health Care and on modification and amendment of some acts as amended by subsequent regulations and of the Act No. 580/2004 on Health Insurance and imposes penalties for the breach of those acts.

### **4. Is there direct or/and indirect discrimination against A and B on the ground of sexual orientation? In relation to indirect discrimination, could applying the criterion of treating same-sex spouses and opposite-sex spouses equally lead to indirect discrimination?**

We can probably talk about both forms of discrimination – direct and indirect. The County Council's policy applied in the case always constitutes for one woman in a lesbian couple barrier to the assisted procreation. Every woman (below 40 years of age) living in heterosexual relationship has access to assisted procreation but one women living in homosexual relationship is always refused from access to this treatment – due to her homosexual relationship. This woman is a victim of direct discrimination – she is treated less favourably than a woman living in heterosexual relationship.

If we examine the County Council's policy to offer treatment only for one person in relationship and its negative effect for lesbian couples, this is likely to constitute indirect discrimination.

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

Direct discrimination cannot be justified. As the treatment is already offered to one woman in lesbian couple I do not think that art. 3(2) would have any effect in this case.

Provided that the case is considered as an indirect discrimination, the policy applied in the present case can be justified if there is legitimate aim and if the policy used is appropriate and necessary for achieving such aim. It is questionable if the preservation of medical resources is a legitimate aim as the complainants asked only for sharing the total number of donor insemination allocated to all couples (whether heterosexual or lesbian) and no information is given on the cost of treatment preceding the donor insemination.

Decision of the European Court of Human Rights in *Karner v Austria* and *EB v France* would have effect if a claim was brought under human rights legislation. The effect of European Court of Justice's decision in *Maruko* case is expressed in Explanatory memorandum to Proposed Directive: "Member States remain free to decide whether or not to institute and recognise legally registered partnership. However once national law recognises such relationships as comparable to that of spouses then the principle of equal treatment applies."

**6. In the alternative to a claim being brought under anti-discrimination law, would a claim be able to be brought under your national human rights legislation pursuant to articles 8 and 14 of the European Convention of Human Rights and is it likely that the claim would be successful? Would your organisation be able to support the claimant in those proceedings or intervene to provide submissions?**

Under national human rights legislation a claim can be brought before the Constitutional Court of Slovak Republic. It is difficult to predict the decision of the constitutional court since the same-sex partners have no legal recognition in the Slovak Republic. Slovak National Centre for Human Rights would not be able to represent the claimant in the proceeding because according to art. 1(3) of the Act No. 308/1993 Coll. on Establishing the Slovak National Centre for Human Rights the centre is competent to represent a party in the proceedings on matters related to violation of the equal treatment principle according to the Anti-discrimination Act.

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

According to par. 9 of the Slovak Anti-discrimination Act, the complainant may seek that the person violating the principle of equal treatment be made to refrain from such conduct and, where possible, rectify the illegal situation or provide adequate satisfaction. Should adequate satisfaction prove to be not sufficient, especially where the violation of the principle of equal treatment has considerably impaired the dignity, social status and social functioning of the victim, the victim may also seek non-pecuniary damages in cash.

## Sweden

*Answers provided by the Equality Ombudsman*

**1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

Yes, the case falls within the Swedish Discrimination Act, Chapter 2, Section 13 "Health and medical care and social services".

**2. Alternatively, would this case fall within the scope of the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?**

Alternatively, the case would fall within the scope of the Proposal Directive in the field of goods, facilities and services. The possibility of taking part in assisted procreation through the assistance program provided a county council falls within the definition of health care (article 3 a in the Proposal Directive). It also falls within the definition of access to and supply of services available to the public (article 3 d).

Concerning Case C- 157 / 99 B.S.M Geraets-Smits, it is apparent from the case that hospital health care is covered by the term "service" in the treaty, previously article 60, whether or not the hospital health care is provided inside or outside of a hospital environment (p. 53). Of course, the term "services" used in the treaty generally refers to services provided in exchange for compensation. Hospital health care that is provided in a Member State and is paid for by the patient does not fall outside the area of application for the treaty just because the costs for the treatment are paid for through a legislated health care insurance (p. 55). Nor does the fact that hospital health care is financed through health insurance schemes based on collective agreements lead to the conclusion that such treatment falls outside the definition of a service set out in article 60 of the treaty (p. 56). Furthermore, it is not necessary that the person receiving the service also pays for the service to be covered by article 60.

Given the Geraets-Smits case, it should be clear that the possibility to receive access to assisted procreation through a tax financed activity carried out by the county council is a service.

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

In Sweden the Equality Ombudsman supervises compliance with the Discrimination Act (also according to an Act concerning the Equality Ombudsman). The Ombudsman can, as party, take cases to court and claim damages on behalf of the individual involved.

Non-profit organisations and employees' organisations as well may bring an action to court, as a party, on behalf of an individual according to the Discrimination Act.

The Member States shall designate a body/bodies for the promotion of equal treatment but also for providing independent assistance to victims of discrimination (Art. 7, art. 12 the Proposed Directive)

**4. Is there direct or/and indirect discrimination against A and B on the ground of sexual orientation? In relation to indirect discrimination, could applying the criterion of treating same-sex spouses and opposite-sex spouses equally lead to indirect discrimination?**

Firstly, it could be argued that there is direct discrimination against both A and B on the ground of sexual orientation. B is mistreated since she did not receive any attempts of insemination. A is mistreated as well since she did not get the possibility to become a parent on the ground of being homosexual.

A decisive issue in examining a discrimination claim lies in establishing the issue of causation in relation to the discrimination ground at issue, and not on the use of a comparator. The comparison is thus not a necessary requirement, but it is a means for showing the connection between the treatment and the ground at issue.

Even if there is no comparator, a less favourable treatment can be discrimination, if there is a connection with the ground of discrimination. In this case the issue is sexual orientation. This could, for example, be the case if only persons that fall within a specific discrimination ground, are the only ones affected by the less favourable treatment. This is apparent from EU case law.



The circumstances in case C-177/88, Elisabeth Johanna Pacifica Dekker against Stichting Vormingscentrum voor Jong Volwassenen, REG 1990, s. I-03941 were in brief the following. Elisabeth Dekker applied for a job as a teacher with an educational facility for young people run by the VJF company. In connection with the application she pointed out to the committee examining the applications that she was in her third month of pregnancy. Even though the committee put her name forward as the most qualified applicant for the job, VJF determined that she would not get the job. VJF said that the reason was that she was already pregnant when she turned in her application, which meant that VJF could not get compensation from its insurer for the daily compensation that the company would have to pay to Dekker during her parental leave. As a result VJF would lack the economic ability to hire a replacement during her Dekker's parental leave, thereby leaving the company with a shortage of personnel.

The Court determined that VJF's actions violated the ban against direct discrimination in the equal treatment directive concerning gender and employment conditions. The Court concluded that only women could be denied employment due to pregnancy. If this occurs, it is therefore to be considered direct discrimination due to gender. A comparison with how a male applicant would have been treated was thus considered unnecessary for a finding of direct discrimination.

A similar line of thinking applies in this case. Only a woman in a lesbian relationship can be denied treatment in the form of assisted procreation because her partner has already had access to such treatment. This means that the negative effect of the regulation has a direct connection with sexual orientation. Against the background of the Court's interpretation of the concept of discrimination in the case above, a comparison with the treatment of persons with another sexual orientation is not necessary in order to find that direct discrimination has occurred. The county council has thus, by denying B treatment related to assisted procreation and thereby hindering A and B from having children together, violated the ban against direct discrimination.

The direct connection to sexual orientation is apparent from the rules. It is apparent from the county council rules that the regulation implemented concerning B applies solely to lesbian couples. "Concerning lesbian couples, only one of the women will be investigated and treated. The couple is to determine which individual this will apply to." In other words, this is a rule that has the direct purpose of and the effect of limiting access to the treatment to women living in lesbian relationships.

Secondly it could be argued that – since the county council is giving treatment only to one person within a couple – that is a neutral criterion disadvantaging lesbians since both the women within a relationship have the biological conditions for receiving treatment.

A less favourable treatment within the meaning of the law arises when someone uses a rule, regulation or behaviour that seems neutral, but that in practice disfavours persons who belong to one of the groups protected by the discrimination legislation. To determine if a rule, criteria or behaviour particularly disfavours persons from a specific group, a comparison has to be made between the group that the person belongs to and some other group. If the comparison shows that there is significant difference in treatment of the groups, this is an indication that indirect discrimination has occurred. However, in the eyes of the law there is a certain amount of leeway for determining that this treatment is justified. Two criteria must be fulfilled. Firstly, the purpose of the rule must be objectively acceptable. Secondly, the measure must be appropriate and necessary. If there are other non-discriminatory measures available for achieving a reasonable goal, the less favourable treatment constitutes indirect discrimination.

For heterosexual couples, the rule in question has no negative effects. The couple's possibilities to get children together do not decrease when no insemination attempts are made in relation to the male in the couple. However, for a lesbian couple the rule means that the couple is denied a treatment that could lead to them getting children, i.e. a treatment that would end their involuntary childlessness.

The rule applied by the county council is thus of a type that its negative effects only apply to lesbian couples. The DO has in this manner showed that it is probable that the county council, through application of this apparently neutral rule, treated A and B less favourably. To avoid liability for damages for indirect discrimination, the county council must thus show that the rule is appropriate and necessary for achieving an acceptable goal.

Concerning the issue of the county council's lack of medical resources in terms of donated sperm, it is possible to argue that avoidance of every increased use of this type of limited medical resource should not be seen as a valid goal in the meaning of the discrimination law. To justify a rule with a discriminatory effect, it should instead be necessary that the question of the avoidance of an increased use of limited medical resources leads to a much greater risk for substantial disturbances in the health care activities of the county council.

Concerning the county council's lack of economic resources, it is apparent from EU case law that this does not constitute the type of acceptable goal that can justify the use of discriminatory rules. The court has repeatedly determined that budget issues cannot justify less favourable treatment between men and women that otherwise constitutes indirect discrimination due to gender. The case law of the court indicates thus that a public authority and/or an employer cannot justify the use of a discriminatory rule solely through an assertion that costs will rise if the discriminatory rule is abolished. (See the ECJ case of 20 March 2003, case no. C-187/00, Helga Kutz-Bauer v. Freie und Hansestadt Hamburg, particularly paragraphs 59-61, and the other cases referred to).

If the court finds that the budget considerations (the county council's lack of funds) or that the lack of medical resources constitute a justifiable goal/purpose, the county council has still not proved the appropriateness or necessity of the rules at issue.

Concerning the county council's attempts to justify its decision to deny B access to treatment due to the increased demands on the council's economic resources due to "double" treatments in comparison to heterosexual couples, the following needs to be pointed out. Since the treatment of A was stopped after three treatments (of a series of six treatments), the county council could still have offered the treatments to B without the couple receiving a greater number of treatments than those available to other couples. Providing treatment to B would thus not have led to a greater demand on the resources of the county council. The county council's denial of treatment to B has thus, in this regard, not helped the council to achieve its goal of saving resources.

Concerning the issue of increased costs for "double" investigation, the council has shown costs for future investigations given the assumption that both women in a lesbian relationship are offered treatment for assisted procreation.

In the first place, you have to look at the factors used by the council in its comparison. A comparison between the costs for the investigations must reasonably cover the entire period for the treatment of homosexual couples and heterosexual couples, respectively. In the investigation of a heterosexual couple, both the man and the woman are examined in order to find out about the possible problems, examinations which naturally result in the use of various economic resources. Thus, "double" investigation costs arise also in regard to heterosexual couples.

The situation is different in regard to lesbian couples. Only the woman who is to undergo treatment is the subject of a medical investigation. There is no investigation of the other woman. Up to the point where B wanted to take over the remaining treatments, no medical investigation had taken place in regard to B. To set up "double investigations" at that time only means that the council did what it already was doing concerning heterosexual couples – i.e. investigating both persons in the couple.

Even if one disregards the above and uses the council's information on increased costs as a starting point, this would mean that the increased costs are so insignificant that they cannot be used to justify something that otherwise constitutes indirect discrimination. The council's

information indicates an increase of about EUR 442, which can be compared to the total cost for the series of treatments at issue, i.e. about EUR 7,528.

It should also be pointed out that in order to justify a rule that leads to indirect discrimination, the measures must be necessary. In other words, there cannot be another means for achieving the goal at issue.

Concerning the council's assertion about the lack of medical resources in terms of a lack of access to donated sperm, given the same reasoning that applied to the council's concerns about an increased use of financial resources, it is clear that this cannot justify the denial to B of assisted procreation. The council could have agreed to supply the rest of the treatment that was involved in the commitment to A, to the same extent that such treatments are provided to other couples. Therefore, even in this case, the council's actions did not help the council to achieve its stated goal.

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

In accordance with the argumentation under question 4, there is no objective justification for the disadvantageous treatment by the county council. Nor is there a possibility to assert an exception to the ban on direct discrimination. There is no exception in the Swedish legislation or in the Proposed Directive. Concerning recital 17 and article 3(2) in the Proposed Directive, there is no contradiction between the national law and the Proposed Directive since there is a possibility of receiving assisted procreation for lesbian couples according to the Swedish law. According to the case law from the ECJ (C -267/06, Maruko), the court upheld the right to not be discriminated against within the context of the national legislation.

According to the case law from the ECHR; particularly convincing and substantial reasons are needed to justify differences in treatment related to sexual orientation and the rights that are covered by article 8 (p. 91 E.B. v. France). However, this is already required by EU law as well.

**6. In the alternative to a claim being brought under anti-discrimination law, would a claim be able to be brought under your national human rights legislation pursuant to articles 8 and 14 of the European Convention of Human Rights and is it likely that the claim would be successful? Would your organisation be able to support the claimant in those proceedings or intervene to provide submissions?**

ECHR applies as Swedish law. It is possible for the Swedish Equality Ombudsman (DO) to also refer to the convention in those cases where a lawsuit is filed concerning violations of the discrimination legislation. However, it is not possible for the ombudsman to assist an individual in court in such cases or to intervene.

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

According to the Swedish legislation against discrimination, the person who is responsible for the discrimination can be required to pay damages for the violation of personal integrity involved in the discrimination. The Equality Ombudsman has the possibility, as a party, to claim damages on behalf of the complainant in the district court. However, the Equality Ombudsman is first required to attempt to reach a settlement with the opposite party.

## Annex 3

# Country responses to the case study on age discrimination

## Austria

*Answers provided by the Ombud for Equal Treatment*

### **1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

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

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

According to the allocation of competences between the federal state and the Länder this case would fall within the scope of the federal equal treatment legislation. The Equal Treatment Act on federal level however only prohibits discrimination on grounds of age in employment and occupation (according to the directive 2000/78/EC), but not in other areas such as goods and services. At the moment there are ongoing negotiations about an amendment of the Equal Treatment Act, which would inter alia cover a provision on equal treatment on grounds of age in the field of goods and services.

### **2. Alternatively, would this case fall within the scope of the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?**

The case would fall within the scope of the Proposed Directive, because the Proposed Directive covers services (art. 3 of the Proposed Directive) and prohibits discrimination on grounds of age. Services in the meaning of the Proposed Directive are services within Article 50 EC Treaty, like loans for example.

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

The authority of the Ombud for Equal Treatment to deal with discrimination cases is limited to cases within the scope of the federal law (Equal Treatment Act).

In case the Proposed Directive will be put into force and implemented into the Austrian legal system, the competent organisations will probably be the following (art. 12 Proposed Directive): The Ombud for Equal Treatment can – as a first step – provide advice, support and information and can further on intervene, negotiate, try to find a friendly settlement or any other out of court solution. The Ombud can also submit the case to the Equal Treatment Commission, but cannot file a law suit at the court.

The Equal Treatment Commission on the other hand is responsible to decide upon a violation of the Equal Treatment Act in proceedings free of charge after hearing both sides separately.

The alleged victim can submit the case by him/herself or via the Ombud for Equal Treatment or other representatives (like NGOs). The Equal Treatment Commission is not competent to grant damages; it only delivers a non-binding decision upon the violation of the prohibition of discrimination and gives recommendations on how to apply the right to equality. The Civil Court delivers a binding judgement and is competent to grant damages in case of a violation of the Equal Treatment Act.

**4. Is there direct or/and indirect discrimination on the ground of age? In relation to age discrimination, could applying the criterion of treating all people over 70 equally lead to indirect discrimination?**

As the different treatment was based on a certain age (-70/+70), so that being 70 years was the boarder line and only reason why the complainant did not get the loan, there seems to be direct discrimination.

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

***In answering this question please consider whether under your current national legislation or under article 2(7) and recital 15 of the Proposed Directive, the age criterion would be treated as a "key factor in the assessment of risk" to justify the age discrimination?***

The Proposed Directive does not preclude differences in treatment on grounds of age if they are objectively and reasonably justified by a legitimate aim, and if the means of achieving that aim are appropriate, proportionate, necessary and effective.

The principle aims of the credit provider were to avoid offering risky loans and not get paid back all of the loan purchases. These aims seem to constitute legitimate aims. The credit provider tried to achieve this aims by having a fixed age limit of 70 years as sole criteria for assigning loans. According to the Proposed Directive, the means have to be appropriate, proportionate, necessary and effective.

The credit provider did not refer to relevant actuarial data, accurate statistical data or medical knowledge stating that age is a determining factor for the risk management of the credit provider. In contrast, he just argued that elderly people typically had low incomes and that a rise in the number of loans provided to elderly people had recently led to raising the risk level. That does not seem to be an explanation why and in how far age is a determining factor in the meaning of art. 2(7) of the Proposed Directive.

Even if the credit provider would have referred to relevant actuarial data or accurate statistical data one has to keep in mind that in this objective case the complainant – at the age of 70 years – asked for a loan of EUR 290 and could show that his monthly income by far exceeded the typical income of persons of his age. A pension can be considered as a stable and predictable income. Moreover the loan would be secured at least to some extent insofar as the credit provider can claim the heirs in case the claimant dies before having paid back the loan. Therefore, the means – namely a fixed age limit only – of achieving the before mentioned aim do not seem appropriate, proportionate, necessary and effective.

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

The sanctions would be paying damages (immaterial and material damage). Due to the provision of the burden of proof the financial institution would have to provide evidence (for example accurate statistical data) to show that the complainant did not get the loan because of objective reasons (for example the particular complainant's financial situation). It does not seem to be enough if the financial institution refers only to the typical income of persons of that age without taking into account the specific financial situation of the complainant related to the sum of the loan.

# Belgium

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

**1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

Yes. The Belgian 10 May 2007 Anti-discrimination Act prohibits – inter alia – direct and indirect discrimination on the ground of age in the access to and offering of goods and services which are available to the public (art. 5, §1, 1<sup>o</sup>). The case at hand regards access to financial services, more specifically hire purchase (consumer credit).

**2. Alternatively, would this case fall within the scope of the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?**

Yes. The Proposed Directive prohibits – inter alia – direct and indirect discrimination on the ground of age in the access to and supply of goods and services which are available to the public (art. 3, sub d). This includes financial services such as hire purchase (consumer credit).

The Proposed Directive has no direct “horizontal” effect in the dispute between the complainant and the credit company, but may influence the outcome through the doctrine of indirect effect.

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

In general, legal disputes regarding credit agreements (cf. Belgian 12 June 1991 Consumer Credit Act), including the denial of payment facilities, fall within the competence of the Justice of the Peace (note that this Belgian tribunal is very different from its namesake under common law).

The 10 May 2007 Anti-discrimination Act also provides in specific summary proceedings in order to obtain a prohibitory injunction. In the case at hand, this type of legal action would need to be introduced before the President of the First Instance Tribunal or the President of the Commercial Tribunal.

The CEOOR’s broad legal mandate as an independent non-judicial equality body includes – inter alia – to receive and follow-up on discrimination complaints, inform, advise, mediate and litigate (within the scope of the federal Anti-discrimination and Anti-racism Acts).

The supervising authority for the Belgian financial sector is the Banking, Finance and Insurance Commission, which mission includes the protection the consumers of financial services. However, except in the field of mortgage credit and supplementary pensions, the Commission does not examine individual complaints. For that purpose, there is a particular Mediation Service Banks - Credits - Investments, presided by the Ombudsman (appointed by the financial sector) and a consumer representative, which can help settle the dispute and issue non-binding advice.

**4. Is there direct or/and indirect discrimination on the ground of age? In relation to age discrimination, could applying the criterion of treating all people over 70 equally lead to indirect discrimination?**

The Belgian Anti-discrimination Act defines “direct distinction” as the situation which occurs when a person is treated less favourably than another is, has been or would be treated in a comparable situation on the ground of age or one of the other grounds protected by this Act (art. 4, 6<sup>o</sup>). A direct distinction which cannot be justified under the provisions of the Anti-

discrimination Act, implies (forbidden) direct discrimination (art. 4, 7<sup>9</sup>). The Belgian definition is de facto identical to art. 2(2) sub a) Proposed Directive.

In case the complainant's application for hire purchase (consumer credit) was turned down because of his age. The financial institution's policy of limiting credit access to consumers under the age of 70, clearly implies a direct distinction (discrimination) on the ground of age. This thesis holds even in the case of a mixed motive decision, i.e. if the complainant's age would have been only one of the elements – amongst other – that influenced the financial institution's refusal<sup>18</sup>.

The hypothesis of indirect distinction (discrimination) appears to be irrelevant, since the general tendencies invoked by the financial institution are clearly age based and can therefore not be considered as being "apparently neutral". If there were statistical or actuarial data to sustain the financial institution's argument, then the question is whether there exists an objective justification for the direct age discrimination (cf. infra question 5).

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

***In answering this question please consider whether under your current national legislation or under article 2(7) and recital 15 of the Proposed Directive, the age criterion would be treated as a "key factor in the assessment of risk" to justify the age discrimination?***

Objective justification or exception

Art. 2(7) Proposed Directive holds that, in the provision of financial services, Member States may permit proportionate differences in treatment where, for the product in question, the use of age (or disability) is a key factor in the assessment of risk based on relevant and accurate actuarial or statistical data.

Under the Belgian Anti-discrimination Act, a direct distinction on the ground of age in the area of goods and services implies (forbidden) direct discrimination, unless the difference in treatment is objectively justified by a legitimate aim and the measures taken to achieve this aim are appropriate and necessary (art. 7). The possibility of using age related criteria for actuarial calculations is only explicitly mentioned in the specific provision for age discrimination in supplementary schemes to social security (art. 12, §2). Nevertheless, when age is a key risk assessment factor for a particular financial service, the general objective justification test will be interpreted accordingly.<sup>19</sup>

<sup>18</sup> In some gender cases the ECJ suggested that only the "fundamental reason" of the decision is determining as to whether there is direct discrimination (Dekker, C-177/88, §10; Habermann, C-421/92, §14). On the other hand, in the Enderby case (C-127/92, §§24-29) the ECJ argued that when the defending party refers to another factor to justify a certain differential treatment, the national court should examine to what extent this factor may wholly justify the discrimination.

More recently, in his opinion on the Coleman case (C-303/06), Advocate General Poirares Maduro held that "religious belief, age, disability and sexual orientation (...) are characteristics which should not play any role in any assessment as to whether it is right to treat someone less favourably" (§10) and that "(...) the Directive [2000/78/EC] performs an exclusionary function: it excludes religious belief, age, disability and sexual orientation from the range of permissible reasons an employer may legitimately rely upon to treat an employee less favourably than another. In other words, after the coming into force of the Directive it is no longer permissible for these considerations to figure in the employer's reasoning when she decides to treat an employee less favourably." (§18).

Under the Belgian anti-discrimination legislation, the mixed motive issue is partly encountered by the provision regarding prefixed damages. In case of discrimination in employment or additional schemes to social security, the prefixed sum of six months gross salary for material and moral damages may be reduced to three months when the defendant can prove that the less favourable treatment would also have occurred on non-discriminatory grounds. In case of discrimination in other areas, the prefixed sum of EUR 650 for moral damages may be raised to EUR 1,300 when the author fails to prove that the adverse treatment would also have occurred on non-discriminatory grounds (cf. answer to question 6). The Belgian model is inspired by the ECJ ruling in Draehmpaehl (C-180/95).

<sup>19</sup> It is not quite clear to which extent art. 2(7) Proposed Directive deviates from the general objective justification scheme. In the light of the current provision of art. 7 Anti-discrimination Act, the CEOOR tends to argue that a difference of treatment on the ground of age in the provision of a financial product – even when it is based on relevant and accurate actuarial or statistical data – is only justified when in concreto there exist no alternative means which are easier to reconcile with the principle of equal treatment.

In the case at hand, the CEOOR would argue that, although the financial institution's concern of limiting high risk loans is legitimate, the refusal of the complainant's second credit application on the sole ground of age was neither appropriate nor necessary given his sound financial standing and good credit history. Even if there is statistical evidence to show that people over the age of 70 generally have lower incomes, it is hard to see the relevance of this argument when an individual applicant – regardless of his or her age – is proved to be creditworthy.

#### Consumer credit and mortality tables: a Belgian example

The issue becomes more complex when financial institutions invoke mortality tables. While such statistics are indeed likely to play an essential role in for example the area of health and life insurance, it is less clear whether this is also the case in the area of financial products such as hire purchase (consumer credit).

The CEOOR is currently dealing with three complaints regarding the refusal of application for a particular department store credit card based on the sole ground of age (70+). The financial institution that issues this card referred to its obligations under the 12 June 1991 Consumer Credit Act (which is mainly intended to protect consumers against exuberant credit debt). According to this act, a credit company is only allowed to conclude a credit agreement with a consumer when it can reasonably assume that he or she will be able to fulfil the contractual obligations. The financial institution also (vaguely) mentioned the average life expectancy in Belgium and stated that there exist more appropriate – i.e. limited duration – credit arrangements for elderly people.

The CEOOR replied that since age as such is not determining for the customer's financial standing and creditworthiness, the use of a standard age limit is, in principle, arbitrary and therefore not objectively justified. Even if the financial institution's policy would be inspired by actuarial or statistical data, the CEOOR is not convinced that age is actually a key risk assessment factor for this particular financial product (moreover, by analogy, since the Consumer Credit Act explicitly prohibits credit companies from asking health related questions). Of course, it is in none of the parties' interest – nor in that of the consumer's heirs for that matter – that significant credit debts remain unsolved after decease. However, the CEOOR believes that the risk of a deficit legacy is or should be sufficiently counterbalanced by the scrupulous assessment of the consumer's current financial standing and ability to repay. Finally, even in the unlikely hypothesis that age is a key risk factor for consumer credit, there certainly must be alternative means which reconcile the use of general statistics with the individual applicant's financial status. In subsidiary order, the credit company could demand for additional loan security (e.g. third party guarantee) or at least propose an alternative financial product to elderly consumers which offers similar advantages. The Federal Public Service for Economy does not exclude that age may be a relevant factor for certain types of credit agreements, but agrees with the CEOOR's line of reasoning in this case.

#### In conclusion

Under the Proposed Directive there remains substantial legal uncertainty regarding the use of age (and disability) related criteria in the vast area of financial services. The CEOOR shares the European Economic and Social Committee's (EESC) concern that the broad exception of art. 2(7) Proposed Directive will perpetuate the well-documented disadvantage of young people, older people and disabled people in relation to banking and a range of insurance products.

The explanatory memorandum of the Proposed Directive mentions that the European Commission will initiate a dialogue with the insurance and banking industry together with other stakeholders, to achieve a better common understanding of the areas where age or disability are relevant factors for the design and pricing of the products offered in these sectors. Consequently, the exception of art. 2(7) of the Proposed Directive should be curtailed



by means of a non-limitative list of types of financial services which are by their nature excluded from its ambit.

As to the financial services for which age and disability do constitute a key risk factor, the CEOOR joins the EESC's recommendation that the actuarial or statistical data used by providers of these services should meet the same requirements for transparency, review and oversight should apply for age and disability as apply for gender<sup>20</sup>. More precisely, the CEOOR is in favour of creating an independent expert organ for this purpose.

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

In Belgium, all provisions contrary to the 10 May 2007 Anti-discrimination Act, as well as clauses which stipulate that contracting parties waive the rights which are guaranteed under this act, are null and void. Note that the Anti-discrimination Act cannot be invoked against a difference of treatment which has been established by or in execution of another law (which does however not appear to be the case here).

Victims of discrimination, the CEOOR, certain interest organisations or the public prosecutor can introduce summary proceedings before the President of the competent Tribunal in order to obtain a prohibitory injunction (possibly combined with penalty payment and measures of publicity). If the convicted discriminator fails to comply with the ceasing order, he is liable for a criminal offense.

When discrimination occurs outside the area of employment, victims may claim a prefixed sum of EUR 650 for moral damages, raised to EUR 1,300 depending on the severity or when the author fails to prove that the adverse treatment would also have occurred on non-discriminatory grounds. Alternatively, victims may try and prove the actual (material and moral) damages suffered (but not in the context of summary proceedings).

## Great Britain

Answers provided by the Equality and Human Rights Commission

**1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

Currently in the UK, there is anti-discrimination legislation relating to disability, sex, race, religion or belief and sexual orientation in relation to the provision of goods, facilities and services. However, there is currently no legislation which prevents discrimination on the grounds of age. At present, age discrimination is only outlawed in relation to employment and vocational training, but not in relation to goods, facilities and services. The Employment Equality (Age) Regulations 2006, (the "Age Regulations") introduced the first anti-age discrimination laws in the UK.

However, it should be noted that legislation currently before Parliament (the Equality Bill) aims to rectify this by making provisions for outlawing age discrimination in the provision of goods and services, including financial services and is expected to come into force in October 2010.

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<sup>20</sup> According to the EESC, the Proposed Directive should allow Member States to permit differences in treatment only if they require providers of financial services to publish up-to-date actuarial or statistical data relevant to the particular 'risk' activity, for example driving, travel, mortgage repayment, and to the age group or to the particular disability concerned. These data should be reviewed periodically to note any variation of risks, and Member States after a fixed period should be required to review the evidence for differential treatment and to consider gradual sharing of risks and equalisation of premiums.

However, the exceptions relating to age discrimination in these fields are going to be produced subsequently to the Bill coming into force and are not expected to be implemented before 2012.

The UK Government has outlined its proposals for age discrimination in the provision of goods, facilities and services consultation. Justified or beneficial differential age-based treatment will continue to be allowed, where this is objectively justified, or permitted under a cross-strand exception which applies to all protected characteristics or a specific age exception under the proposed secondary legislation.

While various policy options have been considered, the Government has decided on three options for dealing with age discrimination in the provision of goods, facilities and services and the exercise of public functions:

Option 1 is strict implementation of the ban on age discrimination, with no specific exception;

Option 2 is a tailored specific exception allowing age to be used provided that it is proportionate to risk and costs. This approach would allow minimum and maximum age limits and the use of age bands. Evidence of risk factors and data would have to be weighed appropriately but commercial considerations could be taken into account and age-based pricing would not require strict mathematical proportionality. This option would prevent unjustifiable age discrimination, such as an insurer deciding to offer insurance to older people at inflated prices that are not related to risk.

Option 3 is a wide specific exception, which would mean that all current practices could continue. It could also mean that service providers would use age as they wish and its use would not necessarily be proportionate to the risk and cost. There would be no requirement for signposting or referral. This would also mean that people would not be able to legally challenge decisions if they felt that they were being treated unfairly.

Option 2 is the government's preferred option. However, as stated above, the laws have not been enacted so this case does not yet fall within the scope of anti-discrimination legislation in the UK.

***2. Alternatively, would this case fall within the scope of the proposal for a Council directive in implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods, facilities and services?***

In July 2008, the European Commission made a proposal for a new directive on anti-discrimination outside employment based on the grounds of religion/belief, sexual orientation, age and disability. The Proposed Directive, if passed, will extend existing EU protection to the provision of goods, facilities and services, education and healthcare, providing much-needed legal protection from unfair age discrimination, to children, young people and adults. This case would fall within the scope of the Proposed Council Directive.

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

In the UK, when age discrimination occurs at the workplace, the victim can bring a claim at the Employment tribunals under the Age Regulations.

In cases of age discrimination outside of employment, as there is currently no legislation prohibiting such discrimination, no court is competent, however when the legislation does come into force the county court will be competent.

The Equality and Human Rights Commission of the UK (EHRC), in relation to employment, provides legal assistance for individuals in age discrimination claims and can represent individuals in age discrimination cases before courts or tribunals. The EHRC also provides assistance in the form of support in taking legal action as well as investigating complaints of

discrimination and usually can force compliance with their investigations by all persons involved. It cannot however decide claims of discrimination.

**4. Is there direct or/and indirect discrimination on the ground of age? In relation to age discrimination, could applying the criterion of treating all people over 70 equally lead to indirect discrimination?**

The Proposed Directive which establishes a framework for equal in the access to and supply of goods and services<sup>21</sup> prohibits both direct and indirect discrimination based on religion or belief, disability, age or sexual orientation. In this Directive, goods should be taken to be those within the meaning of the provisions of the EC treaty relating to the free movement of goods. Services should be taken to be those within the meaning of Article 50 of the EC Treaty.

Under the Proposed Directive, direct discrimination consists of treating someone differently solely because his or her age, disability, religion or belief and sexual orientation. From the facts of the case, this will be a clear case of direct discrimination as it involved the claimant being treated less favourably (not being able to access credit primarily because he was over 70 years of age).

Indirect discrimination occurs when a person is put at a particular disadvantage compared with other persons by an apparently neutral provision, criterion or practice. It is probably not an indirect discrimination case as the provision needs to be neutral.

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

Under the Proposed Directive, age distinctions will be deemed justified in three circumstances.

Firstly, when a person is subjected to what would otherwise constitute direct age discrimination, but where a Member State has provided that the use of an age distinction is proportionate and necessary "within the context of national law" to attain a broad set of legitimate objectives (Article 2(2)(a)).

Secondly, when a person is subject to what would otherwise constitute indirect discrimination on the grounds of age, but the application of the provision, practice or criterion in question is justified as objectively necessary and proportionate (Article 2(2)(b)).

Thirdly, Article 2 (7) of the proposed draft Directive is an exception to both direct and indirect age discrimination in financial services. It specifically deals with the provision of financial services when age or disability is a key factor in the assessment of risk. This provision is wider than the similar provision in Article 7(2) of the Gender Goods and Services Directive in that the Gender Goods and Services Directive requires that the factor concerned in the assessment of risk is a "determining factor" whilst this draft only requires that it is a "key" factor.

The crucial issue in this scenario is whether the system of affording loans to the public which denied persons over 70 years same access because they were perceived typically to have low incomes which, in turn created high risk levels for financial institutions, was justified. This would require an analysis of both their stated aims and whether the means used to achieve those aims were proportionate.

Legitimate aim?

The financial institution's reasons for not providing the loan stated aims of the financial institution were that;

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<sup>21</sup> Directive 2004/113/EC

- (i) the statutory regulation pertaining to credit institutions contained strict requirements on loan arrangements to ensure effective banking operations;
- (ii) the rise in the number of loans provided to elderly had recently led to raising the risk level of the credit institution.

Overall, in the UK, there is undeniably, a clear differentiation of consumers in the financial market on the basis of their age. However, it may seem that the differences are driven by the real differences between age groups in the costs of provision and the level of demand. There is further evidence to show that any restriction on risk-based and cost-reflective pricing leads to distortions in the operation of credit and loan markets resulting in higher prices. There is also significant evidence on the importance of age as a proxy for many risks.<sup>22</sup>

The Government of the UK has made it clear, with the above economic arguments, that any new law prohibiting age discrimination would not mean the complete removal of age-based practices in financial services provision. The policy objective is to prohibit the use of those practices that are unreasonable and cannot be justified on the basis of objective evidence.

Whilst economic considerations may be a legitimate aim, there is still a requirement that any difference in treatment is "objectively necessary and proportionate". In the cases of *Mangold*<sup>23</sup> and *Palacios*,<sup>24</sup> it was held that Member States enjoy "a broad discretion in their choice of measures capable of attaining their objective in the field of social and employment policy" but that there was still a requirement for any difference in treatment to be objectively, necessary and proportionate.

It is possible the aims advanced for the differential treatment based on age by the company would be considered legitimate on the basis of the reasons provided efficiency of pricing, reduced costs and risk considerations etc. But was it a proportionate means of achieving the aim?

The financial company may find it difficult to justify its treatment of the claimant if it failed to take the claimant's financial standing and previous credit record into consideration.

Relevant factors are:

- there was no evidence that the difference in treatment was based "on relevant and accurate actuarial or statistical data";
- no evidence that other alternatives were considered.

The main alternative options, which the company failed to consider and which could have reduced the costs of dealing with persons over certain ages include:

- Offering prices that reflect expected costs (inflated to account for the uncertainty). Such costs, it is said, may be obtained from proprietary data, or from monitoring prices currently available in the market from providers already supplying the age group in question;
- Limit the volume of additional business by offering very high prices (in excess of the prices already obtaining in the market) or imposing restrictions on other risk characteristics; and/or
- Remove certain products entirely from the market to avoid supplying to customers with higher risk.

Taking all these factors into account the means to achieving their legitimate aim, on balance, was disproportionate and therefore, probably unlawfully, discriminatory.

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<sup>22</sup> "The use of age-based practices in financial services"- May 2009 prepared for the Government Equalities Office.

<sup>23</sup> *Werner Mangold v Rudgier Helm*, C-144/04

<sup>24</sup> *Palacios de la Villa v Cortefiel Services SA*-C-411/05

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

Under the Directives, the national courts must ensure violations of the principle of equal treatment are satisfactorily remedied. Sanctions against discriminators must be effective i.e. achieve the desired outcome, proportionate, i.e. adequately reflect the gravity and nature of loss and/or harm suffered and dissuasive, i.e. deter future acts of discrimination.

Financial compensation may include compensation for past and future loss and injury to feelings, damages for personal injury such as psychiatric damage or exemplary damages to punish the discriminator. The victim is, accordingly directly compensated.

Sometimes there are specific sanctions on companies or organisations which differ from those imposed on individuals. In this case the likely sanction would be damages against the company in a county court.

## Cyprus

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

**1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

No this case does not fall within the scope of any anti-discrimination legislation. (Currently, discrimination on the grounds of age is directly prohibited by legislation only in the field of employment.)

**2. Alternatively, would this case fall within the scope of the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?**

Yes, this case would fall within the scope of the Proposal Directive.

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

The District Court and the Equality Body.

**4. Is there direct or/and indirect discrimination on the ground of age? In relation to age discrimination, could applying the criterion of treating all people over 70 equally lead to indirect discrimination?**

The application for credit seems to have been rejected solely on the fact that the complainant was over 70 years old and, thus there is direct discrimination on the ground of age.

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

***In answering this question please consider whether under your current national legislation or under article 2(7) and recital 15 of the Proposed Directive, the age criterion would be treated as a "key factor in the assessment of risk" to justify the age discrimination?***

The Proposed Directive contains some special rules for banking (and insurance) services. Concretely, in article 2(7) of the Directive, it is recognised that age can be an essential

element of the assessment of risk in certain financial products and, in such cases, proportionate differences in treatment based directly on age may be allowed. Furthermore, it is provided that the use of age in the assessment of financial risks must be based on, and supported by, "relevant and accurate actuarial or statistical data".

In this case, and based on the facts given, the adoption of the controversial criterion of excluding clients over 70 years old from being granted credit or loans, was not supported by any statistical data. We agree with the Equal Treatments Authority's position that, the general rise in the risk level cannot justify the difference in treatment, and, that the complainant's application should have been evaluated primarily on the basis of his/her financial standing.

Further to the above, the controversial policy does not satisfy the requirement of proportionality contained in article 2(7) of the Directive. In our case, the complainant was granted credit of EUR 650 at the age 69, which he duly repaid, and, all other things being equal, was rejected credit of EUR 290, less than half of the original amount at the age of 70+. Excluding in a general manner all people who are over 70 is not a proportionate difference in treatment on the basis of age, in relation to people who are below 70. We believe that the test of proportionality could have been potentially met, if the differentiation in the criteria for granting credit in relation to age was more gradual.

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

There are no provisions for sanctions or remedies in our national legislation for this kind of discrimination. (As stated above, currently, there is no anti-discrimination legislation under which this case could directly fall.)

[However, the Commissioner heading the Equality Body, in cases for which she rules that a discriminatory behaviour/practice has occurred or is occurring, she may impose fines. These fines vary depending on whether they are imposed for discriminatory behaviour that is prohibited by the Law or for non compliance with the Commissioner's Recommendations or Orders/Decrees (e.g. for non compliance with a Decree to end a discriminatory practice (within the deadline that the Commissioner sets), the fine is up to a maximum of GBP 350 (about EUR 600). Furthermore, the Law provides for a fine of GBP 50 (about EUR 85) for each day thereafter for which non-compliance continues.]

## Denmark

Answers provided by the Danish Institute for Human Rights

**1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

The case in question does not fall within the scope of the Danish anti-discrimination legislation.

**2. Alternatively, would this case fall within the scope of the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?**

The case would fall within the scope of the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation article 3, paragraph 1(d) regarding goods and services if the directive had entered into force.

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

Since the case does not fall within the scope of the Danish anti-discrimination legislation the following questions – 3 to 6 – will be answered as if the proposed Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation has entered into force.

As it is it would be the courts that would be competent to handle such a case. Another possibility would maybe be the Danish Complaint Board of Banking Services which deals primarily with complaints made by private consumers against financial institutions. Whether such an institution would look at case from a discrimination point of view is however uncertain.

**4. Is there direct or/and indirect discrimination on the ground of age? In relation to age discrimination, could applying the criterion of treating all people over 70 equally lead to indirect discrimination?**

It is a case of direct discrimination. The reason for this is that the financial institution directly refers to the applicant's age when rejecting to grant her the loan. I find it difficult to see how indirect discrimination can be relevant.

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

***In answering this question please consider whether under your current national legislation or under article 2(7) and recital 15 of the Proposed Directive, the age criterion would be treated as a "key factor in the assessment of risk" to justify the age discrimination?***

It follows from article 2, paragraph 6, that notwithstanding paragraph 2, Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. Furthermore it follows that in particular, the directive shall not preclude the fixing of a specific age for access to social benefits, education and certain goods or services.

It further follows from article 2, paragraph 7, in the provision of financial services Member States may permit proportionate differences in treatment where, for the product in question, the use of age or disability is a key factor in the assessment of risk based on relevant and accurate actuarial or statistical data.

It follows from the explanatory memorandum to the Proposed Directive that article 2, paragraph 7 is added for insurance and banking services, in recognition of the fact that age and disability can be essential element of the assessment of risk for certain products, and therefore of prize. It is stated that if insurers are not allowed to take age and disability into account at all, the additional costs will have to be entirely borne by the rest of the "pool" of those insured, which would result in higher overall costs and lower availability of cover for consumers. The use of age and disability in the assessment of risk must be based on accurate data and statistics.

As stated in the above the issue in this case is not covered by the Danish anti-discrimination legislation and it would therefore be legal to have age as a criterion when granting loans.

However, assuming that the Proposed Directive has entered into force, I believe that a banking service that wants to ensure that their banking operations are effective is seen as a legitimate aim. The question is the whether the means of achieving that aim are appropriate and necessary and whether the age criterion would be treated as a key factor in the assessment of risk.

Whether age would be considered a key factor is difficult to say with certainty. It is however my opinion that age should only be treated as a key factor if the financial institution can prove – by using actuarial or statistical data – that indeed there is a high risk involved when granting loan to persons over the age of 70. If the institution shows that generally there is a high risk involved it must in my opinion not lead to an immediate rejection but rather to the question of whether or not the institution can require some sort of security for the loan. This brings us to whether the means (rejecting all loans to persons over 70) of achieving the aim (ensuring effective banking operations) are appropriate and necessary and this cannot be seen as the case. It is neither appropriate nor necessary and is only upholding stereotyping of a specific group of people. Putting up security for the loan can however be a way to ensure effective banking operations but whether or not the financial institution can request this must depend on a concrete and individual valuation where factors like income, debts, expenses, job situation, housing situation and civil status are part of the considerations. Furthermore it could be taken into consideration that the loan the claimant applied for was a rather small and short term loan and the risk in granting such a loan cannot be big.

The fact that the financial institution did not provide any actuarial or statistical data is of high relevance since the use of age as a key factor in the assessment of risk has to be based on relevant and accurate actuarial or statistical data. If such data is not present then financial institutions has too broad of a margin of appreciation to determine that persons over a certain age are not good customers when it comes to granting loans.

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

No sanctions are available since the case is not covered by the Danish anti-discrimination legislation. If sanctions were available it would most likely be in form of compensation.

## Finland

Answers provided by the Office of the Ombudsman for Minorities

**1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

Yes, the case falls within the scope of the discrimination prohibition in the Penal Code, Chapter 11 Section 11. In criminal cases, however, there is no shift in the burden of proof and the question of intent arises.

The case does not fall within the scope of application of the Equality Act. The Equality Act prohibits discrimination based on age, but the scope of application of the Act does not cover the supply or access to services when it comes to age discrimination (it covers only ethnic discrimination).

In legal literature on the provision in the Penal Code (Heinonen et al: Rikosoikeus, 1999) it is specifically mentioned, that for example refusing to sell a product on credit is discrimination, if selling the product on credit is common. It is also mentioned, that the discrimination provision does not hinder the sales person from checking the financial standing etc. of the buyer.

According to the Penal Code Chapter 11, Section 11:

### Discrimination

A person who in his/her trade or profession, service of the general public, exercise of official authority or other public function or in the arrangement of a public amusement or meeting, without a justified reason

(1) refuses someone service in accordance with the generally applicable conditions;



(2) refuses someone entry to the amusement or meeting or ejects him/her; or  
(3) places someone in an unequal or an essentially inferior position owing to his/her race, national or ethnic origin, colour, language, sex, age, family ties, sexual preference, state of health, religion, political orientation, political or industrial activity or another comparable circumstance shall be sentenced, unless the act is punishable as industrial discrimination, for discrimination to a fine or to imprisonment for at most six months.

**2. Alternatively, would this case fall within the scope of the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?**

Yes. The proposal covers discrimination based on age (article 1) in access to and supply of goods and other services to the public (article 3, 1d). (The relevance of the exceptions in article 2, paragraph 6 and 7 will be discussed below.)

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

Since the case in Finland at the moment only can be dealt with as a criminal case, the district police/prosecutor/district court would be the right instances to deal with the case.

Article 12 of the proposal stipulates that Member States shall designate a body or bodies for the promotion of equal treatment, etc.

**4. Is there direct or/and indirect discrimination on the ground of age? In relation to age discrimination, could applying the criterion of treating all people over 70 equally lead to indirect discrimination?**

It is direct discrimination on the basis of age. No, you need to compare with the treatment of people of other ages. (Saying that all black people are treated equally does not make direct discrimination into indirect – in cases where black people are treated differently than white people).

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

***In answering this question please consider whether under your current national legislation or under article 2(7) and recital 15 of the Proposed Directive, the age criterion would be treated as a "key factor in the assessment of risk" to justify the age discrimination?***

a) The Finnish criminal provision includes the words "without a justified reason", which makes it similar to indirect discrimination. But in my opinion there is no justified reason in this case, because the complainant clearly had the ability to pay and he/she had earlier (three months earlier) also shown that he/she had the will to pay. The age as such did not constitute a great risk for the financial institution, in other words: there was no justified reason to discriminate.

b) It is a situation of direct discrimination on the ground of age. The exceptions in the proposal (article 2, 2.6 or article 2, 2.7) might be relevant.

The exception in article 2, 2.6:

- to be able to refer to this exception there would need to be a provision in the national law stipulating that differential treatment in that specific situation is legal, i.e. not discriminatory. Such an exception would need to be justified by a legitimate aim and the means of achieving that aim would need to be appropriate and necessary.

- in this case the aim is to minimise the risk of the financial institution/ensure the financial standing of the buyer, which is legitimate, but the means of achieving that aim are not

appropriate and necessary. Further, it does not seem as if the national regulation is specific enough. Neither does the situation pass the proportionality test, which means that the exception cannot be used.

The exception in article 2, 2.7:

- according to the proposal, the Member States may permit proportionate differences in treatment where, for the product in question, the use of age (or disability) is a key factor in the assessment of risk based on actuarial or statistical data.

- in this case the exception is not applicable: the Member States had not specifically permitted the differential treatment in question. Neither was age a key factor in the assessment of risk (the overall risk was not very big considering that it was a hire purchase credit and the amount was relatively small). Further, there were no actuarial or statistical data on the level of income of people over 70. Further, an age over 70 or even low income as such does not necessarily mean a great risk in a situation, where the amount of the credit was only EUR 290 and it was a hire purchase credit.

- the lack of statistics is relevant, because according to the Proposed Directive, the use of age as a key factor in the assessment of risk needs to be based on relevant and accurate data. This is in accordance with the principle, that exceptions from the general prohibition to discriminate should be interpreted in a narrow way.

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

Since there is no civil legislation covering this case yet, the sanctions would be criminal: a fine or imprisonment for at the most six months (in practice probably about 15-60 day fines). The victim (or the prosecutor on his/her behalf) could also claim compensation for pain and suffering (Tort Liability Act). In practice the damages would be symbolic, probably around EUR 100-3,000, most probably around EUR 200-500.

## Hungary

*Answers provided by the Hungarian Equal Treatment Authority*

**1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

The case falls within the scope of the Act 2003:125 on equal treatment and the promotion of equal opportunities (hereinafter ET Act).

According to Article 5 of the ET Act: "In addition to the entities listed in the above Article 4, the following persons shall observe the principle of equal treatment in respect of the relevant relationships: a) those who make a proposal to persons not defined preliminarily to enter into contract or those who invite such persons to tender and b) those who provide services or sell goods at their premises open to customers". Therefore, according to the Equal Treatment Authority's opinion, the credit provider – also widely advertising its products in theory available to everyone – shall be obliged to observe the principle of equal treatment under the ET Act.

Article 8 of the ET Act defines the protected characteristics, under point o) securing protection for those discriminated against on the grounds of their age.

Under Article 30(1) of the ET Act: "It is considered a particular violation of the principle of equal treatment if at premises open to customers, particularly in catering, commercial, cultural

and entertainment establishments, and based on a characteristic defined in Article 8(a) the provision of services or sale of goods is denied or neglected”.

**2. Alternatively, would this case fall within the scope of the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?**

Yes, I reckon it would/will fall within the scope of the Proposed Directive as Article 1 of the Proposed Directive refers to age as a protected ground even outside the field of employment and occupation and paragraph 1 of Article 2 forbids direct discrimination on the ground of age. Paragraph 1 of Article 3 stipulates that the prohibition of discrimination shall apply inter alia in relation to access to and supply of goods and other services which are available to the public.

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

According to Section 76 of the Civil Code and Section 23 of the Civil Procedure Code any breach of the principle of equal treatment shall be considered as a violation of inherent rights and the geographically competent county civil courts or the Metropolitan Court is competent to investigate any such claims.

Moreover, the Hungarian Financial Supervisory Authority is able and competent to observe the conduct and policies of financial enterprises according to Act 2007:135 on the Hungarian Financial Supervisory Authority.

The Equal Treatment Authority is competent to look into the matter according to Articles 14-15 of the ET Act.

Therefore, the implementation of the directive would necessitate no organisational change in the system.

**4. Is there direct or/and indirect discrimination on the ground of age? In relation to age discrimination, could applying the criterion of treating all people over 70 equally lead to indirect discrimination?**

The case shows the characteristics of direct discrimination. However, indirect discrimination would be also possible against the elderly as they are easily identified as a coherent group, most of them possessing special needs when compared to the younger generations. This could mean special transportation and accessibility requirements – I suspect using a specific type of trains with high stairs or placing a complaint center on the third floor without elevator clearly leaves a higher portion of the elderly with a disadvantage compared to the younger generation.

Indirect discrimination vis-à-vis the elderly is prohibited both under the Hungarian ET Act and the Proposed Directive unless the practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

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

***In answering this question please consider whether under your current national legislation or under article 2(7) and recital 15 of the Proposed Directive, the age criterion would be treated as a "key factor in the assessment of risk" to justify the age discrimination?***

Since the bank used the age limit as an absolute factor of refusal, no objective justification or exception is possible in the case. The fact that they did not even try to justify their position with actuarial or statistical data just underlines this. The banks statement only cannot be enough to prove the higher risks which may lead to the refusal. However, I think it is certainly

a lawful conduct to investigate the different risks associated with age and construct a system in which the client's age plays a role – possibly even leading to the demand of additional conditions.

The Proposed Directive enables these kind of proportionate differences in Article 2(7): 'in the provision of financial services Member States may permit proportionate differences in treatment where, for the product in question, the use of age or disability is a key factor in the assessment of risk based on relevant and accurate actuarial or statistical data'.

The Hungarian ET Act contains a general justification clause under Article 7(2): 'If this Act does not provide differently, the principle of equal treatment is not violated by such conduct, measure, condition, omission, instruction or practice (hereinafter called collectively: disposition),

b) which is found by objective consideration to have a reasonable explanation directly related to the relevant relationship in cases not referred to in the above point a)'.

At the end of the day, in the Authority's opinion, there is a major difference to be observed among the several types of financial services. Proportionate and relevant differentiation by the clients' age in the field of insurance-type contracts can well be justified (using proper statistical and actuarial data) as these represent specific, 'Glücksvertrag-like' contracts, containing a considerable element of luck and therefore necessitating higher premiums from the elderly to guarantee acceptable risk levels for the company and actual risk-based premiums for all clients.

On the other hand, other financial services, such as banks, credit services, etc., do not contain a high level of risk as the companies are normally able to recover their expenses from the clients, and they are also able to secure those by means of additional safeguarding measures.

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

According to Article 16(1) of the ET Act: "If the Authority has established that the provisions ensuring the principle of equal treatment laid down herein have been violated, they may

- a) order that the situation constituting a violation of law be eliminated;
- b) prohibit the further continuation of the conduct constituting a violation of law;
- c) order that its decision establishing the violation of law be published;
- d) impose a fine;
- e) apply a legal consequence determined in a special act."

## The Netherlands

*Answers provided by the Dutch Equal Treatment Commission*

**1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

No it does not. The Dutch Equal Treatment in Employment (Age Discrimination) Act only applies to employment.

**2. Alternatively, would this case fall within the scope of the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?**

Yes it does, as this case concerns the provision of a service and a difference in treatment based on the age of the applicant.

More specifically, it would fall under the scope of article 3(1)(d) of the Proposal for a Council Directive, in conjunction with article 1 of the Proposal. Article 3(1)(d) of the Proposal prohibits discrimination on the ground of age in relation to access to and the supply of goods and services which are available to the public, including housing.

In the present case the complainant applied for hire purchase credit from a credit provider. The provision of such a financial service falls under the scope of the provision of goods and services as mentioned in article 3(1)(d) of the Proposal for a Council Directive.

As in the Netherlands the anti-discrimination legislation does not cover age discrimination in relation to the provision of goods and services, the following answers will be based on the Proposed Directive mentioned under 2.

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

If the Proposed Directive comes into force, the Dutch Equal Treatment Commission as well as the district court of the region the complainants lives in will probably be competent.

As long as the Proposal for Council Directive is not adopted and implemented, complainants can also go to a district court, but not to the Dutch Equal Treatment Commission. As there is no special anti-discrimination legislation in place protecting persons from discrimination in relation to the provision of goods and services on the basis of their age, the complainant would have to make an argument on the basis of general prohibitions of discrimination as laid down in the Dutch Constitution and in international treaties.

**4. Is there direct or/and indirect discrimination on the ground of age? In relation to age discrimination, could applying the criterion of treating all people over 70 equally lead to indirect discrimination?**

The credit provider excludes applicants of 70 years old and older of its services. This constitutes direct discrimination on the basis of age, as it is the age of the applicant that is directly relevant for the decision whether or not his application is taken into consideration. That other criteria than age may also be decisive for a successful application – such as income – is not relevant.

It is a standing line of reasoning of the Dutch Equal Treatment Commission that there is not just direct discrimination if criteria such as the age of a candidate (or his sex or race, etc.) is the only reason for not hiring him for a job, but also if there are several reasons for not hiring him and age is only one of them. The same is held for the provision of goods and services. I see no reason why this line of reasoning should not apply to age discrimination in relation to goods and services if/when the Proposal for a Council Directive is implemented.

The argument that all persons of 70 and over are treated in the same way cannot lead to another decision on whether or not there is direct or indirect discrimination: the consistency of a policy that excludes persons of a certain good or service, is not relevant for the question whether that policy amounts to direct discrimination on the ground of age. It is the exclusion of a certain group of people on the basis of their age that counts.

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

***In answering this question please consider whether under your current national legislation or under article 2(7) and recital 15 of the Proposed Directive, the age criterion would be treated as a "key factor in the assessment of risk" to justify the age discrimination?***

The credit provider has stated that it has designed its policy to avoid too high risk levels. The exclusion of elderly persons is relevant in this respect as, according to the credit provider, elderly typically have low incomes and it had recently been lending a large number of loans to elderly persons. This increased its risk level too much and thus the credit provider deemed the exclusion of persons over 70 to be justified.

Under the Proposed Directive, an act of discrimination on the ground of age can be objectively justified if it has a legitimate aim and if the means used to achieve that aim are appropriate and necessary.

In this case, if the Dutch Equal Treatment Commission had been competent, it may well have found that the aim of avoiding too high a risk level is legitimate, as this is not a discriminatory aim in itself and it can be seen as a realistic commercial interest.

However, given the standing line of reasoning of the Dutch Equal Treatment Commission in age and employment cases, the means to achieve that aim would probably be considered not appropriate and necessary. The Dutch Commission would probably argue that the policy is based on a generalisation of the situation of elderly persons. Even if statistics would show that elderly people are among those with the lowest incomes, a general exclusion of the service on the basis of age alone would probably not be seen as reasonable in relation to the aim of avoiding too high risk levels. Especially as there is an alternative at hand: individual assessment of the financial situation of each applicant. In that way, the selection procedure would become age-neutral and only those elderly persons would be excluded that do not meet the criteria that are applied to all other applicants as well.

This could be different if the credit the complainant applied for, was a long-term credit or a substantive amount of money, e.g. for a mortgage or for an expensive car. If the credit provider would have excluded elderly on the basis of the same argument – they are a risk as they generally have lower incomes – the Dutch Equal Treatment Commission may also have concluded that the direct discrimination was not justified. But if the credit provider had contended that he excludes elderly because there is a vast chance that they die before they are able to pay the money back, it may be different. Whether or not the discrimination would be justified can however only be decided in particular cases, as it depends on the circumstances of each case.

The Dutch Equal Treatment Commission would probably not conclude that the generalisation conducted by the credit provider harms the human dignity of elderly clients. This is firstly because in the discourse on discrimination on the grounds of age in the Netherlands, the language used to express the harm caused to people by discrimination is generally less strong. Secondly, the Dutch Equal Treatment Commission only concludes whether or not there is direct or indirect discrimination and whether or not that discrimination is justified. It may write down that the complainant feels affected in his human dignity or the Dutch Commission may conclude that stereotyping and generalizing has negative effects on the people affected by it, but it would not conclude that the human dignity of the complainant was harmed.

In Dutch anti-discrimination legislation, at this moment there is only one exception for the treatment of any of the grounds as a 'key factor in the assessment of risk' and that is sex. This exception is also limited to the assessment of risks for life insurances. Also, the exception only applies when actuarial data show that there is a difference in risk levels between women and men due to their different life expectancy. No exception is allowed for any other service than life insurances (such as pension schemes, car insurances), even though Directive 2004/113/EC (prohibition of discrimination on the ground of sex with the provision of goods and services) allows for more exceptions.

Given this strict implementation of Directive 2004/113/EC in Dutch national equality legislation, it is hard to say whether the articles 2(7) and 15 of the Proposed Directive will be implemented in Dutch legislation or not or if they will be implemented partially. At the moment, there does not seem to be any intention with the Dutch government to change the strict exception to the Dutch anti-discrimination legislation if and when the Proposed Directive comes into force.

The provision of relevant and accurate data is especially important if the defendant party applies to the exception mentioned above, for the key factor in the assessment of risks for life insurances.

In other cases, the provision of statistical evidence may be helpful to prove facts that cannot be considered as 'generally known facts'. In the latter case, the Dutch Equal Treatment Commission does not generally require any statistical data to prove such facts.

In this particular case however, even if the credit provider had provided statistical evidence that elderly more often than younger persons have a low income (both in the case of direct and indirect discrimination), the distinction still would probably have been considered too generic and there would still have been an alternative.

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

The Dutch anti-discrimination legislation does not provide for any sanctions or remedies to be imposed by the Neb. If the case is brought before a court, sanctions and remedies are possible, but the anti-discrimination legislation has no system of sanctions and remedies 'of its own', like the criminal legislation does.

## Norway

*Answers provided by the Equality and Anti-discrimination Ombud*

***1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?***

No. Age discrimination is prohibited in working life only under Norwegian law. In the proposed new anti-discrimination legislation in Norway age is still protected only in employment. However, in certain cases, where age discrimination outside employment is considered grave or especially unjust, anti-discrimination protection can be granted. Dismissing loan applicants on the sole basis of age is mentioned as an example of unlawful discrimination in the preparatory work of the proposal. It is not yet clear if the proposal will be adopted, and furthermore it is not clear if there will be changes.

However, we have legislation concerning financial institutions stating that customers cannot be dismissed without objective justification/good cause, for example producing relevant statistical data. Maybe one would take into account what kind of credit the application is for, i.e. is the loan secured, e.g. mortgage on a house. Then there would be less reason to decline elderly applicants.

***2. Alternatively, would this case fall within the scope of the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?***

Article 2(7): "In the provision of financial services Member States may permit proportionate differences in treatment where, for the product in question, the use of age or disability is a key factor in the assessment of risk based on relevant and accurate actuarial or statistical data."  
It is stated in the explanatory memorandum section 5, under article 2, that "The use of age and disability in the assessment of risk must be based on accurate data and statistics".  
Furthermore, in recital 15: "Actuarial and risk factors related to disability and to age...should not be regarded as constituting discrimination where the factors are shown to be key factors for the assessment of risk".

Supposing the financial institution can provide data which meet the criteria above, it would be legal to exclude clients over 70 years of age. It would seem that this article does not prohibit stereotyping/generalizations, in that the exemption for statistical data is a special rule. The purpose of anti-discrimination legislation is i.a. to give people a right to individual assessment, and not be excluded/be discriminated against based on the various discrimination grounds. One might assume that in order to have the Directive adopted a compromise was made in this regard.

Anyway, the term „key factor“ should then be applied in a restrictive manner in order to avoid discrimination.

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

As stated under question 1, we do not have anti-discrimination legislation within the scope of the case.

**4. Is there direct or/and indirect discrimination on the ground of age? In relation to age discrimination, could applying the criterion of treating all people over 70 equally lead to indirect discrimination?**

As stated under question 1, we do not have anti-discrimination legislation within the scope of the case. If age discrimination were prohibited in the field of goods and services, we would consider this a case of direct discrimination, since age was an important factor as referred to directly by the bank.

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

***In answering this question please consider whether under your current national legislation or under article 2(7) and recital 15 of the Proposed Directive, the age criterion would be treated as a "key factor in the assessment of risk" to justify the age discrimination?***

As stated under question 1, we do not have anti-discrimination legislation within the scope of the case. Then the exception would not apply. If age discrimination were prohibited in the field of goods and services one would contend that reducing financial losses is a legitimate aim, but it would probably not be deemed appropriate, proportionate or necessary to refuse the credit application, thus one would argue that there was no objective justification.

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

As stated under question 1, we do not have anti-discrimination legislation within the scope of the case.



# Slovakia

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

## **1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

The case falls within the scope of the Act No 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination amending and supplementing certain other law (the Anti-discrimination Act).

Art. 2 of the Anti-discrimination Act stipulates:

(1) Compliance with the principle of equal treatment shall consist in the prohibition of discrimination on grounds of sex, religion or belief, racial, national or ethnic origin, disability, age, sexual orientation, marital status and family status, colour of skin, language, political or other opinion, national or social origin, property, descent or other status.

(2) While complying with the principle of equal treatment, observance shall also be paid to good morals for the purpose of broadening of protection against discrimination.

According to §5 of the Anti-discrimination Act in conformity with the principle of equal treatment, the discrimination on grounds set out above shall be prohibited in social security, healthcare, provision of goods and services, and in education.

The general prohibition of discrimination is expressed 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."

## **2. Alternatively, would this case fall within the scope of the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?**

Yes, this case would fall also within the scope of the proposal for a new Council directive, which prohibits discrimination on the grounds of religion or belief, disability, age, or sexual orientation in relation to access to and supply of goods and other services which are available to the public, including housing.

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

The Slovak National Centre for Human Rights (SNCHR) would be competent to give expert opinion, provide complainant with legal assistance, represent complainant before the court or provide mediation service.

In case of legal action the district court is competent to handle the case. Parties to the proceedings concerning the violation of the principle of equal treatment may also be represented by legal entities:

- a) who have such authority under a separate law, or
- b) whose activities are aimed at or consist in the protection against discrimination.

Surveillance over respecting creditors' trade conditions and contractual terms offered to consumers (in compliance with Act No. 258/2001 Coll. on providing consumer loans) is carried out by The Slovak Trade Inspection.

**4. Is there direct or/and indirect discrimination on the ground of age? In relation to age discrimination, could applying the criterion of treating all people over 70 equally lead to indirect discrimination?**

Under the Anti-discrimination Act, the exclusion of all applicants over 70 years of age from being granted credit or loan would lead to direct discrimination on the ground of age.

According to §2a(2) of the Anti-discrimination Act, direct discrimination shall mean 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. The complainant was treated less favourably than another person in a comparable situation because of his age. This argumentation is supported by credit provider's statements concerning complainant's age.

We do not think that applying the criterion of treating all people over 70 equally could lead to indirect discrimination because the different treatment in question is based on certain age (70 years old) and not on an apparently neutral provision, criterion or practice.

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

***In answering this question please consider whether under your current national legislation or under article 2(7) and article 15 of the Proposed Directive, the age criterion would be treated as a "key factor in the assessment of risk" to justify the age discrimination?***

§8(3) of the Anti-discrimination Act stipulates that the differences of treatment on grounds of age shall not be deemed to constitute discrimination if they are objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, if it is laid down by a law.

Seeking to ensure effective banking operations may be regarded as a legitimate aim but the means in question (the exclusion of all people over 70 from the service without assessing their financial standing) can hardly be described as proportionate or necessary. Credit provider should take into account other possibilities such as credit insurance or guarantee of third person.

Art. 2(7) of the proposal for a new Council directive allows Member States in the provision of financial services to permit proportionate differences in treatment where, for the product in question, the use of age or disability is a key factor in the assessment of risk based on relevant and accurate actuarial or statistical data. Act CXII of 1996 on Credit Institutions and Financial Enterprises mentioned by the defendant contains strict requirements on loan arrangements to ensure effective banking operations but does not mention age as a key factor in the assessment of risk.

Lack of relevant and accurate actuarial or statistical data would be only one of arguments used against the financial institution. Eventual statistical data on lower incomes of elderly people are not relevant enough to exclude all people over 70 from being granted credit or loan. Not the age but the particular client's financial standing shall be considered as the key factor in the assessment of risk. One may even argue that due to the regular income in the form of pension the elderly people with sufficient financial standing do not create high risk levels for financial institution unlike people in reproductive age facing risk of unemployment.

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

According to par. 9 of the Slovak Anti-discrimination Act the complainant may seek that the person violating the principle of equal treatment be made to refrain from such conduct and, where possible, rectify the illegal situation or provide adequate satisfaction. Should adequate satisfaction prove to be not sufficient, especially where the violation of the principle of equal

treatment has considerably impaired the dignity, social status and social functioning of the victim, the victim may also seek non-pecuniary damages in cash.

## Sweden

*Answers provided by the Equality Ombudsman*

**1. Does this case fall within the scope of any anti-discrimination legislation in your country and if so which legislation?**

The Swedish Discrimination Act does not prohibit discrimination on the grounds of age in the field of goods, services and housing.

**2. Alternatively, would this case fall within the scope of the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in relation to the provision of goods facilities and services?**

Yes, the case falls within the scope of the Proposal Directive (article 1, 2a and 3d).

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

According to the Proposal Directive the Member States shall designate a body or bodies for the promotion of equal treatment that includes the competence to provide independent assistance to victims of discrimination in pursuing their complaints (article 7 and 12).

In Sweden the Equality Ombudsman supervises compliance with the Discrimination Act (in addition to the mandate provided by the Act concerning the Equality Ombudsman). The Ombudsman can take cases to court as a party to the case and sue for damages on behalf of the individual in accordance with the Discrimination Act.

Non-profit organisations and employees' organisations as well may bring an action to court, as a party, on behalf of an individual, in accordance with the Discrimination Act.

An individual, on his or her own behalf, also has the possibility of bringing a lawsuit for violations of the Discrimination Act.

**4. Is there direct or/and indirect discrimination on the ground of age? In relation to age discrimination, could applying the criterion of treating all people over 70 equally lead to indirect discrimination?**

As the financial institution in the case refers to the age of 70 it is most likely that the differential treatment will be defined as a form of direct discrimination. It is apparent from the rule/regulation applied by the company that the disadvantageous treatment is related to discrimination ground of age. If the institution had referred to low income it could possibly have been defined as indirect discrimination (a neutral criterion disadvantaging the elderly – but also young people).

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

***In answering this question please consider whether under your current national legislation or under article 2(7) and article 15 of the Proposed Directive, the age criterion would be treated as a "key factor in the assessment of risk" to justify the age discrimination?***

There is no exception to the ban against direct discrimination. However, there is some terminology in 2(7) which indicates that it is possible to take into account age or disability as a "key factor in the assessment of risk based on relevant and accurate actuarial and statistical data".

Concerning the issue of indirect discrimination, lowering the risk level of the credit institution could be an objective justification (legitimate aim). The means of achieving that aim are not appropriate and necessary in the case since the claimant did have a regular net income. In a balancing of the interests that is needed in the implementation of the ban against indirect discrimination – and also in regard to implementation of article 2(7) – the general EU proportionality principle shall be taken into account. In other words, how intrusive are the tools/measures in relation to the individual in comparison with the importance of achieving the opposing party's goal. In this case it is possible to question whether the tool/measure of denying credit to an individual who has a steady income is proportionate with the company's aim of minimising its risks. Even though the aim is legitimate in and of itself, its proportionality in this case can be questioned since fairly small amounts were involved (EUR 650 and 290).

The complainant also had previously repaid earlier loans made by the company, loans that were larger than those at issue here. The provision of credit under such circumstances can hardly be considered to be a substantial risk for the company.

It is possible to come to a different conclusion if the credit amount at issue would have involved much larger amounts. But even under such circumstances the differences in treatment have to be proportionate. It is possible that no one should automatically be denied credit – even in that situation. However, it might be reasonable to require the provision of a health check-up from older persons in conjunction with the provision of a larger loan or line of credit.

In addition; the elderly often have a regular guaranteed net income through the pension system in Sweden – therefore age in general should not be seen as a "key factor in the assessment of risk" in the context presented in the case.

The fact that there was no "relevant and accurate actuarial or statistical data" in general is not of decisive relevance since it is possible to make an individual assessment of the risk in the case. In other cases, when it is more difficult to make individual assessments of risk, for example concerning pension contributions based on assessments of different lengths of life, it is more relevant to show general "relevant and accurate actuarial or statistical data" (for example the average lengths of life for women and men) on behalf of the opposite party. In cases that relate to pensions or life insurance, it is more reasonable to look at age as a "key factor in the assessment of risk".

In any case, the burden of proof lies with the opposing party who must show "relevant and accurate actuarial or statistical data", which in turn shows that age is a "key factor" that justifies the treatment applied in the particular case.

A parallel can be drawn with a case dealt with by the former Gender Equality Ombudsman (JämO) in the Swedish labour court. The company which produces Volvo cars applied a minimum height rule concerning certain factory workers. To get a job the person had to be at least 163 centimeters tall (and not taller than 195 centimeters). Since about 30 % of the working age women in Sweden are less than 163 centimeters tall, and the equivalent figure for men is a few per cent, the JämO asserted that Volvo violated the ban against indirect discrimination in relation to women, i.e. implemented a seemingly neutral criterion that in practice disadvantaged women in particular. The company in turn asserted that the height rule was suitable and necessary in order to minimise the risk of work injuries. However, the company had the burden of proving its assertions. The labour court determined that the company had nothing to demonstrate that the risk of a work injury actually decreased if a person was taller than 163 centimeters. The risk of a work injury is dependent on a number of different factors, and the height of a person is not a decisive factor. A height rule could

therefore not be used to justify the exclusion of so many women from the possibility of employment at Volvo.

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

According to article 15 in the Proposal Directive the Member States shall regulate sanctions. According to the Swedish discrimination legislation, the one who discriminates is to pay damages for the violation of integrity that the discrimination entails. The Equality Ombudsman has the possibility to claim damages on behalf of the complainant in the district court. Firstly, the Equality Ombudsman shall try to reach a settlement with the opposite party.

Equinet Secretariat | Rue Royale 138 | 1000 Brussels | Belgium  
info@equineteurope.org | www.equineteurope.org

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