Equinet Training:
Use of Equality Data in Non-Discrimination Legal Casework

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Introduction

The European Handbook on Equality Data defines equality data (ED) as 'any piece of information that is useful for the purposes of describing and analysing the state of equality'. The information may be quantitative or qualitative in nature. It could include aggregate data that reflect inequalities or their causes or effects in society. Sometimes data that are collected primarily for reasons other than equality-related purposes can be used for producing equality data.[1]

Accurate and comparable ED is essential in enabling adjudicators to assess cases of discrimination using a contextual analysis of group vulnerability and marginalization. It allows equality bodies as both adjudicators and litigators to better design, implement, and monitor purposeful casework strategies. Equality data are a powerful tool in the effective protection of complainants against bias and exclusion.

The need to improve the collection of reliable and comparable data at European and national level has been emphasised in a number of European Commission initiatives, including the Gender Equality Strategy, the LGBTIQ Equality Strategy, the EU Roma Strategic Framework and the Anti-racism Action Plan.

The following illustrative synopsis of case law by the two European courts indicates the possible uses of ED in equality adjudication.

[1] See more at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/equality-data-collection_en.

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European Court of Human Rights

In *Basu v. Germany* (18 October 2022), one of a pair of racial profiling cases decided on the same date[2] – the only profiling cases to date after *Lingurar v. Romania*[3] – the Court used qualitative equality data in an important way. It referred to ECRI and UN Human Rights Committee findings on the impact of racial profiling – stigmatisation, humiliation, and spread of xenophobic attitudes – in order to acknowledge that an arguable claim of racial profiling triggers the authorities' duty to investigate possible links between racist attitudes and a State agent's act implicit under Article 14 in conjunction with Article 8: 'This is essential in order for the protection against racial discrimination not to become theoretical and illusory in the context of non-violent acts falling to be examined under Article 8, to ensure protection from stigmatisation of the persons concerned and to prevent the spread of xenophobic attitudes.' (§34-5) Arguably, this duty to 'take all reasonable measures to ascertain through an independent body whether or not a discriminatory attitude had played a role in the [act]' should encompass a duty to take account of equality data contextualising the impugned act.

In *Muhammad v. Spain* (18 October 2022), the Court took a different, restrictive approach to the implications of equality data for police racial profiling. While it conceded that 'a number of organisations, including intergovernmental bodies, have expressed concern regarding the occurrence of racially motivated police identity checks', it refused to take this context into account, reiterating that its 'sole concern' was to assess the individual case. (§100) The applicant had submitted reports aimed at proving that racially motivated identity checks were a pervasive practice of the Spanish police forces. This equality data, together with the applicant's apparent different treatment – nobody from the majority population had been stopped on the same street immediately before, during or after the applicant's identity check – was insufficient for a prima facie case. (§99) The Court held that the applicant's singling out for a check 'cannot be taken as an indication per se of any racial motivation'. Despite the equality data presented, the applicant 'has not succeeded in showing any surrounding circumstances which could suggest that the police were carrying out identity checks motivated by animosity against citizens who shared the applicant's ethnicity, or which could give rise to the presumption required to reverse the burden of proof at the domestic level'. (§99) The Court declined departing from the domestic courts' conclusion that the applicant's attitude, and not his ethnicity, had caused the officers to stop and identify him. It was only his refusal to show proof of his identity that 'caused his detention' in order to be identified at the police premises. Importantly, not only had the national courts assessed the matter but also, the Court considered the domestic anti-discrimination legislation to be adequate.

[2] The second one being *Muhammad v. Spain*, summarized below.
[3] While in the earlier *Timishev v. Russia*, the issue was also one of ethnic profiling, the Court did not term it in that way.

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In *Beeler v. Switzerland*, the Court dealt with the entitlement to welfare benefits of a widower and single father. It critically assessed statistics submitted by the respondent. The government had argued that gender equality had not yet been entirely achieved in practice as concerns paid employment and roles within a couple. They contended that it was still justifiable to rely on the presumption that the husband provided for the financial maintenance of the wife, particularly where she had children, and thus to afford a higher protection to widows than to widowers. This difference in treatment was allegedly based on social reality, and not on gender stereotyping. (§106) The government provided statistics relating to the percentage of men and women with children under the age of 15 working full time and part time. However, the Court noted, no information was provided on the percentage of widows or widowers who successfully return to the employment market after many years of absence once their children have reached that age or the age of majority. This absence of relevant information was 'noticeable' given repeated attempts to reform the system of widows' and widowers' pensions and relevant domestic Supreme Court findings. (§107)

Furthermore, the Court reiterated its reliance, based on its earlier sex discrimination case law, on trends in 'contemporary European societies' towards 'a more equal distribution of responsibility between men and women for the upbringing of their children' and 'increasing recognition of the role of men in caring for young children'. (§108) In light of these social trends – arguably, a form of equality data – the Court reasserted that 'a general and automatic' sex-based restriction regardless of personal situations, exceeded a state's margin of appreciation. Governmental reliance on the presumption that the husband supports the wife financially ('the "male breadwinner" concept') is incapable of justifying putting widowers at a disadvantage compared to widows. (§110)

Additionally, the Court referenced an earlier (1997) acknowledgment by the government that women were increasingly often in gainful employment and that protection was necessary for men who devoted themselves to carrying out household tasks and bringing up children. (§111) Arguably, such an acknowledgment is a form of equality data as well. Similarly, the Court relied on an assessment of the impugned legislation by the country's Supreme Court. It concluded that the law was based on assumptions that were no longer valid as 'the old "factual inequalities" between men and women have become less marked in Swiss society'. (§113)

In *Landi c. Italie*, the Court reaffirmed, as a matter of general principle, its *Volodina* (see below) holdings on the role of ED to prove discrimination:

- If it is established that domestic violence disproportionately affects women, the burden of proof is on the State to demonstrate it has taken measures to remedy their gender-based disadvantage.
- The evidence required to show such disproportionate impact and shift the burden of proof can vary and include reports of NGOs and international bodies like CEDAW, and official or academic statistics showing that domestic violence primarily affects women

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and that the authorities' general attitude – improper police treatment of reporting victims or judicial passivity – has created favourable conditions for such violence.

- If structural bias is established, the applicant does not need to prove that she was a target of individual bias.
- If, however, the evidence is insufficient to show that the legislation or official practice, or their effects are discriminatory, the bias of particular officials towards the victim will need to be proven. If such proof is lacking, the inadequacy of the measures taken in the individual case will not, in itself, indicate an intention to discriminate. (§101)

In *Landi*, the Court relied on equality data (a GREVIO report) to conclude that the State had taken significant measures to provide protection against domestic violence. (§103) On this basis, the Court found that the applicant had not proven a general justice system passivity in this regard, or discrimination in her particular case – she did not provide any statistics or NGO reports. (§104)

In *Volodina v. Russia*, based on the above principles, the Court held that women are disproportionately affected by domestic violence in Russia, referring to CEDAW conclusions and other ED to that effect. (§117-124) Importantly, the Court also made a finding *about* ED, holding that comprehensive nationwide statistics regarding domestic violence were lacking in Russia despite recommendations by CEDAW and the Special Rapporteur on violence against women. (§117-8) The Court found that the lack of statistics on domestic violence was due to the lack of a legal definition of domestic violence preventing the classification of such offences – for this it relied on a Human Rights Watch report. (§118) Importantly, the Court made it clear that it was Russia's fault that the applicant had been unable to present official data showing that female victims of domestic violence were discriminated against - the failure to collect such data was attributable to the authorities. (§118) (See the *Danfoss*, *Enderby*, *Kelly*, and *Meister* cases below regarding the significance, in CJEU case law, of respondents' non-transparency/ withholding of comparative information.) The Court pointed out that the Government had not produced any statistics, while the applicant had submitted police data of a certain relevance. (§119) The Court discussed the latter at length. (§119-120)

Relying on studies by the World Health Organisation, the Special Rapporteur on violence against women, the UN Committee against Torture, Russian and international NGOs, and Russian official bodies, the Court found that domestic violence, whose victims are largely women, is significantly under-reported, under-recorded, under-investigated and under-prosecuted in Russia and globally, while being highly prevalent. (§121-2)

Referring to official domestic statistics, the Court held that women who are victims of domestic violence have no equal access to justice as their exclusion from public prosecution of the offences disproportionately and adversely affects their prospects of success: the vast majority of acquittals were pronounced in private prosecution cases and such cases were four times more likely to be discontinued on procedural grounds. It followed that victims of domestic violence have been placed in a de facto situation of disadvantage. (§123)

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The Court relied on Council of Europe and CEDAW recommendations and criticism to expose the authorities' failure to provide for the public prosecution of domestic violence. The Court invoked CEDAW's finding that placing the burden of proof on the victim of domestic violence in private prosecution cases had the effect of denying them access to justice. (§84) Based on this, the Court held that the Russian legal framework falls short of Convention requirements. (§85)

In line with its established approach of probing for a 'European consensus', the Court referred to the availability of immediate relief remedies 'in a large majority of Council of Europe Member States' (§88), noting that Russia is one of 'only a few Member States' depriving victims of such protections (§89). (Comparative information of this kind could be considered a form of ED.)

The Court concluded that Russia had persistently failed to adopt adequate legislation on domestic violence – no definition, no protection orders, no public prosecution – by extensively invoking CEDAW, Special Rapporteur on violence against women, Committee on Economic, Social and Cultural Rights, Committee against Torture, and Russian Ombudsman qualitative data (§126-8, 131). The Court explicitly concurred with those assessments, holding that Russia had failed to protect domestic violence victims, as well as women from widespread violence and discrimination.

The Court found that this continued failure 'clearly demonstrate[d]' that the authorities' failures in *Volodina* were not a simple ommission, but flowed from a reluctance to acknowledge the problem of domestic violence in Russia and its discriminatory effect on women. By tolerating for many years a climate which was conducive to domestic violence, the authorities had failed to enable substantive gender equality allowing women to live free from fear of ill-treatment or attacks and to benefit from the equal protection of the law. (§132) This amounted to a violation of Article 14 in conjunction with Article 3. (§133)

In *Bayev and Others v. Russia*, the Court referred to a 'clear European consensus' on sexual minorities' right to openly self-identify and promote their freedoms. (§66) (As suggested above, comparative information on state practice regarding disadvantaged groups could be construed as a type of ED.) (§67) In this regard, the Court also invoked a 'growing general tendency to include relationships between same-sex couples within the concept of "family life". (§67) It made a holding on the relevance for such ED for State duties to evolve policy corresponding to such trends: "It is incumbent on the State, in its choice of means designed to protect the family, to take into account developments in society and changes in the perception of social, civil-status and relational issues […]." (§67) The Court referred to its own docket as a source of ED, concluding that sexual minorities cherish family values based on the number of their applications seeking access to marriage, parenthood and adoption. (§67)

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Importantly, in *Bayev*, the Court also dismissed sociological information presented by the Government – regarding the alleged negative popular opinion on homosexuality – as irrelevant: "[T]hese negative attitudes, references to traditions or general assumptions in a particular country cannot […] amount to sufficient justification for the differential treatment […]." (§68) Rejecting the Government's claim that most Russians disapprove of homosexuality and any display thereof, the Court differentiated between popular support for extending Convention rights (relevant) and popular sentiment against Convention protection: it would be incompatible with Convention values if the exercise of Convention rights by a minority was conditional on majority approval. (§70)

(Accordingly, ED on anti-minority hostility levels is capable of supporting conclusions about enhanced State protection duties towards such minorities, yet not of justifying disadvantage.)

In *N. v. Romania (No. 2)*, the Court implicitly reiterated that ED on historical discrimination and exclusion of certain groups, such as people with mental disabilities, is relevant to the State's margin of appreciation where members of such groups are concerned and to the justifiability of restrictions – both substantially narrower. (§55)

In *S.A.S. v. France*, the Court considered ED on the number of women affected by the impugned full-face veil ban. As they represented a small proportion of the population and of the Muslims living in France, the Court held a blanket ban seemed potentially disproportionate (ultimately, it held the ban was justified). (§145) The Court also considered qualitative data of national and international rights organisations and institutions that had criticized such a blanket ban. (147) Furthermore, it relied on what was assessed as a lack of European consensus on this issue in order to uphold national discretion to make such a decision. (§156)

In the earlier *Zarb Adami v. Malta*, the Court referred to its previous holdings that statistics are insufficient in themselves to disclose a discriminatory practice. (§76) However, it considered statistics produced by both parties, and concluded on their basis that the civic obligation of jury service had been placed predominantly on men, a negligible percentage of women being enrolled, which constituted a difference of treatment between women and men. (§77-8) As the discrepancy in the distribution of this obligation was 'significant', the Court dismissed the Government's explanations for it. This led to a finding of a violation of Article 14. (§82-3)

In *Di Trizio v. Switzerland*, the Court affirmed that information about general assumptions or prevailing social attitudes in a particular country is insufficient justification for a difference in treatment on grounds of sex. (§82) Discussing the applicant's onus of proof, namely to 'adduce evidence of disproportionately harmful effects on a particular group, giving rise to a presumption of indirect discrimination', the Court recalled its past position that 'statistics could not in themselves disclose a practice which could be classified as discriminatory' (*Hugh Jordan v. United Kingdom*, §154). It also acknowledged its evolution in more recent cases

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regarding alleged differences in the effects of a general measure or *de facto* situation (see *Hoogendijk v. the Netherlands* and *Zarb Adami*), in which it had relied extensively on statistics produced by the parties in finding a difference in treatment between two groups in similar situations. (§84)

The Court quoted its *Hoogendijk* judgment: '[W]here an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination.' (§86)

Assessing whether the evidence gave rise to a presumption of indirect discrimination in *Di Trizio*, the Court noted statistics supplied by the Government showing that the impugned rule affected an overwhelming proportion of women. (§88) This discrepancy had furthermore been documented by the domestic courts and other official bodies. (§89) In view of these data, the Court considered the evidence adduced as sufficiently reliable and significant to give rise to a presumption of indirect discrimination. (§90)

Discussing the justifiability of the impugned rule, the Court referenced criticism of it by national courts and other institutions. (§98-101) The Court noted the availability of alternative methods taking greater account of gender equality requirements. (§101) Based on this, the impugned method disadvantaging women was not justified. (§103)

In *Šaltinytė v. Lithuania*, the Court was not persuaded that Government-adduced statistical data showing the average age of marriage, giving birth or obtaining a housing loan constituted evidence of inequalities or hardship allegedly experienced by 'young families'. Accordingly, the Government had not sufficiently demonstrated the existence of factual inequalities between the relevant categories of people. (§73) The Court noted the data showing relevant demographic trends in the national context. Based on this, it accepted that the authorities had legitimately sought to alter those negative trends. (§75)

Taking note of the statistics provided by the Government, the Court was able to accept that the impugned age limit was reasonably based on objective data, and not on general assumptions or prevailing social attitudes, as alleged by the applicant. (§80) The Court attached weight to the fact that the impugned age limit had been updated in the light of more recent data: it was important for the legislation to adequately reflect the actual, contemporary demographic situation in the country.

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In *Oganezova v. Armenia*, the Court steadily used qualitative ED to contextualize and assess homophobic attacks and official responses.[4] The Court consistently referenced the Armenian LGBTI community's exposure to pervasive homophobia in order to gauge the impugned behaviours' severity for purposes of Article 3 applicability. (§§92, 94, 97) It integrated qualitative findings of LGBT vulnerability from international bodies, affirming that a context of systemic group victimization manifests both the discrimination and the level of physical threat against the individual group representative in the particular case. (§§92, 94) The reality of the risk thus derived was sufficient to offset the absence of any physical injury (§94). (This is advanced compared to cases, in which the Court did not rely on ED for its 'severity threshold' analysis (*Women's Initiatives Supporting Group v. Georgia*, §§60-1); *Aghdgomelashvili and Japaridze v Georgia*, §§47-9).)

Moreover, the Court referenced qualitative ED to contextualise the need for effective investigation of the homophobic nature of the arson in the case as an attack on the LGBTI community itself. It enhanced the positive duty to investigate to a level of absolute necessity ('essential'). (§§104-5) This is similar to prior holdings of 'a pressing need' to properly investigate given the 'well-documented hostility against the LGBT community' (*Aghdgomelashvili*, §§40; *Women's Initiatives Supporting Group*, §66). Significantly, in *Oganezova*, the requisite investigation was framed as no less of an imperative – as indispensable – as in other cases, in which the perpetrators were police (*Aghdgomelashvili*), and physical assaults had taken place even if not individually directed against the applicants (in *Women's Initiatives Supporting Group*, mobbers stormed vehicles carrying the applicants and a stone injured one of the applicants in the head, §§24, 26-7, 60). In *Oganezova*, the private perpetrators only destroyed property, their bodily aggression limited to spitting at the applicant once. Regardless, the ED used supported the same conclusion regarding the severity level. Thusly, in *Oganezova*, the Court built upon its respectable practice of heeding contextual information about group vulnerability.

Finally, the Court used ED regarding the legislative deficit – hate crime law not covering SOGI – to iterate this deficit as a well-documented concern, implying that Armenia had persistently ignored it. (§§104, 121) In this sense, it did more than in *Stoyanova v. Bulgaria*, in which it did not reference ECRI's report highlighting a similar legislative gap. In conclusion, the Court's integration of ED in *Oganezova* builds on precedents, consolidating its context-heedful approach.

In *Lingurar v. Romania*, the first and only case to date, in which the Court has made findings of 'ethnic profiling' and 'institutionalised racism', it relied on general reports of racial stereotyping of Roma presented by the intervenor (qualitative ED) to support its conclusion that a police raid was discriminatory, targeting the applicants based on official stereotyping of

[4] Margarita S. Ilieva, *Oganezova v. Armenia: Purposive homophobia in a deprived legal environment*, Strasbourg Observers, August 2022.

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Roma as criminals. (§70) The Court introduced an enhanced procedural duty to investigate racist abuse based on ED evidencing prevalent/ institutionalised racism: '[I]n situations where there is evidence of patterns of violence and intolerance against an ethnic minority, the positive obligations incumbent on States require a higher standard of response to alleged bias-motivated incidents […]. The Court is mindful of the evidence produced by the parties and the available material, which show that, in the respondent State, the Roma communities are often confronted with institutionalised racism and are prone to excessive use of force by the law-enforcement authorities […]. In this context, the mere fact that in the present case stereotypes about "Roma behaviour" feature in the authorities' assessment of the situation […] may give rise to suspicions of discrimination based on ethnic grounds'. (§80)

The evidence adduced had included international reports and surveys by FRA, OSCE, ECRI, CERD, CAT, and Amnesty International of anti-Gypsyism, racial stereotyping and hate crime, and of violent police raids apparently motivated by stereotypical views on Roma criminality, as well as surveys (statistics) on anti-Roma prejudice prevalence. (§63-5) The Court found violations of Article 14 taken in conjunction with Article 3 in both its substantive and procedural limbs.

Conversely, in *Memedov v. North Macedonia*, the Court held that 'the general information from international fora about the alleged police abuse of Roma in the respondent State does not show that Roma communities are confronted with institutionalised racism […]. Furthermore, while potentially relevant, it is an insufficient basis for a conclusion of racially motivated police abuse regarding the concrete events in the present case […].' Accordingly, in this case, the Court used ED to discredit the applicant's allegations of racism in the police's handling of the events.

In *Jurčić v. Croatia*, the Court inferred from domestic case law adduced by the government that pregnant women were generally targeted for health insurance status verification reviews and that women who took employment late during a pregnancy were automatically put in a 'suspicious' category of employees. (§75) Based on this, the Court made a finding of a 'generally problematic' approach of the authorities, using the government's evidence to develop its own ED, as it were. Furthermore, it used domestic qualitative ED showing an overall official stance that pregnant women should not (seek) work. (§83) Relying on this data, the Court made a finding of gender stereotyping as a serious obstacle to the achievement of substantive equality.

In *Biao v. Denmark*, the Grand Chamber adopted an active stance to the use of ED, inviting the government to supply such data. (§108) Specifically, the Court asked for ethnic-disaggregated statistics on those benefitting from the impugned family reunification rule, alleged to be indirectly discriminatory. The government failed to provide such data. (§109) The Court made a point of noting the ensuing impossibility to establish the ratio of beneficiaries in terms of ethnic Danes as opposed to other nationals. (§110-1) It went on to use the *absence* of the requisite statistics as a basis, together with logic-based arguments, to imply that the alleged

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disproportionately prejudicial effect on persons who acquired Danish nationality later in life had not been refuted. (§111) Finding, accordingly, that such a prejudicial effect was in place (§111), the Court inferred that the vast majority of the rule's beneficiaries would be ethnic Danes, while those disadvantaged would be of foreign ethnic origin (§112-3). In this manner, the lack of official ED was used to corroborate the Court's logic-based conclusions about the rule's disparate impact on minorities, i.e. its indirectly discriminatory character.

To back this conclusion, the Court relied on qualitative ED from international bodies, such as ECRI, CERD, and the Council of Europe Commissioner for Human Rights, that the impugned rule entailed indirect discrimination. (§1-7) Based on this and on the government's failure to justify the disparate impact, the Court found a violation of Article 14 in conjunction with Article 8. (§139)

In *Tkhelidze v. Georgia*, the Court relied on qualitative data on domestic violence in the country from the UN Special Rapporteur on violence against women. It referred to 'systemic failings' in the police response to domestic violence identified by the Rapporteur. (§54-5) The Court qualified the police passivity in the particular case as 'even more unforgivable' against the background of international and domestic 'authoritative' ED revealing violence against women as 'a major systemic problem in the country', a 'blight on society'. (§56) The Court referenced this data as evidence that 'discriminatory gender stereotypes and patriarchal attitudes' were present. Importantly, from this information, it derived that the authorities 'thus knew or should have known of the gravity of the situation affecting many women in the country and should have thus shown particular diligence and provided heightened State protection to vulnerable members of that group'. In other words, the Court used ED to show that law enforcement were to be treated as having been aware of the pervasive domestic violence and, accordingly, under an enhanced duty to respond correspondingly protectively.

The Court relied on this context to assert as inevitable the conclusion ('can only conclude') that there was 'general and discriminatory passivity of the law-enforcement' regarding domestic violence, 'creat[ing] a climate conducive to a further proliferation' of violence against women. Using equality data in this way, the Court explicitly framed the particular case as symptomatic, 'a perfect illustration', of the structural problem of official connivance. Based on this, the Court held that the State's failure to protect the victim infringed her right to equality before the law, regardless of 'whether that failure was intentional or negligent'. (§56)

Explicitly basing this on ED, the Court held that the police inaction in the case was 'a systemic failure'. (§57) It amounted to a violation of substantive positive obligations under Article 2 together with Article 14. Furthermore, the unmet 'a pressing need' to effectively investigate possible gender discrimination and bias as a factor behind the police inaction was a breach of procedural positive obligations under Article 2 with Article 14. (§60)

In *Oršuš and Others v. Croatia*, the Court expressly took into account the general situation of the Roma community, to which the applicants belonged, i.e. the ED pertaining to that situation

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produced by international organisations and Council of Europe bodies. (§147) Based on this data, the Court reiterated its recognition of the specific disadvantage and vulnerability of this minority and their ensuing need for special protection, including in the sphere of education. On these grounds, it held that the case 'warrant[ed] particular attention'.

Furthermore, the Court discussed at length the relevance of statistics in Roma educational segregation cases, comparing *Oršuš* to *D.H. and Others* v. *the Czech Republic* and *Sampanis and Others v. Greece*. (§152) In *D.H. and Others*, the Court had found that 50% to 70% of Roma children attended special schools for pupils with learning difficulties, while in *Sampanis and Others*, all Roma children in the relevant school were placed in a separate facility. These percentages had been enough for *prima facie* cases of discrimination. In *Oršuš*, the proportion of Roma children in the relevant regular primary schools varied between 57%-75% (in school No. 1) and 33%-36% (school No. 2). Those children were assembled in Roma-only classes situated in the same premises. The data submitted for the year 2001 showed that in school No. 1, 44% of pupils were Roma and 73% of them attended a Roma-only class. In school No. 2, 10% of pupils were Roma and 36% of them attended a Roma-only class. The Court reasoned that those statistics demonstrated that only in school No. 1, a majority of Roma pupils attended a Roma-only class, while in school No. 2, the percentage was below 50%. Based on this, the Court held that there was no general policy to automatically place Roma pupils in separate classes. Therefore, it concluded, the statistics did not suffice to establish *prima facie* discrimination.

Nonetheless, the Court reiterated that indirect discrimination may be proven without statistical evidence (also in *D.H. and Others*). (§153) It relied on ED (Commissioner for Human Rights and ECRI reports) to uncover the reasons for the Roma children's separation in school (which was non-Roma opposition to integration). (§154) The Court also used the government's own admission of the segregation practice before another Council of Europe body as a form of ED. (§174) Additionally, the Court referenced European ED on Roma school drop-out rates in the country. (§176) In its conclusion, however, it reversed the direction of its use of European ED to relativise the respondent State's failure to curb segregation by noting that based on the data, other states struggled with this issue too. (§180)

In *Gillan and Quinton v. the United Kingdom*, the Court found an Article 8 violation due to broad discretion police officers had when carrying out 'stop and search'. It termed 'striking' the statistical and other evidence of the wide extent to which stop-and-search powers were used. (§83-4) In light of the large number of stops and searches and their limited effectiveness, the Court found 'a clear risk of arbitrariness in the grant of such broad discretion' to police officers. Furthermore, it identified, of its own motion, 'risks of the discriminatory use of the powers against [black and Asian individuals as] a very real consideration' in light of 'available statistics' that proved those ethnic groups were overly affected. (§85) The Court equally critised the police practice of stopping and searching white people with the only aim of fixing the racial imbalance in the statistics. The Court assessed whether, in general, stops and searches under discretionary powers were 'lawful' under Article 8. It implied they should only

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be authorized if necessary as opposed to 'expedient' (as per domestic law) and proportionate, with effective safeguards providing a check on authorizations. The Court appeared persuaded by statistical (and other) evidence showing overuse by the police of stops and searches. The evidence adduced had included official statistical data of the frequency of the impugned discretionary police measures and of the overrepresentation of minorities among their targets.

It is significant that the Court raised *ex officio* the ethnic profiling issue despite the applicants not belonging to a minority. This approach based on domestic ED indicated the Court's own awareness of the linkage between police arbitrariness and ethnic targeting and/or disparities. (Nevertheless, this holding explicitly depended on the availability of statistics demonstrating ethnic disparities.) It is furthermore important that the Court acknowledged the abusive nature of the targeting of white individuals for purposes of manipulating statistics and obfuscating the reality of minority profiling.

In *S. and Marper v. UK*, concerning DNA data retention for profiling purposes and minority overrepresentation among profiling victims, the Court similarly found an Article 8 violation. The authorities had retained the applicants' samples after criminal proceedings against them were variously terminated without conviction. The Court noted it was undisputed by the government that DNA processing allowed the authorities to assess an individual's likely ethnic origin and that DNA-drawn inferences as to ethnic origin were used in police investigations. (§76) The Court relied on an official domestic report that the policies had led to over-representation in the database of young persons and ethnic minorities who had not been convicted of any crime. (§124)

Court of Justice of the European Union

In Case C-167/97 (*Seymour-Smith*),[5] the Court of Justice of the European Union (CJEU) gave general guidance regarding the assessment of statistics in indirect (sex) discrimination cases. It held that statistics produced after the adoption of the impugned rule and showing its impact on women as compared to men are as relevant as data available at the time of adoption of the rule. (§49) The Court indicated 'the best approach to the comparison of statistics': to 'consider, on the one hand, the respective proportions of men in the workforce able to satisfy the [disputed] requirement and of those unable to do so, and, on the other, to compare those proportions as regards women in the workforce'. 'It is not sufficient to consider the number of persons affected, since that depends on the number of working people in the Member State as a whole as well as the percentages of men and women employed'. (§59)

The Court reiterated that, for *prima facie* ('apparent') indirect discrimination to be established, 'it must be ascertained whether the statistics available indicate that a considerably smaller percentage of women than men is able to satisfy the [disputed]

[5] *Regina and Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*.

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condition'. (§60) Equally, the burden of proof could shift 'if the statistical evidence revealed a lesser but persistent and relatively constant disparity over a long period between men and women who satisfy the requirement'. It is for the national court to draw its conclusions from such statistics. (§61) It is also for that court to assess whether the statistics are valid, i.e. whether they generally appear to be significant, cover enough individuals and capture phenomena that are not fortuitous or short-term. In sum, the national court must establish whether the statistics concerning the respective percentages of men and women fulfilling the requirement are relevant and sufficient. (§62)

In *Seymour-Smith*, the Court found the percentage of women unable to meet the requirement insufficient – not 'considerably smaller' (68.9% of women v. 77.4% of men). (§63-4) For a *prima facie* case, the statistics must indicate, as verified by the national court, that a *considerably smaller* percentage of women is able to fulfil the requirement. (§65)

In Case C-83/14 (*CHEZ*),[6] the Court accepted, without statistics or other data, that the impugned practice of mounting electric meters at inaccessible heights was in place only in residential areas where Roma are the majority of the local population – this was common ground between the parties, undisputed by any party. (§81, 87) Based on this, the Court concluded without any ED that the impugned practice was 'liable to affect persons possessing such an ethnic origin in considerably greater proportions and accordingly to put them at a particular disadvantage compared with other persons'. (§107)

In Case 109/88 (*Danfoss*),[7] the Court ruled on the implications of a lack of ED: where an undertaking applies a system of pay which is 'totally lacking in transparency', it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men. (§16)

The case concerned a system of pay supplements implemented in such a way that a woman was unable to identify the reasons for a difference between her pay and that of a man doing the same work. Employees did not know what criteria in the matter of supplements are applied to them and how they are applied. They knew only the amount of their supplemented pay without being able to determine the effect of the individual criteria. Those who in a particular wage group were thus unable to compare the various components of their pay with those of the pay of their colleagues in the same wage group. (§10)

The Court recalled its judgment in Case 318/86, *Commission v France*, in which it had condemned a system of recruitment characterized by a lack of transparency as being contrary to the principle of equal access to employment on the ground that the lack of transparency

[6] *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia, third parties: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane*.
[7] *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*.

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prevented any form of supervision by the national courts. (§12) Accordingly, it held in *Danfoss* that where a system of individual pay supplements completely lacking in transparency is at issue, female employees are deprived of any effective means of enforcing the principle of equal pay before the national courts as they can only establish differences in average pay. Therefore, the employer should have the burden of proving that his practice in the matter of wages is not in fact discriminatory. (§13) To show that his practice in the matter of wages does not systematically work to the disadvantage of female employees the employer will have to indicate how he has applied the criteria concerning supplements and will thus be forced to make his system of pay transparent. (§15)

In Case C-127/92 (*Enderby*),[8] the Court reiterated its *Danfoss* holding on non-transparency. It held that if the pay of an employee group is significantly lower than that of another group and if the former are almost exclusively women while the latter are predominantly men, there is a *prima facie* case of sex discrimination where the two groups' jobs are of equal value and the statistics describing that situation are valid. (§16) The validity of the statistics is for the national court to assess (see above, *Seymour-Smith*, for the criteria for statistics' validity and significance). (§17) If significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, the employer is required to show that the difference is based on objectively justified factors. (§19)

In Case C-381/99 (*Brunnhofer*)[9] and Case C-317/93 (*Nolte*),[10] the Court reiterated its *Danfoss* holding on the implications of lacking ED: under a non-transparent pay system, women are unable to compare the components of their salary with those of male colleagues in the same salary group and can establish differences only in average pay, so that in practice they are deprived of any possibility of effectively examining whether the principle of equal pay was being complied with if the employer did not have to indicate how he applied the pay criteria.

In Case 171-88 (*Rinner-Kühn*),[11] the Court held that a provision resulting in 'considerably less women than men', in percentage terms, meeting the requirements for an entitlement is discriminatory unless justified. (§11-2) Whether the provision 'affects a (much/ far) greater number of female workers than male workers', is for the national court to determine. (§14-6)

In Case C-184/89 (*Nimz*),[12] the Court assessed a collective agreement disadvantaging part-time workers as a group of employees comprising 'a considerably smaller/ much lower' percentage of men than women. The Court held that such a provision is discriminatory unless objectively justified. (§12, 15) In Case C- 33/89 (*Kowalska*),[13] similarly, the Court dealt with a

[8] *Dr Pamela Mary Enderby and Frenchay Health Authority, Secretary of State for Health.*
[9] *Susanna Brunnhofer and Bank der österreichischen Postsparkasse AG.*
[10] *Inge Nolte v Landesversicherungsanstalt Hannover.*
[11] *Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co. KG.*
[12] *Helga Nimz v Freie und Hansestadt Hamburg.*
[13] *Maria Kowalska v Freie und Hansestadt Hamburg.*

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collective agreement disadvantaging part-time workers which 'leads to discrimination against female workers as compared with male workers in cases where a considerably lower percentage of men than of women work part time'. The Court held that such a provision is discriminatory unless objectively justified. (§13)

In Case C-668/15 (*Jyske Finans*),[14] the Court addressed questions about alleged indirect discrimination on ethnic grounds. It defined the requisite disparate impact as 'when a national measure, albeit formulated in neutral terms, works to the disadvantage of *far more persons possessing the protected characteristic than persons not possessing it*' (emphasis added), relying on its *CHEZ* judgment. (§30)

In Case C-457/17 (*Maniero*),[15] the Court held that the concept of 'particular disadvantage' meant that 'it is particularly persons of a particular racial or ethnic origin, because of the provision, criterion or practice in question, who are disadvantaged', referring to *CHEZ* and *Jyske Finans*. (§47) Therefore, the concept of indirect discrimination 'applies only where the alleged discriminatory measure has the effect of placing a particular ethnic origin at a disadvantage'. (§48)

Case law applicable to ED by analogy

In Case C-104/10 (*Kelly*),[16] the Court assessed whether a respondent could be compelled to provide comparative information in order to enable a complainant to establish a *prima facie* case of discrimination. While this did not concern ED in the *Kelly* case, it arguably would apply to such data by analogy. The Court found that, although the relevant gender equality directives do not entitle a complainant to information in order that they may establish a *prima facie* case, 'it cannot be excluded that a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that directive and thus depriving that provision in particular of its effectiveness'. (§34) In *Kelly*, an applicant for vocational training rejected allegedly on sex grounds was not entitled to information held by the course provider on the qualifications of the other applicants for the course. (§38, 43, 47-8) The Court held that the national court must ascertain whether a refusal of disclosure by the defendant could compromise the effectiveness of the protection. (§39) In doing so, the national court must take into account EU legal rules governing confidentiality and personal data protection; the latter can affect a possible right to information. (§48, 56)

In Case C-415/10 (*Meister*),[17] the Court reiterated its *Kelly* findings that, while a respondent is not under a duty to provide comparative information in order to enable a claimant to make out a prima facie case, a respondent's refusal to do so is able to undermine the effectiveness of equality law. (§39) Therefore, in the context of establishing a *prima facie* case, the national court must ensure that a refusal of disclosure by the respondant will not compromise the

[14] *Jyske Finans A/S v Ligebehandlingsnævnet, acting on behalf of Ismar Huskic*.
[15] *Heiko Jonny Maniero v Studienstiftung des deutschen Volkes eV*.
[16] *Patrick Kelly v National University of Ireland (University College, Dublin).*
[17] *Galina Meister v Speech Design Carrier Systems GmbH.*

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directives' objectives. (§40, 42) The national court must take account of all the circumstances in order to determine whether there is sufficient evidence for a finding of a *prima facie* case. It is well-established that this court is responsible for the assessment of a possible prima facie case. (§37)

Since indirect discrimination may be established by any means including on the basis of statistical evidence (§43), the national court may also take into account the fact that a respondent has refused any access to the information a complainant seeks (in *Kelly*, partial access was granted). (§44) The national court may also take into account that an employer does not dispute that a job applicant's level of expertise matches the job description, as well as the fact that, notwithstanding this, the employer did not invite her to a job interview. (§45)

In sum, while a rejected worker who claims plausibly that she meets the advertised job requirements is not entitled to information whether the employer recruited another applicant, the emloyer's refusal to disclose any information may be taken into account for the purpose of finding a prima facie case. The national court is to determine that in light of all the circumstances of the case. (§46-7)

As with *Kelly* above, this would be applicable to non-disclosure of ED by analogy. The principal argument would be that if a respondent withholds ED, the court or other adjudicator could take that into account as a possible reason, among other possible reasons, to infer discrimination.

In Case C-258/15 (*Salaberria*),[18] the Court took into account data submitted by the respondent regarding the correlation between age and physical performance in police officers, and the resulting projections about years of service depending on age at recruitment and the overall age structure of the force and that structure's dynamic. (§42-4, 46) Based on this, the Court accepted that this case was different from *Vital Pérez* (C-416/13) in which it had not been established that the objective of safeguarding the operational capacity and proper functioning of the local police made it necessary to maintain a particular age structure and an age limit for recruitment. (§45) In *Salaberria*, the Court held that, if the national court is satisfied that the data is correct, the impugned maximum age for recruitment is justified. (§48)

In *Vital Pérez*[19] and *Wolf* (Case C-229/08[20]), in which, similarly, maximum ages for recruitment for police, respectively, firemen were discussed, the Court relied on the same kind of data it termed 'scientific data'. In the *Léger* case (Case C-528/13[21]) concerning sexual orientation, the

[18] *Gorka Salaberria Sorondo v Academia Vasca de Policía y Emergencias*.
[19] *Mario Vital Pérez v Ayuntamiento de Oviedo.*
[20] *Colin Wolf v Stadt Frankfurt am Main.*
[21] *Geoffrey Léger v Ministre des Affaires sociales, de la Santé et des Droits des femmes, Établissement français du sang*.

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Court used HIV-related epidemiological data to assess the exclusion of men who have sex with men from eligibility as blood donors.

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