5

Equality and non-discrimination

Ten years on from the European Union's (EU) adoption in 2000 of a detailed legislative framework on discrimination, evidence available to the FRA shows that the elimination of discrimination continues to constitute a significant challenge in the Member States. Not to be discriminated against – be it on the basis of sex, religion, disability, sexual orientation or age – is a fundamental right that is of relevance to countless situations in daily life. Over the reporting period, the EU adopted directives on parental leave and on equality between self-employed men and women, while the European Commission established a new five-year strategy working toward equality between men and women. Member States introduced legislation to implement a number of EU equality directives. But despite this progress, challenges remain. Multiple discrimination, for example, remains a reality that is largely not mirrored by the legal framework of the EU. The Lisbon Treaty puts the EU under a new horizontal obligation to combat discrimination in all its policies and activities – a task that can contribute to more equal societies.

This chapter covers developments in EU and Member State policies and practices in the area of non-discrimination for the year 2010. In order to gain a comprehensive overview of this area, it should be read together with Chapter 6 on racism and ethnic discrimination, which focuses more specifically on discrimination on the basis of racial and ethnic origin, including racist crime. This chapter will first examine horizontal issues that relate to non-discrimination across all grounds, including those of racial and ethnic origin. It will then move on to examine developments in relation to specific grounds of discrimination: sex, religion or belief, disability, sexual orientation and age. Finally, the chapter will address the issue of multiple discrimination.

5.1. Horizontal issues

This section will address issues relating to the area of non-discrimination as a whole, including discrimination on the basis of racial and ethnic origin, discussed in greater detail in Chapter 6 on racism and ethnic discrimination. It will address the development and application of the equality directives, the issue of rights awareness, and the role of the equality bodies, including numbers of complaints.

Key developments in the area of non-discrimination:

- negotiations on the 'horizontal' directive remained ongoing in the Council of the European Union;
- EU Member States continued to introduce new legislation, as well as amending existing ones, to transpose the equality directives, namely the Racial Equality Directive, Employment Equality Directive, Gender Goods and Services Directive and Gender Equality Directive (recast);
- levels of complaints received by equality bodies remained varied across the EU. Despite an increase in complaints reported in 12 EU Member States, overall numbers appeared low. The mandates of some equality bodies were broadened to include more grounds of discrimination;
- directives on parental leave and on equality between self-employed men and women were adopted, as well as a five-year strategy promoting equality between men and women covering the period 2010-2015. Negotiations on the Pregnant Workers Directive remained ongoing;
- the European Institute for Gender Equality (EIGE) was formally opened;
- the EU ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD), as did a further four Member States in 2010, bringing the total to 16 Member States having ratified the convention. The European Commission launched its

European Disability Strategy,[1] and some Member States moved towards the implementation of independent living and inclusive education for persons with disabilities;[2]

- the Council of Europe Committee of Ministers adopted a far-reaching recommendation on sexual orientation and gender identity discrimination,[3] while the Parliamentary Assembly adopted a recommendation and a resolution on the topic. European Court of Human Rights (ECtHR) case law and measures among some Member States prompted developments in the rights of same-sex couples, transgender rights and the carrying out of Pride marches;
- discrimination on the basis of religion received consideration in judicial decisions relating to the display of religious symbols at work and religious classes in schools;
- promotion of the participation of both older persons and young persons in the labour market received attention in initiatives of the European Commission;[4]
- progress towards dealing with discrimination on multiple grounds was seen among some Member States' courts and equality bodies.

5.1.1. The equality directives

The 10th anniversary of the EU equality directives stood at the centre of the 2010 Equality Summit that took place in Brussels on 15 and 16 November 2010 and was co-organised by the Belgian Presidency of the EU and the European Commission. As it stands, EU non-discrimination law prohibits discrimination on the grounds of racial origin, ethnicity and sex across the areas of employment, access to goods and services and access to welfare services. However, discrimination on the grounds of religion or belief, disability, sexual orientation and age is prohibited only in the area of employment. Adoption of the proposed 'horizontal' directive, submitted by the Commission in July 2008, would eliminate this current 'hierarchy of grounds' by prohibiting discrimination on these grounds in roughly the same areas covered by the Racial Equality Directive[5] and Gender Equality Directives, namely the Gender Goods and Services Directive[6] and Gender Equality Directive (recast).[7]

At EU level, negotiations on the 'horizontal' directive remained ongoing. The conclusions of the June 2010 meeting of the Council of the EU on Employment, Social Policy, Health and Consumer Affairs (EPSCO) noted that "despite some progress, further discussions are needed on numerous issues. These include the division of competences between the Member States and the EU, the specific provisions on disabilities (e.g. the scope of the directive, its financial and practical implications and the interrelationship between the directive and more detailed sectoral specifications), the implementation calendar and the issues of legal certainty".[8] The Council Progress report of 19 November 2010 concludes that, although "significant progress has been made under the Belgian Presidency in the attempt to clarify the provisions concerning financial services and housing, there is a clear need for extensive further work on the proposal".[9]

> *"Since diversity enriches the Union, the EU and its Member States must provide a safe environment where differences are respected and the most vulnerable protected. Measures to tackle discrimination, racism, anti-Semitism, xenophobia and homophobia must be vigorously pursued."*
>
> *The Stockholm Programme – An open and secure Europe serving and protecting citizens (OJ C 115, 4 May 2010, p. 1), paragraph 2(3), p. 14.*

FRA ACTIVITY

Many EU Member States extend protection against discrimination

In 2010, the FRA published an update of a comparative legal report on discrimination on the grounds of sexual orientation and gender identity. It found that many EU Member States had introduced legislation prohibiting discrimination on the grounds of sexual orientation in those areas covered by the Racial Equality Directive, even though the equality directives did not require them to do so. "As of 2010, only nine Member States have maintained the 'hierarchy' that affords racial and ethnic origin better protection than other grounds (**Cyprus**, **Denmark**, **Estonia**, **France**, **Greece**, **Italy**, **Malta**, **Poland**, **Portugal**)."

FRA (2010), Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity, 2010 update: Comparative legal analysis

At national level, 10 years after the adoption of the Employment Equality Directive[10] and the Racial Equality Directive in 2000, legislative activity remained ongoing in some Member States. This is both the result of infringement proceedings launched by the European Commission, and efforts to simplify, strengthen and consolidate existing national legal frameworks. For instance, in 2010 **Latvia** continued the transposition of the Racial Equality Directive and of the Employment Equality Directive by amending the Education Law, the Law on the Support for the Unemployed and Jobseekers and the Labour Law. Some of these measures were introduced in response to the reasoned opinion of the European Commission sent to Latvia on 25 June 2009 concerning the failure to properly transpose the definition of indirect discrimination.[11] Furthermore, in September 2010

1 European Commission (2010b).
2 Council of Europe, Committee of Ministers (2010a).
3 Council of Europe, Committee of Ministers (2010b).
4 European Commission (2010c) and (2010d).
5 Council Directive 2000/43/EC, OJ 2000 L 180, p. 22.
6 Council Directive 2004/113/EC, OJ 2004 L 373, p. 37.
7 Directive 2006/54/EC, OJ 2006 L 204, p. 23.
8 Council of the European Union (2010a).
9 Council of the European Union (2010d).
10 Council Directive, 2000/78/EC, OJ 2000 L 303, p. 16.
11 European Commission (2009a).

the Latvian Parliament (*Saeima*) approved amendments to the Consumer Rights Protection Law at the second reading, which in addition to gender, race and ethnicity adds disability as a prohibited ground for discrimination in the provision of access to goods and services.[12]

By the end of 2010, the **Polish** Parliament (*Sejm*) had adopted the Act on implementation of certain EU provisions concerning equal treatment, which was designed to transpose the equality provisions of various EU directives.[13] The act took effect on 1 January 2011. In the **Czech Republic**, the final provisions of the Anti-discrimination Act[14] took effect in December 2009, after most of its provisions entered into force in September 2009. The **United Kingdom** (UK) saw the adoption of the Equality Act 2010, which extends and consolidates non-discrimination law concerning all grounds covered by the equality directives.[15] Most of the legislation took effect on 1 October 2010, applying mainly to England, Wales and Scotland. With a few exceptions, it does not apply to Northern Ireland, since equal opportunities and discrimination are 'transferred matters' under the Northern Ireland Act 1998.

In **Finland**, as the various amendments made to the Equality of Treatment Act in the period following its initial adoption have caused the legislation to grow quite fragmented,[16] the Ministry of Justice (*Oikeusministeriö*) set up a committee to investigate the possibility of reforming the current legislation.[17] The proposed new Equality of Treatment Act aims to reform the bodies currently monitoring equality and discrimination. If and when implemented, the law will provide more extensive and systematic legal protection for equality, prohibiting discrimination in both the public and private sectors.

In the **Netherlands**, a legislative proposal to amend the Constitution was brought before the House of Representatives on 14 June 2010 in order to add disability and sexual orientation to the grounds protected under Article 1 of the Constitution.[18] In addition, the Municipal Antidiscrimination Facilities Act entered into force on 28 January 2010. It requires municipalities to arrange an easily accessible way for citizens to submit a claim to a Municipal Antidiscrimination Facility.[19] Finally, a bill was submitted to the legislature on the establishment of a human rights body. The institute will be combined with the Equal Treatment Commission and form a new organisation to be called the Human Rights and Equal Treatment Commission (on National Human Rights Institutions, see Chapter 8 on Access to justice).

5.1.2. Rights awareness

The equality directives require the EU Member States to raise awareness about equality-related rights by bringing the relevant provisions "to the attention of the persons concerned by all appropriate means".[20] Despite the fact that discrimination continues to be a persistent feature in Europe, it appears that awareness of rights and how to exercise them remains low. It is noteworthy that, according to the Special Eurobarometer survey of November 2009,[21] about 16% of people in Europe claim to have personally experienced discrimination on the basis of race, religion, age, disability or sexual orientation in 2009. Age is the most common reason for self-reported discrimination at 6% of those surveyed. As regards the perception of age discrimination, this appears to be closely correlated with the impact of the financial and economic crisis: the survey shows that 64% of Europeans are concerned that the recession will contribute to more age discrimination in the job market.

Most importantly, the survey illustrates the importance of the work still to be done to raise awareness and inform people about their rights. Consistent with previous findings,[22] only one in three Europeans are aware of their rights should they become a victim of discrimination or harassment. This shows that there are challenges in developing greater rights awareness. However, this figure masks considerable differences at national level: awareness increased since the last survey in 2008 in the **United Kingdom** (UK) (by eight percentage points), **France** (by seven percentage points), **Ireland** and **Sweden** (each by six percentage points), but fell in **Poland** (by 12 percentage points) and **Portugal** (by 11 percentage points).

FRA ACTIVITY

FRA survey shows low awareness of rights and equality bodies

In 2010, the FRA published its third *Data in Focus Report* based on the results of the EU Minorities and Discrimination Survey (EU-MIDIS), which was based on face-to-face interviews in the EU27 with 23,500 respondents with a self-identified ethnic minority/immigrant background. The report focused on levels of rights awareness in the field of non-discrimination and knowledge about equality bodies. The findings revealed that, on average across the different minority groups surveyed, only 25% knew about existing non-discrimination legislation in the three areas of employment, goods and services as well as housing. In addition, 80% of all survey respondents could not think of a single organisation that could offer support to victims of discrimination – be this government-based or an NGO – and, when given the name of an Equality Body or the equivalent organisation in their Member State, 60% of respondents indicated that they had never heard of them.

FRA (2010), Data in Focus 3: Rights awareness and equality bodies

12 Latvia (2010a).
13 Poland (2010a).
14 Czech Republic (2009).
15 United Kingdom (2010a), Chapter 15.
16 Finland (2009a).
17 Finland (2009b).
18 Netherlands (2010a).
19 Netherlands (2010b).
20 Article 12 Employment Equality Directive, Article 10 Racial Equality Directive.
21 European Commission (2009b).
22 European Commission (2008b).

5.1.3. Equality bodies

The Racial Equality Directive and Gender Equality Directives require Member States to establish or designate "a body or bodies" – referred to as 'equality bodies' – with a range of tasks to promote equality, including providing independent assistance to victims of discrimination. Equality bodies now exist in all EU Member States. Since the last FRA Annual Report in 2010, **Spain** has designated equality bodies and **Poland** has adopted a legislative framework for an equality body. Although equality bodies are not required by the Employment Equality Directive, several Member States have designated equality bodies to cover the grounds of religion or belief, sexual orientation, disability and age, in addition to sex and racial and ethnic origin.

This section provides an overview of the level of complaints or requests for assistance made to the respective equality bodies, showing trends in the number of cases, the main areas of discrimination reported and developments in their operation and work.

2010 saw some important developments. Firstly, 10 out of 24 Member States where data for 2010 was available experienced an increase in the number of complaints or requests to equality bodies for assistance. Secondly, institutional reform of existing mechanisms, including a widened mandate to include other grounds of discrimination, took place in **Denmark** and **France**. Thirdly, equality bodies have come under increasing scrutiny from United Nations (UN) Treaty Bodies, notably the Committee on the Elimination of Racial Discrimination (CERD), during the process of periodic review.

Two issues of concern[23] remain:

- the low number of cases brought before many equality bodies;
- the relatively poor quality of data being collected in some Member States, which lacks disaggregation by grounds of discrimination, such as sex and age, or by thematic area, such as employment or education.

The three directives – that is, the Racial Equality and Gender Equality Directives – requiring equality bodies to be established specify that their mandate must include the provision of "independent assistance to victims of discrimination in pursuing their complaints about discrimination."[24] This may, depending on the Member State, be an actual redress mechanism, allowing the equality body:

- to issue a decision on the complaint itself ('complaint'); or
- to provide assistance to victims of discrimination in other procedures, such as referring the complaint to a public prosecutor or mediator, taking the case to court; or
- to provide assistance assistance to the complainant in one of these processes ('reference').

Unless there is a specific need to distinguish between them, 'complaints' in the following section will be taken to include 'references'.

As noted in previous annual reports, the fact that a greater or lesser number of complaints are registered by comparison to previous years cannot in itself be taken as an indication of the trend in actual occurrences of discrimination. Numbers of registered complaints are likely to be dependent on levels of awareness of existing mechanisms, confidence that making a complaint will be useful, levels of possible compensation available, and the user-friendliness of mechanisms. In addition, the history of each Member State's approach to discrimination needs to be kept in mind to understand reporting and recording practices.

FRA ACTIVITY

The role of equality bodies in delivering access to justice

In late 2010, the FRA convened the inception meeting for its research project on access to justice through equality bodies. The project, running throughout 2011, will analyse how equality bodies contribute to facilitating access to justice, as experienced not only by representatives of these bodies, but also intermediaries – such as lawyers and victim support organisations – and complainants themselves. The research will look at the EU as a whole, while focusing on eight selected Member States.

For more information, see: http://fra.europa.eu/fraWebsite/research/projects/proj_accessingjustice_en.htm

FRA ACTIVITY

Promoting a stronger fundamental rights architecture

In May 2010, the Agency organised a symposium entitled 'Strengthening the fundamental rights architecture in the EU' and released four reports relating to issues that contribute to the overarching architecture of fundamental rights in the EU: equality bodies, data protection authorities, and national human rights institutions, as well as the views of social partners as important stakeholders in the sphere of discrimination in employment. The symposium addressed issues like independence, mandates and resources as themes relevant for the efficient protection and promotion of fundamental rights at the national level.

For more information, see http://fra.europa.eu/fraWebsite/media/mr-070510_en.htm

23 These issues are indeed also reflected in several reports published by the Council of Europe European Commission against Racism and Tolerance (ECRI) on EU Member States in 2010 on: Austria (2010a), p. 43; Estonia (2010b), pp. 21 and 45; France (2010d), p. 44; and Poland (2010e), p. 37.

24 Article 13 (2) Racial Equality Directive; Article 12 (2) (a) Gender Goods and Services Directive; Article 20 (2) (a) Gender Equality Directive (recast).

Table 5.1: Equality bodies established in 2010

New equality bodies	
Spain	Council for the Promotion of Equal Treatment and Non-discrimination on the Grounds of Racial or Ethnic origin 'Race and Ethnic Equality Council' (*Consejo para la promoción de la igualdad de trato y no discriminación de las personas por el origen racial o étnico*) The Council commenced operations in late 2009.[25]
Poland	Commissioner for Civil Rights Protection, 'Ombuds Office' (*Rzecznik Praw Obywatelskich*, RPO) supported by the Government Plenipotentiary for Equal Treatment (within the Prime Minister's Office). The Polish government adopted the Act on implementation of certain EU provisions concerning equal treatment in September 2010, which came into effect on 1 January 2011.

Nevertheless, statistics on numbers of complaints can be taken to provide an indication of how aware victims are of complaints mechanisms. Although a high number of registered complaints could suggest that an equality body may have a high impact in terms of changing discriminatory practices, a low number should not necessarily be correlated with a low impact. This is because a single case could have a high impact if it deals with important issues, sets a precedent, results in a change in law or practice and/or receives a high level of attention from the media and the public.

Table 5.2: Number of complaints or requests to equality bodies on all discrimination grounds and ethnic discrimination, by EU Member State, 2009 and 2010

	2009				2010								
	Discrimination on all grounds		Ethnic discrimination (including race)			Discrimination on all grounds				Ethnic discrimination (including race)			
	Number of complaints	Number of complaints per 1,000,000 inhabitants	Number of complaints	Number of complaints per 1,000,000 inhabitants	Number of months reported on	Number of complaints during reporting period	Number of complaints (Total reported/months reported on x 12) adapted to 12 months	Number of complaints per 1,000,000 inhabitants	Change in number of complaints 2009 to 2010	Number of complaints during reporting period	Number of complaints (Total reported/months reported on x 12) adapted to 12 months	Number of complaints per 1,000,000 inhabitants	Change in number of complaints 2009 to 2010	
Austria			482	57	7					347	595	71	+113	National: The three Ombuds for Equal Treatment combined
			257	31	8					165	248	29	-10	Regional: Seven regional discrimination offices
			739	88	8					512	768	91	+29	Total: National and regional above combined
Belgium	1,564	145	827	77	12	1,343	1,343	123	-221	627	627	58	-200	Centre for Equal Opportunities and Opposition to Racism (CEOOR). Note that gender discrimination is not included. Data relates to opened files (*dossiers compétents*) only, not to all received enquiries (*signalements*).
Bulgaria	1,039	137	20	3	9					10	13	2	-7	Commission for Protection against Discrimination (CPD). Data on ethnic discrimination related to decisions only, not all complaints.
Cyprus	168	210	116	145	9	145	193	242	+25					Anti-Discrimination Authority and Equality Authority combined

25 For more information, see: www.igualdadynodiscriminacion.org.

	2009				2010								
	Discrimination on all grounds		Ethnic discrimination (including race)			Discrimination on all grounds				Ethnic discrimination (including race)			
	Number of complaints	Number of complaints per 1,000,000 inhabitants	Number of complaints	Number of complaints per 1,000,000 inhabitants	Number of months reported on	Number of complaints during reporting period	Number of complaints adapted to 12 months (Total reported/months reported on x 12)	Number of complaints per 1,000,000 inhabitants	Change in number of complaints 2009 to 2010	Number of complaints during reporting period	Number of complaints adapted to 12 months (Total reported/months reported on x 12)	Number of complaints per 1,000,000 inhabitants	Change in number of complaints 2009 to 2010	
Czech Republic			3	0	9					24	32	3	+29	Public Defender of Rights. Broadened mandate in September 2009
Denmark			200	36	11	210	229	42						Board of Equal Treatment
Estonia	50	38	2	2	12	47	47	36	-3	2	2	2	0	Gender Equality and Equal Treatment Commissioner
Finland	411	78	318	60	12	364	364	69	-47					Ombudsman for Equality and Office of the Ombudsman for Minorities combined – note that the data for all grounds only covers gender discrimination; data include complaints as well as requests for advice; decrease could be partly due to new Q&A online
France	10,545	163	3,009	47	8	8,239	12,359	191	+1,814	2,269	3,404	53	+395	High Commission against Discrimination and for Equality (Halde)
Germany	10,777	132	639	8										Federal anti-discrimination agency. Data combined from August 2006 through July 2010. Data relate to contacts, not complaints or requests
Greece	54	5	14	1										The Greek Ombudsman
Hungary			60	5	9					112	149	15	+104	Equal Treatment Authority (ETA)
Ireland			79	18	9					29	39	9	-40	Irish Equality Authority. Data include race and Traveller grounds.
Italy			382	6	7					413	708	12	+326	National Office Against Racial Discrimination (UNAR)
Latvia	101	46	14	6	12	78	78	55	-23	9	9	4	-5	Ombudsman's Office
Lithuania			12	3	9					15	20	6	+11	The Office of the Equal Opportunities Ombudsperson (OEOO)
Luxem-bourg					12	90	90	180		12	12	24	+12	Centre for Equal Treatment. Data for August 2009 – August 2010.
Malta	35	88	5	13	12	17	17	43	-18	3	3	8	-2	Maltese National Commission for the Promotion of Equality
Nether-lands			66	4										Equal Treatment Commission
Poland			24	1	7					13	22	1	-2	Human Rights Defender
Portugal			77	7	11.5					73	76	7	-1	Commission for Equality and Against Racial Discrimination
Romania					18					58	39	2	+39	National Council for Combating Discrimination. Data for 18 months, 2009 and through June 2010. Data affected by de facto paralysis of activities during several months in 2009 and 2010.
Slovakia			0	0	8	12					18	3	+13	Slovak National Centre for Human Rights
Slovenia			10	5	10					3	4	2	-6	Advocate of the Principle of Equality

	2009				2010								
	Discrimination on all grounds		Ethnic discrimination (including race)			Discrimination on all grounds				Ethnic discrimination (including race)			
	Number of complaints	Number of complaints per 1,000,000 inhabitants	Number of complaints	Number of complaints per 1,000,000 inhabitants	Number of months reported on	Number of complaints during reporting period	Number of complaints adapted to 12 months (Total reported/months reported on x 12)	Number of complaints per 1,000,000 inhabitants	Change in number of complaints 2009 to 2010	Number of complaints during reporting period	Number of complaints adapted to 12 months (Total reported/months reported on x 12)	Number of complaints per 1,000,000 inhabitants	Change in number of complaints 2009 to 2010	
Spain										235	235	5		Council for the Promotion of Equal Treatment and Non-Discrimination on the Grounds of Racial or Ethnic Origin. Commenced activities in 2010.
Sweden	2,537	270	766	81	12	2,614	2,614	278	77	761	761	81	-5	Equality Ombudsman (DO). Commenced activities in 2009.
United Kingdom			23	0	8					14	21	0	-2	Equality and Human Rights Commission (Great Britain)
			4,983	83										Employment Tribunal. Data for 2008/09.

Source: FRA, FRALEX and RAXEN networks, 2010

It should be noted that data is not available for all EU Member States and complaints numbers are not always broken down by the grounds of discrimination. Disaggregated data were available mostly in respect of discrimination on the basis of racial and ethnic origin, and this has been presented where possible, in addition to aggregated numbers of complaints across all grounds. The disparate nature of the data used in Table 5.2 illustrates the difficulties of data comparability among Member States.

As Table 5.2 shows, 10 Member States recorded an increase in complaints of ethnic discrimination to the equality bodies. In **Austria**, **France** and **Italy**, the increase is very large. Most of the Member States reported no significant change, while six Member States – **Belgium**, **Bulgaria**, **Ireland**, **Latvia**, **Slovenia** and **Sweden** – have experienced reductions in complaints received by equality bodies.

The change in the number of complaints reported from the previous year may, as stated, indicate various changes in the operation or perception of an equality body. In some cases, the change may be related to reforms of the institutions in question regarding mandate or powers, as outlined in the section on institutional reforms and challenges below. The total number of complaints may reflect the extent to which an equality body has shifted emphasis towards receiving and acting on complaints as opposed to, for example, awareness raising or more general monitoring.

The French equality body, the Equal Opportunities and Anti-Discrimination Commission HALDE (*Haute Autorité de Lutte contre les Discriminations et pour l'Égalité*), is noteworthy as it continues to receive more than 10,000 complaints across all grounds of discrimination, as well as the greatest number of complaints related to ethnic discrimination. However, when viewing the numbers, it is important to recall that some systems allow for and indeed process complaints through other channels, such as the **United Kingdom** (UK), where employment tribunals register several thousand complaints relating to discrimination annually.

5.1.4. International monitoring

As equality bodies have come into operation, they have been increasingly subject to scrutiny by the monitoring bodies of the United Nations (UN) human rights treaties to which EU Member States are party.[26] Chapter 10 on international obligations provides an overview of human rights treaties to which EU Member States are party.

Since FRA's 2010 Annual Report, the UN Committee on the Elimination of Racial Discrimination (CERD) has reviewed several EU Member States under its periodic reporting

26 The institutional set-up and work of the equality authorities are also regularly discussed in ECRI's country-by-country reports; for more information see ECRI 2010 reports on: Austria (2010a), pp. 18-21; Estonia (2010b), pp. 20-21; France (2010d), pp. 12-14; Poland (2010e), pp. 16-17; and the United Kingdom (2010c), pp. 25-26.

procedure. The Committee is responsible for monitoring implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which was adopted in 1965. In **Denmark**'s case, the CERD noted that "the State party should strengthen the Board's complaint-lodging-procedure to enable complainants to provide oral testimony which will also assist the panel of the Board to assess and appreciate the demeanour of the parties to the complaint".[27] As regards **France**, the CERD called for better coordination between various mechanisms and – in light of proposals to merge the existing Equality Body with a new, larger structure – stressed the need to have a separate, independent institution dealing with discrimination.[28] In scrutinising **Slovenia**, the CERD did not specifically mention the equality body but called for efforts to raise awareness among the public of available remedies.[29]

"There is a clear need to adopt a more comprehensive approach to human rights at the national level, with efforts and resources focused on key institutions – such as a visible and effective overarching NHRI that can act as a hub to ensure that gaps are covered and that all human rights are given due attention."

FRA (2010), National Human Rights Institutions in the EU Member States, *p. 9*

Regarding **Greece**, the CERD noted that since "the Office of the Ombudsman is the only independent body, [... Greece should] consider giving it overall powers to receive complaints of racial discrimination, while cooperating with the other bodies (the Committee for Equal Treatment and the Labour Inspectorate) when examining them."[30] In relation to **Estonia**, the CERD pointed out that neither the Chancellor of Justice nor the Commissioner is fully compliant with the Paris Principles, which constitute accepted international standards for independent national monitoring bodies. For more information, see Chapter 8 on access to justice.[31] Similarly, for **Romania**, the CERD recommended that the National Council for Combating Discrimination (NCCD) be reformed in order to comply with the Paris Principles, as well as to ensure better cooperation between existing bodies with various mandates.[32] Also in relation to the situation in Romania, the CERD recommended ensuring that data collection would enable adequate and efficient public policies which respond to the needs of specific vulnerable groups.[33]

27 UN CERD (2010a), paragraph 18.
28 UN CERD (2010b), paragraph 19; see also France, National Assembly (2010a).
29 UN CERD (2010c), Concluding observations (Slovenia), CERD/C/SVN/CO/6-7, 20 September 2010, paragraph 14.
30 UN CERD (2010d), paragraph 18. See also ECRI's first interim follow-up recommendation, 2009 report on Greece, p. 51.
31 UN CERD (2010e), Concluding observations (Estonia), CERD/C/EST/CO/8-9, 27 August 2010, paragraph 10. See also ECRI's 2010 report (2010b), pp. 20-21.
32 UN CERD (2010f), Concluding observations (Romania), CERD/C/ROU/CO/16-19. paragraph 11.
33 UN CERD (2010f), paragraph 8.

5.1.5. Institutional reform and challenges

As discussed, while some equality bodies have only recently come into operation, some of those already in existence have been subject to reform. Some equality bodies are witnessing an expansion of their mandates while others are experiencing changes that risk undermining their effectiveness.

In the **Czech Republic**, as of December 2009 the jurisdiction and mandate of the equality body, Public Defender of Rights (*Veřejný ochránce práv*), beyond public administrative bodies to include private entities.[34] In late 2010, the Senate of **Romania** approved and transmitted a legislative proposal to amend Article 24 of Government Ordinance No. 137/2000 on preventing and sanctioning all forms of discrimination to parliament for further discussion. Changes discussed include the appointment process of the steering board as well as the mandate of the equality body.[35]

Promising practice

Complaints: how to improve data collection

In **Germany**, in late 2009 the Federal Anti-Discrimination Agency (*Antidiskriminierungsstelle des Bundes,* ADS) took measures to address the prevailing lack of equality data by commissioning a feasibility study on how to improve the quantitative equality data situation, especially in the area of complaints data. The study recommends the enhancement of specialised anti-discrimination support offices and the setting up of a nationwide network of organisations that support victims of discrimination and register discrimination complaints in a coherent and standardised way. In late September 2010, the ADS held an expert workshop with key actors in the field of anti-discrimination support work to jointly discuss a roadmap for establishing such a support and complaint data collection network.[36]

In its last Annual Report, the Human Rights Ombudsman in **Slovenia** (*Varuh človekovih pravic Republike Slovenije*) noted a lack of comprehensive institutional mechanisms for the prevention of and protection against discrimination. The report further highlighted that there was an obvious lack of relevant data on the situation of specific vulnerable groups, which could only be obtained through field research. According to the Ombudsman, they "have also been reminded of this by the international monitoring bodies in the fields of human rights protection and prevention of discrimination, and, in the recent period, by the FRA". The Ombudsman also noted the lack of independence of the equality body in performing tasks.[37] The Slovenian equality body, Advocate of the Principle of Equality (*Zagovornik načela enakosti*), is placed within the govern-

34 Czech Republic (2009).
35 Romania (2010).
36 Germany, ADS (2010).
37 Slovenia, Human Rights Ombudsman (2010), pp. 42-44.

mental Office for Equal Opportunities (*Urad Vlade Republike Slovenije za enake možnosti*). Following the Ombudsman's comments, the government established an ad hoc working group to look into the institutional status of the Advocate.[38]

In **Spain**, the equality body, the Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin (*Consejo para la promoción de la igualdad de trato y no discriminación de las personas por el origen racial o étnico*), became operational in late 2009. According to information on its website, a complaints mechanism has been introduced by drawing on the capacity of eight existing NGOs.[39] A network of centres to assist victims of discrimination was launched in June 2010 with more than a hundred offices across Spain.

Promising practice

A regional network for improving labour market access

Romania has established a regional network of advisory services on non-discrimination complementing the Romanian Equality Body, which has the aim of promoting the social inclusion of victims of discrimination. The project, carried out under the European Social Fund (ESF), is designed to promote equal access to the labour market for women and persons belonging to vulnerable groups by raising awareness of the principle of equal opportunities and its application to staff working in the local public administration, the social partners, non-governmental organisations (NGOs), experts and media representatives in selected parts of the country.

For more information, see: www.crj.ro/EN/Multi-regional-network-of-advisory-services-on-antidiscrimination-issues-aiming-the-social-inclusion-of-the-discriminated-persons-/.

5.2. Sex discrimination

Important developments in relation to equality between the sexes include the adoption of directives on parental leave and benefits, and the continued negotiation of a directive on pregnant workers.[40] Alongside the official opening of the European Institute for Gender Equality (EIGE), the European Commission also adopted a five-year strategy to promote equality. Case law from the CJEU and at the national level continues to provide clarification of legislative provisions, as well as illustrating the ongoing challenges faced in the context of employment and access to goods and services.

5.2.1. General developments

Important international organisations focusing on equality between men and women were established in 2010. Through its Resolution on system-wide coherence adopted on 21 July, the UN General Assembly created the UN Entity for Gender Equality and the Empowerment of Women, to be known as 'UN Women'. At the European level, June 2010 saw the official opening of EIGE. The role of EIGE is to support the EU and its Member States in their efforts to promote gender equality and fight sex discrimination. In November 2010 the EIGE and FRA concluded a cooperation agreement. Also at EU level, the European Commission adopted a five year S*trategy for equality between women and men 2010-2015* in September 2010.[41] The strategy is a work programme for the Commission and aims to improve gender equality within five priority areas:

- equal economic independence;
- equal pay for equal work and work of equal value;
- equality in decision-making;
- dignity, integrity and an end to gender-based violence;
- gender equality outside the Union.

Key actions include monitoring the correct implementation of EU equal treatment laws, with a particular focus on the Gender Goods and Services Directive and the Gender Equality Directive (recast), and on the extent to which gender has been taken into account in applying the non-discrimination directives.

5.2.2. Employment

The principal developments in the area of employment relate to increased protection of maternity and paternity rights as well as the rights of pregnant workers at both the EU and Member State level. Firstly, in 2010 the Council adopted the Parental Leave Directive[42] entitling male and female workers to at least four months of parental leave of which one month is not transferable between partners. The Parental Leave Directive implements the revised framework agreement on parental leave concluded by the EU-level social partners, namely BusinessEurope, the European Association of Craft, Small and Medium-sized Enterprises (UEAPME), the European Centre of Employers and Enterprises providing Public Services (CEEP) and the European Trade Union Confederation (ETUC). The gender pay gap gives an economic incentive for men, who tend to earn more than women, to take shorter leave or not to take any leave at all. The directive's restrictions on parental leave transferability seek to encourage more equality in the uptake of parental leave between men and women.

38 Information provided by the Advocate of the Principle of Equality.
39 For more information, see: www.igualdadynodiscriminacion.org
40 European Commission (2008a); see also Council Directive 92/85/EEC OJ 1992 L 348, p.1.
41 European Commission (2010a).
42 Council Directive 2010/18/EU, OJ 2010 L 68, p. 13.

FRA ACTIVITY

Stakeholder engagement for the first EU-wide survey on violence against women

The FRA started in 2010 to implement its violence against women survey stakeholder engagement strategy. The academic experts, representatives of civil society organisations, practitioners and governmental experts who attended the consultations discussed the issues the survey should cover and the ways the survey can have an impact on the development of policies at various levels. The results of the consultations shaped the development of a draft questionnaire, which will undergo pre-testing in six EU Member States during first half of 2011. The outcome of the consultations also influenced the aims and objectives of the full-scale survey to be conducted in the EU27 in 2011-2012.

For more information, see: http://fra.europa.eu/fraWebsite/research/projects/proj_eu_survey_vaw_en.htm

Secondly, the Council adopted the Gender Equality for Self-Employed Workers Directive,[43] which strengthens the application of the principle of equal treatment between men and women who want to establish or extend a self-employed activity, including the entitlement of self-employed women to maternity benefits of at least 14 weeks. In October 2010, in a legislative resolution the European Parliament proposed significant amendments to the Commission's proposal for the revised Pregnant Workers Directive.[44] Despite the Parliament's proposal of 20 weeks of continuous maternity leave on full pay, the Council of Ministers voted to take the European Commission's initial proposal of 18 weeks of maternity leave in principle on full pay, but as a minimum on sick pay, as the basis for negotiations.[45]

The issue of paternity leave was also addressed at national level. In **Latvia**, the Labour Law's definition of direct discrimination has been expanded to cover paternal leave. Under the amended Labour Law "less favourable treatment due to pregnancy or maternity leave, or failure to grant parental leave to a father shall be deemed direct discrimination on gender grounds".[46] In **Greece**, the Ombudsman took the initiative in two cases where fathers were refused parental leave. In its role as a mediator, it successfully intervened for the respect and extension of parental leave for male academics employed by universities[47] and in the Armed Forces.[48]

National reports reveal that pregnant women still face significant challenges in the workplace and after returning to work, in addition to other forms of discrimination. For example, a study by the **Belgian** Institute for the Equality of Women and Men (*Institut pour l'égalité des femmes et des hommes,* IEFH / *Instituut voor de Gelijkheid van Vrouwen en Mannen,* IGVM) revealed that up to about 20% of employees encounter at least one form of discrimination when they become pregnant. About 5% claimed to have been dismissed, or to have resigned because of the way they were treated during their pregnancy.[49]

Pregnancy features frequently in cases relating to sex discrimination. In **France**, the Appeal Court of Paris (*Court d'appel de Paris*) ordered the banking group BNP Paribas to pay more than EUR 350,000 in compensation to a former employee for discrimination based on sex, pregnancy and marital status. Returning from parental leave, the employee was neither assigned to her previous position nor to a job similar to the one held before the leave, and was also given lower pay. As a result, the employee appealed to the French equality body HALDE.[50]

In a **Swedish** case, when a woman working temporarily in a shop in Örebro told her employer that she was pregnant she was suspended from her employment. The Equality Ombudsman and the employer reached a settlement of SEK 105,000 (EUR 10,500) for the woman.[51] The Swedish Equality Ombudsman also took Sweden's National Social Insurance Agency (NSIA) to court because it denied sickness benefits to pregnant women. The NSIA argued that the complications experienced by the women concerned were normal consequences of pregnancy and thus did not constitute an illness. The Equality Ombudsman on the other hand emphasised the need to recognise the health issues of pregnant women and argued that the NSIA's approach enhanced discriminatory structures that specifically disadvantage women. The Stockholm District Court ruled in favour of the pregnant women and ordered the NSIA to pay SEK 50,000 (EUR 5,000) to each of the women involved.[52]

5.2.3. Access to goods and services

Developments can be noted in the case law of the Court of Justice of the European Union (CJEU) and national courts in this area. In *Association Belge des Consommateurs Test-Achats ASBL and Others* the Court was, for the first time, asked to interpret the Gender Goods and Services Directive in a context of sex discrimination in insurance premiums. Article 5(2) of the directive allows Member States to permit differences related to sex in respect of insurance premiums and benefits, if sex is a determining risk factor which can be substantiated by relevant and accurate actuarial and statistical data. The Belgian Constitutional Court asked the CJEU whether this provision of the directive is compatible with the prohibition of discrimination on grounds of sex. In her Opinion of 30 September 2010, Advocate General Kokott

43 Directive 2010/41/EU, OJ 2010 L 180, p. 1.
44 European Parliament (2010a).
45 Council of the European Union, EPSCO (2010b).
46 Latvia (2010b).
47 Greece, Ombudsman (2010a).
48 Greece, Ombudsman (2010a).
49 Belgium, IEFH/IGWM (2010).
50 France, HALDE (2009); France / Appeal Court of Paris (2010b).
51 Sweden, Swedish Equality Ombudsman (2010c).
52 Sweden, Swedish Equality Ombudsman (2009a).

urged the CJEU to rule that Article 5(2) of the directive is invalid, insofar as it permits sex discrimination contrary to the fundamental right to be free from sex discrimination. The CJEU handed down its judgment in March 2011.[53]

In **Ireland**, the Supreme Court ruled on whether restricting membership of clubs constituted discriminatory treatment against women. National legislation states that a club shall not be considered to be discriminating due to exclusionary membership rules "if its principal purpose is to cater only for the needs of" a particular group that is defined by a protected ground (such as religion, age or sex).[54] In 2004 the District Court, in proceedings brought by the Equality Authority, ruled that Portmarnock Golf Club was a 'discriminatory' club not exempt under the legislation because its principal purpose was the playing of golf rather than catering for the needs of male golfers. In 2005 the High Court reversed this judgment, finding that the club did in fact fall within the exemption provided by the legislation. This was upheld by the Supreme Court, by a majority of three to two, in November 2009.

5.3. Religion or belief

Principle developments in this area came mainly in the form of court decisions, although some developments in national legislation can be noted. Case law related largely to two aspects of religion or belief – the right to express one's beliefs, but also the right to choose not to do so.[55] Various cases concerning the wearing of the headscarf by Muslim women, which relate to the protected grounds of religion, ethnicity and sex, will be discussed later in this chapter in the section concerning multiple discrimination.

On a more general note, it should be highlighted that the protected ground of religion or belief has the potential to overlap with the protected ground of racial or ethnic origin considered in Chapter 6 on Racism and ethnic discrimination. In this sense, the European Court of Human Rights (ECtHR) stated, for instance in 2005, that "ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.[56] This approach has also been applied at national level. A case in which an individual of Sikh religion was refused entry into a public building because he would not remove his ceremonial sword, was dealt with as one of discrimination on the basis of ethnicity by the Austrian Equal Treatment Commision, Senate III (*Österreichische Gleichbehandlungskommission, Senat III*) in 2005.[57]

5.3.1. Employment, goods and services

Case law has continued to develop in the Member States, in particular around the issue of displaying religious and cultural symbols on clothing in the workplace. At first sight, the approach among the Member States on the issue of clothing may seem contradictory. However, it appears that national courts are more likely to accept restrictions as justified if it can be shown that they are applied as part of a company policy ensuring neutral uniforms.

In **Austria**, in connection with the case of a Muslim supermarket cashier faced with dismissal, the federal Ombud for Equal Treatment ruled that a ban on wearing headscarves was discriminatory.[58] In **Germany**, the labour court in Gießen (Hesse) ruled that the rejection of a job applicant, a 26-year old Muslim woman, on the grounds of wearing a headscarf constituted religious discrimination.[59] In the **Netherlands**, where a Muslim woman was not invited for a job interview because she wore a headscarf, the Equal Treatment Commission considered the relevant employment agency to have violated the law as it neglected to handle the woman's complaint conscientiously.[60]

In contrast, in **Belgium** a labour court in Antwerp judged that the discharge of a receptionist on grounds of wearing the headscarf did not amount to discrimination, since the requirement of the employer for staff to dress 'neutrally' was a legitimate one.[61] Similarly, in the **Netherlands**, in the case of a tram driver who had been suspended for refusing to wear his golden crucifix under his uniform, where it could not be seen, an appeal court ruled that the company clothing policy was legitimate, and that, unlike headscarves, which were part of the company uniform, the visible golden crucifix was considered to interfere with the uniform and professional appearance of employees.[62]

A difference in approach among Member States can be noted in two cases where an individual's religious beliefs reduced the range of employment opportunities they were willing to accept, and therefore resulted in their unemployment benefits being cut. The two cases concerned Muslim men who refused to shake hands with women and were thus unable to take jobs offered to them. In the **Netherlands**, the court ruled that the municipality's action in cutting the man's allowance was legitimate.[63] In **Sweden**,

53 CJEU, Case C-236/09, *Charles Basselier v. Conseil des ministres.*
54 Equal Status Act, Section 9. – (1) For the purposes of *section 8*, a club shall not be considered to be a discriminating club by reason only that – (*a*) if its principal purpose is to cater only for the needs of – (i) persons of a particular gender, marital status, family status, sexual orientation, religious belief, age, disability, nationality or ethnic or national origin,(ii) persons who are members of the Traveller community, or (iii) persons who have no religious belief.
55 For cases concerning places of worship, see ECRI's 2010 report on France (2010d), p. 30.
56 ECtHR, *Timishev v. Russia,* Nos. 55762/00 and 55974/00, 13 December 2005, paragraph 55.
57 Original language text and English summary available through the FRA InfoPortal, Case 5-1, at: http://infoportal.fra.europa.eu/InfoPortal/caselawFrontEndAccess.do?id=5.
58 Austria, Gleichbehandlungsanwaltschaft (2010a).
59 Germany, Labour Court Gießen (Arbeitsgericht Gießen), Az.5 Ca 226/09, 22 December 2009.
60 Netherlands, Equal Treatment Commission (2010).
61 Belgium, Labour Court Antwerp (*Tribunal du Travail d'Anvers*), R.G. 06/397639/A 27 April 2010; see also Belgium, Centre for Equal Opportunities and Opposition to Racism (CEEOR) (2010a).
62 Netherlands, Amsterdam Court (2009a) and (2010).
63 BK7175, Amsterdam Court , AWB 09/3208 WWB, 17 december 2009.

in a similar case, the court ruled that the man had suffered discrimination on grounds of religion.[64] In the latter case the Equality Ombudsman stated that "Sweden is a multicultural country and we must ensure that there are several different ways to show each other respect [other] than to shake hands".[65]

In the context of goods and services, some smaller developments could be observed. For instance, in the *Jakóbski* case in December 2010 the ECtHR held that prison authorities in Poland, by refusing to provide the applicant with a meat-free diet in accordance with his religious precepts, had infringed upon his right to show his religion through observance of the rules of the Buddhist religion, as protected by Article 9 of the European Convention on Human Rights (ECHR).[66] In **Romania** on 6 May 2010, the Parliament adopted legislation on discharge from hospitals or morgues of deceased Muslims, which accommodated Islamic religious rituals when handling the deceased and allowing burial in due time.[67]

5.4. Disability

In December 2010, the EU became party for the first time to a UN human rights treaty alongside its Member States: the UN Convention on the Rights of Persons with Disabilities (CRPD).[68] Insofar as it has competence, the EU has undertaken a range of obligations to guarantee the rights of persons with disabilities parallel to the Member States. In November 2010, the *European Commission launched its European Disability Strategy 2010-2020: A renewed commitment to a barrier-free Europe*,[69] which is embedded in the CRPD philosophy.

The overall objective of the strategy is to empower women and men with disabilities so that they can enjoy their full rights and benefit fully from their participation in society. Achieving this, and ensuring consistent and effective implementation of the UN Convention across the EU calls for a degree of consistency in action. The Strategy therefore identifies EU-level action to supplement that taken at national level. It also identifies the support to be provided in terms of funding, research, awareness-raising, statistics and data-collection. The new Strategy identifies eight priority areas for EU action: accessibility, participation, equality, employment, education and training, social protection, health and external action.

Against this background this section will consider developments beyond the sphere of employment and access to goods and services, and also cover developments on two other issues that are covered by the CRPD, namely independent living and inclusive education.

5.4.1. The EU and the CRPD

The CRPD is the first international human rights treaty which the EU was involved in negotiating and signing, alongside its Member States. It is the first such treaty to which the EU has become party, by signing it on 30 March 2007.[70] On 26 November 2009, the Council of the EU adopted a decision allowing the EU to ratify the CRPD, although with a reservation to exclude the employment of persons with disabilities within the armed forces, as permitted in Article 4 Paragraph 4 of the Employment Equality Directive.[71] Following the finalisation of a Code of Conduct setting out arrangements for the implementation by, and representation of, the EU in relation to the CRPD,[72] the EU formally deposited the instruments of ratification on 23 December 2010. The CRPD entered into force for the EU on 22 January 2011.

> *"I want to conclude the UN Convention under the Belgian presidency as quickly as possible. If it is concluded without waiting for all the Member States [to ratify], then the EU will send a strong signal."*
>
> *Jean-Marc Delizée, Belgian Secretary of State for Social Affairs, at the European Day of People with Disabilities on December 3 2010*

In 2010, a further four Member States ratified the Convention, namely **France**, **Latvia**, **Lithuania** and **Slovakia**, bringing the number of ratifications to 16 out of 27 Member States. When ratifying, several Member States have entered reservations and interpretive declarations.[73]

In addition to the CRPD, there is also an Optional Protocol, which establishes a system of individual complaints, allowing individuals alleging violations by States Parties to this instrument to make a claim to the Committee on the Rights of Persons with Disabilities. All four Member States that ratified the Convention in 2010 also ratified the Optional Protocol. At the end of 2010, 14 Member States had become party to the Protocol. For more on the status of ratifications, see Chapter 10 on international obligations.

5.4.2. Employment

Activities to promote the employment of persons with disabilities can be noted in several Member States. These include quota systems, which can be an effective tool to facilitate access of persons with disabilities to the labour market. In **Cyprus**, a new law came into force towards the end of 2009 introducing quotas for the employment of

64 Sweden, Swedish Equality Ombudsman (2010b).
65 *Ibid.*
66 ECtHR, *Jakóbski v. Poland*, No. 18429/06, 7 December 2010.
67 Romania, Law No. 75/2010.
68 The CRPD was adopted by UN General Assembly resolution 61/106 of 13 December 2006, and it came into force on 3 May 2008.
69 European Commission (2010a).
70 Butler, I. and De Schutter, O. (2008), pp. 277-320. On 29 August 2008, the European Commission adopted and transmitted to the European Parliament and the Council two proposals concerning the conclusion, by the European Community, of the Optional protocol of the CRPD (European Commission (2008c)).
71 Council of the European Union (2010c), p. 55.
72 Council (2010).
73 For more information, see: http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en.

persons with disabilities in the public sector of 10% of the number of the vacancies to be filled at any given time, provided that this does not exceed 7% of the aggregate of employees per department.

In the **UK**, the Department of Work and Pensions published the findings of a study[74] exploring how employers are responding to the provisions of the Disability Discrimination Act (DDA) 1995[75] and 2005.[76] Among other things, the findings include: 30% of surveyed employers were currently employing a disabled person, and 42% had employed a disabled person in the preceding 10 years; 61% of employers surveyed had made an employment-related adjustment for a disabled employee in the past, or planned to do so. This marked a statistically significant fall since the last survey in 2006, where the figure was 70%. Flexible working times or working arrangements were the most commonly reported employment-related adjustments (53% and 50% of respondents, respectively). Almost half of respondents had adapted the working environment, or had provided accessible parking. Reasons cited by employers for making employment-related adjustments were that it was the 'right thing to do' and that adjustments enabled them to retain valued existing employees. The proportion of employers making these sorts of adjustments in response to a request from an employee has increased over time: in 2009 30% of employers making employment-related adjustments had done so following such a request, compared to 22% in 2006.

Promising practice

A Global Employment Strategy for Persons with Disabilities

The **Spanish** State Observatory on Disability (*Observatorio Estatal de la Discapacidad*) reported that between 1 January and 1 June 2010, employment among the disabled rose by 18.37%. In total 23,876 persons with disabilities found work, 3,706 more than in the same period of the previous year. The rise in employment numbers is largely attributed to the 2009-2010 Global Employment Strategy for the Disabled (*Estrategia Global de Empleo para Personas con Discapacidad 2009-2010*), which was implemented in March 2009 with funding of EUR 3.7 billion. This strategy, which is the result of collaboration between the government and business leaders, trade unions, third sector entities and organisations of people with disabilities, aims to raise activity and employment indices among persons with disabilities and improve their working conditions.

Ministry of Health and Social Policy, Media Release, available at: www.msps.es/gabinetePrensa/notaPrensa/desarrolloNotaPrensa.jsp?id=1844

74 UK, Department of Work and Pensions (2009).
75 UK, Disability Discrimination Act (DDA) 1995–1995, Chapter 50.
76 *Ibid.*, Chapter 13.

At the same time, obstacles to the participation of persons with disabilities in the labour market can be observed, as evidenced by several courts. In **Cyprus** in December 2007, a former public hospital employee with a speech impairment lodged a complaint with the equality body against her employer. She had been dismissed from the position of assistant clerk. The Cypriot Ombudsman found[77] that the complainant's speech impairment was considered a disability according to national legislation and in line with the CJEU ruling in the case of *Chacón Navas*.[78] Therefore the complainant was wrongfully dismissed based on her disability, particularly as the duty to provide reasonable accommodation was not met.

In **Belgium**, a man with a physical impairment was refused a job due to his disability. As a result of mediation by the Centre for Equal Opportunities and Opposition to Racism (CEOOR), the parties reconciled and the firm agreed to pay financial compensation to the victim. The compensation will be used to fund a new organisation in support of persons with disabilities, led by the victim.[79]

5.4.3. Access to goods and services

Developments in legislation and policy initiatives promoting access to goods and services, and accessibility for and participation by persons with disabilities can be noted in a number of Member States. A new Law of the Autonomous Community of Navarra, **Spain**, on universal accessibility and universal design for all persons aims to guarantee equal opportunities for persons with disabilities. The law seeks to ensure universal accessibility and universal design of products, environments, programmes and services to be usable by all people in line with the accessibility principles outlined by the CRPD.[80]

In Northern Ireland the Disability Discrimination (Transport Vehicles) Regulations came into force on 25 January 2010 covering trains, buses, coaches, taxis, vehicle rental and breakdown services. The Regulations make it unlawful to treat a person with disabilities less favourably than someone without a disability, for example by offering them a lower standard of service. Transport providers will be under a legal duty to make alterations to their existing practices to ensure that their services are accessible to disabled people.[81]

Many of the discrimination cases reported in 2010 across Member States concern general accessibility of goods and services. Accessibility is one of the overarching principles guiding the CRPD. In **Austria**, a first instance court found the lack of subtitles on DVDs to be illegal, although the

77 Cyprus, Ombudsman (2010) File Numbers A/℗ 2898/2007, A.K.I. 10/2010, dated 23.02.2010
78 CJEU, Case C-13/05, *Chacón Navas*, 11 July 2006, ECR 2006 p. I-6467.
79 Belgium, Centre for Equal Opportunities and Opposition to Racism (2010b).
80 Spain, Navarra, Ley 5/2010 of 6 April.
81 United Kingdom, The Disability Discrimination (Transport Vehicles) Regulations (Northern Ireland) 2009 – 2009 No. 428; see also Northern Ireland, Equality Commission (2010).

judgment is not final. A deaf customer bought DVDs produced by the Austrian Broadcasting Agency (*Österreichische Rundfunk*) which he could not follow because of the lack of subtitles. The competent commercial court stated that the absence of subtitles constituted discrimination on grounds of disability, referring to the Disability Equality Act, as well as to the fact that subtitling would have been affordable and therefore would not have imposed an unreasonable burden on the ABA.[82]

In **Belgium**, a travel agency in Ghent refused to allow a man with a hearing impairment to register for a group trip, claiming that it would not be able to guarantee the man's safety when he would have to communicate with the local population. The only way the man could join, the travel agency argued, was if he brought someone to accompany him, at his own expense. After failed mediation attempts, the CEOOR took the case to the courts. The CEOOR claimed that simple adjustments, like the use of paper and text messaging to convey messages, could be sufficient to let the man participate in the group trip. It argued that the insistence of the travel agency that the man had to arrange for someone to accompany him was not justifiable. The court followed the CEOOR's reasoning. On the basis of the General Anti-Discrimination Act, the travel agency was ordered to pay fixed damages of EUR 650, and a coercive fine of EUR 1,000 per new violation or per day that the violation at hand continued. The travel agency also had to advertise the judgment in their office in Ghent, and have it published at its own expense in various media, in its newsletter and on its website.[83]

5.4.4. Independent living and de-institutionalisation

Article 19 of the CRPD guarantees the right to independent living, recognising that persons with disabilities should have the right to choose their living arrangements. Independent living is also part of the Council of Europe Disability Action Plan 2006-2015, aimed at promoting the rights and full participation of people with disabilities in society. In December 2009, to mark the European Days of Persons with Disabilities, the European Commission organised discussions on the subject of creating conditions for independent living. A policy paper on *Transition from institutional to community-based care*,[84] prepared in 2009 with the support of European Commissioner for Employment, Social Affairs and Inclusion, Vladimír Špidla, was endorsed by his successor László Andor in May 2010. The paper was prepared jointly by representatives of various disabled persons organisations, in collaboration with organisations representing the interests of children and the elderly, who also often reside in group homes.

NGOs also pointed out that using European Structural Funds to fund large-scale infrastructure projects – such as the building or renovation of institutional care homes – results in exclusion, rather than the promotion of social inclusion intended.[85] Some say this is a missed opportunity, as the money could be diverted to fund infrastructure needed for independent living, instead of promoting institutionalisation.[86] The obligation to prevent discrimination on the grounds of disability is included in Article 16 of the Structural Funds regulation.

In his Human Rights Comment of October 2010,[87] the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, condemned the inhuman treatment of persons in institutions and called for de-institutionalisation and the implementation of the right to independent living. This reflects the position adopted in February 2010 in the Recommendation of the Committee of Ministers of the Council of Europe on de-institutionalisation and community living of children with disabilities.[88] A report on the situation of independent living of persons with disabilities in Europe was published by the Academic Network of European Disability experts.[89] This issue is discussed in more detail in Chapter 4 on the Rights of the child and protection of children.

FRA ACTIVITY

Research on persons with disabilities or mental health problems

Independent living is one of the four areas covered by the FRA social study on the fundamental rights of persons with intellectual disabilities and persons with mental health problems launched in 2010. Other areas of focus include legal capacity, fundamental rights in institutions and access to justice. The study collects evidence of the lived experience of persons with disabilities. It is conducted in an emancipatory way in close collaboration with persons with a lived experience of mental health treatment (i.e. user/survivor researchers), persons with intellectual disabilities speaking out for themselves (i.e. self-advocates) and disabled persons' organisations.

For more information, see: http://fra.europa.eu/fraWebsite/attachments/Factsheet-disability-nov2010.pdf

5.4.5. Inclusive education

The right to inclusive education, as guaranteed by Article 24 of the CRPD, is a necessary precondition for creating employment opportunities for persons with disabilities and making the right to work for persons with disabilities, as guaranteed by Article 27 of the CRPD, a reality. The Parliamentary Assembly of the Council of Europe adopted a Recommenda-

82 Austria, Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern (2010b).
83 CEOOR (2010c).
84 European Commission (2009c).
85 European Coalition for Community Living (2010).
86 *Ibid.*
87 Council of Europe (2010).
88 Council of Europe Committee of Ministers (2010a).
89 R. Townsley *et al* (2010).

tion and a Resolution on guaranteeing the right to education for children with illnesses or disabilities.[90] Developments in this regard can be noted in three Member States.

The equality body of **Bulgaria** (PADC) issued a recommendation to the Ministry of Education requesting that children with disabilities be given a choice of educational opportunities on an equal footing with other children.[91] The guiding principles ought to be those of adequacy, accessibility and availability of schooling. This issue was also taken up by the Institute for Human Rights in **Germany**, which published a statement calling on the federal states (*Länder*) to comply with their obligation under the CRPD to provide inclusive education for pupils with disabilities. The statement criticises a decision of the Higher Administrative Court of Hessen (*Hessischer Verwaltungsgerichtshof*) which held that the CRPD does not establish rights for individuals and that the German federal states (*Länder*) are not bound by the treaty.[92]

A 2010 report on discrimination at schools in **France** found that in almost 10 years the number of children with disabilities entering the mainstream education system had doubled, rising from 90,000 to 175,000 children. However, a 'fear' among non-disabled students of 'different' pupils was still found to exist.[93] Although it is not possible to say with certainty whether this increase in numbers is due to students with disabilities passing from a 'special' system of education into the mainstream system – it may be that other factors, such as a decrease in home schooling, are at play. This increase could be interpreted to suggest a more inclusive education system.

5.5. Sexual orientation and gender identity

Several important developments in relation to discrimination on the grounds of sexual orientation can be noted both at the level of the Council of Europe and among the Member States in terms of legislation, policy and case law. In particular, these relate to the position of same-sex partners, legal recognition of gender reassignment and Pride events.

2010 saw the adoption of a Recommendation of the Committee of Ministers of the Council of Europe on measures to combat discrimination on grounds of sexual orientation or gender identity, which provides the most far-reaching political commitment at the intergovernmental level for the protection of LGBT rights.[94] In turn, some police initiatives to counter abuse and violence can be noted at national level.

> *"Discrimination on the basis of gender and sexual orientation has ceased to constitute a political cleavage, and is enshrined in the EU's founding act and statement of values. It is something that distinguishes Europe from many other parts of the world. We are inspired by the sense for human dignity and the uniqueness of each person. Everyone deserves equal chances in life."*
>
> *Statement by Herman Van Rompuy, President of the European Council, on the International Day Against Homophobia, 17 May 2010*

In 2010, the FRA published a comparative legal analysis identifying six developments across the EU Member States:

- a large number of developments in the field of equal treatment in free movement and family reunification law. The definition of 'family member' in legislation transposing EU law on free movement or on family reunification has been or is expected to be expanded in seven EU Member States – **Austria**, **France**, **Hungary**, **Ireland**, **Luxembourg**, **Portugal**, and **Spain**. However, a trend in the opposite direction has emerged in three EU Member States – **Bulgaria**, **Estonia** and **Romania** – where same-sex marriages and partnerships contracted abroad are considered invalid, which makes it more difficult for same-sex spouses and partners to reunite;
- a substantial number of initiatives in asylum law: with the addition of six EU Member States – **Finland**, **Latvia**, **Malta**, **Poland**, **Portugal** and **Spain** – the total number of EU Member States that explicitly afford protection to LGB victims of persecution amounts to 23 countries;
- a mixture of developments in the area of freedom of assembly. While progress has been noted in **Bulgaria**, **Poland** and **Romania**, the right to organise pride events continues to be challenged in **Latvia** and **Lithuania**;
- moderate expansion of legal protection against sexual orientation and gender identity discrimination. There has been an extension of non-discrimination legislation covering sexual orientation beyond employment in the **Czech Republic** and the **UK**. In relation to the recognition of gender identity as autonomous ground or as 'sex' discrimination, changes have been observed in the **Czech Republic**, **Sweden** and the **UK**. The equality body in **Denmark** has extended its mandate to cover sexual orientation discrimination;
- minimal increase in protection against abuse and violence, including hate speech and hate crime. Positive initiatives have emerged in **Greece**, **Lithuania**, **Slovenia** and the **UK**;

90 Council of Europe (2010a) and (2010b).
91 On 13 May 2010, the PADC decision was upheld by the Supreme Administrative Court.
92 Germany, Deutsches Institut für Menschenrechte (2010); the statement includes a comment on the verdict in the Hessen litigation process (7 B 2763/09) of 12 November 2009.
93 Anne Rebeyrol (ed.) (2010).
94 Council of Europe, Committee of Ministers (2010b). The Parliamentary Assembly also adopted a Recommendation (see Council of Europe (2010c)) and a Resolution (see Council of Europe (2010d)).

- setbacks with respect to freedom of expression: **Lithuania** appears isolated in its prohibition of dissemination of material that could be seen as 'promoting' homosexuality.

FRA ACTIVITY

Updated report identifies uneven progress on LGBT rights

In November 2010, the Agency published an update of its comparative legal report on discrimination on the basis of sexual orientation and gender identity of 2008. The report identified discriminatory practices that attracted considerable media interest, in particular legislation in Lithuania which bans the 'promotion' of homosexuality and same-sex relations to minors or in public, and the use of 'phallometric testing' in the Czech Republic as a practice to assess applications by gay asylum seekers.

FRA (2010), Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity, 2010 update: Comparative legal analysis

5.5.1. International and national developments on 'family life'

With respect to case law in the field of discrimination on grounds of sexual orientation, the ECtHR examined three applications referring, albeit in different terms, to the situation of same-sex couples. In the case *Kozak v. Poland*, the ECtHR emphasised that there is a need to strike a balance between the protection of the traditional family and the Convention rights of sexual minorities. At the same time it underlined that "a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy cannot be accepted by the Court as necessary for the protection of the family viewed in its traditional sense".[95] Such an exclusion is in breach of Article 14 ECHR, taken in conjunction with Article 8 ECHR on the right to respect for private and family life.

> *States should 'necessarily take into account developments in society and changes in the perception of social, civil status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life'.*
>
> *ECtHR,* Kozak v. Poland*, paragraph 98*

Subsequently, in *P.B. & J.S. v. Austria*, the ECtHR applied the same principle to a case concerning the extension of a worker's health and accident insurance to his same-sex partner. The ECtHR reiterated that a cohabiting same-sex couple living in a stable de facto partnership falls within the notion of 'family life', and confirmed that the burden falls on the State to prove that there was a 'necessity' to exclude certain categories of people from the scope of application of the law in question.[96] The ECtHR concluded that a difference in treatment between same-sex and different-sex partners was not justified.

The scope of the Member States' obligation to establish a legal scheme equivalent to marriage, or to open up marriage to same-sex couples, was considered in the case of *Schalk and Kopf v. Austria*. The ECtHR concluded that there was no violation of the right to marry as enshrined in Article 12 ECHR because "the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State".[97] With respect to the claim that the lack of an alternative to marriage would violate Articles 8 and 14 ECHR, the ECtHR noted the "rapid evolution of social attitudes towards same-sex couples". The ECtHR concluded, however, that there was no violation of Articles 8 and 14 because "there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes".[98]

At national level, notable decisions in this area were delivered by courts in two Member States, in **Germany** in the context of inheritance and donations[99] and **Estonia** related to financial support to same-sex families with children.[100]

> *"[T]he relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would [...]. Same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship".*
>
> *ECtHR,* Schalk and Kopf v. Austria*, paragraphs 94 and 99*

5.5.2. Transgender rights

Some movement occurred in some Member States towards recognising that issues of gender identity involve a strong element of self-determination, and away from its association with psychiatric disorder. Throughout the EU, however, the conditions that an individual must satisfy in order to obtain gender reassignment treatment and to ensure legal recognition of gender reassignment are often vague and not set out in legislation. The procedure in most Member States foresees lengthy processes of psychological, psychi-

95 ECtHR, *Kozak v. Poland*, No. 13102/02, 2 March 2010, paragraph 99.

96 ECtHR, *P.B. & J.S. v. Austria*, No. 18984/02, 22 July 2010, paragraphs 30 and 42.

97 ECtHR, *Schalk and Kopf v. Austria*, No. 30141/04, 24 June 2010, paragraph 61.

98 *Ibid.*, paragraph 105.

99 Germany, Bundesverfassungsgericht, BVerfG, 1 BvR 611/07; 1 BvR 2464/07.

100 Estonia, Tallinn Ringkonnakohus/3-09-1489.

atric and physical tests[101] and can include disproportionate medical requirements, such as the diagnosis of a mental disorder or compulsory sterilisation. This situation impacts the ability to travel with valid documents or to participate in education and employment, where personal identification documents or certificates must be presented. The *Strategy for equality between women and men 2010-2015*, already mentioned in section 5.2.1, foresees studying the specific issues pertaining to gender identity in the context of sex discrimination.

The scope for improving access to treatment as well as legal recognition of the preferred gender remains generally limited. However, legislative and policy developments can be noted among several Member States. In **France**,[102] transsexuality has been removed from the list of 'long term psychiatric conditions'. Nevertheless, the process of gender reassignment remains attached to the assumption of transsexuality as a severe pathology; gender identity issues are now placed in the category of 'long term afflictions', relating to 'severe' or 'invalidating pathologies' (code ALD 31), as proposed by the French National Authority for Health (*Haute Autorité de santé,* HAS). In November 2010, a new law was adopted in **Portugal** on legal recognition of gender reassignment. Under the new rules, the recognition of the preferred gender can be obtained through a simple administrative procedure and within eight days. As a precondition for legal recognition, the application of the interested person must be accompanied by a certificate from a multi-disciplinary medical team. After the Portuguese President's veto, the law was readopted on 15 March 2011 and entered into force on 20 March 2011.[103]

> *"Neither cultural, traditional nor religious values, nor the rules of a 'dominant culture' can be invoked to justify hate speech or any other form of discrimination, including on grounds of sexual orientation or gender identity."*
>
> *Recommendation CM/Rec(2010) 5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (Adopted by the Committee of Ministers on 31 March 2010)*

In **Latvia**, the establishment of a specialised medical institution for approving applications for gender reassignment is pending.[104] Latvian legislation also explicitly permits a change of name following gender reassignment. **Ireland** is expected to put legislation in place allowing for legal recognition of gender reassignment, following the withdrawal of its appeal to the Supreme Court in the case of a transgender woman who was claiming her right to legal recognition of gender reassignment.[105] In **Germany**, following a judgment by the Constitutional Court, the requirement to divorce as a precondition to alteration of the recorded sex on official documents was abolished.[106] In January 2011, the Constitutional Court ruled that transgender people wishing to enter into a registered partnership no longer need to undergo gender reassignment operations nor do they need to be permanently infertile. In the **Netherlands**, there are proposals to abolish the requirement of compulsory sterilisation for changing the recorded sex on the birth certificate.[107]

Two court decisions at Member State level can also be noted. In **Austria**, the courts have found that surgery cannot be imposed as a precondition for alteration of an individual's name and sex in the relevant documents.[108] In **Malta**, a judgment of the Constitutional Court delivered in November 2010 found that the impossibility for a transgender woman to marry her male partner violated Article 12 of the ECHR on the right to marry.[109]

In December 2010, the federal equality body in **Germany** published a study on Discrimination against Trans people in Germany, especially in the job market.[110] Beyond the area of gender reassignment, **Spain** modified its legislation to provide better protection in the area of criminal law from abuse and violence motivated by transphobia. In June 2010, among other grounds, discrimination on the grounds of 'sexual identity' was added to the aggravating circumstances laid down in Article 22 (4) of the criminal code. The article now considers as aggravating circumstances 'committing an offence out of racist, anti-semitic or other kinds of discriminatory motives related to the victim's [...] gender, sexual orientation or identity [...]'. In Scotland, the June 2009 Offences (Aggravation by Prejudice) (Scotland) Act entered into force on 24 March 2010, also indicating a (homo- and) transphobic motive as an aggravating circumstance.[111]

FRA ACTIVITY

Upcoming large-scale survey on discrimination and victimisation of LGBT people

In 2010, the Agency held consultation meetings with experts and stakeholders in the LGBT field in preparation for a survey on the experiences of discrimination and victimisation of LGBT people. The survey will be carried out in 2011 and 2012 across the EU. The data collected will provide policymakers with the evidence needed to elaborate future measures, especially in light of the Council of Europe Recommendation of 31 March 2010 to promote equality and combat discrimination and hate crime.

101 Hammarberg, T. (2009), p. 16.
102 France, Government order No. 2010-215.
103 Portugal (2011) Lei n.º 7/2011 de 15 de Março Cria o procedimento de mudança de sexo e de nome próprio no registo civil e procede à décima sétima alteração ao Código do Registo Civil, 15 March 2011.
104 Latvia (2009), Section 28 paragraph 1. At the end of 2010 the law has not yet been approved by the cabinet of Ministers.
105 Ireland, High Court/2007/IEHC 470 (19 October 2007).
106 Germany, BGBl I, Nr. 43, p. 1978 (22 July 2009), Article 5.
107 Netherlands, Parliamentary Documents Lower House (2008-2009) 27017, nr. 53 (1 October 2009).
108 Austria, Verfassungsgerichtshof/B1973/08; Austria, Verwaltungsgerichtshof/2008/17/0054; /2008/06/0032; /2009/17/0263.
109 Malta Today (2010).
110 Germany, Antidiskriminierungsstelle des Bundes (2010).
111 Spain, Ley Orgánica 5/2010, de 22 de junio, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal; Spain, State Official Journal of 23/06/2010.

Promising practice

Homophobic crimes: major emphasis on swift reaction

In **Spain**, the National Police Corps in the central district of Madrid has reached an agreement with the Madrid LGBT association (COGAM) to guarantee that an 'immediate response' will be given to homophobic aggressions. At the level of the autonomous communities, it is worth mentioning that in Catalonia a 'Protocol for police action against homophobia' was adopted, which enables the Catalan police to report immediately to the prosecution office any offences that appear motivated by the victims' sexual orientation, in order to record statistical information on this issue. The Public Prosecutor's Office in the province of Barcelona has created a Special Service on Hate and Discrimination Offences. This example of good practice has been followed by the creation of a similar service in Madrid.

5.6. Age

General initiatives relating to age discrimination which promote the participation of both older and younger people can be observed at the EU level. Better legislative protection has been introduced in some Member States extending protection against age discrimination to areas beyond the sphere of employment. Specific developments in relation to employment and retirement are considered separately.

In 2010, the European Commission proposed to designate 2012 as the European Year for Active Ageing. In reaction to the process of significant population ageing in the EU, the initiative aims to help create better employment opportunities and working conditions for older people, and to promote their active social participation and good health.[112]

The European Commission's 2020 Strategy also addresses age-related concerns and calls on Member States to reform age-related public expenditure and raise "effective retirement ages, in order to ensure the financial viability, accessibility and social adequacy of age-related public expenditure".[113]

The EU 2020 Strategy also includes measures for young people. One of the seven flagship initiatives is 'Youth on the move', which aims to enhance the performance of education systems and facilitate entry into the labour market for young people. This will serve to sustain the progress achieved with the adoption in April 2009 of the 'EU Strategy for Youth' for the period 2010-2018.[114]

Increased awareness of age as grounds for discrimination, as discussed in relation to rights awareness in section 5.1.2, is reflected in legislative developments among the Member States that extend protection against discrimination beyond the sphere of employment. In **Sweden**, the government proposed extending the prohibition of discrimination on the basis of age, going beyond employment and education, to new areas such as access to goods and services, housing, public events, health and medical care, social services, social insurance and unemployment insurance.[115] In **Austria**, where protection against age discrimination is still limited to the labour market, amendments to the equal treatment legislation entered into force in March 2011, introducing a provision prohibiting discrimination against the relatives of aged persons.[116]

Principal developments in this area relate to decisions handed down by the CJEU and national courts. In the *Petersen* case[117] a German court requested the CJEU to examine **German** legislation which provides that authorisation to practice as a dentist under the 'panel' system – where dentists providing care under insurance agreements are registered – will expire when the dentist reaches 68 years of age. In January 2010, the CJEU found that this age limit could not be justified by the need to protect public health since dentists are allowed to treat patients beyond the age of 68 outside the 'panel' system. However, the CJEU did accept that the measure could be justified as a means of opening access to employment for younger dentists. The CJEU concluded that Article 6 (1) of the Employment Equality Directive does not preclude a measure aimed at "shar[ing] out employment opportunities among the generations in the profession of panel dentist, if, taking into account the situation in the labour market concerned, the measure is appropriate and necessary for achieving that aim".

In the case of *Kücükdeveci* [118] a German court requested clarification of whether national legislation, under which periods of employment completed by the employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal, constituted age discrimination. The CJEU noted that such a rule could disadvantage younger workers compared to older workers, since younger workers with greater experience or seniority could be treated less favourably than older workers who had worked for a shorter period. The CJEU concluded that the exclusion of experience accrued under the age of 25 for calculating the period for dismissal amounted to age discrimination.

In two Member States national bodies found legislation to be incompatible with the Employment Equality Directive. Firstly, in **Cyprus**, the equality body found that the Employ-

112 European Commission (2010c).
113 European Commission (2010d).
114 European Commission (2009d). For further information on the Rights of the child see chapter 4.

115 Sweden (2010).
116 Austria, Gleichbehandlungsgesetz, Section 19 para 4, Section 21 para 4, Section 44 para 4, Section 47 para 4.
117 CJEU Case C-341/08. *Dr Domnica Petersen v. Berufungsausschuss für Zahnärtze für den Bezirk Westfalen-Lippe* 12 January 2010.
118 CJEU, Case C-555/07 *Seda Kücükdeveci v. Swedex GmbH & Co. KG*, 19 January 2010, not yet reported.

ment Law[119] entitling employers to dismiss employees over 65 years of age without compensation amounted to age discrimination. The law, which is still in force, was thereby found in violation of the Equal Treatment in Employment and Occupation Law N.58(I)/2004, transposing the directive.[120]

Since 2008 the maximum age for compulsory retirement in **France** is 70 years, but several special systems still exist providing compulsory retirement at an earlier age for specific employment sectors, such as civil aviation.[121] However, on 9 November 2010 a new retirement law came into force. This law prescribes that by 2018 the retirement age will start at 62 and not 60 as was previously the case. In two rulings delivered in 2010,[122] the Court of Cassation (*Cour de Cassation*) decided that differing treatment with regard to retirement age is not justified and that exemptions must correspond to a predetermined professional requirement, pursue a legitimate objective and be proportionate to achieving this objective.[123]

Other cases can be noted in the area of access to goods and services. In **Belgium**, the Belgian branch of ING bank announced that it would limit the amount of funds that people above 60 years of age could withdraw at cash machines to protect them against fraud or theft. Following accusations of discrimination based on age, the bank quickly abandoned the idea and entered into dialogue with the CEOOR.[124] The Belgian railway company NMBS/SNCB's practice of imposing additional charges on international rail tickets that are not purchased online raised similar concerns. The CEOOR found that this practice was discriminatory since those unable to take advantage of this reduced price would mainly be people with limited access to the Internet, which would disproportionately include older people.[125] Another question arose in **Cyprus** where the equality body received complaints arguing that age limits on government subsidies for artificial insemination might constitute discrimination.[126]

5.7. Multiple discrimination

The following section covers developments in relation to 'multiple discrimination'. In order to gain a comprehensive overview it should be read in conjunction with Chapter 6 on Racism and ethnic discrimination. The term 'multiple discrimination' refers to discrimination on more than one grounds.[127] The concept recognises the fact that an individual can be discriminated against on more than one grounds in any given situation or time. For instance, an individual may often possess characteristics relevant to more than one protected grounds, such as disability and age, or sex and ethnic origin, that might either increase their chances of being subject to discrimination, or converge to place them in a particular situation that makes him/her vulnerable to discrimination.

In this sense, multiple discrimination may be characterised as 'additive', where an individual may be subject to discrimination on more than one grounds and the role of the different grounds can still be distinguished. For instance, an older person with a disability may experience discrimination on the basis of his/her age in one situation and because of her disability in another. Multiple discrimination may also be characterised as 'intersectional' where two or more protected grounds converge to create a situation where that individual suffers discrimination on several grounds that cannot be separated.[128] For instance, a Muslim woman may experience discrimination in a particular situation that would not affect a non-Muslim woman or a Muslim man.[129] Such a situation might arise where a Muslim woman requires a medical examination but cultural or religious considerations require this to be performed by a female doctor.

Two difficulties may arise where multiple discrimination is not taken into account in legislation, or the practice of courts or equality bodies. Firstly, in order to succeed, claims may be brought on only one of the relevant grounds. This may limit the potential of cases to bring about broader changes to policy or legislation, as well as affecting the level of compensation payable to the victim. Secondly, in the case of intersectional discrimination, it may become difficult to prove one's case because discrimination cannot be shown where the grounds are taken separately.

FRA ACTIVITY

Ethnic minorities more likely to experience multiple discrimination

In 2010, the FRA prepared a *Data in Focus Report* based on the results of the EU-MIDIS survey, looking at multiple discrimination as experienced by members of ethnic minority and immigrant groups. The report found that on average, those belonging to ethnic minorities are almost five times more likely to experience multiple discrimination than members of the majority population (14% against 3%).

FRA (2011), Data in Focus report: Multiple Discrimination, Luxembourg, Publications Office.

In June 2010, the results of the European project GendeRace were presented. The research explored the experiences of people who have lodged complaints on the grounds of gender and race discrimination in six EU Member States.

119 Cyprus, The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law N. 42(1)/ 2004, articles 39(1) and 39(3) respectively.
120 Article 4 of the Termination of Employment Law.
121 France, La loi n° 2008-1330.
122 France, Court of Cassation/Social chamber/ 05-11-2010/n°08-43.68; and 05-11-2010/n°08-45.307.
123 Hautefort, M., pp. 9-10.
124 Belgium, CEOOR (2010d); Belgium/CEOOR (2010e).
125 Belgium, CEOOR (2010f).
126 A.K.R. 126/2009, dated 27 April 2010.
127 Compare to FRA (2011).
128 European Commission (2007).
129 For cases related to the wearing of the headscarf, see ECRI's 2010 report on France (2010d), p. 30.

The results show that most cases of multiple discrimination occur in the employment sector. Both women and men face intersectional discrimination, and both exhibit difficulties in identifying their experiences of discrimination as occurring on multiple grounds. For instance, ethnic minority women tend to identify the discrimination they experienced as due to race discrimination more often than gender discrimination.[130]

5.7.1. Legislation, case law and equality body practice

EU law does not yet use the term 'multiple discrimination' in legally binding provisions and few Member States refer to 'multiple discrimination' in their legislation.[131] Legislative developments occurred in the **UK**, where in April 2010 the UK Equality Act introduced a provision referring to 'dual' discrimination which will enable people to bring claims complaining of direct discrimination based on a combination of two protected characteristics.[132] At the end of 2010, it was not known when the multiple discrimination provision would come into effect.

FRA ACTIVITY

Inequalities and multiple discrimination in access to healthcare

At the beginning of 2010, the FRA held a first expert meeting on 'Inequalities and multiple discrimination in access to healthcare'. The research, which is fieldwork-based, explores the particular vulnerabilities resulting from the intersection of ethnic origin, age and gender in access to healthcare and quality of care. Based on the findings of the research, the FRA will formulate advice to the EU institutions and to EU Member States about how to tackle multiple discrimination in access to healthcare in the EU.

Judicial decisions concerning claims that could potentially have been dealt with as cases of multiple discrimination occurred in various Member States. In this context reference should be made to discussion of cases under the section on religion (above), which may relate to the intersection of grounds of sex, religion and/or ethnic origin. In practice these cases were dealt with generally on the grounds of religious discrimination only. The situation of discrimination against Muslim women wearing the headscarf provides an obvious example of the potential for cases to be dealt with under multiple discrimination. However, in the absence of multiple discrimination provisions in national legislation, such cases tend to be dealt with on one grounds only, that of religion.

For example, in **Sweden,** a Muslim woman was refused entry to an aerobics class because she wore a headscarf. The District Court ruled that this was a case of discrimination on the grounds of religious belief. The sports club was obliged to pay SEK 5,000 (EUR 500) in compensation to the woman. The District Court argued that people who, due to their religious beliefs, are prohibited from removing their headscarves, were disadvantaged by the sports club's rules and that this was a case of indirect discrimination. Following discussions with the Equality Ombudsman, the sports club changed its rules and headscarves are now permitted during exercise at the club's facilities.[133]

The intersection between the grounds of sex and religion was also apparent in the context of a campaign in **Bulgaria** in 2010 to renew personal documents. Muslim women were forced to partly remove their hijabs when pictures of their faces were taken. In June, several muftis wrote letters of protest to the authorities stating that this violates the Muslim canon.[134] However, the government underlines that during the mentioned campaign it has strictly respected the relevant national law. The latter allows the taking of a picture of a person with a hat or a hijab, so long as the two ears of the photographed person may be seen together with 1 cm of their hair.[135]

5.7.2. Equality bodies and multiple discrimination

There is a trend among the Member States towards the creation of single equality bodies able to deal with several protected grounds, or the merging of existing equality bodies. For instance, since 2009 the **UK** and **Sweden** have had one single equality body. At the same time, to date most equality bodies address discrimination on single grounds only. Those equality bodies that do collect data on claims involving multiple grounds report an increasing number of such cases. This could be taken to show an increase in levels of awareness of this issue among legal advisors and victims of discrimination.

In **Bulgaria**, where the national legal framework includes reference to multiple discrimination, among the proceedings instituted by the Commission for Protection against Discrimination (CPD), complaints on multiple grounds have steadily increased from 43 in 2006 to 95 in 2009. According to the CPD, this shows that complaints are becoming more complex and that there is increased public awareness and knowledge of the legal framework.[136] Still, it is likely that the majority cases of multiple discrimination remain unreported or are not addressed as such. In **Austria**, according to data for 2009 released by the Ombud for Equal Treatment, who is responsible for equal treatment between men and

130 Carles, I and Jubany-Baucells, O. (2010).
131 European Commission (2009e).
132 United Kingdom, Equality Act 2010.
133 Sweden, Swedish Equality Ombudsman (2010a).
134 Bulgaria, Bulgaria Helsinki Committee (2010).
135 Addendum No. 5 to Article 9 paragraph 1 of the Ordinance for Issuing Bulgarian Personal Documents.
136 Bulgaria, Комисия за защита от дискриминация (2010); for the exact figures, see Table 1 of Annex 1.

women in employment, nine out of 56 complaints concerned multiple discrimination. In **Germany**, according to data collected between August 2006 and July 2010 by the Federal Equality Body, 308 complaints concerned multiple discrimination, representing 7.7% of the total number of complaints.

Reported cases of multiple discrimination appear to concern two or three intersecting grounds, one of which is usually gender. In **Denmark** in March 2010, Berlingske Media advertised for a staff member with responsibility for organising conferences. The Documentary and Advisory Centre on Racial Discrimination, Denmark (DACoRD) complained to the Board of Equal Treatment that the advertisement constituted discrimination on multiple grounds – age, ethnicity and disability – as the employee should be 'healthy', between the age of 25 and 45 and be 'fluent in Danish'.[137] On 1 December 2010, the case was rejected by the Board of Equal Treatment due to the lack of a specific complainant.

In **Sweden**, a woman complained of discrimination when she was insulted during a job interview for a post in a motel because of her marriage to a Muslim and was later refused the position. The interviewer posed questions about her husband's culture and attitudes towards women in general, saying that she had had bad experiences of "Swedish girls who are together with the immigrants" and that the man's family would not be allowed to sit in the restaurant while she was working. The Equality Ombudsman took the case to the Labour Court alleging discrimination and harassment based on gender, ethnicity and religion, and claimed 200,000 SEK (EUR 20,000) in compensation.[138]

Another case in Sweden concerned a 48-year-old female mathematics teacher of Polish origin who applied for a job at a secondary school in Hallsberg. Although she was qualified and had many years of professional experience, she was not called for an interview. The Equality Ombudsman reached a settlement with the employer who was required to pay SEK 40,000 (EUR 4,000). The Equality Ombudsman considered that she had been treated less favourably due to her gender, age and ethnicity.[139] In the **UK**, a black-African woman working for a global construction company received a settlement in a case alleging unfair dismissal due to race and sex discrimination, after being selected as one of five staff being considered for redundancy, four of whom were women and all five of whom were from ethnic minorities.[140]

Outlook

The coming year provides the Member States with a fresh opportunity to strengthen protection against discrimination on the grounds of religion or belief, sexual orientation, disability and age beyond the sphere of employment. This could be done through various instruments and initiatives including, at EU level, the adoption of the 'horizontal' directive.

While at national level the relatively low numbers of complaints received by many equality bodies is a cause for concern, the fact that there have been increases in many Member States is encouraging. However, in order to maximise their effectiveness, equality bodies will require sufficient resources over the year ahead.

The EU five-year strategy on promoting equality between men and women will provide an opportunity to overcome the challenges facing women in the workplace and in access to goods and services. The strategy also refers to issues of gender identity.

Ratification of the CRPD by the EU offers a remarkable opportunity to develop the promotion of equality for persons with disabilities across the range of EU competences. By the end of 2011, the Commission will suggest solutions to set up a monitoring framework bringing the EU in line with Article 33 (2) CRPD.

The adoption of the Council of Europe's Recommendation on measures to combat discrimination on the grounds of sexual orientation or gender identity provides Member States with a clear set of standards and guidance. Putting this into practice in the coming years is likely to prove a significant challenge. The findings of the FRA's future survey on discrimination and victimisation of LGBT persons may help to shed light on progress as well as provide impetus for improvements.

It is likely that the current economic climate will present major challenges for EU Member States in the field of age discrimination in terms of meeting the objectives of the European Union 2020 Strategy, which includes providing better employment opportunities and working conditions for older people.

Multiple discrimination remains a reality that is largely not mirrored by the legal framework of the EU or the Member States, or the approach of courts and equality bodies. Increasing understanding and awareness of multiple discrimination and accommodating it in the legal process is a necessary, if difficult, task for the coming years.

137 Denmark, Documentary and Advisory Centre on Racial Discrimination (DACoRD) Case no: 2426, 2010.
138 Case: ANM 2009/1300, see Sweden, Swedish Equality Ombudsman (2010d).
139 Sweden, Swedish Equality Ombudsman (2009b).
140 Hinton, J. (2010).

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Austria, Verfassungsgerichtshof/B1973/08, 3 December 2009.

Austria, Verwaltungsgerichtshof/2008/17/0054, 27 February 2009.

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Austria, Verwaltungsgerichtshof/2009/17/0263, 17 February 2010.

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UN & CoE

January

February

2 March – European Court of Human Rights (ECtHR), decides the *Kozak v. Poland* case with implications for the status of same-sex couples

31 March – CoE Committee of Ministers adopts a recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity

March

29 April – CoE Parliamentary Assembly adopts a resolution and a recommendation on discrimination on the basis of sexual orientation and gender identity

April

May

24 June – ECtHR decides the *Schalk and Kopf v. Austria* case with implications for the status of same-sex couples

June

22 July – ECtHR decides the *P.B. & J.S. v. Austria* case with implications for the status of same-sex couples.

July

August

September

7 October – CoE Parliamentary Assembly adopts a resolution and a recommendation on guaranteeing the right to education for children with illnesses or disabilities

22 October – UN Committee on the Elimination of discrimination against women issues Concluding Observations on the Czech Republic

October

November

December

EU

12 January – CJEU decides in the *Domnica Peterson v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* case on the legality of age limits for practicing dentists

19 January – CJEU clarifies in the *Seda Kücükdeveci v. Sedex GmbH & Co. KG* case whether it is possible to disregard periods of employment that predate a certain age

January

February

8 March – EU adopts a directive implementing the revised framework agreement on parental leave

March

April

May

15 June – EU adopts a directive on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity

June

July

August

21 September – European Commission adopts a Strategy for equality between women and men (2010-2015)

September

October

15 November – European Commission adopts a European Disability Strategy (2010-2020)

November

23 December – EU ratifies the UN Convention on the Rights of Persons with Disabilities

December