

EQUALITY LAW IN PRACTICE

REPORT ON THE IMPLEMENTATION OF THE RACE AND GENERAL FRAMEWORK DIRECTIVES

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Report on the Implementation of the Race and General Framework Directives

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Equinet brings together 38 organisations from 31 European countries which are empowered to counteract discrimination as national equality bodies across the range of grounds including age, disability, gender, race or ethnic origin, religion or belief, and sexual orientation. Equinet works to enable national equality bodies to achieve and exercise their full potential by sustaining and developing a network and a platform at European level.

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Preface

Members of Equinet's Working Group (WG) on Equality Law in Practice¹ have met twice to discuss the implementation of the Race and the General Framework Directives² in their Member States. They have submitted contributions to Equinet which have been gathered into this paper with a view to feed into the European Commission's Report on the Implementation of the Directives. The Group is in a unique position to comment on the implementation of the Directives across Europe, with members from 23 national equality bodies.

There was a high degree of agreement among WG members as to where further clarification of the Directives' provisions would be required in order to facilitate the better implementation of the Directives and to enhance their effectiveness.

The WG concluded that a greater approximation of domestic law could also be required in the implementation of certain provisions to ensure equality across the Member States and a homogeneous implementation of EU law. Experiences of the WG members show that, subject to subsidiarity, the standardisation of protection and remedies would enhance equality and freedom of movement between Member States.

The WG also recommends some new measures to combat discrimination for the consideration of the European Commission.

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¹ The legal working group is made up of lawyers from 27 National Equality Bodies representing 23 Member States: Austria, Belgium, Croatia, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Latvia, Lithuania, Malta, Netherlands, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Sweden, United Kingdom (both Great Britain and Northern Ireland). This paper represents the views of the members of the Group and does not necessarily represent the views of the NEBs participating in the Group.

² Directives 2000/43/EC and 2000/78/EC

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Key findings and conclusions

These key findings are based on the collective experiences of the equality bodies represented in the Working Group (WG) in their role as statutory mechanisms with a mandate to provide independent assistance to victims of discrimination, to conduct independent surveys, to publish independent reports and to make recommendations on any issue relating to discrimination.

There was a widespread agreement among WG members regarding the areas which could usefully be strengthened or interpreted in the Directives or which presented particular difficulties. The main areas identified and discussed in the next chapters are:

1. Scope of the Directives
2. Requirement for an national equality body to be established under the General Framework Directive
3. The need for standards for equality bodies in order to guarantee their independence and effectiveness
4. Competencies of equality bodies
5. Discrimination on perceived grounds/on grounds of association with someone with a protected characteristic
6. The definition of disability
7. The scope of protection provided against victimisation
8. The definition of service and the type of services covered by the directives.
9. The scope of the nationality exemption and its interplay with discrimination on the grounds of ethnic origin and race.
10. Sanctions: monitoring across Member States to ensure that they are effective, dissuasive and proportionate (with the possibility of standardising sanctions and the levels of compensation)
11. The correct implementation of provisions on indirect discrimination.
12. The boundaries between education and vocational training.
13. The rules on the burden of proof in cases of victimisation and on reasonable accommodation.
14. The scope of positive action measures to enhance Member States' ability to introduce such measures with a view to ensuring full equality in practice.
15. Extending the scope of the Directives to include provisions on multiple discrimination
16. Extending the scope of the Directives to provide protection to volunteers.

Parity between the Directives

1. Scope of the Directives

The WG notes that the General Framework Directive provides protection in employment and vocational training whereas the Race Directive prohibits discrimination in social protection, including social security and healthcare; social advantages; education; access to and supply of goods and services which are available to the public, including housing as well as employment and vocational training.

This hierarchy of protection at EU level is problematic and the resulting different legislative choices made by Member States ultimately militate against freedom of movement, as there is an uneven patchwork of protection across Member States. Furthermore, the 'Study on discrimination on grounds of religion or belief, age, disability and sexual orientation outside of employment' prepared by the European Evaluation Policy Consortium (EPEC study)³ has identified the economic cost of discrimination on grounds of age, disability, sexual orientation and religion and belief.

The WG notes the progress which has been made towards developing legislation to prohibit discrimination on grounds of age, disability, sexual orientation and religion and belief outside the field of employment and occupation. Based both on the experiences of equality bodies that have such a mandate and those that currently lack one it is recommended that the legislation is introduced as soon as possible.

2. Requirement for a national equality body to be established under the General Framework Directive

Article 13 of the Race Directive 2000/43 EC requires Member States to designate a body to promote equal treatment on the grounds of racial or ethnic origin. However, the General Framework Directive 2000/78/EC has no such requirement.

To guarantee the effective combat of discrimination in the fields covered by the General Framework Directive, the European Commission may wish to consider requiring Member States to designate an independent national equality body for the promotion of equal treatment in the areas covered by the Directive. The experience of more than 20 Equinet member equality bodies holding a mandate for the promotion of equal treatment in the areas covered by the Directive confirms the need for such protection.

³ Annex IV of Commission Staff Working Document accompanying 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 2008/0140 (CNS)

National Equality Bodies

3. The need for standards for equality bodies in order to guarantee their independence and effectiveness

The Race Directive provides that Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. The body shall provide independent assistance to victims of discrimination in pursuing their complaints about discrimination, conduct independent surveys concerning discrimination and publish independent reports as well as making recommendations on any issue relating to such discrimination.

However the Race Directive does not set up any criteria for the institutional framework of equality bodies in order to fulfil their tasks in an independent and effective manner. To achieve the tasks specified equality bodies require institutional independence. Equality bodies report a varying level of resources allocated to their creation and work in different Member States. Where equality bodies are under-resourced or lack powers this inevitably restricts the impact they can have.

The European Commission may wish to consider including standards for the independence, competencies and effectiveness of equality bodies, drawing in particular upon the criteria established by the United Nations General Assembly resolution 48/134 of 20 December 1993 on the Principles relating to the Status of National Institutions (Paris Principles) as well as the European Commission against Racism and Intolerance (ECRI) General Recommendation No 2 on specialised bodies to combat racism, xenophobia, anti-Semitism and intolerance at national level, ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination and the Opinion of the Council of Europe's Commissioner for Human Rights on national structures for promoting equality (CommDH(2011)2).

4. Competencies of equality bodies

The WG suggests that it would be helpful if the European Commission could consider expanding the minimum competencies of equality bodies, including the following:

- Competence for the national equality body to take cases in its own name;
- Competence for the national equality body to challenge domestic legislation where it is incompatible with EU equality directives and/or human rights provisions (where appropriate);
- Powers for national equality bodies to obtain information from alleged perpetrators of discrimination and to compel them to take action to address discriminatory practices;
- Where a body has the power to make a finding of discrimination it would be helpful if they were also empowered to award compensation.

Definitions

5. Discrimination on perceived grounds/on grounds of association with someone with a protected characteristic

There are a variety of approaches across the Member States to discrimination against someone perceived as having a protected characteristic or against someone associated with a person with a protected characteristic.

For example, the Czech Anti-discrimination Act expressly prohibits discrimination on ‘alleged grounds’ and the French Labour Code prohibits discrimination on grounds of assumed membership of a protected group. In Norway there is protection against discrimination based on the perceived characteristics of disability, ethnicity, religion, skin colour, national origin, descent and language. However, protection is not explicitly provided on the basis of gender, age, sexual orientation and gender identity. In Great Britain, there is no express protection against perceived discrimination or discrimination by way of association, but the legislation is understood to cover these types of discrimination on all grounds, except marriage and civil partnership status. Discrimination by association is specifically covered on all grounds in employment in Latvia.

In Croatia there is express protection both against discrimination on perceived grounds (‘based on assumption’) and against discrimination by association for all the prohibited grounds and in the entire scope of the Anti-discrimination Act.

In the view of the WG if a prohibition on discrimination on perceived grounds, and discrimination by way of association with someone with a protected characteristic was explicitly stated in the Directives, it would clarify the protection available.

6. Definition of Disability

The WG notes that the CJEU has given some guidance on the definition of ‘disability’ under the General Framework Directive in the case of *Chacon Navas v Eurest Colectividades SA*⁴ and more recently in the *Ring* case⁵. However, the WG believes that it would be helpful for reasons of legal clarity if a definition was included in the Directive, drawing also on the definition in the UN Convention on the Rights of Persons with Disabilities.

⁴ C-13/05

⁵ C-335/11, C-337/11

7. Victimisation

Several members of the WG raised concerns about the scope of protection provided under Article 9 of the Race Directive and Article 11 of the General Framework Directive relating to victimisation.

Domestic legislation in some Member States is formulated in such a way as to only provide protection for employees if they assert their rights against discrimination, or if they assist other employees who have been discriminated against, but does not cover the situation where the employee is complaining of discrimination outside the field of employment, such as against customers or pupils. For example, where a teacher at a public university is dismissed because s/he has alleged publicly that disabled students are treated badly at the university the dismissal would not be covered by the prohibition of victimisation under the General Act on Equal Treatment in Germany.

In contrast to this, in Great Britain for example, protection is provided against victimisation where there has been any allegation that the Equality Act has been breached (provided it is made in good faith).

This difference in approach is likely to have arisen as Article 11 General Framework Directive requires Member States to introduce measures to protect *employees* against dismissal or other adverse treatment by the employer as a reaction to a complaint aimed at enforcing compliance with the principle of equal treatment, where the principle of equal treatment in this case is only extended to employment and vocational training. This contrasts with the Race Directive which has a much broader scope also applying the principle of equal treatment outside employment. Therefore, the introduction of the proposed prohibition of discrimination on grounds of sexual orientation, religion and belief, age and disability would also extend protection against such victimisation and ensure a harmonised approach across Europe.

In the WG members' experience, individuals are often afraid to speak out if there is discrimination and therefore it is necessary to ensure that protection is provided to tackle all detrimental treatment where someone makes an allegation of discrimination in good faith.

8. Services available to the public

The Race Directive prohibits discrimination with regard to access to and supply of goods and services which are available to the public. Despite the developing case law of the CJEU on this issue, questions remain as to the definition and scope of services and as to the exact meaning of public availability⁶.

The Race Directive does not define the meaning of goods and services, only stating that they need to be available to the public. Importantly, this is also in contrast with the later 2004/113 Directive which extended the protection of discrimination based on sex to the field of provision of services and which states in its preamble⁷ that the services it refers to are those within the meaning of Article 57 TFEU which states that '*Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration ...*' and

⁶ For a detailed analysis see also: Julie Ringelheim: The Prohibition of Racial and Ethnic Discrimination in Access to Services under EU law, in: European Anti-Discrimination Law Review No. 10, 2010

⁷ Recital 11 of Directive 2004/113/EC

includes activities of an industrial or commercial character, activities of craftsmen and professions.

The Court of Justice of the European Union (CJEU) stated on several occasions that the notion of service does not require that services have to be paid by those for whom they are performed (Case B.S.M. Geraets-Smits C-157/99; Case Bond van Adverteerders and Others C-352/85; Joined Cases Deliège C-51/96 and C-191/97).

There is uncertainty in some Member States as to whether or not discrimination cases for instance in the area of medical services, renting out rooms in private homes, police activities or free counselling services of public institutions/NGOs are covered by the scope of the Directive. Therefore, it would be helpful to clarify which services are covered by the Directive in order to ensure a consistent implementation. This could be achieved via amendments to the Race Directive, guidance by the European Commission or, where domestic legislation is not clear on the issue, by strategic litigation by national equality bodies (where they are empowered to litigate) or others.

9. Nationality exemption

According to the Race Directive there shall be no discrimination based on racial or ethnic origin. However the Race and Framework Directives provide that they do not cover difference of treatment based on nationality and are 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.

In some Member States discrimination on the ground of nationality is nevertheless prohibited (subject to specified exceptions)⁸, whilst in other Member States there is no protection against nationality discrimination.

Based on the experience of the WG members, the blanket exemption in the Directives for requirements relating to nationality is too wide and there is a need for protection against discrimination as a result of nationality, subject to justified exceptions. There have been cases where nationality requirements have been imposed, for example in access to housing and employment, where the justification for this is not made out.

The scope of the nationality exception and how it relates to the prohibition on discrimination on grounds of racial/ethnic origin has also caused difficulties for the equality bodies in interpreting the provisions⁹. A number of equality bodies have reported that this exception hinders their anti-discrimination work.

The fact that, subject to certain limitations and exceptions, according to both Article 18 of the TFEU and Article 21 of the Charter of Fundamental Rights of the EU '*any discrimination on grounds of nationality shall be prohibited*' might potentially cause further confusion even if the field of application of the TFEU, the Charter and the Directive are different.

The European Commission may wish to consider if it is appropriate to amend the exception so that not every difference of treatment based on nationality is excluded.

⁸ For example, in the Czech Republic, Great Britain and Belgium discrimination on the ground of nationality is prohibited, subject to exceptions, and in Latvia it is prohibited in employment only.

⁹ See *Equality law in practice. Comparative analysis of discrimination cases in Europe. An Equinet report*. Equinet, December 2012

It would also be helpful if the European Commission could issue guidance on the scope of this exception and whether a difference of treatment based on nationality can amount to discrimination on the ground of ethnic origin/race. Some members of the group also called for guidance on the meaning of “ethnic origin”¹⁰.

Where this is an issue domestically, equality bodies or others may wish to consider pursuing strategic litigation to clarify if protection is provided in a particular case under ethnic origin or race.

Implementation

10. Sanctions

Art 15 of the Race Directive and Art 17 of the General Framework Directive state that sanctions must be effective, proportionate and dissuasive.

The Directives do not define these terms which leads to legal uncertainties and a lack of clarity as to how sanctions should be applied and measured.

According to the information provided by members of the WG, there appears to be a wide variance in potential remedies available and levels of compensation awarded in discrimination claims among Member States¹¹.

There are examples of Courts recognising the need for sanctions to be dissuasive¹² (see Appendix 1). However, the level of compensation in employment cases often depends on the complainant’s salary, which may result in awards which do not reflect the gravity of the discrimination suffered, and this brings the requirements for proportionality, effectiveness and dissuasiveness into question. It is noted that awards are generally low, particularly in cases outside employment. Most recently the Swedish Equality Ombudsman has taken a case to the Supreme Court, arguing, inter alia, that the amount awarded by the Court of Appeal in a discrimination case is insufficiently dissuasive¹³.

The WG believes that European, national legislators and equality bodies could usefully monitor and analyse whether the sanctions applied in discrimination cases fulfil the conditions of effectiveness, dissuasiveness and proportionality.

The WG members’ experience suggests that, subject to subsidiarity, the European Commission may wish to consider recommending that the Directives be amended (or a Recommendation/guidance issued) to create a minimum standard for sanctions to guarantee their effectiveness. It may also wish to consider defining criteria for ‘benchmarking’

¹⁰ The Working Group notes that there is some guidance on the meaning of race and ethnicity in The Handbook on European non discrimination law, pages 104 – 6, chapter 4.6.

¹¹ Examples of sanctions and levels of compensation in some Member States are set out in Appendix 1.

¹² See *Accept v Consiliul Național pentru Combaterea Discriminării* (C-81/12), <http://curia.europa.eu/juris/document/document.jsf?docid=136785&pageIndex=1&occ=first&part=1&text=&doclang=EN&mode=req&dir=&cid=310541>, in which the court said at paragraph 63 that ‘*The severity of the sanctions must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect (see, to that effect, in particular, Case C-383/92 Commission v United Kingdom [1994] ECR I-2479, paragraph 42, and Draehmpaehl, paragraph 40), while respecting the general principle of proportionality*’

¹³ *Diskrimineringsombudsmannen ./. Stockholms läns landsting* (The Equality Ombudsman v. Stockholm County Council, *The Equality Ombudsman v. Stockholm County Council*) I

sanctions¹⁴ in order to introduce some approximation across Europe so that similar cases attract similar remedies.

Clarification required

11. Indirect discrimination

There are reported problems with the interpretation of the indirect discrimination provisions in some Member States¹⁵:

In Ireland for example a case has given rise to concern that domestic legislation does not adequately implement the Race Directive.

Stokes v Christian Brothers High School concerns the refusal to enrol a Traveller boy at a second-level school. The school received more applications than it had places. It used a published set of criteria for ranking the applicants, and sons of former pupils were given preference to those who are not sons of former pupils. Irish Travellers have had a history of low levels of enrolment in schools, and at second-level in particular.

The High Court interpreted the following provision of the Equal Status Acts:

"3.(1) For the purposes of this Act discrimination shall be taken to occur ... where an apparently neutral provision puts a person referred to in any paragraph of section 3(2) at a particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

The High Court Judge found that since the school's rule also placed others (that is, in addition to Travellers) at a disadvantage, it did not constitute a "particular disadvantage" for the purpose of the definition of indirect discrimination.

The case has now been appealed to the Irish Supreme Court, which may be asked to refer some questions to the Court of Justice of the European Union.

Some members of the WG thought that guidance on the meaning of 'particular disadvantage' would be helpful.

It would be useful to monitor and address such cases ensuring a uniform and comprehensive implementation of provisions on indirect discrimination.

¹⁴ For example, in Great Britain, there are Vento guidelines which give guidance on appropriate levels of compensation for injury to feelings awards, falling within three bands:

- **Upper band: 21025 – 34951 EUR.** The most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Only in the most exceptional case should an award of compensation for injury to feelings exceed 34,951 EUR.
- **Middle band: 7008 – 21025 EUR.** The middle band should be used for serious cases, which do not merit an award in the highest band.
- **Lower band: 817 – 7008 EUR.** Less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than 817 EUR are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition or injury to feelings.

¹⁵ The Working group noted that the Open Society Institute has found that in the Ministry of the Interior v ERRC the court's decision left unclear whether 'Italian law prohibits the full scope of racial discrimination as defined in Article 2 of the Race Directive or intent is required', see Open Society Institute, Brussels, Evaluating the Implementation of the Race Equality Directive: Targeted questions, May 2012.

Further, others raised a concern that their domestic legislation did not reflect the wording of the Directive as it said that indirect discrimination occurs where there was a provision, criterion or practice which 'puts' someone at a particular disadvantage, rather than 'puts or would put'. Therefore, it is unclear whether a policy which is potentially indirectly discriminatory but which has not yet been applied to an individual would fall within the domestic legislation, whereas it would be covered by the Directives.

12. Vocational guidance/training and education

Currently, discrimination in vocational training is prohibited by the Race and General Framework Directives.

However, the extent to which areas traditionally thought of as 'education' may fall within vocational training (and therefore fall within the scope of the General Framework Directive) is not clear.

An example of the difficulties faced in Member States is Germany, where public universities are seen as part of the public education system and are not regarded as vocational training. In some universities students are required to have a minimum age and a maximum age for example between 18 years and 28 years. As the university is seen as part of the public education system the prohibition of age discrimination in vocational training is not deemed to be applicable. According to German law the age limitation would be legal.

However, the Working Group notes the case *Gravier v City of Liege* in which the CJEU decided:

"1. Although educational organisation and policy are not as such included in the spheres which the Treaty has entrusted to the community institutions, access to and participation in courses of instruction and apprenticeship, in particular vocational training, are not unconnected with community law. It appears from the measures and programmes adopted in that area by the Council that the common vocational training policy referred to in Article 128 of the Treaty is gradually being established. It constitutes, moreover, an indispensable element of the activities of the community, whose objectives include inter alia the free movement of persons, the mobility of labour and the improvement of the living standards of workers. It follows that the conditions of access to vocational training fall within the scope of the Treaty.

The imposition on students who are nationals of other member states of a charge ...as a condition of access to vocational training, where the same fee is not imposed on students who are nationals of the host member states, constitutes discrimination on grounds of nationality contrary to Article 7 of the Treaty.

Any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary skills for such a profession, trade or employment is vocational training, whatever the age and the level of training of the pupils or students, even if the training programme includes an element of general education. The term 'vocational training' therefore includes courses in strip cartoon art provided by an institution of higher art education."

The legal situation in Germany shows that there is a need to clarify when education may fall within vocational training in the Framework Directive.

The experience of WG members shows that it would be helpful if further guidance was provided to clarify the borders between vocational training and education, in universities as well as in high schools and adult education centres.

13. Burden of proof in cases relating to victimisation and reasonable accommodation

It is not clear in some Member States whether or not the burden of proof provisions in Articles 8 Race Directive and 10 General Framework Directive apply to victimisation cases and to cases of lack of reasonable accommodation: a clarification from the European Commission on the applicability of the burden of proof provisions in these cases would be helpful.

The Netherlands

For example in cases before the Netherlands Institute for Human Rights (NIHR) the burden of proof is on the person complaining. So a complainant would have to establish a prima facie case of discrimination, and once established they would have to prove that because she or he complained, she or he was then disadvantaged for complaining about discrimination. This can arise in employment cases particularly, where the contract is terminated. Even though it is clear that the complaint had something to do with the termination, it is often difficult to prove this.

In the NIHR's view, the rules on the burden of proof should be applicable to victimisation cases.

Great Britain

However in Great Britain the equality body understands that the burden of proof provisions in the Directives apply equally to direct and indirect discrimination, victimisation and harassment.

The European Commission may wish to consider if it would make the law clearer if victimisation was brought within Article 2 (concept of discrimination) of the Race Directive and the General Framework Directive or if alternative measures were taken to ensure that the burden of proof rules apply to victimisation claims throughout the EU.

Sweden

In Sweden the difficulties arise in relation to the burden of proof in reasonable accommodation cases.

This is because there is no clear rule in Swedish legislation or case-law when the duty arises on the distribution of the burden of proof in cases concerning the employer's duty to provide reasonable accommodation for persons with a disability.

In a few cases the Swedish Labour Court has stated that it is incumbent upon the employer to perform a careful investigation into the possibilities of rehabilitation and accommodation. Several other factors should be taken into account when assessing if the employer has fulfilled her/his duty to take reasonable accommodation measures, such as the size of the

workplace and the employee's participation in finding a solution. The burden to explain how the duty is fulfilled falls on the employer. However, a failure to participate in the investigation may have an impact on the employee¹⁶.

14. Positive action measures

The WG members have identified many positive action schemes, many relating to employment quotas for disabled people.

However, there remains a lack of clarity regarding what action is allowed: for example, a programme for supporting Romani young people to study in high schools in the mainstream educational programme¹⁷ is currently being investigated by the Czech Ombudsman.

There is a concern that the limitations derived from EU court cases on positive action measures relating to gender may not be automatically applicable to other discrimination grounds. For example, trainee programs reserved for ethnic minorities, including education and job training under full pay, can be considered positive action measures, but their legality is not easy to decide.

Positive action is crucial to prevent or compensate for disadvantages linked to the protected characteristic, in order to ensure full equality in practice. The WG is of the view that clarification is required as to when such measures can be used and to what extent in order to facilitate a greater take up of positive action measures.

Possible new provisions

15. Multiple discrimination

The WG notes that the need to tackle multiple discrimination at EU level has been considered in a detailed study and report funded by the European Commission. That report recommended that the proposed Directive prohibiting discrimination outside employment on grounds of religion and belief, sexual orientation, disability and age should contain specific provisions to combat multiple discrimination, including intersectional discrimination. Furthermore, the Summary of the Impact Assessment¹⁸ accompanying the proposal for that Directive found that:

'Although [multiple discrimination] is now widely recognised as a serious problem, little has been done so far to lay down coherent rules or specific strategies to address it Dealing with discrimination on multiple grounds would be of special benefit to women, since most cases involve a combination of discrimination based on gender and the other grounds. According to a Flash Eurobarometer

¹⁶ See the Labour Court AD 2006 No 83 and AD 2012 No 51

¹⁷ Roma Decade of Social Inclusion, www.romadecade.org

¹⁸ P22, SEC (2009) 2181

survey conducted in February 2008, discrimination based on a combination of factors (religion or belief, disability, age, sexual orientation, gender, and race or ethnic origin) has been personally experienced by a relatively high proportion of EU citizens. At 16% this is the second highest percentage (following 'age') of the grounds of discrimination covered in the survey'.

The WG reports that a multidimensional approach to discrimination cases can often be very important. Moreover, sometimes it is difficult to single out one discrimination ground in a case, because different grounds can be entwined. How to handle such cases from a legal point of view is currently difficult. WG members report that there is a lack of clarity regarding procedures to be followed in multiple or intersectional discrimination cases and question whether sanctions should reflect the multi discriminatory aspect of cases,

The European Commission may wish to consider whether amendment of the Race and General Framework Directives is required to prohibit discrimination on combined grounds.

16. Volunteers

The European Commission may wish to consider whether protection should be provided under the Directives for volunteers.

The Working Group notes that the EC has conducted a Study on Volunteering in the European Union¹⁹ and found that volunteering makes a significant contribution to the GDP of Member States. In addition, protection for volunteers is already provided in some countries already such as Belgium, the Czech Republic, Slovenia, the Netherlands and Norway²⁰. However, domestic case law in Great Britain has found that volunteers are not protected against discrimination under the General Framework Directive²¹.

¹⁹ See <http://ec.europa.eu/citizenship>

²⁰ See *Dynamic Interpretation – European Antidiscrimination Law in Practice V*, Equinet, 2010, p. 7-18 and 36–72.

²¹ In the case of *X v Mid Sussex Citizen's Advice Bureau (CAB)* a volunteer worker at the Citizens Advice Bureau claimed that she was protected from acts of discrimination on grounds of her disability under the General Framework Directive. The Equality and Human Rights Commission intervened in the case and argued that volunteering fell either within the concept of "employment" or "occupation" as defined in the Directive; and further, that the post involved "vocational training" within the meaning of Article 3(1)(b). It contended that effect could be given to these provisions by direct enforcement of a fundamental right. The Supreme Court did not accept the Commission's submissions.

Appendix 1: Comparison of remedies and compensation across Member States

Differing levels of compensation are likely to be awarded in discrimination cases in Member States:

In 2012 Equinet published a report by this WG²² which examined how compensation would be dealt with in an age discrimination case and found that there is a wide variance in the level compensation applied in the different Member States.

In most national legislations the only sanction applied in cases of direct age discrimination in the employment field would be the payment of compensation for economic loss and/or injury to feelings. In Denmark compensation for discriminatory dismissals generally corresponds to 6, 9 or 12 months' salary, depending on the duration of the employment of the complainant. In the UK compensation levels tended to range between 7.500 and 37.500 EUR²³ (although there is no cap on the amount which can be awarded). In Poland the minimum level of compensation for discrimination in the employment field is equivalent to the minimum wage (approx. 363 EUR)²⁴. This can however be complemented by compensation for material damage. In Germany damages can be awarded for economic loss and/or for immaterial damages. In cases of immaterial damages in the event of non-recruitment the compensation is limited to up to three months' salary, if the employee would not have been recruited even if the selection had been made without unequal treatment.

In comparison to these sanctions the Swedish court awarded compensation of approximately 14.550 EUR²⁵ to each of the discriminated employees in the case study examined by the group. In accordance with national law the court also invalidated the discriminatory dismissals, allowing for the complainants to regain their employment.

In some countries the payment of compensation can also be complemented by other sanctions, such as publication of the decision or the payment of an administrative fine. The levels of such fines vary greatly between countries, ranging for instance between approximately 227 and 22,727 EUR²⁶ in Romania, reaching a maximum of 600 EUR in Lithuania and between 2,500 and 40,000 EUR in Slovenia. It is to be noted however that these are the minimum and maximum legal levels for such fines and that none of the concerned equality bodies indicated the actual levels being applied in cases of discrimination. The Slovenian equality body said that in practice even fines reaching the minimum level are almost unheard of.

In a small number of jurisdictions the discriminatory act, provision or decision can also be overturned and in others actions can be taken to eliminate the discriminatory effects of the act, provision or decision. In Slovenia criminal sanctions can also be adopted in cases of intentional discrimination.

Generally the WG found that the amount of compensation remains low.

²² See Equality law in practice. Comparative analysis of discrimination cases in Europe. An Equinet report. Equinet, December 2012

²³ Between £6,000 and £30,000

²⁴ Currently 1.500 PLN,

²⁵ It has to be stressed, however, that the compensation awarded (125 000 SEK) was based on the fact that the company was in breach of both the Discrimination Act as and the Law on Employment Protection. Had the latter not been invoked, the compensation would most likely had been at a considerably lower level. See: Labour Court AD 2011 No 37

²⁶ It is noteworthy that multiple discrimination cases in Romania attract higher fines.

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Ombud for Equal Treatment
www.gleichbehandlungsanwaltschaft.at

BELGIUM

Centre for Equal Opportunities & Opposition to Racism
www.diversite.be and www.diversiteit.be

BELGIUM

Institute for the Equality of Women and Men
<http://igvm-iefh.belgium.be>

BULGARIA

Commission for Protection against Discrimination
www.kzd-nondiscrimination.com

CROATIA

Office of the Ombudsman
www.ombudsman.hr

CYPRUS

Office of the Commissioner for Administration
(Ombudsman)
www.ombudsman.gov.cy

CZECH REPUBLIC

Office of the Public Defender of Rights
www.ochrance.cz

DENMARK

Board of Equal Treatment
www.ast.dk

DENMARK

Danish Institute for Human Rights
www.humanrights.dk

ESTONIA

Gender Equality and Equal Treatment Commissioner
www.svv.ee

FINLAND

Ombudsman for Equality
www.tasa-arvo.fi

FINLAND

Ombudsman for Minorities
www.ofm.fi

FRANCE

Defender of Rights
www.defenseurdesdroits.fr

GERMANY

Federal Anti-Discrimination Agency
www.antidiskriminierungsstelle.de

GREECE

Greek Ombudsman
www.synigoros.gr

HUNGARY

Equal Treatment Authority
www.egyenlobanasmod.hu

HUNGARY

Office of the Commissioner for Fundamental Rights
www.ajbh.hu

IRELAND

Equality Authority
www.equality.ie

ITALY

National Office against Racial Discrimination - UNAR
www.unar.it

LATVIA

Office of the Ombudsman
www.tiesibsargs.lv

LITHUANIA

Office of the Equal Opportunities Ombudsperson
www.lygybe.lt

LUXEMBURG

Centre for Equal Treatment
www.cet.lu

(FYRO) MACEDONIA

Commission for the Protection against Discrimination
www.kzd.mk/mk/

MALTA

National Commission for the Promotion of Equality
www.equality.gov.mt

NETHERLANDS

Netherlands Institute for Human Rights
www.mensenrechten.nl

NORWAY

Equality and Anti-Discrimination Ombud
www.ldo.no

POLAND

Human Rights Defender
www.rpo.gov.pl

PORTUGAL

Commission for Citizenship and Gender Equality
www.cig.gov.pt

PORTUGAL

Commission for Equality in Labour and Employment
www.cite.gov.pt

PORTUGAL

High Commission for Immigration and Intercultural Dialogue
www.acidi.gov.pt

ROMANIA

National Council for Combating Discrimination
www.cncd.org.ro

SERBIA

Commission for the Protection of Equality
www.ravnopravnost.gov.rs

SLOVAKIA

National Centre for Human Rights
www.snslp.sk

SLOVENIA

Advocate of the Principle of Equality
www.zagovornik.net

SPAIN

Spanish Race and Ethnic Equality Council
www.igualdadynodiscriminacion.org

SWEDEN

Equality Ombudsman
www.do.se

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Equality and Human Rights Commission
www.equalityhumanrights.com

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