EQUINET
European Network
of Equality Bodies

AN EQUINET
HANDBOOK

Handbook on Identifying and Using Equality Data in Legal Casework

by Margarita S. Ilieva

Co-funded by
the European Union

2024

Handbook on Identifying and Using Equality Data in Legal Casework is published by Equinet, European Network of Equality Bodies. Equinet brings together 48 organisations from across Europe which are empowered to counteract discrimination as National Equality Bodies across a range of grounds, including age, disability, gender, race or ethnic origin, religion or belief, and sexual orientation.

Equinet members: Commissioner for the Protection from Discrimination, **Albania** | Austrian Disability Ombudswoman, **Austria** | Ombud for Equal Treatment, **Austria** | Unia (Interfederal Centre for Equal Opportunities), **Belgium** | Institute for Equality between Women and Men, **Belgium** | Institution of Human Rights Ombudsman, **Bosnia and Herzegovina** | Commission for Protection against Discrimination, **Bulgaria** | Ombudswoman of the Republic of Croatia, **Croatia** | Ombudsperson for Gender Equality, **Croatia** | Ombudsman for persons with disabilities, **Croatia** | Office of the Commissioner for Administration and the Protection of Human Rights (Ombudsman), **Cyprus** | Office of the Public Defender of Rights, **Czech Republic** | Danish Institute for Human Rights, **Denmark** | Gender Equality and Equal Treatment Commissioner, **Estonia** | Ombudsman for Equality, **Finland** | Non-Discrimination Ombudsman, **Finland** | Defender of Rights, **France** | Public Defender (Ombudsman), **Georgia**| Federal Anti-Discrimination Agency, **Germany** | Greek Ombudsman, **Greece** | Office of the Commissioner for Fundamental Rights, **Hungary** | Irish Human Rights and Equality Commission, **Ireland** | National Office Against Racial Discrimination, **Italy** | Ombudsperson Institution, **Kosovo*** | Office of the Ombudsman, **Latvia** | Office of the Equal Opportunities Ombudsperson, **Lithuania** | Centre for Equal Treatment, **Luxembourg** | National Commission for the Promotion of Equality, **Malta** | Commission for the Rights of Persons with Disability, **Malta** | Equality Council, **Moldova** | The Protector of Human Rights and Freedoms (Ombudsman), **Montenegro** | Netherlands Institute for Human Rights, **Netherlands** | Commission for Prevention and Protection against Discrimination, **North Macedonia** | Equality and Anti-Discrimination Ombud, **Norway** | Commissioner for Human Rights, **Poland** | Commission for Citizenship and Gender Equality, **Portugal** | Commission for Equality in Labour and Employment, **Portugal** | High Commission for Migration, **Portugal** | National Council for Combating Discrimination, **Romania** | Commissioner for Protection of Equality, **Serbia** | National Centre for Human Rights, **Slovakia** | Advocate of the Principle of Equality, **Slovenia** | Council for the Elimination of Ethnic or Racial Discrimination, **Spain** |Institute of Women, **Spain** | Equality Ombudsman, **Sweden** | Ukrainian Parliament Commissioner for Human Rights, **Ukraine** | Equality and Human Rights Commission, **UK – Great Britain** | Equality Commission for Northern Ireland, **UK – Northern Ireland** |

**This designation is without prejudice to positions on status and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.*

Equinet Secretariat | Place Victor Horta, 40 | 1060 Brussels | Belgium |

info@equineteurope.org | www.equineteurope.org

978-92-95112-81-0 (Online)

This publication was prepared based on the information, contributions, and comments provided by members of the Research and Data Collection Working Group. The veracity of the information provided is the responsibility of each member of the Working Group. The views expressed in it belong to the author and members of the Working Group and neither the moderator nor Equinet or the European Commission are liable for any use that may be made of the information contained therein. This information does not necessarily reflect the position or opinion of individual members of Equinet or the European Commission.

EQUINET
European Network of Equality Bodies

Co-funded by the European Union

Acknowledgements

This publication was prepared based on in-depth interviews with several members of Equinet's Working Groups on Research and Data Collection and Equality Law. In addition, the publication drew upon discussions and findings from the training "Use of Equality Data in Legal Casework," which took place on 27 and 28 October 2022 in Brussels, Belgium. The training brought together members of the Equinet Working Groups on Research and Data Collection and Equality Law.

List of persons interviewed

Both the author and Equinet warmly thank and acknowledge:

- **Alexander Hoogenboom**, Formerly General Legal Counsel at Netherlands Institute for Human Rights.
- **Bogdan Banjac**, Advisor of the Commissioner for the Protection of Equality.
- **Eva Cankar Farkaš**, Adviser to the Advocate of the Principle of Equality of Slovenia.
- **Leona Bashow**, Principal Lawyer at Great Britain's Equality and Human Rights Commission.
- **Margrethe Søbstad**, Senior Legal Adviser at the Norwegian Equality and Anti-Discrimination Ombud.
- **Nele Roekens**, Legal advisor and Project lead AI at Unia - Interfederal Centre for Equal Opportunities.
- **Rachel Waerniers**, Policy Advisor at Unia - Interfederal Centre for Equal Opportunities.

Author

Margarita S. Ilieva

Editorial and Publication Coordination

Milla Vidina (Equinet, European Network of Equality Bodies)

Formatting

Martina Bianco (Equinet, European Network of Equality Bodies)

Contents

Acknowledgements ..... **iii**

Contents ..... **iv**

List of abbreviations ..... **v**

1. Introduction ..... **v**

Methodology 10

2. Concept of Equality Data **11**

What are equality data and what do they include? 12

Actionable steps for an Equality Body 12

3. Quality Standards for Equality Data **13**

What equality data are considered adequate to base legal arguments and legal reasoning upon? 14

European case law criteria for the quality of equality data 17

Actionable steps for an Equality Body 18

4. Sources of Equality Data **19**

Where to find quality equality data? 20

Actionable steps for an Equality Body 21

5. Learning from the European Court of Human Rights and the lawyers arguing cases before it **22**

Implications of a lack of Equality Data 35

6. Learning from the CJEU's jurisprudence using equality data **37**

Actionable steps for an Equality Body in relation to ECtHR and CJEU jurisprudence 43

7. Learning from Equality Bodies' practice **44**

Case typology 48

Equality data and positive action 58

Usability and quality of equality data, including Equality Bodies' own data, for purposes of Equality Bodies' legal casework 60

8. Challenges (and possible solutions) **67**

Actionable steps for an Equality Body 71

10. A Roadmap for Equality Bodies Using Equality Data in Legal Cases **75**

11. Conclusion **78**

Annex I: Analytical summaries of ECtHR case law utilising or otherwise addressing equality data **80**

Annex II: Analytical summaries of CJEU case law using or otherwise addressing equality data **100**

List of abbreviations

Artificial intelligence (AI)

Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW)

Convention on the Rights of Persons with Disabilities (CRPD)

Court of Justice of the European Union (CJEU)

Civil society organisation(s) (CSO)

Equality data (ED)

European Institute for Gender Equality (EIGE)

European Commission (EC)

European Union (EU)

European Court of Human Rights (ECtHR)

European Convention on Human Rights (ECHR)

European Parliament (EP)

High Level Group on Non-Discrimination, Equality and Diversity/ Subgroup on Equality Data (HLG/SED)

Fundamental Rights Agency (FRA)

Lesbian, Gay, Bisexual, Transgender, Intersex, Queer (LGBTIQ)

Sexual orientation and gender identity (SOGI)

Third-party intervener(s)/ intervention(s) (TPI)

United Nations (UN)

1. Introduction

Accurate and comparable equality data are essential in enabling adjudicators to assess cases of discrimination using a contextual analysis of group vulnerability and marginalisation. Such data allow 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 and communities from entrenched bias and exclusion.

The importance of reliable and comparable equality data at European and national level has been emphasised in a number of European Commission (EC) programmatic documents, including the Gender Equality Strategy, the LGBTIQ Equality Strategy, the EU Roma Strategic Framework, and the Anti-racism Action Plan.

In its recent proposed directives on binding standards for Equality Bodies responsible for gender equality and for non-discrimination on race/ ethnicity, religion, disability, age, and sexual orientation grounds, the EC has acknowledged that "equality data is key for […] quantifying discrimination, showing trends over time, proving the existence of discrimination, [and] demonstrating the need for positive action".[1] In the said proposals, the EC has suggested that Equality Bodies should have a "larger role" in using equality data, as well as in the "defence of rights, including investigative and litigation powers, alternative dispute resolution, and sanctions", among other powers. The EC proposals set out a requirement for Equality Bodies not only to collect equality data, but also to access equality data collected by others, to recommend what data others should collect, and to coordinate such pursuits.

A systemic reading of these proposals suggests that Equality Bodies are, or should be, expected to use equality data in their legal casework, including when investigating, litigating, mediating, or adjudicating cases and imposing sanctions. If not, Equality Bodies would not be able to actualise the potential of their powers to demonstrate or establish acts of discrimination, as well as deep-rooted systemic disparities requiring special remedial measures. Indeed, a number of Equality Bodies actively use equality data in their legal casework, as will be detailed in this Handbook (see p. 38).

The EC has made its commitment to "stepping up equality data" clear.[2] The need for "reliable and comparable data" has been stressed in all European Union (EU) initiatives relating to equality. The director of the European Institute for Gender Equality (EIGE) has stated that "well-informed gender-sensitive policy-making is impossible without data".[3]

By the same token, gender-sensitive case law, including case decisions by Equality Bodies, is impossible without equality data. So is case law responsive to other protected identities and intersections thereof, including gender identity, sex characteristics, age, sexual orientation, age, religion, ethnicity, and disability. For instance, the EC High Level Group on Non-Discrimination, Equality, and Diversity (Subgroup on Equality Data) has articulated the rationale for using equality data as evidence for race discrimination:

[1] See the two EC proposals adopted in December 2022 here.
[2] Irena Moozova, Director for Equality, EC, Statement, EC Roundtable on Equality Data, 2021, Report, p. 7.
[3] Carlien Scheele, Statement, EC Roundtable on Equality Data, 2021, Report, p. 2.

> "Equality data are essential for assessing the situation of ethnic minorities and other racialised groups and so effectively tackling racism and structural inequalities. Data make the nature and extent of discrimination and inequality visible."[4]

The EU, in the Racial Equality Directive, has acknowledged that:

> "statistical evidence based on racial or ethnic origin can play a decisive part in legal proceedings. Individual claimants often find themselves in need of statistical evidence to back up their claim, particularly where indirect discrimination is at issue".[5]

The Guidelines on improving the collection and use of equality data also document the vital importance of equality data for "enabling proper assessment of the implementation of the relevant EU equality legislation and other relevant national legal […] frameworks [and] providing reliable evidence in administrative or judicial cases regarding discrimination through data that point to direct or indirect discrimination".[6]

This Handbook is premised on the understanding that equality data consideration is pivotal for mindful, just adjudication, including by Equality Bodies. In that sense, integration of equality data in the adjudication of cases is a matter of effective access to justice. In its Guidance on collecting and using data on racial or ethnic origin, the EC High-Level Group on Non-Discrimination, Equality and Diversity (Subgroup on Equality Data) has recognised that "such data could be used by the courts to ensure the right to effective remedy (Article 47 of the EU Charter of Fundamental Rights)".[7] Equality Bodies and national human rights institutions are expressly included in "the target audience for this guidance".[8]

At the same time, heedful adjudication will reflect that complaints data indicate but the "tip of the iceberg". While the European Commissioner for Equality has acknowledged that "without sufficient statistical evidence, it is impossible to track discrimination",[9] the Fundamental Rights Agency's (FRA) director has recognised that "reported evidence is always a tiny fraction of the actual incidents […] we know that 1 in 10 incidents of violence and discrimination are reported. Therefore, the true scale of discrimination is not accurately captured in official statistics."[10]

The well-documented severe under-reporting of discrimination should serve as a basis for expansive legal interpretations of available equality data as evidence: for instance, where qualitative data show that Roma victims of gender-based violence are repeatedly not taken seriously by the police, *a*

[4] Guidance Note on the Use of Equality Data Based on Ethnic or Racial Origin, p. 10, available here.
[5] See Recital 15.
[6] Guidelines on improving the collection and use of equality data, p. 8-9, available here.
[7] Guidance Note on the Use of Equality Data Based on Ethnic or Racial Origin, p. 17.
[8] Guidance Note on the Use of Equality Data Based on Ethnic or Racial Origin, p. 14.
[9] Helena Dalli, statement, EC Roundtable on Equality Data, 2021, Report, p. 1.
[10] Michael O'Flaherty, statement, EC Roundtable on Equality Data, 2021, Report, p. 1.

fortiori, there will be a systemic issue in reality to be taken into account as an overarching context in order to reach duly informed conclusions in individual cases.

The European Court of Human Rights (ECtHR) has recognised, for domestic violence as "a general problem", "affect[ing], to a varying degree, all member States" and "transcend[ing] the circumstances of an individual case", with "women mak[ing] up an overwhelming majority of victims", that this problem nevertheless "does not always surface". (*A.E. v. Bulgaria*, §85)

This Handbook is designed to assist Equality Bodies to utilise equality data in their legal casework. Depending on their powers, Equality Bodies will benefit from the instrumentalisation of equality data in a variety of roles, including as:

- litigators of equality cases before the domestic courts
  - on behalf or in support of an individual victim or a group/ class of victims (collective redress)
  - on the equality body's own behalf, with or without an identifiable victim (*actio popularis*);
- overseers of sub-contracted legal representatives of victims, providing input in legal submissions;
- partners supporting litigating specialist civil society organisations (CSO) by providing input in, or feedback on legal submissions;
- legal advisors providing independent assistance to victims;
- third-party interveners (TPI) before domestic courts;
- providers of legal opinions to government bodies regarding preliminary references to the Court of Justice of the EU (CJEU);
- TPI before the ECtHR;
- TPI before the European Committee of Social Rights
  - submitting observations in the reporting procedure
  - and/or in the collective complaints procedure;[11]
- TPI before United Nations (UN) Treaty Bodies;
- adjudicators of cases;
- investigators of cases;
- mediators of cases.

Most of these roles, currently exercised in varying combinations by a number of Equality Bodies, correspond to the EC policy proposals for powers for all Equality Bodies.[12] In all these legal roles, Equality Bodies can and should benefit from equality data in order to deliver fact-based legal arguments and findings, in the interests of right-holders, duty-bearers, and the public. In terms of victim assistance, Equality Bodies can and should include in their legal advice equality data empowering victims to put their own victimisation in perspective by comprehending the context of it and to make, in their future legal submissions, farther-reaching data-based claims for social justice.

In their alternative dispute resolution pursuits, Equality Bodies can and should use data-based observations to establish context and accordingly help tailor context-responsive solutions, in the best

[11] Under Rule 32A of the Rules of the European Committee of Social Rights regarding "Third party intervention", upon a proposal by the Rapporteur, the President may invite any organisation, institution or person to submit observations.

[12] See, for example, Articles 6-9 of the proposed directives on standards for equality bodies.

interests of the victims, potential victims, and duty bearers (who benefit from prevention as opposed to liability). For example, equality data will help design structural relief that addresses a continued violation or a systemic issue affecting a class of victims.

In their investigation of cases, Equality Bodies can and should use equality data to prioritise issues to examine *ex officio*. In their fact-finding, Equality Bodies will benefit from equality data to better target their information requests in order to uncover underlying structural problems.

In their assessment of cases, preliminary or final, Equality Bodies will be aided by equality data in a range of ways in order to correctly interpret the facts and their due legal implications. This is exemplified by the relevant case law of the two European courts, the ECtHR and the CJEU, discussed below (see p. 16 and 31), as well as by Equality Bodies' existing practices, also narrated in this Handbook (see p. 38).

Equality data will furthermore help Equality Bodies in crafting specific remedies, including interim and preventive interventions, addressing the root causes of violations and encompassing the spectrum of their symptoms impacting victims. Data are equally instrumental in operating case selection policies for purposes of strategic litigation – Equality Bodies need equality data to be able to prioritise the right cases in light of the context. Especially where Equality Bodies use their own standing to sue systemic discriminators or to tackle violations symptomatic of structural or pervasive abuse, equality data will be indispensable to guide them to the most important priorities and to the most suited legal strategies, including a choice of respondent, type of proceedings, remedy sought, framing of the facts, and creative construction of the legal provisions and precedence.

It is noteworthy that Article 9 (4) of the proposed directives on standards for Equality Bodies seeks to prevent Equality Bodies from using in court evidence obtained through their proposed investigative powers when initiating or participating in proceedings on behalf or in support of victims, as well as when initiating proceedings in their own names. At the same time, the study on behalf of the LIBE Committee of the European Parliament (EP), Strengthening the Role and Independence of Equality Bodies, criticises this evidentiary constraint as being "unnecessary and problematic" as it runs counter to the "recognise[d] need to rebalance to achieve an 'equality of arms' between the respondent and the claimant in a discrimination case". Accordingly, the study proposes that draft Article 9 (4) be deleted. So does Equinet in its Position Paper. The EP draft report, Standards for Equality Bodies, as well as the Council of the EU's General Approach, equally propose the deletion of Article 9 (4).

This Handbook assumes that Equality Bodies would be free to use equality data obtained through their investigative powers as evidence in court in all their procedural roles. Currently, many of them are free to do so and indeed do so, as illustrated in this Handbook (see p. 38). Interesting questions stem from Equality Bodies' procedural use of equality data that the bodies themselves generated, such as monitoring findings and surveys. Those questions are discussed below, in the section concerning Equality Bodies' relevant practices (see p. 38).

A number of Equality Bodies have been using equality data in one or more of the abovementioned procedural roles. This Handbook provides learning based on their experience, including promising practices, challenges, and plans for the future. Examples from their diverse legal practices are included as illustration of the utility of equality data in a range of cases and of the possible legal outcomes of such data's use.

Firstly, this Handbook examines the supranational level of legal practice based on equality data, offering perspectives into the consideration and usage of equality data by the two European courts – the ECtHR and the CJEU. A considerable number of cases, in which the two Courts have assessed and relied on equality data, are analysed to pinpoint generally applicable insights into the legal conclusions capable of being derived from equality data. Additionally, extensive summaries of relevant case law are provided in Annexes I and II to showcase case specificity and allow contextual comprehension of the broader lessons.

Most recent relevant case law of the ECtHR has been analysed and included (as of 1 June 2023, the cut-off date for this Handbook). ECtHR case law is highly relevant to EU Equality Bodies' legal work. Under Article 52 (3) of the EU Charter of Fundamental Rights, Charter rights which correspond to European Convention on Human Rights (ECHR) rights shall be interpreted in line of the ECHR, with the ECHR considered as a minimum standard: "the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection." With the forthcoming EU ratification of the ECHR, the ECtHR's jurisprudence is now even more relevant to EU Equality Bodies' work.

To begin with, we take a look at the inclusivity of the concept of equality data, in the EU context, and at the spectrum of sources of equality data.

Methodology

This Handbook is based on research and analysis employing several tools:

- a review of relevant European (ECtHR and CJEU) case law;
- presentations and discussions in plenary and working group formats with a significant number of Equality Bodies convened in October 2022 for the purposes of capacity building and peer exchange in terms of equality data usage in legal casework;
- in-depth interviews with six legal practitioners and a researcher representing a diverse set of Equality Bodies ensuring coverage of an array of procedural roles and jurisdictions, both in terms of varying national legal traditions and societal contexts, and geographic spread (BE, NL, NO, SI, SRB, GB).

2. Concept of Equality Data

What are equality data and what do they include?

The European handbook on equality data, and the Guidelines on improving the collection and use of equality data define 'equality data' as any piece of information that is useful for the purposes of describing, analysing, reasoning about, and decision-making on 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 societies. Sometimes data that are collected primarily for reasons other than equality-related purposes can be used for producing equality data.[13]

The illustrative synopsis of case law by the two European courts, included in this Handbook, indicates the range of possible sources and types of equality data, and their uses in equality adjudication.

Actionable steps for an Equality Body

- Disseminate amongst all staff members – data gatherers (researchers), as well as data users (lawyers) – the above definition of equality data.
- Map existing own practices that amount to using equality data in legal casework. Raise awareness of those amongst all staff in order to spread them universally across team(s).
- Raise awareness amongst partners/ stakeholders and public as to existing own practices of using equality data in legal casework.
- Enhance existing own practices by highlighting in legal submissions and/ or case decisions the importance of equality data relevant to a particular case and making a point of drawing conclusions from such data.
- Identify opportunities and challenges based on existing own practices of using equality data as per the definition above.
- Make action plan to capitalise on identified opportunities and tackle challenges.
- Appoint staff to monitor and evaluate progress in implementing above action plan.
- Regularly share amongst staff reports on progress.
- Incorporate in financial planning necessary monies to pursue equality data usage more coherently and sustainably.
- Share knowledge and experience by conducting training for own staff and stakeholders (legal CSO, local bar associations, judges, law students, etc.)

[13] Guidelines, p. 8.

3. Quality Standards for Equality Data

What equality data are considered adequate to base legal arguments and legal reasoning upon?

This section looks at supranational policy and jurisprudential standards regarding the validity of equality data in general. It is suggested that Equality Bodies should consider these standards when identifying equality data for use in their legal casework. Below, in section "Usability and quality of equality data, including Equality Bodies' own data, for purposes of Equality Bodies' legal casework", we discuss standards already implemented by certain Equality Bodies in their existing practices, as illustrated by specific cases.

The proposed directives on standards for Equality Bodies reference the "comparability, objectivity and reliability of the data" regarding the functioning of Equality Bodies themselves (Article 16), implying that those features constitute criteria for data adequacy in general as well. The EU Anti-racism Action Plan 2020 – 2025 mentions further criteria:

> "This data should be comprehensive, reliable, regular and timely; mainstreamed into EU and national surveys; and both representative and comparable."[14]

Under the Guidelines on improving the collection and use of equality data (the Guidelines), data are required to be "robust and objective", "systematically collected", "reliable", and having "validity", "representativeness", "comprehensiveness", "timeliness", and comparability.[15] "Validity" relates to the correct measurement of a variable of interest, which is itself observable in the 'real world'. An indicator, a test, a survey question or a system of categorisations used to classify a person's characteristics in administrative or in other data sources is valid: (1) if it correctly measures what it is supposed to measure, and (2) if it renders phenomena or characteristics that are directly observable or have at least been perceived to exist in the 'real world'. Validity is, for example, linked to the extent to which respondents misinterpret survey questions or response categories and to the extent that they deliberately do not reveal the truth (often the case when the personal information asked is perceived as sensitive). A lack of validity can also be observed if, for example, the extent of discrimination is only measured through the number of incidents reported to the competent bodies as there might be a high number of non-reporting. There are no perfectly valid measures, but some measures are more valid than others.[16]

"Reliability" implies stability or consistency of the measurement/ test applied to the variable. A measure of discrimination, for example, is reliable to the extent to which the measuring procedure yields the same results in repeated trials. For example, if we measure the number of reported incidents per year, but the number of competent (equality) bodies changes over time, this will have a negative effect on the reliability of this measure and will also impact on its comparability over time. No measure is absolutely reliable; reliability is therefore always a matter of degree. There is a direct relation between validity and reliability in the way that tests that are valid are also reliable

[14] EU Anti-racism Action Plan 2020 – 2025, p. 16.
[15] Guidelines, pp. 7, 10-11, 13.
[16] Guidelines, p. 19.

(repeatable). Tests that are reliable, however, are not always valid.[17] Furthermore, under the Guidelines, quality criteria for equality data include consistency, clarity, punctuality, accuracy, continuity, objectivity, relevance, comparability, and transparency.[18]

In terms of "clarity", the Guidelines suggest that, for instance, data publication tools should include, where possible, information notes for users, synthesising the basic facts about the data on display.[19] This would be in line with Principle 15, on "Accessibility and Clarity", of the European Statistics Code of Practice (revision 2017). "Continuity" is required to allow for consistent monitoring over time.[20]

"Comparability" is impacted by the consistency of measurements/ tests applied, similarly to "reliability",[21] which is further defined below. Insufficient comparability of equality data across different data sources results from different data sources often relying on diverging definitions and using various population categorisations. Because of such discrepancies, equality data are often not comparable, both within and across Member States.[22] "Comparability" is therefore defined as the extent to which differences between findings, statistics or outcomes from different equality data sources, countries, regions, cultures, life domains or time periods can be attributable to differences in target populations' true values. Comparability is strongly affected when concepts, definitions or categories of study design vary across data sources, points in time, or countries. Improving comparability implies that error due to sample or questionnaire design, mode of data collection, translation, etc. is minimised. To help determine comparability, the decisions involving the design, definitions, and categories to be applied should be well-documented.[23]

"Transparency" implies that equality data should be disseminated as quickly as possible after collection and be presented in an accessible language and format, taking into consideration that it should be understandable to the greater public.[24] This is in line with the recommendations under the 'Transparency' section of the Guidance note on data collection and disaggregation by the United Nations High Commissioner for Human Rights (2018), *A Human Rights-based Approach to Data – Leaving No One Behind in the 2030 Agenda for Sustainable Development*, p. 15.

Furthermore, transparency is enhanced by inter-institutional cooperation and regular consultations on the collection and use of equality data. Inter-institutional working groups to coordinate and monitor progress, complemented through regular consultations with data collectors and data users who are not represented in the working group help build trust in equality data collection. Stakeholders to be regularly consulted incude relevant national and local authorities'

[17] Guidelines, p. 20.
[18] Guidelines, p. 20.
[19] Guidelines, p. 16.
[20] Guidelines, p. 10.
[21] Guidelines, p. 20.
[22] Guidelines, p. 10. For example, some sources collect data on issues relevant to disability by applying a medical model. Others follow the human rights approach enshrined in the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which focuses on the interaction between impairments and existing social and environmental barriers. In the absence of a mechanism to coordinate decisions on how to conceptualise and measure different grounds of discrimination and on how to categorise potentially affected persons or groups, data and outcomes will therefore most certainly suffer from incomparability.
[23] Guidelines, p. 21.
[24] Guidelines, p. 16.

representatives, statisticians, survey research experts, and academics, as well as community and civil society organisations.[25]

"Robustness" is also affected by consultations with stakeholders. Where people, groups, and communities at risk of discrimination are involved in establishing definitions and categories for data collection, their participation – in itself a good practice in terms of a human rights-based approach to data collection – results in more robust data. A lack of participation of stakeholders in data collection may adversely impact the response rate and hence the validity, reliability, and representativeness of the data collected.[26]

The robustness of data is impacted by the institutional capacity of data collectors as well. Relevant staff require skills, expertise, and awareness of best practice, including the use of harmonised definitions, to adequately design the collection of equality data and to comply with standards set out in domestic legislation and UN principles of human rights-based approaches to data collection and analysis.[27]

Finally, "robustness" is boosted by inclusive data collection in which under-represented and hard-to-reach groups are reached out to, enhancing samples and sample sizes.[28] Qualitative and mixed-methods research helps when target groups are too small or highly dispersed, also ensuring insights into a full range of protected characteristics or groups at risk of discrimination who might be left out from existing sampling frames. Qualitative methods complementing statistical insights also enhance representativeness and validity.

"Systematical collection" of data requires using a methodological guidance for all the different data collectors.[29] A fixed set of data collection methods should be used over time to ensure collection is planned and methodical, resulting in its coherence. Systematic data collection prevents the effort from being unevenly split between different sources and data collection bodies that are generally not coordinated or connected with each other.[30] A systematic approach is premised on a national mapping of existing sources of equality data, identifying data gaps. This helps establish a baseline, avoiding duplication of data collection efforts.[31]

While "punctuality", "accuracy", "objectivity", and "relevance" are not further defined in the Guidelines, Equality Bodies could employ their own interpretations in line with other data standards, complemented by further research as necessary.

"Representativeness" of equality data is defined as a sample mirroring a population group, reflecting all its essential properties in a correct way. This quality can be negatively affected if the sample size is too small, when it does not include a sufficient number of persons belonging to a targeted population group, or if specific subgroups of the population are systematically excluded from data

[25] Guidelines, p. 14-15.
[26] Guidelines, p. 11. For example, if questions on discrimination experienced on the grounds of sexual orientation or gender identity are not consulted with potentially affected population groups, this can lead to a lack of trust in the purpose of data collection and to questioning wordings that do not reflect the self-understanding of the persons under study, thus deterring responses.
[27] Guidelines, p. 16.
[28] Guidelines, p. 21.
[29] Guidelines, p. 19.
[30] Guidelines, p. 9.
[31] Guidelines, p. 13.

collection in the first place (because of language difficulties, impairments, or other factors). Representativeness can also be affected if the sample is large enough, but biased, for example, when those persons belonging to a target population who experience more discrimination are less or more inclined to take part in a survey.[32]

According to the Guidance note on collecting and using data on racial or ethnic origin (Guidance), representative data are "based on sample sizes that are sufficient to allow for more detailed data analysis to identify geographical disparities and (intersectional) inequalities. This means that the net sample size should be big enough to allow for further disaggregation of the data as regards geographical distribution, age, sex/gender, and education."[33]

"Comprehensiveness" of equality data relates to incorporation of the measurement of multiple and intersectional discrimination into data collection systems; for example, data collected on disability should ideally include information on racial or ethnic origin, sex, age and other potential characteristics that might lead to a higher risk of discrimination based on multiple factors or intersecting inequalities. This type of analysis generally requires larger sample sizes for robust results, and a range of different sources could be considered, including large surveys, administrative and linked data.

"Timeliness" indicates that data are collected/ updated regularly and are therefore recent.

European case law criteria for the quality of equality data

The two European courts have enunciated certain criteria for the adequacy of equality data, quantitative, as well as qualitative, as a basis for legal findings in discrimination cases. The CJEU has held that, in order to be "valid", statistics must:

- generally appear to be significant;
- cover enough individuals;
- capture phenomena which are not fortuitous or short-term;
- as a whole, be relevant and sufficient.[34]

The national court is to assess the validity of statistics by applying these general criteria and adapting them to the specificity of individual cases.

The ECtHR has posited, in the context of police profiling of trans people, that equality data showing systemic discrimination for the purposes of a *prima facie* case "need to appear to be reliable and significant on critical examination".[35]

[32] Guidelines, p. 21.
[33] Guidance, p. 53.
[34] Among other authorities, see Case C-167/97 (*Seymour-Smith*), § 62. In Annex II, see analytical summaries of this and other relevant CJEU judgments.
[35] See *Duğan v. Türkiye*, § 54. In Annex I, see analytical summaries of this and other relevant ECtHR judgments.

Actionable steps for an Equality Body

- Create internal guidelines for quality of equality data to be used in own legal casework. Comprehensively incorporate above standards, in addition to concrete instructions for staff fit for purpose in concrete national context.
- Disseminate guidelines amongst staff with explanatory sessions to prepare for implementation.
- Set up a mechanism to self-monitor and evaluate progress.
- Periodically report on progress, disseminating key findings amongst staff. Adjust policy and practice accordingly.
- Share knowledge with partners and stakeholders.
- Ensure legal staff draft arguments (in legal submissions) and reasons (in case decisions) that fully explain the relevance and validity of data used. Use own legal drafting as an education tool for legal profession and public in that regard.
- Ensure staff researchers and staff lawyers have an appropriate mechanism to exchange information on the internal flow and quality of equality data used in legal casework.
- Ensure staff monitor evolving national and supranational quality standards for equality data (domestic case law, legislation, and policies; EU acts and European jurisprudence) to accordingly update internal guidelines and practices.
- Explore budgetary and other logistic possibilities to train a staff member or more in data analysis and/or to attract staff statisticians or consultants with expertise in data science.
- Seek out new partners, such as statistical institutes, research organisations, universities, to create opportunities to benefit from pro bono assistance in terms of quality control of equality data for purposes of legal casework

4. Sources of Equality Data

Where to find quality equality data?

In its Guidance, the EU High Level Group on Non-Discrimination, Equality and Diversity/ Subgroup on Equality Data (HLG/SED), has listed various sources of quantitative data:

> "Equality statistics can be complied from multiple data sources, such as population censuses, administrative registers, household and individual surveys, victimisation surveys, and attitudinal surveys. Other sources could encompass complaints data (including aggregate profiles of complainants and offenders, for example), criminal justice data (including court statistics and data on outcomes of court cases, as well as compensation offered/sanctions applied, for example), as well as other avenues of data collection, encompassing discrimination testing, diversity monitoring by employers and service providers, and data used to train algorithms for artificial intelligence (AI) and machine learning."[36]

Supranational data could be obtained, for example, from the EU Labour Force Survey, the EU Statistics on Living Conditions survey or EU-wide surveys such as the Eurobarometer, among many other sources. Furthermore, the Equinet (European Network of Equality Bodies) working group on research and data collection has conducted a survey on the collection and use of complaints data, showing what data is collected and available in which jurisdiction.

The Guidance suggests a comprehensive national mapping of all available equality data, to be done periodically, taking into account the regularity with which the mapped data sources are updated (every few years), and taking into consideration new potential data sources and providers. The diagnostic mapping tool developed by the Subgroup on equality data in 2018 could be helpful in this regard.

In its Guidelines, the HLG/SED has confirmed that robust and reliable equality data can be drawn from targeted surveys on discrimination experiences and discrimination testing experiments conducted by Equality Bodies and CSO, as well as public institutions.[37] Moreover, data sources that are not specifically designed to gather equality data, but include variables that can be used to show and analyse existing inequalities, should also be taken into account.[38] Qualitative research, including findings from case studies and in-depth and expert interviews, is also relevant. The Guidelines recommend that qualitative data be used throughout to complement statistical insights and to enhance representativeness and validity.[39]

---

[36] Guidance, p. 13.
[37] Guidelines on improving the collection and use of equality data, Subgroup on Equality Data, High Level Group on Non-Discrimination, Equality and Diversity, DG Justice and Consumers, European Commission, Brussels, 2018, p. 16.
[38] Guidelines, p. 13.
[39] Guidelines, p. 21.

Pursuant to the Guidelines, equality data users should draw from multiple and complementary sources of equality data in order to obtain and consider a comprehensive rendering of the relevant facts. Using, as recommended, a broad set of equality data would entail combining and linking different data sources (as above, those would include large scale surveys, attitudinal surveys, victimisation surveys, discrimination testing, administrative data, complaints data (and their outcomes), robust and reliable data from CSO, data collected by employers and service providers, and other quantitative and qualitative research).

While the Guidelines focus on quantitative data, and, therefore, the above content on data sources mostly concerns quantitative data, Equality Bodies would equally benefit from integrating qualitative equality data in their legal casework. While Equality Bodies may be likely to think of "equality data" in terms of statistics, in fact, qualitative data, such as research and monitoring findings, coupled with analyses, is as relevant and helpful. Qualitative equality data is especially useful where socio-legal national contexts disincentivise the collection and use of statistics, in particular on race and ethnicity. Sources of qualitative equality data range from domestic CSO reports to findings by UN and European monitoring bodies. The relevant case law of the ECtHR as presented below provides a rich illustration of possible sources.

Actionable steps for an Equality Body

- Conduct a mapping exercise to catalogue all national and nationally relevant sources of equality data, noting for each its period of updating: for example, ECRI country report, updated every five years. 'Nationally relevant sources' would include supranational sources that issue findings concerning the country in question, for example, GREVIO reports. Additionally, the catalogue could list supranational sources of equality data that provide aggregated regional data, for example, for the EU. Such data could serve to establish wider contexts or contrast the country in question to its 'peer group'. Hyperlink the sources, for ease of use by all staff, including new recruits.
- Train legal staff to go through the catalogue when researching any case for purposes of identifying comprehensively the relevant equality data. Fix this method as a default one, through formalising a casework methodology.
- If applicable, create a template legal submission that integrates the catalogue of equality data sources, for use by default in each legal case. Irrelevant or unhelpful sources would be simply deleted from the submission once the equality data is checked and the useful sources confirmed, depending on the facts and issues.
- Appoint staff to regularly update the catalogue by adding emerging sources of equality data, hyperlinking the new editions of periodic surveys or monitoring reports, and removing obsolete and defunct sources.
- Share catalogue with other Equality Bodies/ Equinet, inviting suggestions for its expansion. Initiate, on this basis, a pan-EU catalogue for any equality body to use and adjust depending on the national context.

5. Learning from the European Court of Human Rights and the lawyers arguing cases before it

In its case law, the ECtHR has provided plentiful examples of the implications of using equality data in adjudication, in particular qualitative data, as well as criteria for assessing such data's relevance and sufficiency to base legal inferences and conclusions on. The Court has considered qualitative equality data (ED) as a standard approach in almost every discrimination case, but has significantly dealt with statistical information as well.

It has used both qualitative and quantitative ED to derive diverse, many-sided and far-ranging legal consequences for both the applicants' arguments and the respondent governments' defences. In numerous cases, the Court has adopted ED-based arguments advanced by litigators, including both applicants' representatives and expert and community-based TPI. In certain cases, the ECtHR has rejected their arguments, yet such cases still provide learning from the example of strategic lawyers designing legal strategies relying on ED, documented by the judgments.

The Court has also critically considered ED-based counter-arguments put forth by governments' legal representatives, not infrequently finding them wanting. Its reasoning in this regard is also enlightening concerning what is the legitimate and effective instrumentalisation of ED in the process of construing evolving fundamental rights.

In recent relevant judgments (delivered November 2022 – May 2023) summarised and analysed below and in Annex I, [40] the Court has relied on various forms of ED in a wide range of cases in terms of subject matter, including:

- information about general implementation measures in respect of an earlier ECtHR judgment concerning homophobic hate speech, including statistics on reopened cases and revised decisions, and qualitative shifts in the domestic judiciary's reasoning and conclusions;[41]
- statistics on schools' and classes' ethnic composition and the ethnic composition of school catchment areas;[42]
- comparative qualitative information on the legislation and practice in Member States concerning the legal recognition of same-sex families, including international bodies' reports;[43]
- studies on attitudes to LGBTIQ books labelled with warnings, and international bodies' surveys and findings on the prevalence of SOGI-based stigmatisation and bullying against children in school;[44]
- comparative information on Member States' practices of censoring children's books of LGBTIQ content, revealing a systemic issue;[45]

[40] For analytical summaries of relevant judgments by the Court, see Annex I.
[41] See summary of *Valaitis v. Lithuania*, Annex I.
[42] See summary of *Elmazova and Others v. North Macedonia*, Annex I.
[43] See summary of *Fedotova and Others v. Russia*, Annex I.
[44] See summary of *Macatė v. Lithuania*, Annex I.
[45] See summary of *Macatė v. Lithuania*, Annex I.

- international reports and surveys, and TPI submissions on the persistence of stereotypical attitudes, prejudice, hostility, and discrimination against the LGBTIQ community in a country;[46]
- data about the enforcement of provisions on censoring, revealing a targeting of LGBTIQ-related content;[47]
- the absence of scientific or sociological data that exposing children to LGBTIQ content would harm them; international bodies' findings that such data are absent and that in fact a lack of LGBTIQ-related information is harmful to children;[48]
- TPI submissions that labelling LGBTIQ content as harmful to children contributes to SOGI-based discrimination and violence against children;[49]
- comparative domestic case law on children's access to information about same-sex relationships: holdings that the authorities may not disregard social realities of different types of relationships, unjustifiable to prevent children from learning about;[50]
- the absence of data to corroborate assumptions equating human size (height and weight) and strength in the context of access to vocational training as a military physician - no "studies, research or statistical data or any type of empirical evidence".[51]

Such ED exemplifying a broad spectrum of data sources have been submitted to the Court by both applicants' lawyers and specialist TPI. From those litigators' strategic ED-based arguments, the Court has derived consequential legal conclusions:

- Based on quantitative data regarding the ethnic composition of public primary schools and classes, the Court has found that those were segregated in breach of Article 14 in conjunction with Article 2 of Protocol No. 1 ECHR.[52] For this, the Court has also taken into account statistics on the Roma population in the relevant catchment areas and qualitative ED produced by national bodies, including domestic case law establishing segregation. Relying on numerical information, the Court has dismissed the government's defence that a refusal to enrol a Roma pupil was due to his residing outside the catchment area: the Court has referenced the numbers of other pupils enrolled in the school despite not residing in the area. At the same time, the Court has implied that other "concrete evidence or statistical data" was needed for a finding that the impugned refusal to enrol was race-based.[53]
- Drawing on a plurality of converging ED sources, the Grand Chamber of the Court has found that a State is not allowed not to recognise same-sex couples.[54] Firstly, based on comparative information about trends in the Member States, including domestic case

[46] See summary of *Macatė v. Lithuania*, Annex I.
[47] See summary of *Macatė v. Lithuania*, Annex I.
[48] See summary of *Macatė v. Lithuania*, Annex I.
[49] See summary of *Macatė v. Lithuania*, Annex I.
[50] See summary of *Macatė v. Lithuania*, Annex I.
[51] See summary of *Moraru v. Romania*, Annex I.
[52] For example, *Elmazova and Others v. North Macedonia* and *Szolcsán v. Hungary* – see summaries, Annex I.
[53] See summary of *Szolcsán v. Hungary*, Annex I.
[54] See summary of *Fedotova and Others v. Russia,* Annex I.

law and public opinion in favour of same-sex couples, the Court has concluded that same-sex families are covered by the ECHR notion of "family life". It has additionally used international bodies' reports to support these data on "an emerging European consensus" in order to set the ECHR standard that a State must legally protect same-sex families. Following from this ED-based standard, the Court has found a violation of the right to family life where domestic law ignored same-sex couples.

- Using an array of ED sources, the Grand Chamber has outlawed national-level censoring of LGBTIQ literary content for children.[55] Based on international reports and surveys, the Court has found that homophobia persisted at the national level. In this context, based on a survey showing that a (minority) book's distribution would be adversely affected by warning labels attached to it, the Court has acknowledged such labelling as an interference with an LGBTIQ author's freedom of expression. Based on studies, surveys, reports, and international bodies' statements, as well as comparative domestic laws and case law, the Court has held that LGBTIQ content is not harmful to children, indeed, the suppression of such content is harmful to them: misinformation leads to exacerbated SOGI-based stigmatisation, in turn leading to more SOGI-based targeting and victimisation of children, as well as adults.
- Furthermore, based on data about the selective, anti-LGBTIQ implementation of legal provisions that an interference with an LGBTIQ book author's freedom of expression was based on, the Court has declared the aim of that interference unlawful: effectively, the aim of the provisions' implementation was homophobic as exposed by the data. The Court has therefore found a violation of an LGBTIQ children's author freedom of expression based on a body of diverse yet consistent ED.
- The Court has relied on data regarding the domestic implementation of its own prior judgment against the same State concerning the same issue – non-prosecution of homophobic hate speech – to declare that issue now resolved and an effective domestic remedy present.[56] The implementation data included both qualitative information, such as domestic case law, and stakeholders' policy statements, as well as numerical information on criminal proceedings reopened and prosecutorial acts revised/ rendered. Because of the documented shift of the judiciary's stance towards homophobic hate speech, no violation was found in the subsequent case of this nature despite the domestic proceedings in that case having no favourable outcome for the applicant.
- The Court has declared a violation of Article 14 jointly with Article 2 of Protocol No. 1 ECHR based on its finding that domestic judicial decisions justifying size-based discrimination against a female applicant to study military medicine were not evidence-based, no data supporting those courts' assumption that height and weight equaled strength.[57] The Court has explicitly noted the absence of "any studies, research or statistical data or any type of empirical evidence" concerning the connection between a candidate's size and her strength.

[55] See summary of *Macatė v. Lithuania,* Annex I.
[56] See summary of *Valaitis v. Lithuania,* Annex I.
[57] See summary of *Moraru v. Romania*, Annex I.

In certain cases, the Court has dismissed ED-based arguments advanced by pro-rights test (impact) litigators. Select recent examples:

- The Court has declined to accept that ED showing police profiling of trans sex workers and general discrimination against the LGBTIQ community in the country was sufficient for an inference of trans discrimination in the instant case.[58] The applicant and TPI had evidenced such profiling by means of relevant organisations' reports, however, the Court held that this information was insufficient for a prima facie case. Nevertheless, it acknowledged "that a number of organisations, including intergovernmental bodies" had confirmed the said general discriminatory context, as well as that "applicants may have difficulty in proving discriminatory treatment".[59]
- The Court has not accepted that a case of alleged police discrimination against Roma exemplified institutional racism, dismissing the TPI's qualitative data to that effect.[60] For the Court, this context of a structural issue was insufficient to indicate any causality between the established ill-treatment of Roma in the case and their race despite evidence of accompanying racist utterance. "[F]urther contextual evidence" and "further information or explanations" were required, held the Court. At the same time, the Court held that the perpetrators' reference to their victims as a "Gypsy gang" indicated "possibly racially motivated ill-treatment" and was "clearly […] plausible information […] sufficient" to show the need for domestic investigation of possible racist motivation.[61] However, this same information was insufficient for an inference of discrimination to shift the burden of proof before the Court itself.

While such holdings seem to evolve primarily on a case-by-case basis rather than systematically, and, therefore, are hard to draw secure overarching lessons from, it would nevertheless appear that a possible pattern to identify is the Court (still) being wary of shifting the burden of proof based on equality data in what could be termed more highly controversial cases. Alternatively, such restrictive holdings are not representative of any such a pattern but merely of a lack of full coherence in the evolving case law. The fact remains that in other cases, the Court has benefitted from equality data for the purposes of the shifting burden of proof. Negative examples, it is argued, should not deter Equality Bodies from insisting on such arguments as tested in the above cases, as in time the Court may reach different conclusions in comparable cases.

The Court has also discarded certain government defences relying on general information that could be considered to be a form of ED. For example, the Court has consistently rejected governments' counter-arguments based on illiberal – sexist, or homophobic, for example – popular opinion supporting impugned interferences with minority rights. Evidence of such anti-minority bias shared by majority populations, and prevailing social attitudes against unpopular identities originating from traditional stereotypes and assumptions, constitute invalid justification.[62]

The Court has also dismissed domestic courts' denials of segregation on grounds that the lack of diversity purportedly reflected the share of Roma children in a catchment area. The Court has

[58] See summary of *Duğan v. Türkiye,* Annex I.
[59] See summary of *Duğan v. Türkiye*, Annex I.
[60] See summary of *M.B. and Others v. Slovakia (no. 2)*, Annex I.
[61] See summary of *M.B. and Others v. Slovakia (no. 2)*, Annex I.
[62] See summaries of *Fedotova and Others v. Russia* and *Moraru and Marin v. Romania*, Annex I.

assessed this as being unsupported by the actual population figures. Moreover, the Court has clarified that whatever the ethnic minority share in the local population, it could not justify minority segregation.[63]

More information, including references to specific sources and types of equality data considered by the ECtHR, is provided in 27 case analyses featured in Annex I below, as well as in the following two illustrative cases.

Case Study: Domestic Violence

In *A.E. v. Bulgaria* (judgment of 23 May 2023), a case of domestic violence against a girl, both the applicant and the TPI, a national CSO network, submitted equality data. The TPI's submissions related to Article 3 ECHR (freedom from inhuman or degrading treatment) (§81-3):

- A 2021 report by the World Health Organisation, according to which globally about one in three women have been subjected to either physical and/or sexual violence, mostly intimate partner violence.
- A finding by the Bulgarian Ombudsperson that in 2019, at least two women a month lost their lives to domestic violence.
- The latest concluding observations of the CEDAW Committee on Bulgaria.
- The vast majority of cases of violence resulted in minor bodily harm and fell outside the scope of publicly prosecutable offences. Private prosecutions were hard for victims to pursue, especially for minors or otherwise vulnerable people.
- The government did not collect data on criminal proceedings pursued in cases of light bodily harm or the percentage of those that resulted in convictions.

Under Article 14 ECHR, the applicant claimed that the authorities' failure to prosecute and punish domestic violence disproportionately affected women. She relied on a number of reports, including ones indicating that the number of female victims was consistently and overwhelmingly higher than the number of male victims. She also referred to the 2020 conclusions of the CEDAW Committee on Bulgaria concerning the State's limited commitment to combating persistent gender stereotypes, as well as to the EU Gender Equality Index 2017, according to which violence against women in Bulgaria was higher than the EU average. (§114)

In its assessment, the Court posited, as a general principle:

"The issue of domestic violence […] transcends the circumstances of an individual case. It is a general problem which affects […] all member States and which does not always surface […] women make up an overwhelming majority of victims […]

[63] See summary of *Szolcsán v. Hungary*, Annex I.

The particular vulnerability of the victims of domestic violence and the need for active State involvement in their protection have been emphasised in a number of international instruments and the Court's case-law." (§85-6)

This is an important pronouncement insofar as it makes it unnecessary to prove any more that domestic violence is systemic and gender-biased – the Court accepts this as a given, in light of the body of equality data discussed in this case and in previous cases. In terms of specific equality data references, the Court relies on its own case law, as well as other international law to establish, as a matter of course, the heightened vulnerability of victims and therefore, of State protection duties.

Furthermore, the Court references its own case law – a form of ED *per se* – to note, twice, that this is the third case against Bulgaria, in which the authorities' response to domestic violence against women was found wanting. (§118-9) The Court observes that, in this preceding case law, it had already held that "it was hardly in doubt that domestic violence in Bulgaria affected predominantly women". These holdings are further examples of the Court's own case law amounting to equality data in certain cases.

The Court also observed a lack of official equality data as being relevant for the acceptability of unofficial statistics on the national rates of domestic violence and women's disparate victimisation:

"In the absence of official comprehensive statistics, the applicant […] submitted various other statistics as regards violence against women in Bulgaria, reported by domestic non-governmental organisations and contained in the 2017 EU tool for measuring gender equality. It transpires from those statistics that women are the predominant victims of violence in Bulgaria […] and that Bulgaria scored the highest overall among all EU countries in respect of prevalence, severity and lack of reporting by women victims of violence […]." (§118)

Based on this "sufficient statistical material", the Court found that the applicant had established a *prima facie* case "that, by virtue of being a woman victim of domestic violence in Bulgaria, she was in an unequal position which required action on the part of the authorities in order to redress the disadvantage associated with her sex in that context." It then "reiterate[d] that once it has been established that domestic violence affects women disproportionately, it is for the government to show what kind of remedial measures the domestic authorities have deployed to tackle that disadvantage and to ensure that women can fully enjoy human rights and freedoms on an equal footing". (§119) Accordingly, in this context, equality data *per se* suffice for an inference of gender bias.

(Interestingly, once the burden of proof shifts onto the government, in this context, no objective justification is possible, on the one hand, which is clearly positive but, on the other, the discrimination can still be 'excused', if the State demonstrates that it is working towards eliminating it, even though it still has not eliminated it, as manifested by the case at hand.)

In *A.E.*, Bulgaria's applicable law was found "not capable of adequately responding to domestic violence to which the majority of victims in Bulgaria are women". Indeed, "the way in which [that law] w[as] worded and interpreted by the relevant authorities was bound to deprive a number of women victims of domestic violence from official prosecution and thus effective protection". (§120) In that sense, the Court instrumentalised the information submitted regarding the relevant domestic case law as a form of equality data to then draw the conclusion that the relevant domestic law malfunctioned to the detriment of women.

Regarding the lack of official statistics, the Court not only used that lack to validate the applicant-submitted unofficial statistics, but also interpreted that lack as an indication that, instead of demonstrating remedial measures as expected, the government was responsible for an absence of any such measures to speak of:

"[T]he Court finds that the absence of official comprehensive statistics kept by the authorities can no longer be explained as a mere omission on their part, given the level of the problem in Bulgaria and the authorities' related obligation to pay particular attention to the effects of domestic violence on women and to act accordingly." (§120)

By the same token, the Court interpreted Bulgaria's refusal to ratify the Istanbul Convention as an indication of its (low) level of commitment to fighting domestic violence. (§121) Accordingly, State ratification of, or opposition to, a relevant treaty can, in certain cases, be considered as a form of equality data indicating the general situation regarding the (in)equality of a particular group as determined by the authorities' response to a treaty protecting that group.

Jointly, the unofficial statistics submitted by the applicant, the State's refusal (not "a mere ommission") to gather official statistics, the sexist law and case law (a *sui generis* form of equality data), and the official rejection of the Istanbul Convention (also) were enough evidence that the State had failed in rebutting the inference of systemic official discrimination against women:

"[These] combined elements are sufficient for the Court to find that the authorities have not disproved the applicant's prima facie case of a general institutional passivity in matters related to domestic violence in Bulgaria. As the statistics provided by the applicant show, for a sustained period of time women have continued to suffer disproportionately from domestic violence and the authorities have not shown that they have engaged adequately with the problem. In such a case, it is not necessary for the applicant to show that she was individually a target of prejudice by the authorities." (§122)

Resulting from this data-based conclusion, the Court found a violation of Article 14 in conjunction with Article 3 ECHR.

This holding is a strong example of the important role equality data can play in the Court's reasoning. Nevertheless, it is interesting to interrogate the Court's reliance on the State's refusal to gather official statistics being intentional and/or symptomatic of a systematic failure (not "a mere ommission"). Arguably, bias or consistent

malpractice should not be required to find that a respondent has failed to rebut a *prima facie* case of discrimination; a mere omission to rebut, or an inadequate attempt to rebut, should be sufficient for a finding of discrimination following an inference of discrimination. As for the above case's "combined elements", which indicate, as the Court observes, not a mere omission, but instead State prejudice against women and their right to be safe from inhuman or degrading treatment, it would appear that the applicant, harnessing equality data, fully proved institutional mysogyny, and not merely a *prima facie* case.[64]

Case Study: Homophobic Hate Speech

In the case of *Nepomnyashchiy and Others v. Russia* (judgment of 30 May 2023), the Court considered homophobic hate speech by public officials targeting LGBTIQ people in general. The applicants claimed victim status by virtue of being LGBTIQ people and activists.[65] The case is a precedent as it is the first one in which the Court has found a breach of the ECHR resulting from general homophobic hate speech, not targeting any of the applicants as individuals. It is also the third case, in which the Court has found a breach of the ECHR resulting from general hate speech of any kind, not targeting any of the applicants as individuals.[66]

The Court used its own case law as a source of equality data to the effect that, in general, "gender and sexual minorities required special protection from hateful and discriminatory speech because of the marginalisation and victimisation to which they have historically been, and continue to be, subjected to". (§59) Based on equality data drawn from reports and observations by international and domestic actors, including the Council of Europe Commissioner for Human Rights, the UN Committee Against Torture, ECRI, the UN Human Rights Committee, and Human Rights Watch, the Court made a country-specific contextual holding as well:

"Furthermore, given the history of public hostility towards the LGBTIQ community in Russia and the increase in homophobic hate crimes, including violent crimes, at the material time […] indicative of serious tensions in society concerning issues relating to sexual orientation and gender identity – the Russian LGBTIQ community can be regarded as a particularly vulnerable group needing heightened protection from stigmatising statements." (§59)

Accordingly, equality data served to generate a holding of special community vulnerability to hate speech.

---

[64] See similar summary analyses of 27 cases in Annex I below.

[65] They relied on the legal precedents of Budinova and Chaprazov v. Bulgaria and Behar and Gutman v. Bulgaria, see Ilieva, M. S., *Behar and Budinova v. Bulgaria: The Rights of Others in Cases of Othering* (Strasbourg Observers, 2021).

[66] See Ilieva, M. S., Behar and Budinova v. Bulgaria: The Rights of Others in Cases of Othering (*Strasbourg Observers*, 2021) for an analysis of the first and second precedents, the twin cases of *Budinova and Chaprazov v. Bulgaria* and *Behar and Gutman v. Bulgaria*.

The TPI in the case supplied more qualitative equality data based on its own monitoring as a European community-representative organisation. Its findings included that:

- Many instances of violent hate crimes committed against LGBTIQ people were linked to prior homophobic hate speech or occurred in a context of heightened dehumanisation and discrimination.
- Even when not acted upon, homophobic and transphobic statements could have extremely serious repercussions for the private lives and equality of LGBTIQ people. Hate speech could cause its targets to feel not only afraid and insecure but also ashamed and humiliated, leading to a loss of self-confidence and self-esteem. Those experiences can result in physical symptoms such as loss of sleep and headaches, as well as mental and physical health problems of a more serious nature. As a result, hate speech could have consequences for every aspect of the life of those concerned. (§71)

The Court furthermore relied on ECRI qualitative data to recommend that domestic law explicitly mention SOGI as prohibited grounds for discrimination. (§78) It also noted the lack of equality data in the form of domestic case law recognising SOGI as protected within the domestic right to respect for human dignity and private life or as an element of the offence of hate speech. The Court explicitly termed this lack of equality data as a failure of th e government to submit evidence. (§78) Based on this, it held that the domestic provisions were of dubious effectiveness in practice. (§79) The Court furthermore held the domestic courts responsible for not duly taking into account the context of stigmatisation and targeting of LGBTIQ people in the country, i.e. ignoring the existing equality data to that effect: "They disregarded the vulnerability of the LGBTIQ community in Russia and their need for special protection." (§79)

Resulting from this domestic failure to provide due protection, such protection being due in light of the equality data, the Court declared a breach of Article 8 in conjunction with Article 14 ECHR. (§85)[67]

The ECtHR has used or considered both qualitative and quantitative ED in various case types, including:

- Domestic violence;[68]
- Hate crime and hate speech;[69]
- Police ethnic profiling;[70]

[67] See similar summary analyses of 27 cases in Annex I below.
[68] See summaries of *A.E. v. Bulgaria* above and of *Landi c. Italie*, *Volodina v. Russia*, and *Tkhelidze v. Georgia* in Annex I.
[69] See summaries of *Nepomnyashchiy v. Russia* above and of *Oganezova v. Armenia* and *Valaitis v. Lithuania* in Annex I.
[70] See summaries of *Muhammad v. Spain, Lingurar v. Romania*, *Gillan and Quinton v. the United Kingdom*, *S. and Marper v. GB*, and *Basu v. Germany* in Annex I.

- Police profiling of transgender sex workers;[71]
- Police abuse of Roma;[72]
- School segregation of Roma;[73]
- Laws repressing LGBTIQ expression;[74]
- Laws denying recognition to same-sex couples;[75]
- Official homophobic negative stereotyping;[76]
- Laws repressing female Muslim expression (head dress);[77]
- Deprivation of legal capacity based on disability;[78]
- Immigration rules (curbing the family reunification of individuals of non-national origin);[79]
- Provisions on jury service and their implementation (targeting or adversely affecting men);[80]
- Disability allowances (having a disparate impact on women);[81]
- Health insurance policies affecting women undergoing *in vitro* fertilisation;[82]
- Unequal welfare for widowed single fathers;[83]
- Height and weight (as proxy for physical strength) requirements for access to a profession;[84]
- Gendered retirement ages;[85]
- Housing subsidies (disadvantaging older individuals by means of maximum age requirements).[86]

As in its judgments analysed above, the Court has previously routinely considered and utilised various ED sources, including:

- National and international CSO reports;

[71] See summary of *Duğan v. Türkiye* in Annex I.
[72] See summaries of *Memedov v. North Macedonia* and M.B. and Others v. Slovakia (no. 2) in Annex I.
[73] See summaries of *Oršuš and Others v. Croatia*, *Szolcsán v. Hungary*, and Elmazova and Others v. North Macedonia in Annex I.
[74] See summary of *Bayev and Others v. Russia* in Annex I.
[75] See summaries of *Buhuceanu and Others v. Romania* and *Fedotova and Others v. Russia* in Annex I.
[76] See summary of *Macatė v. Lithuania* in Annex I.
[77] See summary of *S.A.S. v. France* in Annex I.
[78] See summary of *N. v. Romania (No. 2)* in Annex I.
[79] See summary of *Biao v. Denmark* in Annex I.
[80] See summary of *Zarb Adami v. Malta* in Annex I.
[81] See summary of *Di Trizio v. Switzerland* in Annex I.
[82] See summary of *Jurčić v. Croatia* in Annex I.
[83] See summary of *Beeler v. Switzerland* in Annex I.
[84] See summary of *Moraru v. Romania* in Annex I.
[85] See summary of *Moraru and Marin v. Romania* in Annex I.
[86] See summary of *Šaltinytė v. Lithuania* in Annex I.

- UN monitoring bodies' findings, including
  - CEDAW, CERD, Committee on the Rights of the Child, CAT, Special Rapporteurs, World Health Organisation, Committee on Economic, Social and Cultural Rights, and others;
- Council of Europe monitoring bodies' findings, including
  - GREVIO, ECRI, Commissioner for Human Rights, and others;
- EU research institutions' findings, including
  - FRA, EIGE, and others;
- Other international bodies' findings, for example OSCE/ ODIHR;
- Domestic bodies' findings, including
  - ombudspersons, Equality Bodies, courts, and others;
- Comparative information on domestic laws, case law, policies and practices across the Member States ('European consensus' data);
- The Court's own prior case law documenting relevant contexts or incidences.

As in its judgments discussed above, the Court has, also in its jurisprudence overall, construed ED as having significant legal implications. The Court has instrumentalised ED, including statistics, as well as qualitative data, to support the following notable conclusions, among others:

- To establish context for the purposes of a comprehensive factual analysis, including generally applicable and case-specific facts, in particular incidences and continuation of covertly or indirectly discriminatory acts, also taking account of trends over time;
- To assess individual victim vulnerability in light of their identity's/ community's exposure to stereotyping and targeting, and *de facto* disadvantage, including, in particular[87]
  - to ascertain if ill-treatment reached the severity threshold under Article 3 ECHR;
  - to conclude that States have enhanced victim protection and/or investigation duties where it was "essential" that they prevent and address ill-treatment of victims considered particularly vulnerable in light of ED on their groups' oppressed status;
  - to find that authorities 'knew or should have known' of the systemic disadvantage and/ or heightened risks a victim was facing, and were therefore under duties to actively protect them;
  - both statistics and qualitative findings have served as a basis to find that a State had heightened response duties in the individual case;
- To make a declaration of "institutional racism" or "structural bias",[88] or "general passivity"/ "condoning", or "systemic failings"[89] in individual cases, rendering in this way

[87] See, for example, summary of *Oganezova v. Armenia* in Annex I.
[88] See, for example, summary of *Lingurar v. Romania* in Annex I.
[89] See, for example, summary of *Tkhelidze v. Georgia* in Annex I.

landmark, impact judgments. ED have helped make some of the cases designated by the Court as "key cases".

- Relying on an ED-based finding of a systemic issue, the Court has concluded that there was no longer a need to prove bias in the individual case, i.e. that case would be regarded as symptomatic of the existing structural bias.[90]
  - Similarly, discriminatory intent in the instant case would not need to be established.
  - Also, State margin of appreciation would be regarded as narrower where a systemic State failing has been found.
  - Accordingly, the justifiability of an interference or difference of treatment would be restricted too.
- To find "State reluctance to acknowledge" an issue, i.e. to document State denial.[91]
  - Such a holding, in a domestic violence context, would then result in a declaration of Article 14 being breached.
  - This would be complemented by a finding that such State tolerance is conducive to proliferation of the abuse, i.e. an indirect acknowledgment of the State passively contributing to the violence.
- To shift the burden of proof, which the Court has done using both statistics and qualitative data.[92]
  - The Court has clarified that statistics could suffice, but are not required, for a *prima facie* case.[93]
  - An ED-based conclusion of disparate impact would result in the respondent government being expected to demonstrate any counter-measures it has taken to correct the existing inequality.
    - For the respondent government to be required to justify ED-evidenced disparity, such disparity would have to be 'clear'.
    - The more significant the disparity, the more cogent the justification needed.
- To find a State has general remedial duties with regard to a documented issue.[94]
  - To find a State has accordingly taken remedial action, or has failed to do so.
    - In the latter case, a State may be found lagging behind a "European consensus".

[90] See, for example, summary of *Landi c. Italie* in Annex I.
[91] See, for example, summary of *Volodina v. Russia* in Annex I.
[92] See, for example, *D.H. and Others* v. *the Czech Republic* referenced in the *summary of* Oršuš and Others v. Croatia, Annex I.
[93] See, for example, summary of *Di Trizio v. Switzerland*, Annex I.
[94] See, for example, summary of *Volodina v. Russia*, Annex I.

- To posit a State duty to evolve policy in line with a liberal trend observed among the other Member States.[95]
  - Such a trend would be characterized as "European consensus" based on comparative information arguably constituting a form of ED.
- Conversely, based on such ED, a lack of "European consensus" would be found.[96]
  - Such a finding would result in a holding that a State has broader discretion in the matter.
- Based on similar comparative ED, the Court has found that other States are struggling with the same issue. In some cases, this would then serve the Court to relativise/ normalise the State's failure to address this issue in the instant case.[97]
- In the context of domestic violence, the Court has used statistics to find that women have unequal access to justice based on the success rate of available remedies.[98]
- In the context of religious freedom, the Court has found that a purported issue the government sought to address by interfering was in fact small in terms of the share of the population affected – for example, the Muslim veil is worn by a relatively small number of people, therefore, the alleged societal issues resulting from the wearing of it are limited and not a sufficient basis for the government to interfere with individual religious freedom. From this conclusion, it would follow that a general ban on the allegedly problematic behaviour was hard to justify.[99]
- Based on evolving societal trends as documented by statistics, the Court has declared a State under a duty to update the relevant policy to reflect the recent data.[100]

Implications of a lack of Equality Data

In cases, in which the Court established that relevant ED was unavailable because the State failed to gather or provide them, it has reached legal conclusions based on the absence of such data.

- The Court has declined to hold the applicant accountable for the unavailability of statistics, such unavailability being attributable to the authorities: it has refused to derive unfavourable consequences for the applicant's case from the latter's inability to submit absent data.[101]
- Where international bodies have recommended that the State collect certain ED that the Court then finds absent, the Court would consider as aggravated the authorities' failure to collect such statistics. The implication would be that the State has been made aware of the need to produce such data but has ignored this, therefore, knowingly

[95] See, for example, summaries of *Fedotova and Others v. Russia* and *Bayev and Others v. Russia*, Annex I.
[96] See, for example, summary of *S.A.S. v. France*, Annex I.
[97] See, for example, summary of *Oršuš and Others v. Croatia*, Annex I.
[98] See, for example, summary of *Volodina v. Russia*, Annex I.
[99] See, for example, summary of *S.A.S. v. France*, Annex I.
[100] See, for example, summaries of *Šaltinytė v.* and *Lithuania Beeler v. Switzerland*, Annex I.
[101] See, for example, summary of *Volodina v. Russia*, Annex I.

perpetuating and exacerbating the invisibility and non-provability of existing inequalities.[102]

- In certain cases, the Court has demanded that the government produce relevant statistics.
  - In such cases, the government's failure to comply would result in a finding that the government was unsuccessful in its rebuttal of inferred inequality, therefore the inference of discrimination was in this way corroborated.

[102] Id.

6. Learning from the CJEU's jurisprudence using equality data

Analytical summaries of relevant CJEU case law are provided in Annex II below. As a rule, the CJEU has instrumentalised or otherwise addressed quantitative, and not qualitative ED. The types of cases, in which the CJEU has dealt with statistics include but are not limited to:

- Direct sex discrimination[103]
  - Access to vocational training;
- Indirect sex discrimination[104]
  - Unequal pay for women;
  - Disadvantage of part-time workers, predominantly women;
- Indirect ethnic discrimination (alleged)
  - Origin-based extra requirements for loans (imposed on applicant by credit institution);[105]
  - Award of scholarships conditional on applicants' having taken domestic educational test;[106]
- Direct age discrimination (alleged)
  - Max. age requirements for access to jobs (police, firefighters);[107]
- Exclusion of men who have sex with men from eligibility as blood donors.[108]

Case Study: Disability

In Joined Cases C-335/11 and C-337/11,[109] concerning disability, the CJEU interestingly relied on equality data in an implicit manner, not referencing any specific data source for a finding of generalised contextual facts. The CJEU held that disabled persons "generally face greater difficulties than non-disabled persons in re-entering the labour market, and have specific needs in connection with the protection their condition requires". This holding, implicitly based on equality data, served to substantiate a finding regarding the vulnerability of people with disabilities. The Court held that "the risks run by disabled persons should not be overlooked". On this basis, the CJEU resolved this case by declaring that Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of his

[103] See, for example, summary of Case C-104/10 (*Kelly*) in Annex II.
[104] See, for example, summary of Case C-167/97 (*Seymour-Smith*) in Annex II.
[105] See, for example, summary of Case C-668/15 (*Jyske Finans*) in Annex II.
[106] See, for example, summary of Case C-457/17 (*Maniero*) in Annex II.
[107] See, for example, summary of Case C-258/15 (*Salaberria*) in Annex II.
[108] See, for example, summary of Case C-528/13 (*Léger*) in Annex II.
[109] HK Danmark, acting on behalf of Jette Ring, v Dansk almennyttigt Boligselskab (C-335/11), and HK Danmark, acting on behalf of Lone Skouboe Werge, v Dansk Arbejdsgiverforening (C-337/11), §91.

disability, unless that legislation does not go beyond what is necessary to achieve its legitimate aim, that being for the referring court to assess.[110]

The above implicitly data-based holding regarding risks, difficulties and needs experienced by people with disabilities in general, reiterated the Court's prior finding in Case C-152/11,[111] in which the CJEU referenced, in a context of disability/ age intersectionality, "the risks faced by severely disabled people, who generally face greater difficulties in finding new employment, as well as the fact that those risks tend to become exacerbated as they approach retirement age". The Court linked these generalized, implicitly data-based findings of risks and vulnerabilities to relevant special needs to be legally recognised:

"Severely disabled people have specific needs stemming both from the protection their condition requires and from the need to anticipate possible worsening of their condition."

Based on these implicitly data-based observations, the Court concluded that "regard must be had to the risk that disabled workers may throughout their lives have financial requirements arising from their disability which cannot be adjusted and/or that, with advancing age, those financial requirements may increase." In this case, the Court used these conclusions to declare the contested difference of treatment unjustified: paying a severely disabled worker compensation on termination which is lower than the amount paid to a non-disabled worker has an excessive adverse effect on the legitimate interests of severely disabled workers and therefore goes beyond what is necessary to achieve the social policy objectives pursued by the legislature.[112]

In Case C-395/15,[113] also concerning disability, the CJEU explicitly relied on "data" to clarify the meaning of a "long-term limitation" of a person's capacity for the purposes of the concept of "disability". Providing the national court with guidance, the CJEU held that in order to ascertain the long-term nature of the limitation it is necessary to rely on "current medical and scientific knowledge and data". While medical science data do not (necessarily) include equality data, this holding arguably paves the way for the use of both qualitative and quantitative equality data as well. The Court stressed that an assessment of whether a limitation in one's capacity is long-term is objective and "factual in nature", and to be based on comprehensive evidence from impartial and varied sources:

[110] Joined Cases C-335/11 and C-337/11, §92.
[111] Johann Odar v Baxter Deutschland GmbH, §69.
[112] Case C-152/11, §70-72. The Court held that Article 2(2) of Directive 2000/78 must be interpreted as precluding an occupational social security scheme under which, in the case of workers older than 54 years of age who are made redundant on operational grounds, the compensation to which they are entitled is calculated on the basis of the earliest possible date on which their pension will begin – unlike the standard formula, under which account is taken inter alia of the length of service – with the result that the compensation paid is lower than the standard formula compensation, although still at least one half thereof, and that alternative calculation method takes account of the possibility of receiving an early retirement pension on the ground of disability.
[113] Mohamed Daouidi v Bootes Plus SL, Fondo de Garantía Salarial, Ministerio Fiscal, §57.

"In the context of the verification of the 'long-term' nature of the limitation of capacity of the person concerned, the referring court must base its decision on all of the objective evidence before it, in particular on documents and certificates relating to that person's condition, established on the basis of current medical and scientific knowledge and data."

The suggestion that "all of the objective evidence" is required to determine the fact of disability implies that all pertinent data would be necessary to consider, arguably including equality data. Such an interpretation would be supported by the social model of disability as projected by the CRPD (as opposed to the medical model of disability).

Sources of Statistics

While the CJEU, in its relevant case law, has no practice of listing the sources of equality statistics to be considered, its use of inclusive wording in that regard suggests that all sources of such statistics are eligible, including both official and unofficial sources, as long as the data meet the CJEU's substantive requirements of being "significant". For instance, in its judgments in *Seymour-Smith* and *Enderby* (see summaries below, in Annex II), the Court's language – "the statistics available" – suggests that all available statistics, from all sources, are to be considered:

"[T]he national court - which must determine, taking into account all the material legal and factual circumstances, the point in time at which the legality of a rule is to be assessed - must verify whether the statistics available [emphasis added] indicate that a considerably smaller percentage of women than men is able to fulfil the requirement imposed by that measure.

49 With regard, in particular, to statistics, it may be appropriate to take into account not only the statistics available at the point in time at which the act was adopted, but also statistics compiled subsequently which are likely to provide an indication of its impact on men and on women. […]

60 As the Court has stated on several occasions, it must be ascertained whether the statistics available indicate that a considerably smaller percentage of women than men is able to satisfy the condition of two years' employment required by the disputed rule. That situation would be evidence of apparent sex discrimination unless the disputed rule were justified by objective factors unrelated to any discrimination based on sex." Seymour-Smith [emphasis added]

In *Enderby*, the Court has used similarly inclusive language, suggesting a comprehensive consideration of all valid statistics regardless of their sources, referring to "the statistics describing th[e] situation":

"16 However, if the pay of speech therapists is significantly lower than that of pharmacists and if the former are almost exclusively women while the latter are predominantly men, there is a prima facie case of sex discrimination, at least where

> the two jobs in question are of equal value and *the statistics describing that situation* [emphasis added] are valid.
>
> 17 It is for the national court to assess whether it may take into account those statistics, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant."

Based on the relevant CJEU case law, of which analytical summaries are provided in Annex II below, the following legal conclusions derived from ED by the CJEU become apparent:

- Statistical data may be sufficient to prove indirect discrimination but they are not required for that. (Indirect discrimination may be proven by any means, including but not limited to statistics.)[114]
- To evidence disparate impact (a particular disadvantage) for the purposes of establishing indirect discrimination, statistics must show
  - that a *considerably smaller* percentage of women compared to men are able to meet the impugned condition, or
  - *lesser but persistent (relatively constant)* disparity between women and men over a *long period of time.*[115]

If statistics demonstrate either of the two types of situations, a *prima facie* case of indirect discrimination is capable of being found, and the burden of proof would then shift to the respondent, to justify the said sex disparity. These findings are arguably applicable *mutatis mutandis* to comparisons between minoritised/ underprivileged groups and privileged control groups.

Equally, the CJEU has clarified that the absence of relevant and necessary ED has important legal implications for a case's outcome:

- The fundamental EU law principle of effectiveness, from which it flows that courts must be able to supervise employers' practices, implies that a comparison must be made, and therefore, must be enabled, in alleged pay discrimination cases. Accordingly, employers have an (implicit) duty to enable (the court to make) such a comparison by generating and supplying the necessary comparative data, i.e. ED.[116]
- By analogy, this duty is arguably applicable outside of unequal pay contexts as well.
- In pay inequality contexts, employers have an established duty to make their pay systems transparent. They must (be able to) show before a court how their pay criteria are being applied.
- Their failure to do so results in a possible *prima facie* case of pay discrimination.[117]

[114] See, for example, summary of Case C-415/10 (*Meister*) in Annex II.
[115] See, for example, summary of Case C-167/97 (*Seymour-Smith*) in Annex II.
[116] See, for example, summary of Case 109/88 (*Danfoss*) in Annex II.
[117] See, for example, summary of Case C-127/92 (*Enderby*) in Annex II.

- Equating a lack of ED to system non-transparency, the CJEU has held that a finding of a non-transparent system may shift the burden of proof onto a respondent who is responsible for that system.
- On the other hand, in an access to employment context, a (job applicant) complainant is not entitled to comparative information from the respondent employer in order to establish a *prima facie* case.
- Nevertheless, it "cannot be excluded" that an employer's refusal to disclose comparative information, in this context, could compromise the objectives of EU law, i.e. equality, in breach of the effectiveness principle. It is the national court's role to assess if this is the case.[118]
- If so, the national court (or, by analogy, another domestic adjudicator) is to ensure such a refusal of disclosure by a respondent employer will not compromise the effectiveness of equality rights.
- Accordingly, while an employer is not under a duty to disclose comparative data, they may suffer legal consequences imposed by the national adjudicator to offset any impairment to the effectiveness principle resulting from non-disclosure.
- The national court (adjudicator) is to take account of all the circumstances, including a refusal of information by the respondent, in order to determine whether the entirety of evidence suffices for a *prima facie* case.
- Therefore, the national adjudicator may, if this is warranted – it is a matter of a case-specific, context-specific assessment – draw an inference of discrimination based on an employer's refusal to disclose relevant comparative data, and shift the burden of proof onto such a respondent as a consequence.

Importantly, the new Pay Transparency Directive relies on the above CJEU case law to the effect that "when a system of pay is totally lacking in transparency, the burden of proof should be shifted to the respondent, irrespective of the worker showing a *prima facie* case".[119] Based on this standard, the Directive codifies a duty to shift the burden of proof to an employer who does not comply with their pay transparency obligations under the Directive.[120] This duty is premised on the acknowledgment that "equal pay is hindered by a lack of transparency in pay systems" and "by procedural obstacles faced by victims of discrimination".[121] The Directive accepts that "[w]orkers lack the necessary information to make a successful equal pay claim" and that "increased transparency would allow revealing gender bias and discrimination in the pay structures of an undertaking".

This "general lack of transparency about pay levels within organisations" prevents the detecting and exposing of gender bias and pay disparities for the purposes of victims' access to justice. Therefore, workers should have the right to obtain sex-disaggregated comparative data. Employers have a duty to regularly disclose gender pay disparities data. They are obligated to report these data to the

[118] See, for example, summary of Case C-415/10 (*Meister*) in Annex II.
[119] See Preamble, Recital 52.
[120] Article 18.2.
[121] See Preamble, Recital 11.

designated authority competent to publish them. Employees and Equality Bodies, among others, have the right to ask for clarifications of the data and for explanations. Employers are bound to provide a substantiated reply reasonably soon.

In legal proceedings, courts and other adjudicators have the power to require evidence disclosure by the respondent employer. The directive entrusts Equality Bodies with the powers to represent and support victims in legal proceedings, implying that they would be in a position to use those equality data for enforcement purposes.

Actionable steps for an Equality Body in relation to ECtHR and CJEU jurisprudence

- Study in depth the ECtHR and CJEU existing and emerging equality case law from a standpoint of identifying the actual and possible uses of equality data by the Courts and, by implication, any adjudicator (or litigator). Use this Handbook as a starting point.
- Analyse and systematise the possible uses of equality data, based on the ECtHR and CJEU case law, to frame domestically relevant issues, craft arguments, and draw conclusions.
- Train own legal staff in above research and share knowledge with stakeholders' legal staff.
- When drafting own legal submissions before domestic courts or supranational bodies, or own case decisions, fully integrate ECtHR and CJEU case law using equality data, to mainstream those Courts' approaches, educating the domestic courts and legal profession, and maximising cases' chances of success.
- In drafting own submissions before the CJEU and ECtHR, for example, as TPI, fully integrate knowledge of the Courts' case law in terms of using equality data, suggesting that the Courts adopt it and build on it, expanding their methods of utilising equality data to serve justice seekers.

7. Learning from Equality Bodies' practice

As mentioned in the Methodology statement above, this Handbook draws learning from the practices of six Equality Bodies: UNIA (BE), the Equality and Anti-Discrimination Ombud (the Ombud) (NO), the Netherlands Institute for Human Rights (the Institute) (NL), the Advocate of the Principle of Equality (the Advocate) (SI), the Commissioner for the Protection of Equality (the Commissioner) (SRB), and the Equality and Human Rights Commission (the EHRC) (GB).[122] Overall, those Equality Bodies, taken together, have been involved in at least 30 national and international legal cases, in which they have used equality data, while performing various procedural roles, including:

- Investigation (the Institute NL, EHRC GB);
- Litigation (UNIA BE, the Ombud NO, the Advocate SI, the Commissioner SRB)
  - on their own behalf (the Commissioner)
  - on a victim's behalf;
- Adjudication (the Ombud NO, the Institute NL, the Commissioner SRB);
- Mediation (UNIA BE);
- Domestic TPI (the EHRC GB, the Advocate SI, UNIA BE);
- ECtHR TPI (the Advocate SI, the EHRC GB);
- Legal opinion regarding CJEU proceedings provided to government body (UNIA BE);
- Legal assistance to victims litigating their own cases (informal advice) (the Advocate SI);
- Legal assistance to victims through funding and instructing lawyers (the EHRC GB);
- Legal assistance to specialist CSO through funding their litigation, providing input (the EHRC GB);
- Counselling victims (providing legal advice, including contextual information placing the individual's complaint in perspective) (UNIA BE).

For example, in a 2019 domestic court case, UNIA (BE) used qualitative equality data contained in several reports, including its own annual report, as well as complaints data and investigation findings concerning structural racism. These data helped make the point, in UNIA's legal submission, that the burden of proof should shift onto the respondent as the "recurrence test" provided for under the applicable law had been met. This test allows the court to presume discrimination in an individual case where data indicate a pattern of disadvantage affecting the complainant's group. Such group disadvantage data enable an inference that the complainant's individual disadvantage was causally linked to her/his protected group characteristic. Interestingly, such data may not be gathered pro-actively, with the aim of uncovering discrimination for the purposes of litigation, as the findings of such a procedure would lack legitimacy before the courts, in the BE context. However, the data revealing a pattern need not predate the individual case – they could also be contemporaneous with it or subsequent to it. Such data may include victim statements, witness statements, statistics, or complaints filed with UNIA or other organisations, among other types of information. UNIA's

[122] Representatives of those equality bodies were interviewed in January-March 2023, accordingly, the findings reflected in this Handbook correspond to that point in time.

submission of such data in this case resulted in an agreement reached in mediation. In comparable cases, UNIA typically uses qualitative equality data to argue that the "recurrence test" has been met for purposes of shifting the burden of proof.

In an exceptional judicial decision explicitly embracing equality data, statistics and qualitative findings alike, the Tribunal du Travail de Bruxelles (Brussels Labour Tribunal) (2021) has upheld a UNIA-supported claim of indirect intersectional discrimination against a Muslim woman who was refused employment because of wearing her headscarf.[123] The Tribunal expressly relied on statistics presented by UNIA, as well as on official statistics. It also referenced qualitative data published by Amnesty International and quoted the UN CEDAW Committee. For example, the Tribunal took account of the fact that the "number of 55 national origins represented in [the respondent's workforce] appears quite relative when compared to the 180 national origins registered in Brussels in 2020 and the fact that, in 2015, women were only 9,3 % of the [respondent's] staff sounds like a failure in terms of sex diversity". The court relied on data by the Brussels Institute of Statistics and Analysis for this finding.

Furthermore, the Tribunal held that a number of facts allowed it to presume indirect sex discrimination, including facts proven by means of equality data:

- UNIA's data to the effect that in 2017-2020, the ban on wearing religious signs in the workplace concerned in more than 95 % of the cases the Islamic headscarves, and, therefore, women.
- The respondent's own submissions indicating that its recruitment policy is gendered: in 2015, women represented just 9.5 % of its workforce, with only 7.86 % in managerial roles.
- An academic study revealing that the respondent's policy of prohibiting women from covering their heads in the workplace is a barrier to the employment of a category of applicants.
- A recent study by the Centre for Intersectional Justice and of Actiris concerning the invisibility of Muslim women wearing the headscarf amongst discrimination victims documented by qualitative surveys, in particular, in terms of applying for jobs.
- A 2012 report by Amnesty International on the inherent links between sex discrimination and other protected grounds, including religion.
- CEDAW Observations on multiple discrimination against women.

Some of the above sources of relevant equality data were suggested by UNIA, and others were proactively identified and employed by the court itself. In other cases, ED-based UNIA arguments have not been taken up as actively or as directly as in this instance.

The EHRC (GB) intervened in the ECtHR case *of J.D and A v. United Kingdom*, submitting equality data. Prior to that stage, the EHRC had intervened in a similar manner before the domestic Court of

[123] Tribunal du Travail de Bruxelles, 3 May 2021, en cause Le Centre interfederal pour l'egalite des chances (UNIA), "M.T" and L'A.S.B.L. LDH v. STIB.

Appeal. The EHRC relied on the government's own report submitted to the CEDAW Committee regarding the contested policy.

The Advocate (SI) intervened before the Constitutional Court in a landmark case concerning same-sex marriage and adoption. The Advocate used qualitative equality data, such as research findings and CSO reports, in order to enable the positive outcome of the case. Importantly, this intervention was *informal*, as well as formal – the Advocate's input was introduced before the Court via individual petitioners' submission, in addition to being formally filed by the Advocate itself. The Constitutional Court ruled in favor of the petitioners and the applicable national legislation was amended. Such informal submission of equality data and expert analysis by an equality body supporting individual petitioners is a noteworthy practice, especially for Equality Bodies not having formal standing to act as TPI, or to bring cases before a constitutional or supreme court.

Additionally, the Advocate intervened formally before the ECtHR in *Toplak and Mrak v. Slovenia*, submitting both qualitative equality data (research findings) on inaccessibility and numerical information on accessible polling stations at the national level.

The Ombud (NO) has hypothetically considered using its own survey on young people's experience with the police as evidence in a possible court case. The survey showed that teenagers of minority background were stopped more often than teenagers of majority background, especially in the groups of teenagers who were stopped multiple times over a year. The Ombud uses this survey and its findings in its dialogue with the police. It is noteworthy that, like other Equality Bodies, the Ombud would use its own equality data as evidence in its own litigation. While, theoretically, opponents could question the credibility of such equality body-produced evidence to support an equality body's litigator's claims in court, no such occurrence was reported by any of the six Equality Bodies interviewed for this Handbook.

More importantly, the Institute (NL) uses its own equality data gathered in the course of its own investigations, including ones undertaken *ex officio*, in order to adjudicate cases. For example, the Institute has investigated the equal pay situation at Dutch hospitals, using the numerical information gathered to apply its own chi-square test statistical analysis in order to calculate the proportion of the difference in pay between women and men possibly attributable to gender stereotyping, and based on that, reach its conclusions.

Likewise, the Commissioner (SRB) relied on equality data drawn from its own research in its decision in a case of race discrimination (national and ethnic origin). The Commissioner used these equality data *ex officio*, together with other data on the social distance towards (prejudice against) Roma at the national level. The equality data, along with other evidence, served to shift the burden of proof. The case was brought by a Roma individual against a beauty salon owner for discrimination in access to services.

In its work as an adjudicator, the Commissioner *ex officio* identifies and uses equality data, including data produced through its own monitoring and research activities, as a matter of course, in all cases where such data might be helpful. This established practice includes using third-party research findings and international organisations' reports as well. The practice is not based on express legislation or internal policy but instead on a team-wide understanding that using equality data is a matter of common sense for purposes of a contextual analysis of cases. This solidified approach is

supported by the Commissioner herself (the equality body's head official). It emerged from the Commissioner's work on her annual reports to Parliament, overviewing equality in various areas, supported by survey and research outputs.

From a stringent fair trial perspective, an equality body adjudicator's use of its own evidence of its own motion might be questionable, as it is capable of being perceived as clashing with impartiality. However, no party to a case or other actor has questioned the practice of the Commissioner. While its decisions are non-binding recommendations and not subject to judicial review, which is a possible reason for the lack of scrutiny of their evidentiary methodology, those decisions' implementation rate is estimated at 85-90 % by Commissioner staff.[124] In addition, most of the Commissioner's research is contracted out to external experts, and not by Commissioner staff. Furthermore, the Commissioner estimates that such equality data on its own would not be sufficient to establish discrimination in a case, but only in concordance with direct evidence. The only criticism of the Commissioner's use of its own survey findings has been by a newspaper journalist who questioned the fact that the equality data used by the Commissioner measured perceptions (of discrimination victims) rather than 'facts' (this author argued against measuring perceptions as a research method in general).

Other Equality Bodies, such as the Advocate, also use equality data by default in their legal analyses of cases in a litigator or TPI role, especially qualitative data, including their own findings.

Case typology

The types of cases, in which the Equality Bodies interviewed for this Handbook have used equality data, in terms of subject matter and forms of discrimination include but are not limited to:

- Homophobic hate speech (harassment) in the media;
- Institutional/ structural racism in employment and social protection;
- Artificial intelligence (university face detection software) disparately impacting racial minority students;
- Race discrimination in access to services;
- Housing policies affecting Roma;
- Procedural rules affecting access to justice for children with disabilities;
- Architectural accessibility of voting facilities;
- Housing policies affecting victims of domestic violence and children with disabilities;
- Same-sex marriage and adoption;
- Equal pay for hospital staff;
- Rental practices disadvantaging women and people with disabilities;

[124] Interview with Bogdan Banjac, staff member, Commissioner for the Protection of Equality, 27 January 2023.

- Sex discrimination in employment (the police);
- Domestic violence and Roma victims' access to justice;
- Alleged discrimination against a divorced father in terms of access to school information about his son, access to the school, and the processing of his complaints by the equality body;
- Positive action measures facilititating the inclusion of women and people of migrant background in the fire brigade;
- Gender bias in occupational investigations to determine personal injury indemnification and disability insurance;
- Muslim headscarf bans producing intersectional discrimination (gender and religion);

Under the domestic legislation, in most cases of interviewed Equality Bodies, there are no legal provisions specific to the use of equality data as evidence. Instead, broad, implicitly inclusive language in applicable general civil procedure rules on evidence is available to be relied on (for example, NO, SI, SRB, GB). Generally, it is up to the courts to attach weight to specific pieces of evidence, and there is nothing to prevent equality data from being submitted as evidence. Some Equality Bodies derive a possibility to use equality data in legal cases from their own general mandates to collect data and assess the state of equality in the country (as mentioned above, the Commissioner (SRB).

Under BE legislation, statistics are explicitly mentioned regarding proving indirect discrimination, while there is no mention of qualitative data. Under the provisions, statistics are a means of establishing a *prima facie* case of discrimination, and, accordingly, shifting the burden of proof. Under GB legislation, a judge must take into consideration the EHRC's findings in an inquiry report, or an investigation report, while not being bound by those findings. The law is explicit that such EHRC findings, which inherently can include equality data, can be relied on in court by claimants or other parties. The EHRC can make a recommendation, in an inquiry or investigation report, to any class of persons, including a public body, and a claimant can rely on that in court. In this way, the EHRC can combine its own powers to support the use of equality data in litigation. It could possibly strategise by conducting an inquiry in order to produce a finding to then use, or have used by another party, in court.

In its notable 'fire brigade' case – its second case of structural racism, UNIA succeeded in proving structural racism against a public agency, the fire brigade authority. The case was litigated based on a UNIA-compiled report of multiple related complaints (firefighters' witness statements revealing both a pattern of racism, as well as passivity on the part of management), a source of equality data. The case started in 2019 based on an individual complaint by a fire brigade recruit of North African origin following vandalism of his possessions at the workplace. The complainant claimed that the incidents were symptomatic of a structural issue, a racist culture perpetuated by the perpetrators' impunity. This was confirmed by the subsequent complaints and the data aggregating those. The case outcome importantly included an external audit of the respondent agency, as well as individual solutions for the complainants. The audit findings were discussed at a parliamentary hearing in 2021, with UNIA giving a formal statement.

No equality body, of the six interviewed for this Handbook, reported any 'due process'/ 'fair trial' objections raised by any party regarding the equality body's use of its own (gathered or generated) equality data, whether as litigator or TPI (and all interviewees were specifically asked). Neither the courts (on judicial review, for example), nor the media have questioned Equality Bodies' use of their own equality data in their own case decisions, or their use of such equality data *ex officio*. Courts have been occasionally skeptical of the credibility of particular data used (for example, reporting CSO not perceived as being authoritative enough) but not dismissive on grounds that data were gathered/ used by the equality body of its own motion and/or were its own monitoring outcomes.

What is more, courts have used Equality Bodies' equality data of their own motion in cases in which the Equality Bodies themselves were not involved; for example, data by the Ombud (NO) was used in this manner by the Supreme Court. This is a possible impact of preceding TPI submitted by Equality Bodies, raising the visibility of equality body knowledge resources, including equality data.

For example, the EHRC (GB) intervened in a housing case at the High Court stage.In 2015, the GB government had updated its Planning Policy for Traveller Sites. The intention was to change the definition of 'Gypsy or Traveller' so that people who had permanently ceased to travel were no longer classed as Gypsies or Travellers. The legal issue was whether the change in policy amounted to indirect discrimination. Before the High Court, the EHRC, as TPI, argued that, if the updated policy would be construed as excluding that group, that would constitute indirect discrimination on the basis of age and disability, as older / disabled people are more likely to be forced to cease travelling permanently. The narrowed definition would also indirectly discriminate against ethnic Gypsies and Irish Travellers as they are more likely to be people of nomadic habit who have permanently ceased travelling.

In terms of justifiability of such disparate impact, the EHRC argued that there had been no assessment of the impact, and no consideration of less intrusive measures. Instead, the government had assumed that the change would have a 'minimal' effect with no evidence, and the EHRC's research indicated significant effect, i.e. equality data produced by the equality body were relied on.

The High Court's judgment (2021) rejected the applicant's case, however, the latter won before the Court of Appeal (2022). The EHRC did not intervene at that stage, yet the Court referred to the EHRC's research and relied on it in part to conclude "that there are undeniably harsh consequences of the policy".

> "The report of the [EHRC] also made clear the widespread effect of the relevant exclusion."
>
> "In any event, the report of the [EHRC] (to which we have referred [...]) made plain that the need for pitches for Gypsies and Travellers as assessed by local planning authorities fell by up to 75 % since the relevant exclusion became effective."

Even without the EHRC intervening before it, the Court of Appeal found, based on EHRC equality data, indirect discrimination on the basis of age, race, and disability.

In the High Court's judgment, despite the unfavourable outcome, EHRC equality data (reports) were nevertheless also referenced, to the effect that Roma/ Travellers are most marginalised and vulnerable communities. The High Court referenced also the specific research regarding the impact of the new policy, citing numerical information.

It dismissed the case not on grounds of not being persuaded by these equality data but because it made a finding that there had not been any less intrusive measure to use, therefore, the contested measure was a proportionate means of achieving a legitimate aim.

This attentive attitude by courts, however, is not even across jurisdictions. In Serbia, for instance, the Commissioner reported three instances of court not taking into account the equality data it submitted in a case of hate speech/ harassment it had brought. All three judicial instances failed to even mention the data in their reasoning in this case. In this jurisdiction, the courts' lack of recognition of the relevance of equality data in court cases is noted as a challenge.

While a number of Equality Bodies, both adjudicators and litigators, use, in their legal casework, equality data as standard practice, they nevertheless lack any formal internal guidelines to that effect. Instead, their practices are based on informal legal staff consensus.

The Institute (NL), however, which is an adjudicator and investigator equality body, and not a litigator, reported internal division of opinion as to whether case decision-makers should use equality data *ex officio* or in all cases, with some Institute legal staff perceiving this as an 'activist' aprroach and, therefore, not appropriate for judges. Therefore, within the Institute, *ex officio* use of equality data to decide a case is discretionary, up to the assigned individual adjudicator. In all cases, *ex officio* use of equality data by an Institute adjudicator must be seen as *necessary* in order to be done, rather than merely useful, therefore, the practice is not 'liberal'. Certain Institute adjudicators apply this approach actively. However, time constraints are also a factor, as docket size limits the time to spend on a single case, including time to gather equality data. Where an individual adjudicator does make a decision to *ex officio* identify equality data to base conclusions on, they can utilise another power of theirs to help with such data collection. Under the law, the Institute has the power to *ex officio* require information from parties, including to indicate relevant evidence parties are failing to submit. As no standardised approach exists in this regard, the Institute's practice might not be consistent, which seems to not have been recognised as a potential challenge.

For example, in the high-profile "childcare allowance scandal" case, the Institute, after receiving a number of individual complaints of race discrimination in 2021, made a decision to conduct an *ex officio* investigation into possible systemic discrimination, i.e. regarding the operation of the childcare benefits system as such, beyond any/ all individual cases.[125] It had been alleged that the algorithms used to select applicants for benefits to be investigated for possible misuse had used 'foreign nationality' as a (negative) risk factor. In addition, the system had been found to illegally

[125] See more information in Alexander Hoogenboom's account here.

register if individuals possessed a second nationality, in addition to their Dutch one, and made use of these data in its fraud investigations.

To verify if these findings reflected institutional discrimination, the Institute undertook a comprehensive data gathering exercise and in-depth statistical analysis of the data gathered. The Institute sought to examine the potential discriminatory effects of the application of artificial intelligence (AI) to select individuals to be investigated. For this, it scrutinised the enforcement processes in question to document if in practice they affected persons of foreign descent disproportionately, which would give rise to a presumption of discrimination on grounds of race/ ethnicity in social protection.

The Institute approached this by requiring the relevant national authority to provide data on all persons who had received childcare allowances in 2014 and 2018. The year 2014 was selected because it featured significantly in the individual complaints submitted to the Institute, and because it was also considered in other authorities' investigations. 2018 was selected as a 'control year', as the last full year before the Dutch Supreme Administrative Court rulings, which sought to limit the contested enforcement practices (inter alia, by reinstating the principle of proportionality).

The Institute then defined two groups to be compared based on the data thus obtained to broadly match the groups at issue in the judgments of the ECtHR and the CJEU in the cases, respectively, of *Biao v Denmark* and *Firma Feryn*:

- Persons of foreign descent
  - A composite of persons of any foreign nationality/nationalities, persons of Dutch + another nationality and persons with a 'recent immigration date' (arrived in the Netherlands in the last 25 years);
- Persons of Dutch descent
  - A composite of persons of Dutch nationality with a non-recent immigration date.

With respect to these groups, the Institute conducted statistical analysis to answer the following questions:

- Were persons of foreign descent more likely to be investigated than persons of Dutch descent?
- Were persons of foreign descent more likely to receive the qualification "intent/ gross negligence"?
- Were persons of foreign descent more likely to be included in an application known as the "Blacklist"?

In order to conduct this analysis, for each individual who received childcare allowance in 2014 and 2018, a set of data was requested. Whereas the responsible authority cooperated in providing the data, the administrative processes of making the first set of data available took five months. The second data set took a similar amount of time to become available. The Institute, accordingly, spent an entire year on merely obtaining the data. Once obtained, the data were analysed using the chi-

square statistical test to probe whether the variables (descent and investigation outcome) were associated. The analysis sought to achieve a "statistically significant" result and, for this purpose, used as a reference point CJEU case law, in particular case *C-389/20, CJ v Tesorería General de la Seguridad Social (TGSS)*. In the latter, women were found to be 22 times more likely to fall within the disadvantaged category than men, which the CJEU indicated was sufficient for a presumption of indirect discrimination.

In the "childcare benefits" case, the Institute achieved statistically significant outcomes by applying the chi-square test, indicating association between descent and the negative outcomes in question (being selected for investigative action under the risk algorithm), with persons of foreign descent being overrepresented in the affected category. Such persons were found to be 3.52 times more likely to be selected for further investigation by a civil servant in 2018. In 2014, that likelihood was 16 times.

Based on these findings, the Institute proceeded to examine if a 3.52 odds ratio constituted a "significantly greater proportion" of individuals of foreign descent compared to persons of Dutch descent, which would suffice for a presumption of indirect discrimination. Compared to a 50/50 division of people of Dutch and non-Dutch descent, the variance of 22/78 (Dutch/ foreign descent) (3.52 applied to a sample of 100 people) was considered significant. Therefore, the Institute held that the impugned enforcement practices affected a significantly greater proportion of persons of foreign descent, giving rise to an inference of discrimination. In reaching this conclusion, the Institute relied on the findings of other authorities whose prior investigations had also produced data, as well as on the data processed in the course of the Institute's own *ex officio* investigation. It also took account of the contemporaneous finding of the Dutch Central Bureau for Statistics to the effect that half of the victims of the contested practices were born abroad.

Importantly, the outcome of the investigation into structural racism carried out by the Institute shifted the burden of proof in the individual cases based on separate complaints, onto the responsible authority to justify the disparity established. Thusly, the significant equality data exercise undertaken by the Institute of its own motion - seen as necessary in order to address the underlying issue - had "game-changing" implications for all the individual victims who had complained of indirect discrimination. (As most of those victims' individual cases are still pending (as of February 2024), the specific implications for their cases remain to be seen, in terms of individual case outcome.) The Institute carries out large-scale data-based *ex officio* investigations approximately once every 5 years, and small *ex officio* investigations more frequently, particularly in indirect discrimination cases.

As a matter of course, Equality Bodies use equality data produced by third parties; sometimes published/ publicly available, at other times, internal data which Equality Bodies obtain using their legal powers to demand information, or their networks' (stakeholders'/ partners') resources. As previously mentioned regarding the Institute (NL), under domestic law, most Equality Bodies, whether as adjudicators or as litigators, have the (enforceable) power to *ex officio* require data from respondents, public bodies and other actors, and/or to indicate relevant evidence for the parties to a case to submit, including internal unpublished/ administrative data (NL, NO, SI, GB).

For example, the EHRC (GB) has a strong legal power to order a third party to yield any relevant information, including equality data, that such a party has. Applicable in the context of formal EHRC

proceedings (investigations, inquiries, and assessments), this power is backed by criminal liability in case of non-compliance. The EHRC findings from an investigation, inquiry, and assessment are to be documented in a report. Under the law, the courts shall treat this report as admissible evidence: they "may have regard" to it although they may not treat it as conclusive.[126] Moreover, the EHRC's statutory codes of practice (guidance documents approved by Parliament), which could contain equality data too, are admissible as evidence in court as well, in both civil and criminal proceedings. Under the law, they "shall be taken into account" by the court,[127] i.e. they have considerable weight. Once published, the codes can be relied on by a claimant.

Importantly in terms of equality body data gathering, the GB Civil Procedure Rules provide for a duty on claimants to notify the EHRC when they lodge equality proceedings in court. Based on such notices, the EHRC has been able to detect trends of types of cases and has internally discussed how this type of aggregate information can inform EHRC case selection decisions. EHRC staff are also considering what weight such collective data could have in court.

The EHRC is in the process of optimising their storing and use of complaints data. Having recently developed their intelligence hub, they are aiming to have a single interface collating all complaints in order to observe issues and trends. Their plans include developing systems and databases for recording of equality complaints for possible legal use of derived equality data.

Generally, Equality Bodies have common access to public information rights, applicable vis-à-vis public authorities, as well as their specific powers to exact information and documents from any party. In practice, Equality Bodies actively use their information-gathering powers as described above. For example, the Institute (NL) has a standardised data request (form) which it uses to obtain data in various cases. UNIA ensures it has authority to require information, potentially including equality data, from public bodies, under its cooperation agreements.

Once obtained, equality data can pose challenges in terms of effort and time required to process them. The Advocate (SI) has a critical approach to equality data provided by respondents on demand by the Advocate, assessing their data and verifying their conclusions.

The Institute (NL) reported that they request "relatively simple data" and apply a chi-square test of independence combined with calculating the effect size. For example, in an indirect discrimination case, the Institute, applying this approach, concluded that an employment-related benefit provided to new employees who relocated for the purposes of the job was higher for persons who had lived independently (and not with their parents) prior to relocation. The Institute held that this rule was indirectly discriminatory on grounds of age, as persons younger than 30 years more rarely received the benefit than persons above 30 years. This resulted from the application of a chi-square test comparing the two age groups.

To avoid gathering specific equality data, certain Equality Bodies subcontract specialist organisations that collect and publish such data, for purposes of litigating a particular issue. For example, in the EHRC's (GB) practice, third-party funding provided for under the applicable law can be an effective way to litigate a case, especially where the EHRC does not have the specific specialist expertise. For

[126] Equality Act 2006, Section 17(1)(a).
[127] Equality Act 2006, Section 15(4)(b).

instance, the EHRC provided funding for legal assistance for a specialist CSO, Shelter, to litigate discriminatory rental practices on behalf of an individual claimant. Shelter, a charity specialising in housing law and advice, had carried out relevant research that was used in the litigation. The case concerned an estate agent's policy excluding social benefits recipients from access to private rentals. This policy was alleged to indirectly discriminate against women and people with disabilities in access to housing, a claim the court upheld. In terms of evidence, research conducted by Shelter showed that the contested policy (operated, in some form or other, by 63 % of private landlords) puts women and people with disabilities at a particular disadvantage as they are more likely to receive housing benefits. This case is a good example of Equality Bodies using equality data in litigation "by proxy", i.e. through an external entity that they support to act as the litigator submitting the data.

Occasionally, Equality Bodies make joint legal interventions with specialist partners who have equality data. For example, the EHRC intervened in a pending case concerning procedural issues applicable to public sector equality duties (public bodies' duties to have due regard to the need to eliminate discrimination) as regards disability-related special needs in education, partnering with an organisation that gathers access to justice statistics. The EHRC submitted arguments regarding access to justice for children with disabilities, relying on statistics on the relevant cases as compared to other comparable cases, and their relative success rates. The data were supplied by IPSEA (Independent Provider of Special Education Advice), a specialist CSO offering legal assistance and keeping records of cases.

In situations where an equality body does have the relevant equality data to substantiate a legal argument – and may have in fact produced those data itself – but for procedural reasons it might expect that the court or another actor might question its standing to rely on its own equality data as a party to the proceedings, in any directly involved capacity, the equality body could simply provide legal assistance to a victim to take legal action on their own behalf through legal representation by a lawyer contracted and instructed by the equality body. For example, in a case concerning interim relief for employees alleging sexual harassment, the EHRC funded the litigation, using its legal power to pay for an external lawyer to represent the claimant. Instructed by the EHRC, that lawyer relied on an EHRC report, Turning the Tables, containing evidence that the absence of a timely remedy results in a withdrawal of complaints irrespective of their merits, among other equality data. Other data-based arguments used included the point that there was no empirical basis to suggest that any expected increase in cases – if interim relief was made available – and the ensuing burden on the courts would be substantial: only a small fraction of unfair dismissal complaints pursue interim relief. In its judgment, the first-instance court referred to the EHRC's report, upholding the claim (the case was later overturned on appeal).

Certain Equality Bodies use equality data particularly in cases concerning issues perceived as posing enhanced contextualisation requirements. For example, UNIA builds context as an evidentiary strategy in intersectional cases, such as ones challenging bans on the wearing of religious signs and headgear in the workplace, most of which affect Muslim women wearing headscarves. UNIA has achieved an exceptional court win in such an intersectional case, with a judge using equality data that UNIA submitted, both qualitative and quantitative data (official statistics and Amnesty International reports), in a judgment considered 'leftist' and 'activist'. UNIA used such data to evidence the bans' impact on the affected vulnerable groups. The positive precedence attained

provided valuable reasoning on intersectionality referring to both the qualitative equality data and the statistics submitted by UNIA, i.e. the data proved instrumental to the court's findings. UNIA has addressed the "headscarves" issue also as a TPI before the CJEU.

While the interviewed Equality Bodies *ex officio* use qualitative equality data in all cases where applicable, a good share of them reported not being aware, prior to the relevant Equinet training on the use of equality data in legal casework (2022), of this approach amounting to 'using equality data'. It would appear that not all Equality Bodies are sufficiently aware of the EC definition of equality data being inclusive of qualitative information, as well as statistics. Accordingly, more capacity building could be undertaken to enable all Equality Bodies to fully integrate the EC work on equality data in their conceptual frameworks and operations in practice.

Use of equality data in the assessment of structural discrimination cases could improve case selection and prioritisation decisions by Equality Bodies. Cases with insufficient evidence would normally be deselected, however, equality data could compensate for certain shortages of proof regarding individual facts. In particular, in cases of covert direct discrimination, data regarding the general levels of discrimination against the victim's group would enable an inference in terms of the causality between the contested act of less favourable treatment and the victim's group identity (protected characteristic). In other words, a general context of exclusion and disadvantage of a particular group will evidence the likelihood that in the individual case at hand that group's identity, shared by the victim, was the reason that the victim was disadvantaged. Where a case's facts match a documented pattern of discrimination, a *prima facie* case can be found. Therefore, use of equality data as a case selection tool could help identify the most symptomatic cases, for example, by contextualising victim/ group vulnerability.

As an illustration, in a case involving a university's use of "anti-cheating" software and its effect on a dark-skinned student, the Institute (NL) dealt with a computer "webcam check" required for a student to access an exam procedure online. The software assessed whether a person was present at the computer by applying a face detection algorithm to webcam images, before and during an exam. A student complained that this proctoring system often failed to detect her (it would report 'face not found' or 'room too dark') and removed her from the online exam environment. The complainant asserted that this was related to her skin color, relying on equality data showing that face detection algorithms perform worse on people of darker skin.

The respondent's defence included the assertion that, based on the log data, it did not take the complainant an "exceptionally long" time to log in. She also did not experience "restarts" "exceptionally often". Allegedly, the software did not cause her more, or worse problems than it did other students. Additionally, no other students had reported problems related to skin colour.

The Institute took into account academic research showing that face detection software generally performs worse on darker-skinned individuals. In part, such research outcomes were identified *ex officio* by the Institute, and in part, submitted by the complainant. The Institute concluded that, together with the undisputed issues encountered by the complainant, these data were sufficient for a presumption of indirect race discrimination.

The Institute critically examined the comparative data provided by the university to scrutinise its counterargument that the complainant did not experience software errors "exceptionally often". The

Institute found those data incomplete. For example, the average login time of other students was not investigated. In addition, it was questionable whether the other students were in comparable circumstances to the complainant. In this way, importantly, the Institute applied criteria for the quality of comparative data submitted by a respondent and, therefore, for its rebuttal of inferred discrimination.

In its interim decision, the Institute referred to CJEU case law to the effect that apparent discrimination can be substantiated by reference to general data where "the data subject cannot be expected to provide more accurate data [as] such data is difficult to access or even unavailable to that person". (Case C-274/18) The Institute relied on scholarship that it had identified *ex officio* to establish "a consistent picture of a [worse] performance of face detection algorithms with regard to persons with certain characteristics, including having a dark skin color". These data showing a pattern and the instant case's fitting that pattern constituted grounds for a *prima facie* case. The burden of proof having shifted onto the university, the latter's attempted rebuttal was under scrutiny. In that regard, the Institute reasoned that other students could have experienced similar software errors due to other reasons, unrelated to skin colour. This did not affect the inference of discrimination. Moreover, it was questionable whether other students were a valid comparator as they may not be in comparable (technical) circumstances. At any rate, the comparisons made by the respondent were incomplete as the average time it took the complainant to log in (2.2 minutes) was not compared to the general average login time, and the spread within that time, of the other students who took part in the same set of exams. This also applied to the (average number of) restarts experienced by other students, and those restarts' duration.

This case is a good example of an equality body using, as an adjudicator, equality data to support a conclusion that a *prima facie* case had been established: discrimination was presumed where individual disadvantage was found to fit a pattern as evidenced by equality data.

> "In this case, the applicant's experiences and the data from the published scientific studies into the functioning of facial detection software lead the Board to the conclusion that there are sufficient indications for suspicion of discrimination on the basis of race. The Board considers it plausible that the face detection algorithms applied by Proctorio's proctoring software to photo or video images as recorded by a webcam and the consequences associated with this by the software, will in practice particularly affect people with a dark skin color."[128]

The case was pending for a relatively longer period of time as the Institute required the respondent university to provide more data on the performance of the algorithms on persons with various skin tones, allowing them to rebut the presumption of discrimination. The university succeeded in doing

[128] Judgment No. 2022-146 of 07.12.2022.

so, by documenting the average login time of comparators (other students) and demonstrating that the complainant's difficulties with the face detection software were not related to her skin colour.

The EHRC (GB) has dealt with a case involving facial recognition technology having a disparate impact on certain groups (indirect race discrimination) as well. In a case that was settled out of court, the EHRC funded the cost of the claimant's lawyers. The latter's pleadings, in which the EHRC had an input, included equality data, such as:

- US National Institute of Standards and Technology (NIST) Face Recognition Vendor Test findings that faces classified in NIST's database as African-American or Asian were 10-100 times more likely to be misidentified than those classified as white;
- A 2018 study by the Massachusetts Institute of Technology concluding that three facial recognition programmes (including the software used by the respondent in the case) produced errors at a rate of 0.8 % for men with light skin compared to 20-34 % for women with dark skin;
- A 2020 report by the Alan Turing Institute exploring the discriminatory effect of facial software recognition and referring to the EHRC's criticism of the government's continued usage of facial recognition software despite evidence that such software is susceptible to error based on skin colour.

The latter source of equality data provided a way of relying on qualitative findings by the equality body reproduced or referenced by another established actor with credibility in terms of equality data.

UNIA has used complaints data to build a lawsuit challenging a structural issue – public transportation inaccessibility affecting people with disabilities. During the years 2016-2020, UNIA received 30 complaints regarding such inaccessibility. Under the applicable law, multiple unrelated similar complaints addressed to UNIA amount to data showing a particular pattern of unfavourable treatment. Using this legal basis, UNIA filed a test case, there being no existing case law to clarify whether 30 complaints over a 4-year period constitute sufficient evidence. (As of February 2024, the case is pending.)

Equality data and positive action

As a case negotiator, UNIA has used quantitative equality data to help build positive action plans, by demonstrating existing inequalities, including via outcomes of its own "Socio-economic Monitoring" statistical tool.

The Institute (NL) has interesting practice regarding equality data and positive action as an adjudicator. The Institute considered a positive action policy pursued by the authority managing the local fire brigade. The policy involved a preference for women and "persons of migrant background". In order to assess the preferential policy's justifiability, the Institute used statistics showing the under-representation of women and ethnic minorities amongst fire fighters. It then compared their respective shares to the percentage of eligible women and minority individuals. The outcome supported the Institute's finding that the fire brigade displayed a demonstrable disadvantage of women and minorities in terms of women and minorities being employed proportionately, i.e. de

facto inequalities to be addressed. Because the respondent successfully established in this way that the proportion of female firefighters in the relevant area is low, the Institute held that the aim of the policy was legitimate.

Based on the numerical data, the Institute furthermore observed that, while the gender disparity had been decreasing over recent years, this was due not to an increase in female recruits' numbers but to a decrease of male recruits' numbers:

> "In absolute terms, only two women have been added between 2017 and 2022. Moreover, the increase in the number of women is the result of the preferential policy pursued, which is now being assessed."

Interestingly, the Institute corrected the respondent's proposition that the share of female firefighters should be compared to the share of working women in the region. Instead, the Institute reasoned that the relevant comparator was the share of women possessing a relevant training course diploma, such a diploma being required to qualify for the position of fire fighter.

Based on a review of the statistical data over a number of years, the Institute concluded that

> "[the gender disparity was] not only considerable but also persistent. In the course of the five years, the number of women has only increased by one."

Significantly, the Institute integrated, in the equality data it relied on, general qualitative knowledge not traced to a specific source of information regarding the causality between a traditionalist mindset and the institutional marginalisation of women and minorities:

> "It is also important that the defendant describes the work culture as "white and masculine". It is a well-known fact that a masculine culture carries the risk of (unconscious) exclusion mechanisms towards women. Respondent has made it sufficiently clear that a culture change can only be made if there are effectively more women working as firefighters."

Similar to its reasoning regarding the inclusion of women, the Institute examined whether the data indicated under-representation of individuals of non-European origin as firefighters. The respondent had not submitted any figures on those groups' share in the fire brigade, explaining that it is not allowed to register the origin of employees. Based on "observations", its estimate was that 5 % of the firefighters belonged to "non-European origin" groups, which did not reflect those groups' share in the population.

The Institute accepted this approximation, explicitly reasoning that the lack of an exact percentage does not prevent its assessment of the contested positive action policy. The Institute acknowledged

that precise ethnicity-disaggregated figures may be unavailable, unlike with gender. Importantly, the Institute held that

> "[t]he lack of precise statistical information should not prevent measures being taken to reduce or eliminate inequalities where the [existing disparity] can be sufficiently deduced from the data that are available or can be adequately substantiated in another way."

This is an important holding which provides a purposive construction of the quality requirements for equality data, in the context of positive action.

The Institute compared the share of minority-background firefighters to the share of (descendants of) migrants originating outside Europe living in the relevant region, as well as the share of them who have received the relevant training diploma. This comparative data analysis supported a finding that, in the fire brigade, there was a demonstrable disparity in terms of minority recruits – around four times fewer than the relevant population share, i.e. a racial disadvantage warranting remedial action.

In terms of the requisite persistence of that considerable disadvantage, the Institute took into account that minority-origin firefighters had invariably represented 5 % of the firefighters "for a long time", as submitted by the respondent. On this basis, together with the evidence concerning the "white masculine culture" of the fire brigade, the Institute accepted that the preferential policy was justified on grounds of necessity – the situation would not improve unless more minority-origin individuals were recruited.

Additionally, the Institute took into consideration data regarding the diversity of the population served by firefighters. Since fireffighters were expected to come into close contact with all residents, educate them about fire safety, and perform "repressive tasks" in their neighbourhoods, it is was "essential" for the firefighters to be able to relate to the inhabitants, i.e. to be representative of local diversity themselves.

The Advocate (SI) also has experience scrutinising special measures (positive action) based on equality data concerning existing inequalities. The Advocate actively requires equality data from respondents for such purposes.

Usability and quality of equality data, including Equality Bodies' own data, for purposes of Equality Bodies' legal casework

As Equality Bodies have an inherent monitoring mandate and therefore as a rule, produce equality data (as a minimum, qualitative data), it seems meaningful to consider their use of their own equality data as evidence in legal cases, especially in their own court actions. For example, to consider if they experience any hurdles in this regard, or any (perceived) tension between their independent and impartial adjudication role and their (selective) monitoring and data-processing role, as well as their (partial, pro-victim) legal advocacy/ litigation role. Where an equality body litigates based on its own data, the court could, in theory, struggle to see such data as external and independent. All the more, where an equality body adjudicates cases, relying (in part) on its own equality data, parties to a case

and other observers could question such a practice on at least two grounds: is the body an impartial adjudicator if it proactively identifies and uses evidence that favors the alleged victim; and is such evidence credible if the body itself produced it, being by definition pro-equality/ pro-victims. Such potential (perceived) fair trial/ equality of arms issues could affect an equality body's overall credibility in society, including its reporting role. If a court should dismiss equality data produced by the equality body as evidence, discrediting its reliability, this could damage the equality body's public standing in terms of policy advocacy based on the same set of data, or on other data produced by the body.

Equality Bodies' use of their own equality data in a TPI role in court may be less potentially controversial than as a litigator, as by definition, a TPI is not an advocate for any of the parties but a neutral friend of the court. For example, the Ombud (NO) has used its own qualitative equality data (reports) as a TPI before the Supreme Court in several cases, including a sexual harassment case. Importantly, in other cases, the Supreme Court, of its own motion, has referred to the Ombud's equality data without the Ombud intervening. The latter cases concerned hate speech and the Court used the data to reason about the targeted groups' vulnerability. The Ombud has plans to file more equality data-based submissions as a TPI before the Supreme Court and other courts.

This Handbook and in particular, this section, seek to prepare Equality Bodies for some of the above possible questions, directing them to consider potential risks when using their own equality data in legal casework, in light of the methodology and quality standards applicable to data usable as evidence in legal cases. Do the same or different quality standards apply to equality data gathered by Equality Bodies for reporting and policy advocacy purposes, on the one hand, and for use as evidence in court, on the other?

Is it relevant if Equality Bodies have or do not have written internal guidelines on quality standards for their own and other equality data, which they may or may not use in their legal casework to ensure those data are admissible evidence even under enhanced scrutiny? If such guidelines would be helpful to point to when/ if Equality Bodies' and other equality data's quality or methodology are questioned by others, for example, regarding timeliness, or sample sizes (among numerous other parameters), what should those guidelines encompass? Should Equality Bodies start monitoring and evaluating their own practices in terms of using their own and other equality data in legal casework in order to preemptively control identifiable risks? Do they have the resources for that? Do they have the resources to use their own and other equality data, in the first place, to such an extent that issues might arise? What are some of the quality standards applied by Equality Bodies to equality data that they have considered in their litigation or adjudication work?

For example, the Institute (NL) applied the criterion of timeliness in a case based on official statistics that it heard in 2022. The Institute addressed a complaint by a divorced father who alleged that his son's school's policy to only keep informed the parent with parental authority (in this case, the mother) affected mostly men. The complainant used official statistics to the effect that in 2015, only 2 % of children of divorced parents lived with the father. Therefore, an overwhelming share would live with the mother, resulting in the father not being kept informed by the relevant school. This policy allegedly amounted to indirect gender discrimination. The Institute considered the statistics relied on to be outdated. It expressly held that those not timely "figures cannot play a role in the assessment of the [complaint]".

Going even further, in a very interesting case regarding disability indemnification based on official statistics regarding women's earning projections, the Institute engaged in critical examination of the use of statistics rather than the statistics themselves. The Institute heard the gender discrimination complaint of a 16-year-old girl who had become permanently and completely incapacitated for work as a result of a traffic accident. She alleged that the respondent, an occupational survey agency specialising in occupational investigations for determining personal injury and disability insurance, had used gender-biased statistics to calculate her loss of earning opportunities, disadvantaging her in terms of her estimated damages. The insurance company calculated the earning loss of the girl based on the average amount of hours worked by women in the Netherlands (there being no other reference as the girl had not yet worked).

The respondent agency had followed the appropriate methodology, using national statistics. The Institute accepted that, as argued by the respondent, it is customary for damage calculations to use general statistical data when an individual's circumstances give no support for projections regarding their individual future earning over a lifetime. The Institute acknowledged that use of statistical data is in itself a neutral means and not contrary to equal treatment law.

However, it reiterated, the data must meet the requirements of relevance, quality and timeliness. In this case, the correctness and timeliness of the official statistics used were not in question. What the Institute critically examined was whether the gender differentiation reflected in these statistics may automatically be adopted in an advisory report such as the contested one. The Institute's legal predecessor, the Equal Treatment Commission, had previously ruled that the use of statistical data in determining work-related disability resulted in sex discrimination if the data disadvantaged a certain gender. The Institute relied on this precedent to reiterate that data used for predictions are problematic if they do not correspond to current or expected developments but merely reflect the past. The Institute furthermore referenced CJEU case law to the effect that using statistical data that differentiate based on protected characteristics, such as gender, is directly discriminatory (Case C-236/09, Test-Achats).

On these grounds, the Institute concluded that, by relying on statistics that differentiate according to gender to the detriment of women, the respondent directly discriminated against the complainant.

> "Although the use of statistical data in a 'would be study' such as that [...] may be unavoidable and therefore justified as such, the person or organisation using these data must be alert to the fact that statistical data, by their very nature, say only something about the past. There is a danger that stereotypes, gender roles and inequality of opportunities from the past, which are reflected in the statistical data, will persist for a long time to come if these data are used to make estimates about the likelihood of events or situations in the future. Equal treatment law serves to put a stop to precisely this kind of inequality of opportunity – in this case: between men and women."

In another interesting case concerning child rights in the context of foster care, the EHRC (GB) intervened to show, via qualitative equality data, the impact on the child of homophobic views held by foster carers. The court hearing the case offered certain reasoning concerning the possibility of these data amounting to evidence. The litigation aimed at establishing whether it would be reasonable for a local authority to examine the attitudes to homosexuality and same-sex relationships of a candidate for foster carer. While the court refused to engage with the complex issue whether homophobic foster carers' beliefs could harm a child, it commented that the EHRC's data

> "do show a body of opinion which considers that a child or young person who is homosexual or is doubtful about his or her sexual orientation may experience isolation and fear of discovery if their carer is antipathetic to or disapproves of homosexuality or same-sex relationships. The material also indicates that there is support in the literature for the view that those who hide their sexual orientation or find it difficult to 'come out' may have more health problems and in particular mental health problems. Whether those views are 'right' or 'wrong', whether the claimants or the [EHRC] have the preponderance of expert opinion on their side, is not the point – and it is not a matter on which we express any views. But in the light of such literature [...] it cannot be said that an examination of the attitudes to homosexuality and same-sex relationships of a person who has applied to be a foster carer is [...] unreasonable."

Equality Bodies do not seem to have specific or formal internal policies on the quality of equality data required for them to base findings on in their case adjudication processes or to submit in their own litigation. Overall, Equality Bodies currently use generally applicable evidentiary standards provided for under equality legislation and other relevant laws to assess equality data on the same basis as any other type of proof in terms of the strength of such evidence, on a case-by-case basis. In certain Equality Bodies, staff lawyers adhere to the CJEU criteria (for example, the Institute (NL): "These statistical data must meet the requirements of relevance, quality and timeliness."[129]

Equality Bodies actively deal, in their reasoning as adjudicators, with the "statistically significant difference" (significantly higher proportion) criterion drawn from CJEU case law (NO, SI, NL). The Institute (NL) uses a data test consistent with CJEU-recommended statistical analysis: take the group of people who are not affected by the impugned measure and record the minority/majority (gender) ratio (shares along protected grounds), then take the group of affected people and do the same, and note any disparities between the two groups. Internal equality body work on fine-tuning definitions

[129] Judgment No. 2022-46 of 03.05.2022.

is ongoing: for example, what is the meaning of “significant difference” – is it 60/40 % (majority/minority impact) as stated by a CJEU AG; is 45 % the turning point, which transforms a ratio into “significant difference”? Is it possible to fix a number for “a significant difference”, or does this have to be established on a case-by-case basis? Complainants and respondents, as well as equality body legal staff, might benefit from equality body or other guidance in that regard.

In some jurisdictions, domestic courts have provided applicable guidance on equality data standards, especially in indirect discrimination cases (for example, GB). They have recognized diverse equality data as admissible and relevant, including qualitative information, as well as statistics.

Equality Bodies are flexible when interpreting quality standards for equality data depending on the case specifics (for example, the Institute (NL). In practice, on a case-by-case basis, the Institute has applied criteria for the quality of data put forth by respondents seeking to rebut a *prima facie* case (for example, in the face detection algorithms case discussed above).

In order to ensure equality data are valid and reliable, when demanding such data from respondents, certain Equality Bodies deliberately require comprehensive, generally defined information – all of the raw data as opposed to any specific correlations capable of being extracted from those data. Equality Bodies then process those data themselves as this ensures no tampering by respondents providing the information. For example, in a case where such tampering by the respondent was considered a risk, the Advocate (SI) made sure that the respondents were unable to tell from its data requests what data categories would be scrutinised and therefore were unable to distort the information before providing it.

The drawback with such a practice is that equality body staff may be required to process large amounts of raw data taking time and possibly requiring qualifications staff may not have. Equality Bodies could subcontract external data experts for such tasks – applicable legislation does not seem to prevent that – subject to budgetary limitations. Experts could be assigned within the framework of legal proceedings, however, in some jurisdictions that might depend on the parties’ initiative and not be open to an adjudicating equality body to *ex officio* do. In all cases, the question would remain as to who would bear the costs for such expert involvement. In certain contexts, Equality Bodies might have to consider whether the use of such experts is not an additional litigation expense a potentially losing victim risks liability for.

In UNIA’s experience, for example, using a court-appointed data expert to collect and/ or analyse equality data for the purposes of a particular case would significantly delay the proceedings, negatively impacting the victim. In a case, in which the respondent requested such an expert to be appointed, UNIA was opposed, for that reason. However, in cases without individual victims, or without significant psychosocial impact on victim(s), using a court-appointed data expert could be a promising practice, for a litigating equality body to consider.

In order to ensure equality data they obtain from respondents and others do not capture fortuitous or short-term phenomena, Equality Bodies take care to require and process data for relatively long periods of time (a number of years, ranging between 3 and 10) in order to verify the persistence of any disparity (for example, the Advocate (SI), the Ombud (NO).

Under the applicable legislation, public authorities are under a duty to provide the Ombud (NO) with information as requested. The Ombud actively uses this power, which is enforceable in case of non-

compliance and which it considers an important one to have.[130] It is able to use equality data collected in this way as evidence to base a claim before the competent tribunal on. This is a non-costly and less complicated alternative to collecting the Ombud's own equality data for litigation purposes. Other public bodies may have available data collected for their own purposes or be able to collect data easily at the Ombud's request. This tool is therefore a noteworthy source of equality data, for the Ombud.

For example, as an adjudicator, the Ombud handled a case concerning pension rights for part-time workers in the Oslo municipality, in which it implemented this tool. This was the first case concerning pensions based on equality data, and therefore a relatively novel one (statistics had previously been used in domestic case law regarding equal pay). The Ombud reached a (non-binding) decision, reasoning based on the equality data collected. The municipality implemented this decision, amending their system. Accordingly, the Ombud achieved structural redress in administrative practice, using equality data. Some of these data were submitted by the complainant, the National Nurses' Union, including official statistics and internal data specific to the respondent municipality. The complainant organisation referred to CJEU case law regarding the interpretation of these statistics.

The Ombud gathered equality data as well, by requiring the respondent to provide information. As described above, this is an approach well-used by Equality Bodies, including the Ombud. The latter has used this power in other cases too, demonstrating proactivity in gathering evidence, including equality data. In the Nurses' Union's case, the statistical data were crucial for the indirect sex discrimination claim made. In particular, the Ombud considered that the municipality employed 70 % women and 30 % men. Of full-time workers, there were 70,5 % women and 29,5 % men. Of part-time employees, there were 75,3 % women and 24,7 % men. Work exceeding the time stipulated under a part-time contract did not count towards pension earnings. 67,6 % of female part-time employees worked extra compared to 32,4 % of part-time male employees. Therefore, a much higher share of women, both in absolute numbers and in terms of percentage, were affected by the rule.

Importantly, in terms of requirements for equality data, the Institute (NL) has applied a modified, purposive standard for data quality in the context of positive measures' justifiability (see the fire brigade case discussed above). It has explicitly held that a lack of precise statistical information should not prevent measures being taken to reduce or eliminate inequalities where such inequalities can be sufficiently deduced from the data that are available or can be adequately substantiated in another way. Arguably, there is no issue with having less stringent requirements regarding quality of data when they serve to justify the use of positive action compared to when they are used to rebut a presumption of discrimination. Positive action measures are subject to purposive, i.e. broad construction as they are not an exception under equality law but are instead integral and indispensable to achieve the goals of equality law. On the other hand, once a complainant succeeds in proving a *prima facie* case, a respondent should be held to a high evidentiary standard when they attempt to rebut that case. This is a part of the shifting burden of proof principle designed to balance the inherent procedural inequality between a complainant and an alleged discriminator. Victims of

[130] Interview, Margrethe Soebstad, staff member, Equality and Anti-Discrimination Ombud, 26 January 2023.

discrimination mostly lose their cases – or do not even bring them – resulting in a loss of justice by society as a whole.

Most Equality Bodies use more qualitative data than statistics, which poses less challenges in terms of data analysis. The Institute (NL), however, uses statistics quite extensively, pushing its legal staff to extend their competence and practice to be able to handle broad data-based patterns. In this equality body's experience, investigating institutional discrimination cases requires both a qualitative analysis to posit a hypothesis and quantitative analysis to then test that hypothesis. The Institute's data analysis in its notable childcare benefits case discussed above evolved into a blueprint for assessing how institutional processes impact categories of people based on protected grounds. Institute legal staff have come to the conclusion that building equality body capacity for equality data processing and use is no longer a matter of choice: Equality Bodies should accept that cases will progressively require expertise in data systems, technology, AI, algorithms. Respondents' decision-making will progressively be less traceable to a (single) person or case but will instead involve institutional structures, which can only be assessed through data analysis, assessing numerical information based on large enough samples of instances to uncover patterns of discrepancies along protected grounds, as well as qualitative data, and combinations of the two data types. Due to the trend toward AI and big data use and the opacity of technology-based systems, data analysis is the future of non-discrimination enforcement.[131]

[131] Interview, Alexander Hoogenboom, staff member, the Netherlands Institute for Human Rights, 2 February 2023.

8. Challenges (and possible solutions)

Certain Equality Bodies have reported limited availability of usable equality data at the national level (for example, the Ombud (NO).

The Institute (NL) has highlighted difficulties obtaining data from respondents and other organisations within the framework of legal proceedings. Organisations can be (increasingly) hesitant to provide data, citing GDPR and information sensitivity. In the Institute's experience, this is a definite trend and such concerns, while partially genuine, may be exaggerated as a pretext to obstruct proceedings and resulting liability. Equality Bodies may need to point out the legal basis for their own authority to require information in order to overcome such resistance. For example, in the Institute's "childcare benefits" case discussed above, the government took six months to provide the requisite data, while the Institute argued and negotiated with officials. The respondent authority even referred to a "governmental secrecy" legal exception to the Institute's power to demand the information. While the data were ultimately provided without the Institute going to court over this, it took significant staff time and energy.

On the other hand, when they do yield the information, public entity respondents might do it, providing direct access to their internal data systems, and no exported data, which would require equality body staff to learn how to use those systems and operate with the data within them. Unfamiliar databases, with unfamiliar statistical analysis software, could be challenging, especially if heavily encrypted. In the Institute's experience, an equality body might have to hire external help even if it has staff statisticians, as the latter might lack relevant experience for analysing the data. In addition, equality body lawyers might have to receive advanced statistics training in order to process such cases, as the Institute has experienced. Such a double investment – in enhancing staff qualifications and in external consultancy – could be financially taxing for an equality body and should be planned for.

While an equality body may have the legal authority to demand data from a respondent or other entity in a specific format it prefers (rather than the provider's preferred format), insisting on a format might cause delays in obtaining the data, especially where court action over a refusal would be involved. Even if legally existing, a power to require a specific data format for ease of access may not be simple to exercise in practice. On the other hand, as the Institute has found out, (longer) delays could be caused by an equality body having to acquire the human resources needed to deal with a challenging data format.

At the same time, for massive datasets that need to be regularly updated over time, simpler/ more accessible formats may not work well, wherefore such data are kept by institutions in technically complex formats in the first place, causing an equality body to have to access the data in those challenging formats. Therefore, balancing exercises might be involved and decisions made on a case-by-case basis as to which course of action to adopt. Generally, it would be strategic for an equality body to equip itself with staff or consultants qualified to operate with hard-access formats. This would also enable it to operate more freely with added variables, i.e. to have dynamic or operative access. It would furthermore minimise the risk of data pollution – partial or distorted data being exported from a respondent's database in order to be submitted to an equality body in an accessible format. Therefore, a technically challenging direct-access data format may be a guarantee of effective and full access, as the Institute's insight indicates.

Few Equality Bodies have data scientists on staff, or legal staff trained in statistical analysis, or funding to hire consultants. Only the Institute (NL) reported having such resources. Those were made available to it for the purposes of the exceptional "childcare benefits" case – a high-profile political case of institutional discrimination, which caused the government to resign promising remedial action by the Institute. Such a case of institutional discrimination would not be able to be proven by scrutinising individual instances for bias; data would be essential and therefore, the resources were provided.

Such a case can take considerable resources, including staff time. In the Institute's experience, it took a year and a half to investigate, and three staff members, including a professional statistician and a lawyer trained in statistical analysis, as well as data expert consultants.

Relatively smaller EBs may not have sufficient staff or sufficiently qualified staff to process complex statistics, as shown by the experience of the Advocate (SI). Most Equality Bodies would have no staff trained for data analysis. Moreover, internal equality body awareness may be lacking of this knowledge gap or its significance, adversely affecting equality body planning. In the Advocate's experience, there hasn't been any planning for the risk of not having data expertise to handle a complex case. In part, this has been due to a shortage of time – staff focus on addressing emerging issues rather than plan ahead for potential issues. Most Equality Bodies seem to have no budgetary or administrative planning in place to manage issues that would emerge if numbers of data-heavy cases accumulated. Equality Bodies' resources might be insufficient to retain staff trained for strategic planning to account for risks in advance, while other staff may be too busy dealing with existing problems.

AI/ algorithms cases would present difficulties to most Equality Bodies in terms of staff time and effort to obtain all the relevant data to assess the system in place, staff expertise to understand the data once obtained, and staff time to process the data. An equality body might have to hire consultants, but not necessarily have the budget for that, in which case it would have to strongly rely on the peer exchanges and capacity building provided by Equinet, ENNHRI and other EU partners for support. This has been reported by UNIA where lawyers are currently experiencing difficulties in an AI case, including struggling with formulating what kind of data to require from the relevant public body. UNIA researchers would not necessarily be able to help with such complex and specific quantitative data as AI cases would involve, and even if so, dealing with that would be taxing time-wise. UNIA researchers are not organised to have the time to spend *ad hoc* on a case outside of their specific thematic projects, and are not available in this way for unplanned litigation-related demands. Additionally, an external data scientist might not be available for hire by UNIA whether as a consultant or staff, given UNIA wage levels (reportedly, five times lower than market levels). Insofar as such challenges are shared across a number of Equality Bodies, scarce resources might block Equality Bodies' access to data expertise. As a result, an AI case might not be selected for litigation as the implied investment might not be strategic or indeed possible at the particular time.

To try and prepare for possible cases requiring data analysis by improving staff competences, Equality Bodies could explore the possibilities to access free staff training by partners. For example, the Advocate has identified such solutions.

Processing equality data could require planning in terms of time as well. Assessing internal (unpublished/ unofficial) statistical data provided by third parties, if such data are not well structured

or consistent, could be costly timewise, taxing on staff resources. This has been the Advocate's experience.

While an equality body could successfully sue a respondent over non-compliance with a data request, this might be costly not only in terms of time but also if perceived as undermining the equality body's own (ability to assert its) authority as a case adjudicator. Furthermore, there is an implied risk of not winning such a case, undermining the equality body even more. For these reasons, the Institute (NL) has taken but a single such case, in the 1990s, and while it still uses this favourable court precedent today in negotiations to assert its authority when demanding data, the Institute prefers not to litigate again over a data refusal but instead to negotiate cooperation.

In certain jurisdictions, if an equality body was to conduct additional research in order to support its litigation which it planned based on existing equality data revealing a systemic issue, the use of those additional research findings in court could possibly be questioned for not being objective due to having a biased premise (being intended for the litigation and its goals). A tension might be perceived between an equality body's impartial monitoring role and its partial, victim-support legal advocacy role. Conversely, intervening as a TPI, an equality body would avoid such a potential perceived conflict, as a TPI is an impartial actor by definition.

Certain Equality Bodies have reported instances of judges questioning (the significance of) statistics tests applied by the equality body in its decisions, for example, finding the sample size small. This has been the experience of the Institute (NL). Such findings by judges discrediting data analyses by an equality body could impact respondents' defense strategies as well. The latter could try and use such precedents to discredit equality body decisions or submissions. This is a possible challenge Equality Bodies could consider preemptively, ensuring the soundness and transparency of their data analyses (by explaining and justifying their approaches in detail) to minimise potential critique.

In certain court cases brought by Equality Bodies, the judges have reportedly ignored (qualitative) equality data submitted by the equality body, not addressing those data in their reasoning. This has been the experience of the Commissioner (SRB). The courts might be unfamiliar with using (qualitative) equality data in their decisions. Training for judges in that regard might be required. Equality Bodies could seek ways to become involved in facilitating such training.

In relatively larger Equality Bodies, internal coordination and information-sharing between staff researchers and staff lawyers might be insufficient, preventing relevant equality data from reaching legal case workers who could use them. This has been the experience of both UNIA (BE) and the EHRC (GB). Data gatherer and litigator teams might lack the communication channels to facilitate equality data flow between sources and cases. Similarly, within lawyer teams, ground-specific specialist sub-teams might lack the time or tools to exchange equality data. Such a lack of sharing seems to be no issue in relatively smaller Equality Bodies, for example, the Advocate (SI): smaller teams are more tightly knit and regularly transfer equality data from researchers to lawyers for use in legal casework.

Equality body researcher teams might be understaffed and/ or organised to focus on specific issues, and therefore lacking the capacity to respond to lawyers' requests for equality data. This has been UNIA's insight. Researchers might (perceive themselves to) be ill-equipped to recognise equality data needs and possible uses for purposes of legal cases, and therefore expect their lawyer colleagues to

formulate such needs and uses. In some cases, equality body researchers are not fully aware of their own produce's applied utility to legal casework (for example, at UNIA).

Equality body lawyers, even when required to process data submitted by a respondent in a case, may not have the "reflex" to ask their researcher colleagues for support, as has been experienced at UNIA. The lawyers would deal with such cases unassisted (where data issues are simple) or use court-appointed experts (which would cause delays in proceedings). Accordingly, establishing and maintaining channels for equality data to be exchanged between equality body data gatherers and their litigating colleagues seems promising. As well as benefit from research outcomes, lawyers too could provide equality data drawn from cases, for example, preliminary complaints data.

In some jurisdictions, using complaints data as evidence in court could present difficulties as the courts might expect facts concerning other complaints to be proven through direct witness testimony provided by those other complainants. Judges might treat complaints data as "hearsay" evidence regarding other complaints and violations unless other complainants testify in person. If so, it would be unmanageable for an equality body to submit complaints data as proof. (This might not be relevant in many jurisdictions.)

Actionable steps for an Equality Body

- Study other Equality Bodies' experiences to identify learning relevant to own casework-related needs. Use this Handbook as a starting point. Seek further information through direct contact with peer equality body staff and/ or through the Equinet secretariat and thematic working groups. Explore possibilities for pairing with knowledgeable equality body partners when pursuing a particular case project that could benefit from their data-use experience.
- Through relevant peer Equality Bodies, seek comparative law information on the domestic case law in their jurisdictions that employs equality data in order to influence developments in own jurisdiction case law and the ECtHR by relying on comparative legal arguments regarding the relevance of equality data.
- Team up with relevant equality body partners to pursue joint strategic, data-based litigation before the ECtHR and other supranational bodies, by submitting co-authored TPI.
- Invite relevant equality body partners to intervene as TPI (where procedurally possible) before domestic courts in own jurisdiction, in select/ impact cases, in order to advance conclusions based on equality data.
- Invite relevant equality body partners to intervene as TPI (where procedurally possible) in own proceedings, in select/ impact cases, in order to advance conclusions based on equality data, which then to integrate in own case decisions.
- Actively share own experiences using equality data with other Equality Bodies to gain visibility and validation for own work and achievements, motivating hard-working staff to keep up the good work, and facilitating peer Equality Bodies' access to comparative knowledge.

9. Equality Bodies' Plans to Use Equality Data in Legal Casework

The Institute (NL) has plans to conduct more *ex officio* investigations in cases of institutional discrimination. Such cases, in which systems need to be scrutinised as such, might require the processing of technology-based data and the Institute plans to invest in building its staff's capacity for this. Based on its successful experience with the "childcare benefits" case, the Institute can advocate for funding to build resources for more such cases. It will institutionalise a framework to handle data-heavy cases: ideally, train staff lawyers *and* hire data scientists. Since regular statisticians may not be prepared to integrate in their conceptual frameworks the principle of the shifting burden of proof and the lowered threshold to build a *prima facie* case, perceiving this as incompatible with data analysis methodologies, the Institute defines a need for hybrid experts: forensic data scientists versed in anti-discrimination law, including data testing that constructs statistical categories corresponding to protected grounds and their intersections. Alternatively, equality lawyers versed in data analysis would be required to adapt the methodology to the shifting burden of proof. Additionally, such staff need to be trained in various data processing software products and not be specialised in a single such tool, as respondents may store their data in different structures.

In the Institute's experience, an equality body can only have capacity for a single large-scale data-based investigation per year. However, smaller audits and "pushing" organisations to self-audit can be done in addition. The Institute also plans to advocate for legislation requiring private companies and public bodies to self-monitor and self-evaluate, i.e. collect equality data to scrutinise the impacts of their own systems' operation *ex ante* to uncover and control any bias in their own structures and any resulting profiling. This corresponds to Equinet's consistent calls for compulsory equality impact assessments and equality duties, especially for public institutions. The Institute plans to release a handbook for public bodies and others to conduct their own data-based self-inspections for possible systemic bias.

The Institute's forthcoming handbook will offer a template on the use of equality data designed to serve its own staff, as well as external actors. This tool will be based to a degree on the Institute's investigation report in the "childcare benefits" case: staff lawyers have described the steps they took in order to ensure this investigation's transparency and to preempt criticism of the methodology used, including the manner of construction of the statistical categories and the variables for the data analysis done. Developing this Handbook requires a better qualified statistical consultant than the Institute currently has, and its plans include building further capacity in that regard as well.

The Advocate (SI), which lacks, under the legislation, express formal standing to intervene before domestic courts has considered resorting to creative lawyering to acquire leave to intervene. It considered applying before the Supreme Court for leave to intervene in a collective labour case based on having "a legal interest" due to having similar cases to decide as a public authority serving the public interest.[132] The Advocate, more broadly, plans to expand its strategic litigation portfolio. It intends to use equality data to assess and select potential cases to litigate in terms of their strategic value, i.e. based on contextual data revealing systemic issues and their relative importance, allowing evidence-based prioritisation.

UNIA is now partnering with universities and their legal clinics for purposes of receiving support for legal cases from data scientists associated with universities. Student volunteers are seen by UNIA as a valuable potential *pro bono* human resource as well, as they may think creatively and have

[132] Ultimately, the Advocate preferred to submit its input before the courts by providing the claimants' lawyer with its expert analysis, which was then incorporated in their formal legal brief.

motivation to acquire experience. At the same time, UNIA is preparing to manage the drawbacks: students would require supervision taxing on staff resources, especially time, and this would not be as efficient as paying for a professional consultant. On the other hand, the funding to hire experts may not be available and, accordingly, UNIA is preparing to partner with data-knowledgeable organisations, inviting them as TPI in its legal cases in order to avoid handling the submission of complex equality data itself. Internally, UNIA is planning to enable inter-team groups and meetings in order to facilitate exchanges and consultations regarding the use of equality data in legal cases, including needs assessments. Legal teams could initiate internal staff training on using equality data in line with litigation priorities, and identify and communicate such needs to UNIA researchers via a cross-teams too

10. A Roadmap for Equality Bodies Using Equality Data in Legal Cases

The above section has listed examples from Equality Bodies' real-life plans for using equality data in legal cases to inspire their peers in other jurisdictions to consider similar or adapted initiatives. For such pursuits, we suggest consideration of the following courses of action:

- Study the two European courts' case law using equality data, including both past and emerging judgments and decisions. Monitor emerging CJEU and ECtHR cases relating to equality to identify and catalogue the Courts' evolving use of equality data. Consult this Handbook's extensive analyses of relevant case law (summaries of numerous cases provided in Annexes I and II).
- Integrate the Courts' approaches and reasoning (and the sound arguments of litigators before them) derived from equality data in own casework and data use methodologies. Reference the case law in Equality Bodies' own submissions and decisions in order to substantiate the points made in a manner convincing to observers, educating other practitioners as well.
- Monitor domestic equality case law to identify and catalogue the national courts' evolving approaches to using equality data for legal findings. Integrate their approaches in own casework/ data use methodologies where appropriate.
- Monitor and evaluate own casework in terms of impact of equality data use in legal submissions and decisions. Identify opportunities for growth and best practices to share.
- Share own successes and their impacts with stakeholders and the public, raise awareness of equality data use as being integral to equality adjudication and litigation. Standardise equality data use for legal casework purposes within own practice and in public and professional perceptions.
- Exchange domestic case law using equality data with other Equality Bodies, and implement promising comparative practices.
- Identify roadblocks in the use of equality data by the European and domestic courts, such as restrictive interpretations, and consider devising test cases suited to challenging and dismantling these barriers, as an example of public interest impact litigation. Consider actively using own equality data as TPI (impartial by definition) before higher courts and supranational bodies to establish the equality body as an authority on the state of equality, normalising domestic courts' use of equality body-produced equality data, including such *ex officio* use.
- Use equality data to guide case selection and prioritisation for strategic litigation. Institutionalise such usage.
- Consider issuing injunctions for respondents to put in place mechanisms to investigate and capture their own system bias, i.e. create equality data for the equality body to consider in cases against those same respondents and others in relevant sectors. Define standards for such internal policies and mechanisms to apply across diverse organisations. Build equality body staff capacity to develop model mechanisms/ procedural tools for organisational self-audits. Draw on Equinet's Compendium of Good Practices on Equality Mainstreaming: The Use of Equality Duties and Equality Impact Assessments for examples of Equality Bodies' experience using relevant tools, such as

equality impact assessments and diversity charters. Consider equally Equinet's Preventing and Reacting Through Sanctions and Remedies report.

- Map equality data sources at the national and supranational levels, and monitor evolving data sets.
- Budget in the time required to develop internal equality body casework tools and policies based on equality data. Expect the time and additional human resources needed to build equality body capacity to institutionalise equality data-based casework mechanisms.
- Partner with other public bodies, such as regulators with technical expertise in data analysis, especially in the context of AI systems, including data protection and consumer protection authorities.
- Partner with research institutions. Consider advocating for legislation or policy placing discrimination litigants under a duty to notify Equality Bodies of cases filed, for example, in the way the EHRC (GB) is notified. This would enable Equality Bodies to monitor and use evolving complaints data as a source of information on systemic issues and novel issues, as well as to intervene as TPI in select cases and/ or to facilitate other TPI.

11. Conclusion

As demonstrated by this Handbook, based on contemporary European legal and policy standards in the field, equality data are now recognised as a critical tool of purposeful equality-oriented decision-making, including adjudication. Equality adjudicators and litigators should be expected to utilise equality data in their handling of legal cases in order to do the issues and their victims justice. A key objective of this Handbook is for Equality Bodies to incorporate and institutionalise the best national and supranational practice in terms of framing and deciding cases based on equality data, including by creating internal guidelines on comprehensive equality data consideration and quality standards for data to use before the courts and in their own case decisions.

A primary objective of this Handbook is to document and showcase under-recognised existing equality body practices in terms of use of equality data to argue and resolve cases. Doing so validates Equality Bodies' work in this field and enhances Equality Bodies' understanding of the potential and significance of their own and their peers' work in this regard, in terms of advancing both domestic and supranational equality law, as well as comparative law.

By following and shining a light on some of the routes that the European courts and certain Equality Bodies have forged in terms of building legal arguments and legal reasons on equality data, this Handbook seeks to amplify those routes' resonance for others to join, as well as for the original waymakers, to be empowered. This Handbook seeks to acknowledge and serve equality body pathfinders in their public interest quest to instate societal realities in equality proceedings designed to enable justice seekers and their communities and identities.

Annex I: Analytical summaries of ECtHR case law utilising or otherwise addressing equality data

In *Duğan v. Türkiye*, the applicant referred to equality data in order to substantiate her allegation that her arbitrary detention was based on her transgender status. (§30) She argued that transgender people were regularly discriminated against in Türkiye, claiming that in 2017, more than thirty people were arrested in Istanbul during the LGBTIQ pride parade and the authorities banned an LGBTIQ film festival. These data were intended to establish an inference of causality between her detention and her vulnerable identity. In other words, the applicant used ED to try and shift the burden of proof.

The TPI in the case also maintained, based on studies and reports by human rights and international organisations, that many transgender sex workers in Türkiye experience physical and verbal police violence, as well as detention and other interferences. (§34) The TPI noted that this police profiling of transgender sex workers was difficult to prove as their detention was often unrecorded. The TPI submitted that the Court could employ such contextual evidence for an inference of discrimination, which the government would be expected to rebut.

Accordingly, both the applicant and the TPI relied on ED demonstrating the higher risk of police brutality and arbitrary detention a transgender individual such as the applicant faces, to compensate for the lack of direct evidence of the causal link between the disadvantage and the protected ground in this covert discrimination case.

Having acknowledged the detention as illegal, the Court, however, declined to recognise this violation of the applicant's rights as an indication of discrimination against her. (§1) Therefore, the ED submitted to the Court showing the applicant's vulnerability as a member of a targeted community were not enough to cause the Court to infer that the violation committed against the applicant was based on her vulnerability, i.e. that she was targeted – merely because the targeting was not overt. At the same time, the Court acknowledged that the covertness of the alleged discrimination – the lack of any overt bias against the applicant on the part of the police – was no reason to dismiss the allegation of discrimination.

The Court expressly posited that ED showing systemic discrimination for the purposes of a *prima facie* case "needs to appear to be reliable and significant on critical examination". (§2) This language points to certain quality criteria for ED. In *Duğan*, however, the Court disregarded ED which it recognised as reliable. While the Court acknowledged "that a number of organisations, including intergovernmental bodies, indicated that transgender people were regularly subjected to fines and detention in Türkiye", it nevertheless, despite this context, refused to accept that the applicant had provided circumstantial evidence enough to infer that she was detained because of her gender identity, which would shift the burden of proof. In this way, the Court deferred to the findings of the domestic judiciary, regardless of its nominal recognition "that the applicants may have difficulty in proving discriminatory treatment in certain circumstances". It concluded, "having assessed all the relevant elements", that the applicant had failed to prove that her identity played a role in her detention. (§56) In this way, the Court dismissed the ED submitted and effectively required the victim to fully prove discrimination, while the respondent government shared none of the burden of proof.

In *Elmazova and Others v. North Macedonia*, the Court considered segregation of Roma pupils in two public primary schools, one a Roma-only school and the other, with Roma-only classes. It found a violation of Article 14 in conjunction with Article 2 of Protocol No. 1 ECHR. The Court took into account both qualitative and quantitative ED produced by a national body (§36-7). The applicants submitted that the available statistics per se, which demonstrated continuing segregation, shifted the burden of proof onto the government. (§66)

Based on those statistics, the Court found that one of the schools was "predominantly attended by Roma" (83.5 % of pupils were Roma and the non-Roma were mostly concentrated in a single class). (§71) The other school was "almost exclusively attended by ethnic Macedonians who represented 95.1 % of all the pupils (2.54 % were Roma pupils)". The domestic judiciary had established "two ethnically divided schools", as had the Ombud. (§71-2)

The Court expressly discarded the government's attempted justification based on data, that most of the residents were Roma, therefore, so were the pupils: "[T]he ethnic structure of residents within the catchment area cannot, in the circumstances, be sufficient to objectively justify the segregation" in the mostly-Roma school. (§73) The other school, which was mostly non-Roma, with the Roma pupils separated in Roma-only classes, was located in the same catchment area, at a distance of 600 metres.

Based on the statistics for several successive school years, the Court observed that the situation in the mostly-Roma school continued, worsening in 2021/2022. (§74) Based on the statistics evolving over the years, the Court also considered the trends in the mostly-non-Roma school, concluding that there was not "a general policy to automatically place Roma pupils in separate classes". (§75) Nevertheless, it noted, based on the figures, the "uneven distribution of first-grade pupils in the 2017/2018 academic year in mixed (31 and 32 pupils in the two classes) and Roma-only (18 pupils) classes […] the latter class having fewer pupils than the minimum threshold set by law." (§76)

The case of *Szolcsán v. Hungary* also concerned segregation of Roma pupils. The third-party intervener submitted ED showing such segregation was a country-wide issue: almost half the Roma children attended Roma-only schools or classes. Hundreds of schools had 50 % or more Roma pupils. Education policies adversely affected Roma pupils, increasing the gap. Pupil enrolment and transfer procedures, including the formation of school catchment areas, school capacity not being open to the public, and admission refusals being oral and not reasoned, hindered Roma children's access to inclusive education. The systemic issue was also documented by domestic case law unsuccessfully ordering desegregation. The infringement procedure brought by the EC exposed domestic legislation and practices of placing Roma children in special needs classes in disproportionately high numbers. (§42-3)

The Court took due account of the statistics submitted, uncontested by the government, and found that the school in question was "almost exclusively attended by Roma pupils, whereas the Roma population in the catchment area does not seem to have exceeded 4%". (§53) The Court rejected the domestic court's denial of this segregation on the grounds that it reflected the share of Roma children in the catchment area. The Court assessed this domestic conclusion as being not "supported by the actual population figures". Additionally, the Court pointed out that "the ethnic structure of residents within the catchment area, in the circumstances, could not objectively justify the segregation". (§54) In those circumstances, the above ED was sufficient evidence for the Court to find segregation and declare a violation of Article 14 in conjunction with Article 2 of Protocol No. 1 ECHR (§55, §59)

Regarding the applicant's allegation that he was refused admission into a non-segregated school on racial grounds, the Court dismissed the government's defence that the actual reason was his not residing in that school's catchment area: the Court referenced numerical information that other students were enrolled despite not residing in that area. (§51) However, the Court refrained from finding that the applicant was disallowed on racial grounds, relying on "the absence of any concrete

evidence or statistical data". (§51) "Concrete evidence" in this holding appears to imply overt bias, as in the refusal being openly motivated by race. "Statistical evidence" seems to point to numerical information on other comparable refusals documented as being racist.

In *Fedotova and Others v. Russia*, the Grand Chamber of the Court addressed the lack of any legal recognition or protection for same-sex couples. As a basis to confirm that same-sex partnerships fell within "family life", in line with its previous case law, it took account of ED in the form of information about relevant trends in other States. (§146) To reiterate that same-sex couples are entitled to legal recognition and protection, the Court referenced its previous judgments invoking domestic courts' positions reflecting the sentiments of the majority of their populations in favour of same-sex couples. (§162) This reliance by the Court on pro-rights legal and societal developments, including shifting popular opinion, is based on its principle of evolutive interpretation of the Convention. (§167-9) The Court, by its own admission, has been consistently influenced by ED in the form of "an emerging European consensus" and, more generally, clear liberal tendencies in a critical mass of States. (§171-5)

Equally, the Court's case law is "consolidated" by ED in the form of "converging positions of a number of international bodies". (§3) The Court "has regard to relevant international instruments and reports, in particular those of other Council of Europe bodies, in order to interpret the guarantees of the Convention and to establish whether there is a common European standard". (§176)

Expressly deriving its conclusion from this body of ED, the Court held that "States are required to provide a legal framework allowing same-sex couples to be granted adequate recognition and protection". (§178) Moreover, the Court relied on these ED showing "a clear ongoing trend […] within the Council of Europe" in favour of same-sex couples to hold that "the States Parties' margin of appreciation is significantly reduced when it comes to" that issue. (§187)

In contrast, the Court explicitly rejected the government's reliance on the illiberal views of the majority of the Russians. (§205, §214) It has "consistently declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority", declaring that "traditions, stereotypes and prevailing social attitudes in a particular country cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment based on sexual orientation". (§217) "[I]t would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority." (§218) Therefore, "the allegedly negative, or even hostile, attitude on the part of the heterosexual majority in Russia cannot be set against the applicants' interest". (§219) Accordingly, ED showing pro-rights public attitudes and corresponding domestic legal developments are a valid basis for progressing the case law, while ED showing anti-rights public opinion are irrelevant.

Indeed, instead of "reinforce[ing] stigma and prejudice and encourage[ing] homophobia", the State "must necessarily take into account developments in society and changes in the perception of social and civil-status issues and relationships". (§222, §209) Russia was found to be in violation of Article 8 partly because "[t]he situation in [it] differs markedly from the situation in a substantial number of States Parties". (§195, §225) To assess the national situation, the Court took account of ED in the form of domestic CSO findings, as well as ECRI monitoring (§198-9).

In the similar subsequent case of *Buhuceanu and Others v. Romania* (judgment of 23 May 2023), the Court reiterated that government counter-arguments relying on the majority of the population disapproving of same-sex unions were subject to rejection: "allegedly negative, or even hostile, attitude on the part of the heterosexual majority cannot be set against the applicants' interest in having their respective relationships adequately recognised and protected by law". (§80) Conversely, the Court heeded the applicants' submission that, because their partnerships are not formally acknowledged, same-sex couples are prevented from accessing numerous social and civil rights that are provided by law for married couples. The Court accepted this argument based on equality data to that effect supplied by the Council of Europe's Commissioner for Human Rights (the Commissioner) intervening as a third party, namely, monitoring conducted in Romania by the Commissioner's Office. (§54, §78) This is a good example of equality data generated by a human rights institution being accepted as valid evidence in court proceedings when submitted by that same institution in its third-party intervention. By analogy, Equality Bodies should be able to submit equality data generated by their offices, whether statistics, or monitoring findings, when the Equality Bodies act as TPI in court proceedings, both before domestic and supranational courts and quasi-judicial bodies.

In *Buhuceanu*, the Commissioner also submitted equality data concerning the "movement towards legal recognition of same-sex couples continu[ing] to develop in Europe": at that time, 30 Member States provided such recognition as opposed to 24 at the time of the 2015 *Oliari* judgment. (§55) Furthermore, the Commissioner relied on equality data in the form of "Council of Europe institutions and human rights monitoring mechanisms and United Nations treaty-based committees constantly call[ing] on States to provide some means of legal recognition to same-sex couples". (§56) As a form of equality data, relevant comparative case law by regional human rights courts, in particular the Inter-American Court of Human Rights, was also presented in the Commissioner's TPI.

A set of international CSO complemented these data (§64-5):

- The *Oliari* majority of Member States recognising same-sex couples had increased by 25 % – from twenty-four to thirty (that is to say from 51 % to 63.8 % of Member States). There was now a clear majority.
- Case-law from across the world showed that a growing number of national and international courts required at least an alternative to legal marriage, if not access to legal marriage for same-sex couples.

The numerous other liberal TPI in this case – international and domestic LGBTIQ and human rights organisations, as well as a domestic social scientist and academic – submitted additional equality data:

- Countries that legally recognised same-sex relationships generally had a higher per capita gross domestic product and ranked higher on the Human Development Index. (§60)
- The decriminalisation of homosexuality and the prohibition of homophobic discrimination had a positive impact on the perception of same-sex couples in Romania. Statistical data drawn from European and national authorities showed that Romanians – especially younger people – were now more openly accepting of gay families. (§61)
- National censuses showed that the number of consensual unions was constantly increasing. (§63)

The applicants also relied on equality data (§37, §40):

- Romanians had evolved and were now ready for recognition of same-sex relationships: the 2018 referendum on a change to the definition of "family" was invalid due to a low turnout, showing a lack of meaningful opposition. Opinion polls showed an increasing acceptance of same-sex couples.
- Recommendations by Council of Europe and other international human rights bodies reflected the State's passivity in addressing the lack of recognition of same-sex couples. The State had also failed to fully enforce the CJEU judgment in the *Coman* case.

An illiberal TPI relied on a comparative report by a "fact tank" conducting public opinion polling and demographic research, which showed that Eastern Europeans and religious people were less accepting of homosexuality. It submitted that in Romania, 98 % of the adults identified as Christians, and 74 % of Romanians opposed same-sex marriage. (§71)

Based on this body of qualitative and quantitative material, in addition to the facts of the individual cases of the applicants, the Court found a violation of Article 8. However, it declined to rule under Article 14, declaring this "not necessary".

In *M.B. and Others v. Slovakia (no. 2)*, the Court considered allegedly racist police brutality against Roma youngsters who argued that this was an example of the existing institutional racism in the Slovak police. (§82) Intervening as a third party, the European Roma Rights Centre submitted that "anti-Gypsyism" in policing in Slovakia was a structural problem, which the Court should recognise and assess related cases in its context. (§84)

Although the Court established ill-treatment, it considered the contextual evidence insufficient "to establish its purpose" (implying that ill-treatment had to be intentionally racist in order to be racist). (§89) Even though the applicants' physical ill-treatment was accompanied by racist slur, being called a "Gypsy gang", in the absence of "further contextual evidence", this was said to be insufficient for a conclusion that racism was a causal factor for the violence. "Failing further information or explanations", the Court concluded that it was not established racist attitudes played a role in the violation of the applicants' rights under Article 3. (§90) The burden of proof did not shift. (§91) There was no violation of Article 14 with Article 3 in its substantive aspect. (§93)

The Court effectively held that the submissions of the TPI – a representative Roma CSO acting at the international level based on extensive field monitoring at the domestic level in all of Europe, and possessing specialised expertise in Roma rights violations – did not constitute sufficient equality data for a *prima facie* case of Roma discrimination. Additionally, unspecified contextual evidence and "information or explanations" were required.

In terms of possible discrimination with regard to the investigation's effectiveness, the Court acknowledged that for a State, "proving racial motivation will often be extremely difficult in practice". (§94) (There was no such acknowledgment of the difficulties in proving racial discrimination for an applicant.) In the context of the difficulties for the State, the Court nevertheless held that, because the ill-treatment was accompanied by verbal comments referring to the victims as a "Gypsy gang", the authorities "clearly had before them plausible information which was sufficient to alert them to the need to carry out an investigation into possible racist overtones". This was "possibly racially motivated ill-treatment". (§94) Therefore, there was a violation of Article 14 with Article 3 in its procedural aspect. (§97)

At the same time, "such possibly racially motivated ill-treatment" as found by the Court was not enough to constitute a *prima facie* case before the Court itself despite the submissions of a specialised TPI presenting contextual information based on its monitoring of the respondent State. Accordingly, ED in the form of TPI may not be enough to establish a context of structural discrimination, for an individual case to be assessed in.

In *Macatė v. Lithuania*, the Grand Chamber dealt with the authorities' restricting a children's book depicting same-sex relationships as being of equal worth by labelling it as harmful to those under 14. A number of TPI submitted ED in various forms:

- a study suggesting that librarians and educators tend to not order controversial books out of fear, in particular books by or about minorities (TPI submitted that a warning label on a book would reinforce such fears); (§166)
- comments by the Council of Europe Commissioner for Human Rights based on a FRA survey that LGBTIQ children were often bullied and attacked; (§169)
- a report by the UN Independent Expert on protection against SOGI-based violence and discrimination that the abuse of LGBTIQ pupils and children of LGBTIQ parents in school was exacerbated by the negative portrayals and/or invisibility of sexual and gender diversity in educational materials (TPI submitted that labelling LGBTIQ content with warnings contributed to the continued stigmatisation and social exclusion of the LGBTIQ community); (§169)
- various other international documents and surveys showing that LGBTIQ children, as well as children coming from LGBTIQ families, were often stigmatised, bullied, discriminated against, and attacked; (§172)
- sanctions and censoring of speech concerning SOGI purportedly to protect children was a wider phenomenon in the Member States, stigmatising LGBTIQ people and restricting children's rights to comprehensive information on sexuality and health. (§170-1)

The Court found that the warning labels in this case were likely to dissuade a significant number of adults from allowing children under 14 to read the book, "especially in the light of the persistence of stereotypical attitudes, prejudice, hostility and discrimination against the LGBTIQ community in Lithuania". (§181) For its finding of the latter context, the Court relied on "the relevant international reports and surveys" and the TPI. Based on this "chilling effect" conclusion, the Court held that the marking of the book as being harmful to the age group for which it was intended constituted an interference with the applicant author's freedom of expression. (§182-3)

Furthermore, the Court noted data about the implementation of the provisions that the impugned measures were based on: "[E]very single instance in which [the provisions were] applied or relied on has concerned information about LGBTIQ-related issues". (§197) Along with other evidence, these data led to the Court concluding that the aim of the measures was illegitimate: "to restrict children's access to content which presented same-sex relationships as being essentially equivalent to different-sex relationships". (§198, §200, §213)

It was based on data that the Court found this aim to be illegitimate: "[T]here was no scientific evidence or sociological data at its disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children […;] to the

extent that minors who witnessed demonstrations in favour of LGBTIQ rights were exposed to the ideas of diversity, equality and tolerance, the adoption of these views could only be conducive to social cohesion". (§210)

The Court relied on ED in the form of "various international bodies, such as the PACE, the Venice Commission, ECRI, the European Parliament and the UN Independent Expert on sexual orientation and gender identity [criticising] laws which seek to restrict children's access to information about different sexual orientations, on the grounds that there is no scientific evidence that such information, when presented in an objective and age-appropriate way, may cause any harm to children. On the contrary, the bodies in question have emphasised that it is the lack of such information and the continuing stigmatisation of LGBTIQ persons in society which is harmful to children". (§211) The Court also referenced the TPI, a source of ED themselves, "that legal rules which label LGBTIQ-related content as harmful to children contribute to the discrimination, bullying and violence experienced by children who identify as LGBTIQ or who come from same-sex families".

Moreover, as in many other cases (for example, see *Fedotova and Others* above), the Court observed the "consensus" on the issue among Member States: "[T]he laws of a significant number of Council of Europe Member States either explicitly include teaching about same-sex relationships in the school curriculum, or contain provisions on ensuring respect for diversity and prohibition of discrimination on the grounds of sexual orientation in teaching". In contrast, "legal provisions which explicitly restrict minors' access to information about homosexuality or same-sex relationships are present in only one Member State […] which has prompted the European Commission to launch the contentious phase of the infringement procedure". (§212)

Equally a form of ED, relevant comparative case law at the domestic level in various jurisdictions (including non-European ones) was taken into account too: the Court noted that national courts had variously held concerning children's access to information about same-sex relationships that the authorities could not disregard social realities of different types of relationships; the mere fact that some people might object to certain types of relationships could not justify preventing children from learning about them. (§213)

Ultimately, this ED-based analysis produced the case's outcome: the impugned measures were in violation of Article 10 ECHR. (§218)

In *Valaitis v. Lithuania*, the Court, interestingly, considered data about the implementation, at the national level, of its previous judgment against Lithuania concerning similar facts, i.e. online homophobic expression – *Beizaras and Levickas v. Lithuania*. In response to the Court's judgment in *Beizaras and Levickas*, the authorities had taken wide-ranging and multifaceted measures against hate speech. Therefore, the "lack of an effective remedy" found in *Beizaras and Levickas* was no longer present in *Valaitis*.

The Court discussed at length the "Lithuanian authorities' response to the Court's judgment in *Beizaras and Levickas*" (§98-107):

- The Minister of Justice set up an inter-institutional working group on how to tackle hate speech and hate crimes.
- The Prosecutor General issued Methodological Recommendations on how to detect and prosecute hate speech, referring to the Court's case-law on the subject.

- The Prosecutor General's Office's decision in the applicant's reopened case acknowledged the flaws in earlier prosecutors' decisions, stressing Lithuania's unconditional obligation to execute the *Beizaras and Levickas* judgment; it underlined the Court's finding that attacks against sexual minorities in Lithuania had reached the required level of gravity for criminal liability to apply to them; and, on the basis of the Court's case-law, noted that hurtful and prejudicial comments were not necessary for a public discussion, and also that hate speech fell outside the protection of Article 10 ECHR. For the Court, this decision "demonstrate[d] a clear and positive shift in the State authorities' attitude towards the prosecution of hate crimes". (§100)
- 261 decisions to terminate pre-trial investigations in hate speech cases were reviewed and some cases were reopened. In the decisions, the competent prosecutor noted that the Court's case-law had direct effect and prevailed over prior domestic case-law.
- In contrast, at the time of the *Beizaras and Levickas* judgment, the Supreme Court's case-law, instead of providing for an effective domestic remedy for homophobic discrimination, referred to "eccentric behaviour" or the alleged duty of sexual minorities "to respect the views and traditions of others". At that time, the government had not provided a single Supreme Court verdict showing a different interpretation.
- At the time of the *Valaitis* judgment, the Court noted a shift in the Supreme Court's position. The latter, referring to the Court's case-law, had observed that freedom of speech could be restricted when it concerned hate speech and that incitement to hatred did not necessarily entail a call for violence. Based on this, the Court found that the Supreme Court "clearly and unconditionally acknowledged the gravity of hate crimes and discrimination based on sexual orientation and eliminated the appearance of impunity in cases of hate speech against homosexuals as established by the Court in *Beizaras and Levickas"*. It held that this "ruling by the Supreme Court demonstrates that an effective domestic remedy for complaints of homophobic discrimination now exists at all levels of jurisdiction". (§103)
- The CSO, representatives of the applicants and TPI in *Beizaras and Levickas*, supported the above reforms. The Court found that their approval "demonstrates amply that the view of the organisations supporting the non-discrimination cause has shifted and they no longer see the State authorities as being ambivalent towards protecting the interests of persons of homosexual orientation". It was also "noteworthy that representatives of civil society were directly involved in the State authorities' discussions […] to consider the impact of the [*Beizaras and Levickas*] judgment.
- Following the latter judgment, numerous hate crime training sessions for judges, prosecutors and police were held.
- Importantly, the Court assessed quantitative ED on implementation as well: the statistics provided by the government showed "a clear increase in the number of investigated crimes, and, unlike the statistics referred to by the Court in *Beizaras and Levickas*, demonstrate[d] that intolerance towards sexual minorities no longer goes unchecked, and that [hate crime law] can no longer be considered a "dead letter".

— The Committee of Ministers welcomed the above measures and decided to continue the examination of the *Beizaras and Levickas* judgment under the standard procedure (as opposed to the enhanced one).

Based on the above implementation equality data, the Court found that following *Beizaras and Levickas*, the Lithuanian authorities had taken "wide-ranging and multifaceted measures to increase the capacity of the Lithuanian criminal justice system to adequately respond to hate speech and hate crimes and thus to address the issues raised by the Court". (§113) The Court assessed the *Valaitis* case in this light.

It found that the authorities "drew the necessary conclusions" from *Beizaras and Levickas* and "addressed the cause of the Convention violation". Their recently adopted guidelines and the comprehensive approach when tackling hate crimes, including a number of decisions by prosecutors and courts, demonstrate that the authorities' discriminatory attitude identified in *Beizaras and Levickas* is no longer apparent and that effective remedies against hate crimes "may also come about through domestic practice". (§114-5) This was enough to conclude that there was no violation in the authorities' handling of the *Valaitis* case. (§116)

In *Moraru and Marin v. Romania*, the Court considered the inability of female civil servants who had attained the retirement age for women to work until reaching the higher retirement age for men. A blanket rule provided for automatic termination of women's employment at a lower age than men. The applicants were forced to retire. This rule constituted unjustifiable discrimination based on sex, perpetuating harmful stereotypes. The Court held that (sexist) "traditions, general assumptions or prevailing social attitudes" are no justification for sex discrimination. (§106) Accordingly, ED on sexist attitudes of the majority are not relevant. This is similar to the *Fedotova and Others* holding above that homophobic public opinion may not justify homophobic oppression by the government.

In *Moraru v. Romania*, the Court addressed size-based discrimination against a woman who was prevented from sitting the entrance exam for military medicine because her height and weight were below the required minimum for female candidates. The Court declared this unjustified: the domestic courts had failed to provide any reason to connect a candidate's size and her strength (strength being expected from a military doctor). The applicant argued that the anthropometric limitations had prevented her from proving her physical strength and suitability to become a military physician. Those limitations had been subsequently repealed, while the job description of a military physician remained unchanged, which showed that the former were unjustified in the first place. (§32-3)

The Court found a violation of Article 14 together with Article 2 of Protocol No. ECHR. (§58) It observed that the domestic courts' decisions equating size and strength were not evidence-based – they did not rely on "any studies, research or statistical data or any type of empirical evidence" concerning the connection between a candidate's size and her strength. (§55) The State had failed to justify the disadvantage it had subjected the applicant to. (§57) The Court also noted that the impugned anthropometric requirements had recently been eliminated from the selection criteria. (§56)

In *Basu v. Germany*, one of a pair of racial profiling cases decided on the same date[133] (18 October

[133] The second one being *Muhammad v. Spain*, also summarised here.

2022) – the first profiling cases after *Lingurar v. Romania*[134] – 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 ECHR: "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 CSO and 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. These 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 – were, however, 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 had 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. The national courts had assessed the matter and also, the Court considered the domestic anti-discrimination legislation adequate.

In *Beeler v. Switzerland*, the Court dealt with the unequal entitlement to welfare benefits of a widower and single father. It critically assessed statistics submitted by the respondent. The government argued that gender equality was not yet 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

[134] While in the earlier *Timishev v. Russia*, the issue was also one of ethnic profiling, the Court did not term it that.

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 the 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 any personal situation exceeded a State's margin of appreciation. Governmental reliance on the presumption that the husband supports the wife financially ("the 'male breadwinner' concept") was 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 gender-based discrimination:

- If it is established that domestic violence disproportionately affects women, the burden of proof is on the State to demonstrate that it has taken measures to remedy such gender-based disadvantage.
- The evidence required to show such disproportionate impact and shift the burden of proof can vary and include reports of CSO and international bodies like CEDAW, and official or academic statistics showing that domestic violence primarily affects women 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 general justice system passivity in this regard, or discrimination in her particular case – she did not provide any statistics or CSO reports. (§104)

In *Volodina v. Russia*, 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 data.) The Court pointed out that the government had not produced any statistics, while the applicant had submitted police data of 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 (CAT), Russian and international CSO, 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 unequal 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 domestic violence victims are placed in a *de facto* situation of disadvantage. (§123)

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 domestic violence victims 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, CAT, 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 omission, 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 ECHR. (§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 of such ED for State duties to evolve policy corresponding to relevant 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)

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, as mentioned above, 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 CSO 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 ECHR. (§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 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.

In *Oganezova v. Armenia*, the Court steadily used qualitative ED to contextualize and assess homophobic attacks and official responses.[135] The Court consistently referenced the Armenian LGBTIQ 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 LGBTIQ vulnerability from international bodies, affirming that a context of systemic group victimisation 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 LGBTIQ 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 LGBTIQ community" (*Aghdgomelashvili*, §40; *Women's Initiatives Supporting Group*, §66). Significantly, in *Oganezova*, the requisite investigation was framed as no less of an imperative – i.e. 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 case, in which the Court found "ethnic profiling", and the only one to date, in which it has found "institutionalised racism", it relied on general reports of racial stereotyping of Roma presented by the TPI (qualitative ED) to support its conclusion that a police raid was discriminatory, targeting the applicants based on official stereotyping of 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

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

> 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 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 these 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

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 ECHR. (§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" findings, i.e. ED, revealing violence against women as "a major systemic problem in the country", a "blight on society". (§56) The Court referenced these 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 the police 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 ECHR. Furthermore, the unmet "pressing need" to effectively investigate possible gender discrimination and bias as a factor behind the police inaction was a breach of positive procedural obligations under Article 2 in conjunction with Article 14 ECHR. (§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 produced by international organisations and Council of Europe bodies. (§147) Based on these data, the Court reiterated its recognition of the specific disadvantage and vulnerability of the Roma 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 on 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 – 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" powers. 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 be authorized if necessary, as opposed to "expedient" (as per domestic law) and proportionate, with effective safeguards providing a check on authorisations. 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 on 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. 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 over-representation 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)

Annex II: Analytical summaries of CJEU case law using or otherwise addressing equality data

In Case C-167/97 (*Seymour-Smith*),[136] 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] 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*),[137] the Court accepted, without statistics or other data, that the impugned practice of mounting electric meters at inaccessible height 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 specific 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*),[138] 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 its 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

[136] Regina and Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez.
[137] CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia, third parties: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane.
[138] Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss.

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 were applied to them and how they were applied. They knew only the amount of their supplemented pay without being able to determine the effect of the individual criteria. Those 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 characterised by a lack of transparency as being contrary to the principle of equal access to employment on the ground that the lack of transparency

revented 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 its practice in the matter of wages is not in fact discriminatory. (§13) To show that its practice in the matter of wages does not systematically work to the disadvantage of female employees the employer will have to indicate how it has applied the criteria concerning supplements and will thus be forced to make its system of pay transparent. (§15)

In Case C-127/92 (*Enderby*),[139] 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*)[140] and Case C-317/93 (*Nolte*),[141] 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*),[142] 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

[139] Dr Pamela Mary Enderby and Frenchay Health Authority, Secretary of State for Health.
[140] Susanna Brunnhofer and Bank der österreichischen Postsparkasse AG.
[141] Inge Nolte v Landesversicherungsanstalt Hannover.
[142] Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co. KG.

of female workers than male workers", is for the national court to determine. (§14-6)

In Case C-184/89 (*Nimz*),[143] 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*),[144] similarly, the Court dealt with a 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*),[145] 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*),[146] 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" (rather than a mixed group of various non-nationals). (§48)

Case law applicable to ED by analogy

In Case C-104/10 (*Kelly*),[147] 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 could 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*),[148] 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*

[143] Helga Nimz v Freie und Hansestadt Hamburg.
[144] Maria Kowalska v Freie und Hansestadt Hamburg.
[145] Jyske Finans A/S v Ligebehandlingsnævnet, acting on behalf of Ismar Huskic.
[146] Heiko Jonny Maniero v Studienstiftung des deutschen Volkes eV.
[147] Patrick Kelly v National University of Ireland (University College, Dublin).
[148] Galina Meister v Speech Design Carrier Systems GmbH.

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 respondent will not compromise the 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 employer'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 this in light of all the circumstances of the case. (§46-7)

As with *Kelly* above, this could 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*),[149] 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 are correct, the impugned maximum age for recruitment is justified. (§48)

In *Vital Pérez*[150] and *Wolf* (Case C-229/08[151]), 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[152]) concerning sexual orientation, the Court used HIV-related epidemiological data to assess the exclusion of men who have sex with men from eligibility as blood donors.

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

Equinet Member Equality Bodies

ALBANIA
Commissioner for the Protection from Discrimination
www.kmd.al

AUSTRIA
Austrian Disability Ombudsman
www.behindertenanwalt.gv.at

AUSTRIA
Ombud for Equal Treatment
www.gleichbehandlungsanwaltschaft.gv.at

BELGIUM
Institute for the Equality of Women and Men
www.igvm-iefh.belgium.be

BELGIUM
Unia (Interfederal Centre for Equal Opportunities)
www.unia.be

BOSNIA AND HERZEGOVINA
Institution of Human Rights Ombudsman of Bosnia and Herzegovina
www.ombudsmen.gov.ba

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

CROATIA
Office of the Ombudswoman
www.ombudsman.hr

CROATIA
Ombudsperson for Gender Equality
www.prs.hr

CROATIA
Ombudsman for Persons with Disabilities
www.posi.hr

CYPRUS
Commissioner for Administration and Human Rights (Ombudsman)
www.ombudsman.gov.cy

CZECH REPUBLIC
Public Defender of Rights
www.ochrance.cz

DENMARK
Danish Institute for Human Rights
www.humanrights.dk

ESTONIA
Gender Equality and Equal Treatment Commissioner
www.volinik.ee

FINLAND
Non-Discrimination Ombudsman
www.syrjinta.fi

FINLAND
Ombudsman for Equality
www.tasa-arvo.fi

FRANCE
Defender of Rights
www.defenseurdesdroits.fr

GEORGIA
Public Defender of Georgia (Ombudsman)
www.ombudsman.ge

GERMANY
Federal Anti-Discrimination Agency
www.antidiskriminierungsstelle.de

GREECE
Greek Ombudsman
www.synigoros.gr

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

IRELAND
Irish Human Rights and Equality Commission
www.ihrec.ie

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

KOSOVO*
Ombudsperson Institution
www.oik-rks.org

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

MALTA
Commission for the Rights of Persons with Disability
www.crpd.org.mt

MALTA
National Commission for the Promotion of Equality
ncpe.gov.mt

MOLDOVA
Equality Council
www.egalitate.md

MONTENEGRO
Protector of Human Rights and Freedoms (Ombudsman)
www.ombudsman.co.me

NETHERLANDS
Netherlands Institute for Human Rights
www.mensenrechten.nl

NORTH MACEDONIA
Commission for Prevention and Protection against Discrimination
www.kszd.mk

NORWAY
Equality and Anti-Discrimination Ombud
www.ldo.no

POLAND
Commissioner for Human Rights
bip.brpo.gov.pl

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

PORTUGAL
Commission for Equality in Labour and Employment
cite.gov.pt/web/pt

PORTUGAL
High Commission for Migration
www.acm.gov.pt

ROMANIA
National Council for Combating Discrimination
www.cncd.ro

SERBIA
Commissioner for Protection of Equality
www.ravnopravnost.gov.rs

SLOVAKIA
Slovak National Centre for Human Rights
www.snslp.sk

SLOVENIA
Advocate of the Principle of Equality
www.zagovornik.si

SPAIN
Council for the Elimination of Ethnic or Racial Discrimination
www.igualdadynodiscriminacion.igualdad.gob.es

SPAIN
Institute of Women
www.inmujeres.gob.es

SWEDEN
Equality Ombudsman
www.do.se

UKRAINE
Ukrainian Parliament Commissioner for Human Rights
www.ombudsman.gov.ua

UNITED KINGDOM - GREAT BRITAIN
Equality and Human Rights Commission
www.equalityhumanrights.com

UNITED KINGDOM - NORTHERN IRELAND
Equality Commission for Northern Ireland
www.equalityni.org

** This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.*

EQUINET
European Network of Equality Bodies

ISBN 978-92-95112-81-0 | **© Equinet 2024**

Co-funded by the European Union

www.equineteurope.org