

# The Prohibition of Discrimination under European Human Rights Law

Relevance for EU Racial and Employment Equality Directives

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Fundamental rights & anti-discrimination

Employment & social affairs

# **The Prohibition of Discrimination under European Human Rights Law**

**Relevance for EU Racial and Employment Equality Directives**

Prof. O. De Schutter

European Network of Legal Experts in the non-discrimination field

**Employment & social affairs**

Fundamental rights and anti-discrimination

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The text of this report was drafted by Professor Olivier De Schutter, member of the **European Network of Legal Experts in the non-discrimination field** (on the grounds of Race or Ethnic origin, Age, Disability, Religion or belief and Sexual Orientation), managed by:

**Human european consultancy**

Hooghiemstraplein 155  
3514 AZ Utrecht  
Netherlands  
Tel +31 30 634 14 22  
Fax +31 30 635 21 39  
office@humanconsultancy.com  
www.humanconsultancy.com

**The Migration Policy Group**

Rue Belliard 205, Box 1  
1040 Brussels  
Belgium  
Tel +32 2 230 5930  
Fax +32 2 280 0925  
info@migpolgroup.com  
www.migpolgroup.com

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The Action Programme has three main objectives. These are:

1. To improve the understanding of issues related to discrimination
2. To develop the capacity to tackle discrimination effectively
3. To promote the values underlying the fight against discrimination

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# Table of Contents

<b>Executive Summary</b>	<b>5</b>
<b>Introduction</b>	<b>9</b>
<b>I. The European Convention on Human Rights</b>	<b>11</b>
1. The substantive content of the requirement of non-discrimination under the ECHR	13
1.1. A non-exhaustive list of prohibited grounds of discrimination	13
1.2. The significance of the prohibition of discrimination and the question of a hierarchy of grounds	14
1.3. The Forms of Prohibited Discrimination	16
1.4. Positive action	19
2. The Scope of Application of Article 14 ECHR	20
3. Protocol n°12 to the ECHR (2000)	24
<b>II. The European Social Charter</b>	<b>27</b>
1. The European Social Charter of 1961	29
1.1. The legal framework prohibiting discrimination	30
1.2. The legal measures promoting the full effectiveness of the prohibition of discrimination	31
1.3. Policy measures intended to improve professional integration of target groups	32
2. The Revised European Social Charter of 1996	33
<b>III. A Comparison with the EC Directives: Key Interpretive Challenges</b>	<b>37</b>
1. Race and ethnic origin	39
2. Disability	40
3. Sexual orientation	43
4. Religion or belief	45
5. Age	49
<b>IV. Conclusions</b>	<b>51</b>
<b>Bibliography</b>	<b>55</b>
Cases	56
European Court of Human Rights (in chronological order)	56
European Commission of Human Rights	57
European Committee of Social Rights	57
Doctrine (in alphabetical order)	57

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# Executive Summary

**The report offers an overview of the protection from discrimination under the 1950 European Convention on Human Rights and the 1961 European Social Charter as well as the 1996 Revised European Social Charter, which are the main human rights treaties of the Council of Europe. The report seeks to identify aspects of that protection which could influence the outstanding questions of interpretation of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.**

The report is structured in three parts. Part I offers an overview of the anti-discrimination clauses of the European Convention on Human Rights and of the relevant case-law of the European Court of Human Rights. The European Convention on Human Rights (ECHR) contains a large range of civil and political rights, including the right to life, the prohibition of torture and of inhuman or degrading treatment or punishment, the prohibition of slavery and forced labour, the right to liberty and security, the right to a fair trial, the principle of no punishment without law (*nullum crimen, nulla poena sine lege*), the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, and the right to marry. Additional protocols to the ECHR guarantee rights such as the protection of property, the right to education, the right to free elections (Protocol n°1), the prohibition of imprisonment for debt, freedom of movement, the prohibition of expulsion of nationals and the prohibition of collective expulsion of aliens (Protocol n°4), the abolition of the death penalty (Protocol n°6 and, extending the prohibition to times of war, Protocol n°13), the procedural safeguards relating to the expulsion of aliens, the right of appeal in criminal matters, the right to compensation for wrongful conviction, the right not to be tried or punished twice, and equality between spouses (Protocol n°7). The enjoyment of all these substantive rights must be ensured without discrimination, under Article 14 ECHR to which the later additional protocols refer. Part I of the report describes the method used by the European Court of Human Rights in the examination of differences in treatment which are denounced as being discriminatory. It notes in particular that the level of the scrutiny exercised by the Court will vary according to a largely implicit and evolving, but nevertheless identifiable, hierarchy of prohibited grounds of discrimination: differences in treatment on the basis of “suspect” grounds (birth out of wedlock, sex, sexual orientation, race and ethnic origin, and more recently nationality) must be justified by “particularly weighty reasons” and be necessary to the fulfilment of the aims pursued; differences in treatment based on “non-suspect” grounds (these constitute a residual category which includes property, but arguably also religion as well as disability) must have an objective and reasonable justification, requiring that they pursue a legitimate aim and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Part I of the report includes a study of the added value of Protocol n°12 to the ECHR, opened for signature in 2000 and which will enter into force in 2005, as this instrument provides for a general anti-discrimination clause for the States parties with respect to which that protocol will be in force. Indeed, the non-discrimination clause included in the 1950 ECHR only applies in the enjoyment of the rights and freedoms set forth in the Convention, and cannot be invoked independently of those other substantive provisions : as a result, although Article 14 ECHR may be invoked in contexts such as education, social aid or social security, the exercise of political rights or the provisions which seek to facilitate family life, as well as in situations where the impugned difference in treatment is based on the exercise of freedom of religion, on sexual orientation, or generally on the exercise by the individual of the freedoms protected under the Convention, it shall not be invocable in principle in the context of employment and occupation. Protocol n°12 to the ECHR provides for a protection from discrimination which, in contrast with Article 14 ECHR, has a general scope of application; however, the relatively low number of ratifications of this instrument as well as the timid approach it appears to take on the scope of positive obligations which may be derived from it will limit its effectiveness in imposing on States parties to adopt measures to combat discrimination in private relationships.

Part II examines the protection from discrimination under the European Social Charter, under the interpretation given to the Charter by the European Committee of Social Rights either in its conclusions adopted on the basis of the periodic State reports, or in the context of collective complaints. This part emphasizes the content of the non-discrimination requirements derived from Article 1 para. 2 of the 1961 European Social Charter and the 1996 Revised European Social Charter (the right to work), as well as from Article 15 (the right of persons with disabilities to independence, social integration and participation in the life of the community) and Article 23 (the right of elderly persons to social protection), whether combined or not with the non-discrimination clause included in Article E of the 1996 Revised European Social Charter. On the basis of this latter provision, the European Committee of Social Rights requires that States parties to the Revised European Social Charter monitor the impact of their policies and legislation on the most vulnerable segments of the population, thus imposing on them a positive duty to promote equality which goes beyond what the European Court of Human Rights has imposed on the basis of Article 14 ECHR and what we may expect it to derive from Protocol n°12 to the ECHR when it will come into force. Part II of the report also examines the content of the practical measures (especially of a procedural nature) which the European Committee of Social Rights encourages the States bound by these provisions to adopt, which promote the full effectiveness of the efforts to combat discrimination according to these provisions.

Part III examines the relationship of these instruments and the case-law of those bodies to the interpretation of Directives 2000/43/EC and 2000/78/EC. In this latter part, an overview is proposed, ground per ground, of the questions of interpretation which the European Court of Human Rights and the European Committee of Social Rights have addressed, to the extent that they may influence the interpretation of the directives.

The conclusions which may be derived from the study concern both the general orientation of an anti-discrimination strategy based on legal tools and specific questions of interpretation relating to each of the grounds covered by the 'Race' and Framework Directives. At the level of the general orientation of the strategy against discrimination, the report concludes that in the progressive development of anti-discrimination law in Europe, despite the important influence traditionally exercised by the European Convention on Human Rights on fundamental rights in the legal order of the Union, the European Social Charter may become of rising importance. Indeed, being presented with State reports which make it possible to follow on a regular basis the progress made in the realisation of the rights of the 1961 European Social Charter or the 1996 Revised European Social Charter and with collective complaints which target general legislations and policies and the effect they produce on groups, the European Committee on Social Rights may be better placed than the European Court of Human Rights to develop a jurisprudence on the need for an active labour policy aimed at the integration of target groups and, more generally, on the need for affirmative action – in the field of employment but also in the fields of education, housing, or social policy – directed towards the social and professional integration of the most vulnerable segments of the population.

The quasi absence of any case-law of the European Court of Human Rights deriving positive obligations from Article 14 ECHR and the timidity of the drafters of Protocol n°12 to the ECHR on the issue of positive action contrasts with the insistence of the European Committee of Social Rights that legislation prohibiting discrimination actually produces effective integration, and with the requirement that the States parties monitor closely the impact their policies have on the situation of the most vulnerable groups. The report argues that combating discrimination requires more than prohibitions : as exhibited within the EU by the complementarity between the anti-discrimination directives and the European Employment Strategy, it requires an active social and employment policy commensurate to the aim of realizing integration. It is this direction which recent evolutions within the European Social Charter point at. On the other hand, the case-law of the European Court of Human Rights under Article 14 ECHR may have an impact on certain specific issues of interpretation. It could in particular encourage an understanding of the prohibition of indirect discrimination on the grounds of race or ethnic origin which includes the requirement to take into account relevant differences between racial or ethnic groups, per analogy with the approach taken towards religion-based discrimination by the European Court of Human Rights.

From the point of view of the impact on the interpretation of the 'Race' and Framework Directives of the reference to the jurisprudence of the European Social Charter and the European Convention on Human Rights, the clearest lesson from the report is that such reference could lead to move beyond the explicit definition of indirect discrimination under Articles 2 § 2, b), of the both the 'Race' and the Framework Directives. In the directives, indirect discrimination is defined only in reference to one of the three potential understandings of that concept distinguished in the report : it is seen to occur where apparently neutral regulations, criteria or practices appear to be particular disadvantageous to the members of a certain category, if the provision creating the disadvantage is not objectively and reasonably justified (a). Neither disparate impact discrimination, as demonstrated by statistics (b), nor the failure to treat differently a specific individual or category by providing for an exception to the application of the general rule (c), are explicitly included in that definition. The jurisprudence of the European Committee of Social Rights however strongly encourages the States to combat institutional discrimination by authorizing the statistical proof of discrimination and by measuring the impact of the laws and policies they implement. And the case-law of the European Court of Human Rights illustrates why, although the Framework Directive only mentions a requirement of reasonable accommodation with respect to persons with disabilities, the failure to take into account relevant differences could be seen as a form of indirect discrimination even though it may not be falling clearly within the definition of Article 2(2)(b) of the directives. With respect to religion, as shown in section 4 of Part III of the report, this could be a consequence of the freedom of religion guaranteed under Article 9 ECHR.

The report also draws two further conclusions with regard to two specific grounds of prohibited discrimination, namely disability and sexual orientation. In the context of the Framework Directive, the requirements deriving from Article 8 ECHR may have a decisive role to play in order to counter the risk of discrimination against workers with disabilities resulting from the imposition of health and safety requirements creating an obstacle to their recruitment or their detainment, where allegedly their occupation would put themselves, their co-workers or the general public at risk. The same provision of the Convention, insofar as it protects the right to respect for private life to which the sexual orientation of a person belongs, may contribute to the effectiveness of the prohibition of direct discrimination on the ground of sexual orientation. On the other hand, the report shows that the European Court of Human Rights has not considered that reserving advantages to married couples should be treated as discrimination based on sexual orientation in violation of Article 14 ECHR, read in combination with either Article 8 ECHR (right to respect for private life) or Article 1 of Protocol n°1 to the ECHR (right to property, including to social benefits), even under jurisdictions where marriage is not available to same-sex couples.



# Introduction

This report offers an overview of the protection from discrimination under the European Convention on Human Rights and the Revised European Social Charter, and seeks to identify aspects of that protection which could influence the outstanding questions of interpretation of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin<sup>1</sup> and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation<sup>2</sup>. Although other instruments adopted within the Framework of the Council of Europe may also in the future influence the interpretation of the directives, insofar as they contain clauses protecting from discrimination based on the membership of a national minority<sup>3</sup> or on genetic heritage,<sup>4</sup> grounds which intersect with those of religion or ethnic origin or of disability, the European Convention on Human Rights has been recognized to have a particular significance in European Union law, and its requirements are to be considered part of the general principles of Union law which the European Court of Justice applies as part of its task of ensuring that the law is respected in the application of the Treaties.<sup>5</sup> The reference to the European Social Charter is justified to the extent that the European Court of Justice has occasionally referred to that instrument for the interpretation of EC law.<sup>6</sup>

The report is structured in three parts. Part I offers an overview of the anti-discrimination clauses of the European Convention on Human Rights and of the relevant case-law of the European Court of Human Rights. Part II examines the protection from discrimination under the European Social Charter, under the interpretation given to the Charter by the European Committee of Social Rights (previously the Committee of Independent Experts) either in its conclusions adopted on the basis of the periodic State reports, or in the context of collective complaints. Part III examines the relationship of these instruments and the case-law of those bodies to the interpretation of Directives 2000/43/EC and 2000/78/EC. Certain general comments are offered, after which an overview is proposed, ground per ground, of the questions of interpretation which the European Court of Human Rights and the European Committee of Social Rights have addressed, to the extent that they may influence the interpretation of the directives.

<sup>1</sup> OJ L 180 of 19.7.2000, p. 22.

<sup>2</sup> OJ L 303 of 2.12.2000, p. 16.

<sup>3</sup> Framework Convention for the Protection of National Minorities (ETS n° 157), signed in Strasbourg on 1 February 1995, in force on 1 February 1998 :see Art. 4. On 15 January 2005, The Framework Convention had been ratified by all the Member States of the EU, with the exception of Belgium, France, Greece, Latvia, Luxemburg and the Netherlands.

<sup>4</sup> Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine : Convention on Human Rights and Biomedicine (ETS n° 164), signed in Oviedo on 4 April 1997, in force on 1 December 1999: see Article 11.

<sup>5</sup> See, in the context of the EC Treaty, article 220 EC.

<sup>6</sup> Case 149/77, *Defrenne v. Sabena* [1978] ECR 1365, at para. 26. See also Case 6/75, *Horst v. Bundesknappschaft* [1975] ECR 823, at 836.

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# Part I

## The European Convention on Human Rights

The 1950 European Convention on Human Rights (ECHR) is in force in all the Member States of the Union and binds them even in situations where they are implementing Union law. It contains a large range of civil of political rights, including the right to life, the prohibition of torture and of inhuman or degrading treatment or punishment, the prohibition of slavery and forced labour, the right to liberty and security, the right to a fair trial, the principle of no punishment without law (*nullum crimen, nulla poena sine lege*), the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, and the right to marry. Additional protocols to the ECHR guarantee rights such as the protection of property, the right to education, the right to free elections (Protocol n°1), the prohibition of imprisonment for debt, freedom of movement, the prohibition of expulsion of nationals and the prohibition of collective expulsion of aliens (Protocol n°4), the abolition of the death penalty (Protocol n°6 and, extending the prohibition to times of war, Protocole n°13), the procedural safeguards relating to the expulsion of aliens, the right of appeal in criminal matters, the right to compensation for wrongful conviction, the right not to be tried or punished twice, or equality between spouses (Protocol n°7). The enjoyment of all these substantive rights must be ensured without discrimination, under Article 14 ECHR to which the later additional protocols refer. In order to explain what the ECHR may contribute to the implementation and interpretation of the Directives adopted on the basis of Article 13 EC, this section examines the substantive content of the requirement of non-discrimination under Article 14 ECHR and Article 1 of Protocol n°12 ECHR (1.). It then examines the scope of application of the non-discrimination clause contained in Article 14 of that instrument (2.), and the extension of the requirement of non-discrimination by Protocol n°12 additional to the Convention, which has been opened for signature on 4 November 2000, and shall enter into force on 1 April 2005<sup>7</sup> (3.).

<sup>7</sup> On 24 December 2004, 11 States parties to the ECHR had ratified Protocol n°12. Of the 25 EU Member States however, only the Netherlands, Cyprus and Finland have ratified the Protocol at this date.

## 1. The substantive content of the requirement of non-discrimination under the ECHR

Article 14 of the European Convention on Human Rights provides that :

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The guarantee against discrimination afforded by Article 14 ECHR in the enjoyment of the rights and freedoms of the Convention, and which Article 1 of Protocol n°12 to the ECHR now shall extend beyond the scope of the Convention in those States bound by that Protocol (see hereunder, section 2),<sup>8</sup> presents three characteristics : these clauses contain a non-exhaustive list of prohibited grounds of discrimination (1.1.) ; the case-law on Article 14 ECHR recognizes to a limited extent a distinction between « suspect » and « non-suspect » grounds of differentiation (1.2.) ; and they prohibit both direct and indirect discrimination, both in the sense of disparate impact discrimination and in imposing that the specific situations of certain individuals be accommodated (1.3.). A last paragraph in this section will briefly comment upon the regime of positive action under these anti-discrimination clauses (1.4.).

### 1.1. A non-exhaustive list of prohibited grounds of discrimination

Both Article 1 of Protocol n°12 to the ECHR and Article 14 ECHR prohibit discrimination in the enjoyment of the rights and freedoms set forth in the Convention « on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status ». This list is not exhaustive.<sup>9</sup> Thus, Article 14 ECHR has been applied for instance in order to protect individuals from discrimination based on their sexual orientation<sup>10</sup> or birth out of wedlock;<sup>11</sup> indeed, any criterion of differentiation may be potentially examined under Article 14 ECHR, whether or not it has traditionally been listed among the prohibited forms of discrimination in the international law of human rights.

<sup>8</sup> See further, *inter alia*, J. Gerards, "The Application of Article 14 ECHR by the European Court of Human Rights", in J. Niessen and Isabelle Chopin (eds.), *The Development of Legal Instruments to Combat Racism in a Diverse Europe*, Martinus Nijhoff Publ., Leiden/Boston, 2004, pp. 3-60.

<sup>9</sup> Eur. Ct. HR, *Engel and Others v. the Netherlands* judgment of 8 June 1976, Series A no. 22, pp. 30-31, § 72. The Explanatory Report to Protocol n°12 to the ECHR states in § 20 that "expressly including certain additional non-discrimination grounds (for example, physical or mental disability, sexual orientation or age) [appeared to the drafters of the Protocol as] unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included".

<sup>10</sup> See, e.g., Eur. Ct. HR (4th sect.), *Salgueiro da Silva Mouta v. Portugal* (Appl. N° 33290/96), judgment of 21 December 1999, ECHR 1999-IX, § 28

<sup>11</sup> See, e.g., Eur. Ct. HR, *Marckx v. Belgium*, judgment of 13 June 1979, Series A n°31; Eur. Ct. HR, *Inze v. Austria*, judgment of 28 October 1987, Series A n° 126, § 41; Eur. Ct. HR (3d sect.), *Mazurek v. France* (Appl. N° 34406/97), judgment of 1 February 2000,

## 1.2. The significance of the prohibition of discrimination and the question of a hierarchy of grounds

It is the established case-law of the European Court of Human Rights that a difference of treatment is discriminatory within the meaning of Article 14 ECHR if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.<sup>12</sup> The examination of a discrimination claim thus requires a two-tiered analysis, focusing first on the aim pursued, second on the *relationship between the impugned difference in treatment (or, as we shall see, the lack thereof) and the realisation of that aim*.

How this two-part test is to be applied may depend on the nature of the criterion on which the difference in treatment is based. To this extent, a certain hierarchy of grounds does appear in the case-law of the European Court of Human Rights: although, in most cases, a difference of treatment will pass the test of non-discrimination if it pursues a legitimate aim by means presenting a reasonable relationship of proportionality with that aim, where differential treatment is based on a « suspect » ground, it will be required that it is justified by « very weighty reasons » and that the difference in treatment appears both suited for realising the legitimate aim pursued, and *necessary*.

It is difficult to offer a systematic presentation of the regime resulting from the hierarchy between « non-suspect » and « suspect » grounds of differentiation, because of the shifting character of the boundary between the two categories, both in time and according to the subject-matter under consideration.<sup>13</sup> It is however undeniable that certain grounds of differentiation require particularly strong justifications from the State. There exists no relationship between the explicit identification of a particular criterion in Article 14 ECHR or Article 1 of Protocol n°12 and the question whether or not that criterion is treated as « suspect »: « property », for instance, although listed in Article 14 ECHR, is a criterion frequently relied upon by the national authorities in the areas of taxation or social security, matters in which States Parties are recognized as having a wide margin of appreciation;<sup>14</sup> conversely, although not mentioned in Article 14 ECHR, birth out of wedlock is considered in principle a suspect ground,<sup>15</sup> requiring any difference in treatment based on such ground to be justified by « particularly weighty reasons ». Other « suspect » grounds are, *inter alia*, sex,<sup>16</sup> sexual orientation,<sup>17</sup> and more

<sup>12</sup> See, among many others, the *Karlheinz Schmidt v. Germany* judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24.

<sup>13</sup> Indeed, it has been suggested that a new approach to dealing with protection against discrimination under the Convention should be adopted, based on more clearly delineated variations in the strictness of scrutiny: see Oddn\_ Mjöll Arnadóttir, *Equality and non-discrimination under the European Convention on Human Rights*, Martinus Nijhoff Publ., International studies in human rights n° 74, The Hague, 2003, 265 pp.; and J. Gerards, "Intensity of Judicial Review in Equal Treatment Cases", N.I.L.R., 2004, pp. 135-183.

<sup>14</sup> See, e.g., Eur. Ct. HR, *Fredin v. Sweden*, judgment of 18 February 1991, Series A n° 192, § 151; *Immobiliare Saffi v. Italy*, judgment of 28 July 1999, Reports 1999-V, § 49; or *Chapman v. the United Kingdom*, judgment of 18 January 2001.

<sup>15</sup> Eur. Ct. HR, *Inze v. Austria*, judgment of 28 October 1987, Series A n° 126, § 41; Eur. Ct. HR (3d sect.), *Mazurek v. France* (Appl. N° 34406/97), judgment of 1 February 2000, § 49; Eur. Ct. HR (GC), *Sommerfeld v. Germany* (Appl. N° 31871/96), judgment of 8 July 2003, § 93.

<sup>16</sup> See Eur. Ct. HR, *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 29, § 27; *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24; *Petrovic v. Austria*, judgment of 27 March 1998, Reports of Judgments and Decisions 1998-II, p. 587, § 37)

<sup>17</sup> Indeed, partially for the same motives that an interference with the sexual life of a person will only be justified by very serious reasons (see, e.g., Eur. Ct. HR, *Smith and Grady v. the United Kingdom*, judgment of 27 September 1999; *Lustig-Prean and Beckett v. the United Kingdom* (Appl. N° 31417/96 and 32377/96), judgment of 27 September 1999; and Eur. Ct. HR (3d sect.), *A.D.T. v. the United Kingdom* (Appl. N° 35765/97), judgment of 31 July 2000, ECHR 2000-IX, § 37) – being related to the most intimate aspects of one's personality, such matters should in principle not concern the outside world –, the Court has considered that differences based on sexual orientation require particularly serious reasons by way of justification: see Eur. Ct. HR (1st section), *L. and V. v. Austria* (Appl. N° 39392/98 and 39829/98), judgment of 9 January 2003, § 45; Eur. Ct. HR, *S.L. v. Austria* (Appl. N° 45330/99), judgment of 9 January 2003, § 36; Eur. Ct. HR (1st sect.), *Karner v. Austria* (Appl. N° 40016/98), judgment of 24 July 2003, § 37.

recently nationality.<sup>18</sup> *Obiter dicta* and common sense also suggest strongly that race and ethnic origin should be included in that list.<sup>19</sup> On the other hand, religion does not seem to be in general considered as a suspect ground;<sup>20</sup> nor does disability.

Even where the claim of discrimination is clearly considered by the Court to concern a « suspect » ground of discrimination leading to a form of heightened scrutiny, such scrutiny, for all its strictness, is not necessary fatal to the impugned differentiation. The presumption that no objective and reasonable justification will be supporting the difference of treatment remains a rebuttable one. The Court has admitted as constituting « very weighty reasons », powerful enough to justify even differences in treatment based on « suspect » grounds, reasons which, by their very nature, come close in certain circumstances to simply annulling the special guarantee afforded to groups defined by their sex, their sexual orientation, their birth, or their nationality. For instance, the Court accepts that « protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment » based on the homo- or heterosexual nature of a relationship, provided such a difference in treatment is necessary for the protection of such a traditional notion of family.<sup>21</sup> The legitimacy, in principle, of such a justification, has also been recognized by the Court when it was confronted with a difference in treatment based on birth – within or outside wedlock –, again with the consequence that the « suspect » character of the ground of differentiation is practically nullified by the admission of the legitimacy of that aim.<sup>22</sup>

Whether or not a particular difference in treatment, operated within a particular sphere on the basis of a particular ground, is in principle suspect, will evolve over time : since the 1980s sex and sexual orientation are treated differently then in the 1960s ; also the view on birth out of wedlock changed since the late 1970s; nationality has lost in the 1990s the appearance of legitimacy it once may have seemed to have;<sup>23</sup> age and disability, the next candidates for being treated as suspect grounds, are rapidly rising in the hierarchy of prohibited grounds,<sup>24</sup> and it is hardly doubtful that Union law will have an important – indeed, probably decisive – impact on that evolution.

<sup>18</sup> See Eur. Ct. HR, *Gaygusuz v. Austria*, judgment of 16 September 1996, at § 42; *Koua Poirrez v. France*, (Appl. N° 40892/98), judgment of 30 September 2003, at § 46.

<sup>19</sup> See, e.g., Eur. Ct. HR, *Jersild v. Denmark*, judgment of 23 September 1994, § 30.

<sup>20</sup> Eur. Ct. HR (2nd sect.), *Palau-Martinez v. France* (Appl. N° 64927/01), judgment of 16 December 2003, § 39 (applying a classical test based on the legitimacy of the reasons for differentiating on the basis of religion and on the proportionality of the differentiation). Comp. However with Eur. Ct. HR, *Hoffmann v. Austria*, judgment of 23 June 1993, Series A n° 255-C, at § 36.

<sup>21</sup> Eur. Ct. HR, *Karner v. Austria*, judgment of 24 July 2003, § 40 (although the Court concludes with a finding of discrimination on grounds of sexual orientation).

<sup>22</sup> See Eur. Ct. HR, *Mazurek v. France* (Appl. N° 34406/97), judgment of 1 February 2000, at §§ 50-51 (although the Court concludes that a discrimination has occurred on grounds of birth).

<sup>23</sup> See, to that effect, J. Gerards, "Gelijke behandeling en het EVRM", *NJCM-Bulletin*, vol. 29-2, March 2004, pp. 176-198, at p. 179.

<sup>24</sup> Indeed, it should not be a surprise that these grounds have been mentioned as possible candidates for explicit designation in Article 1 of Protocol n°12 to the ECHR (see § 20 of the Explanatory Report).

### 1.3. The Forms of Prohibited Discrimination

Although the same terms may be used in different ways in various legal systems, we may examine the case-law of the European Court of Human Rights by distinguishing between the following instances of discrimination. (i) *Direct discrimination* occurs where certain categories of persons are treated differently without this difference in treatment having an objective and reasonable justification, either because it does not pursue a legitimate aim or because there is no reasonable relationship of proportionality between the means employed and the aim pursued. (ii) *Indirect discrimination* comes in three different forms : (a) where, without creating a difference in treatment on its face (and being thus apparently neutral), a regulation or a practice appear to be particularly disadvantageous to the members of a certain category, if the provision creating the disadvantage is not objectively and reasonably justified ; (b) where a general measure is applied which affects a disproportionately high number of members of particular category, unless the measure resulting in such a disparate impact is objectively and reasonably justified (disparate impact discrimination) ; (c) finally, where the author of a general measure has without objective and reasonable justification failed to treat differently a specific individual or category by providing for an exception to the application of the general rule. A failure to provide effective accommodation – to a person with a disability or, for instance, to a person with specific needs because of religious prohibitions – may be seen as an instance of this latter sub-category of discrimination, insofar as such a discrimination does not have its source in the general measure as such, which may still be perfectly justified, but in the failure to take into account, up to the individual level, the specific situation of those to whom the general measure is applied.

The European Court of Human Rights presently is in a transitory moment, as it seeks to go beyond the prohibition of direct discrimination in order to reinforce the protection afforded by Article 14 ECHR, but has not yet developed a systematic case-law on the different forms of indirect discrimination which have been identified. The Court has recognized that the failure to treat differently the members of certain categories could constitute a form of discrimination (which corresponds to the third sub-category of indirect discrimination distinguished above). But it has appeared more sceptical towards the attempt to assimilate disparate impact to discrimination, showing thus that it remains attached to the notion that prohibited discrimination must be intentional or, at least, sufficiently explicit as occurs where it has its sources in an openly differential treatment which cannot be objectively and reasonably justified. It has recognized, however, the difficulties of proof which the victims of discrimination frequently confront, and has therefore recently agreed to facilitate such proof, at least where the national authorities have failed to adequately investigate instances of alleged discrimination. The following paragraphs briefly describe these evolutions.

The European Court of Human Rights has traditionally been confronted with situations where the laws or practices of a State party to the European Convention on Human Rights were differentiating between categories on allegedly discriminatory grounds, raising the question whether such differences in treatment could be considered objectively and reasonably justified. In such situations, the question presented to the Court is whether the challenged laws or practices are the source of a *direct discrimination* against the category of persons with respect to whom they impose a certain disadvantage. Only in 2000, in the case of *Thlimmenos v. Greece*, did the Court extend its case-law in order to identify a violation of Article 14 ECHR in the *failure to provide effective accommodation* to meet the specific needs of certain categories. The applicant in that case, a Jehovah's Witness, had been refused an appointment as a chartered accountant because of his past conviction for insubordination consisting in his refusal to wear the military uniform. He complained not about the « distinction that the rules governing access to the profession make between convicted persons and others », but about the fact, rather, « that in the application of the relevant law *no distinction is made* between persons convicted of offences committed exclusively because of their religious beliefs and persons convicted of other offences ». <sup>25</sup> The answer of the Court is

<sup>25</sup> Eur. Ct. HR (GC), *Thlimmenos v. Greece* (Appl. N° 34369/97), judgment of 6 April 2000, § 42.

well known. It enriches its understanding of the notion of prohibited discrimination under Article 14 ECHR in order to include as a form of discrimination not only direct discrimination (i), but also the failure to accommodate effectively the specific needs of persons whose situation distinguishes them from the majority (ii) (c) :<sup>26</sup>

The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification (...). However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different. [The Court therefore has to address the question] whether the failure to treat the applicant differently from other persons convicted of a serious crime pursued a legitimate aim. If it did the Court will have to examine whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Court considers that, as a matter of principle, States have a legitimate interest to exclude some offenders from the profession of chartered accountant. However, the Court also considers that, unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession. Excluding the applicant on the ground that he was an unfit person was not, therefore, justified. (...) the Court finds that there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a serious crime.

The reasoning of the Court in *Thlimmenos* could be applied, for instance, to the application of regulations relating to land use, without taking into account the particular needs of the Gypsies arising from their tradition of living and travelling in caravans.<sup>27</sup> The discrimination would have its source, in this instance, not in the adoption of land use regulations or their application in a generality of cases, but in the failure to consider the impact their application towards Gypsies might have and to examine which mitigating measures, including the provision of an exception in the law, could be taken.

A second direction in which the European Court of Human Rights has been recently moving is by facilitating the proof of discrimination, which – where that proof may be offered by providing statistical data – leads to the progressive recognition of disparate impact discrimination as a form of prohibited discrimination under Article 14 ECHR. The European Court of Human Rights has been confronting these questions of proof of discrimination only recently.<sup>28</sup> In the case of *Hugh Jordan v. the United Kingdom*,<sup>29</sup> the Court was confronted with statistics showing that, over a period of 25 years (1969-1994), 357 people had been killed in Northern Ireland by members of the security forces, the overwhelming majority of whom were young men from the Catholic or nationalist community. According to the applicant, whose son has been killed by the security forces while unarmed, « When compared with the numbers of those killed from the Protestant community and having regard to the fact that there have

<sup>26</sup> Ibid., §§ 44-47.

<sup>27</sup> See Eur. Ct. HR (GC), *Chapman v. the United Kingdom* (Appl. N°27238/95), judgment of 18 January 2001, at §§ 127-130 (where the Court does not exclude this reasoning, concluding however that there was no discrimination in that case); Eur. Ct. HR (GC), *Beard v. the United Kingdom* (Appl. N°24882/94), judgment of 18 January 2001, at §§ 129-132 (same); Eur. Ct. HR (GC), *Coster v. the United Kingdom* (Appl. N°24876/94), judgment of 18 January 2001, at §§ 139-142 (same); Eur. Ct. HR (GC), *Jane Smith v. the United Kingdom* (Appl. N°25154/94), judgment of 18 January 2001 (same); Eur. Ct. HR (GC), *Lee v. the United Kingdom* (Appl. N° 25289/94), judgment of 18 January 2001, at §§ 126-130 (same).

<sup>28</sup> It should be emphasized that, as an international court deciding issues of State responsibility, the Court is not passing judgment on the responsibility, civil or criminal, of any individual defendant facing an allegation that he or she has acted in a discriminatory fashion. See Eur. Ct. HR, *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, p. 24, § 32; Eur. Ct. HR (1st sect.), *Nachova and Others v. Belgium* (Appl. N° 43577/98 and 43579/98), judgment of 26 February 2004, § 166, with further references).

<sup>29</sup> Eur. Ct. HR (3d sect.), *Hugh Jordan v. the United Kingdom* (Appl. N° 24746/94), judgment of 4 May 2001.

been relatively few prosecutions (31) and only a few convictions (four, at the date of his application), this showed that there was a discriminatory use of lethal force and a lack of legal protection vis-à-vis a section of the community on grounds of national origin or association with a national minority ».<sup>30</sup> Although the Court in that case was led to find a violation of the right to life protected under Article 2 ECHR because of the lack of appropriate investigations in the death of the son of the applicant, it rejected the claim of discrimination, noting that mere statistical data would not suffice to prove discrimination as prohibited under Article 14 ECHR :

Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group. However, even though statistically it appears that the majority of people shot by the security forces were from the Catholic or nationalist community, the Court does not consider that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14.<sup>31</sup>

Although it appears reluctant to recognize disparate impact discrimination by allowing for discrimination to be proved by statistical data, the Court is aware of the need to adapt the evidentiary requirements imposed on the victim to the specific character of discrimination, which remains most often obfuscated. In *Nachova*, where it was confronted with the killing by State agents of two deserters of Roma origin and the ensuing lack of effective investigations,<sup>32</sup> the Court referred to the provisions relating to the proof of discrimination in Council Directive 2000/43/CE of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/CE of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, and concluded that « it has become an established view in Europe that effective implementation of the prohibition of discrimination requires the use of specific measures that take into account the difficulties involved in proving discrimination (...). The Court has also emphasised the need for a broad interpretation of the protection provided by Article 14 of the Convention (see *Thlimmenos*, cited above, § 44). Member States have expressed their resolve to secure better protection against discrimination by opening for ratification Protocol No. 12 to the Convention ».<sup>33</sup> It considered therefore that

in cases where the authorities have not pursued lines of inquiry that were clearly warranted in their investigation into acts of violence by State agents and have disregarded evidence of possible discrimination, [the European Court of Human Rights] may, when examining complaints under Article 14 of the Convention, draw negative inferences or shift the burden of proof to the respondent Government.<sup>34</sup>

This position of the Court contrasts with its previously much more cautious attitude when it was confronted with the allegation that State authorities had committed racial discrimination. It may be explained by a refusal of the Court to see a State benefit from its own wrong : when confronted with the allegation that killings by State agents were committed with racial overtones, States are under a positive obligation to pursue an official investigation with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the authorities to protect them

<sup>30</sup> Ibid., § 152.

<sup>31</sup> Ibid., § 154. The same wording was adopted by a Chamber constituted within another section of the Court in the case of *McShane v. the United Kingdom*, which raised similar issues : see Eur. Ct. HR (4th sect.), *McShane v. the United Kingdom* (Appl. N° 43290/98), judgment of 25 May 2002, §§ 132-136.

<sup>32</sup> Eur. Ct. HR (1st sect.), *Nachova and Others v. Bulgaria* (Appl. N° 43577/98 and 43579/98), judgment of 26 February 2004, § 158. The judgment has now been referred to the Grand Chamber of the Court.

<sup>33</sup> Ibid., § 168.

<sup>34</sup> Ibid., § 169.

from the threat of racist violence<sup>35</sup>; where the public authorities fail to comply with this obligation, it becomes justified to shift the burden of proof and presume the existence of a discrimination even in the absence of any positive evidence demonstrating this. The circumstances present in *Nachova* should be nevertheless considered as exceptional. In later cases, the Court has shown it was unwilling to find that discrimination has occurred in the absence of material facts pointing strongly to that conclusion. For instance, in *Balogh v. Hungary*, the applicant, of Roma ethnic origin, has been ill-treated by police officers, leading the Court by a narrow majority of 4 votes to 3 to find a violation of Article 3 ECHR; but although he argued that the suspected police officers were aware of the fact that he was of Roma origin and noted that the Hungarian police's discriminatory conduct vis-à-vis persons of Roma origin was well-documented, the Court explicitly distinguished his situation, where there was no substantiation whatever of the claim that he had been a victim of discrimination, from that of the applicants in *Nachova*.<sup>36</sup> In *Hasan Ilhan v. Turkey*, the applicant argued that the destruction of his family home and possessions was the result of an official policy, which constituted discrimination because of his status as a member of a national minority; this claim was dismissed, the Court considering that there is an insufficient basis in fact for grounding this allegation.<sup>37</sup>

## 1.4. Positive action

There exists no case-law of the European Court of Human Rights on the compatibility with Article 14 ECHR of positive action measures.<sup>38</sup> It is however likely that most such measures would pass this test. In the Preamble to Protocol No. 12, the signatories reaffirm that "the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures". The explanatory report of Protocol No. 12 specifies in this respect<sup>39</sup>:

The fact that there are certain groups or categories of persons who are disadvantaged, or the existence of de facto inequalities, may constitute justifications for adopting measures providing for specific advantages in order to promote equality, provided that the proportionality principle is respected. (...) However, the present Protocol does not impose any obligation to adopt such measures. Such a programmatic obligation would sit ill with the whole nature of the Convention and its control system which are based on the collective guarantee of individual rights which are formulated in terms sufficiently specific to be justifiable.

Whether under Article 14 ECHR or under Article 1 of Protocol n°12 to the ECHR, affirmative action should be considered admissible provided that the difference in treatment it results in is objectively and reasonably justified, in other words, provided it pursues a legitimate aim, and it does not pursue this aim by disproportionate means. Like the fight against other forms of discriminations, the fight against racism and xenophobia indisputably constitutes a very important objective for the European Court of Human Rights, which affirms that it is "particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations"<sup>40</sup>. As we

<sup>35</sup> Ibid., § 157.

<sup>36</sup> Eur. Ct. HR (2nd sect.), *Balogh v. Hungary* (Appl. N° 47940/99), judgment of 20 July 2004, § 79.

<sup>37</sup> Eur. Ct. HR (2nd sect.), *Hasan Ilhan v. Turkey* (Appl. N° 22494/93), judgment of 9 November 2004, §§ 128-130.

<sup>38</sup> On the question addressed in the following paragraphs, see also J.-Fr. Flauss, "Discrimination positive et Convention européenne des droits de l'homme", in: *Pouvoir et liberté. Mélanges offerts à Jacques Mourgeon*, Bruxelles, Bruylant, 1998, p. 415.

<sup>39</sup> Explanatory report of Protocol no. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, H (2000) 11 prov., 29 August 2000, § 16.

<sup>40</sup> Eur. Ct. H.R., *Jersild v. Denmark*, judgment of 23 September 1994, § 30.

have seen, in certain cases, discrimination on grounds of race can also constitute degrading treatment within the meaning of Article 3 of the Convention<sup>41</sup>. A *fortiori*, the need to combat racial discrimination is one of the legitimate aims which the States Parties to the Convention may want to pursue, even if this leads to certain restrictions on the rights and freedoms enumerated by the Convention, such as the right to non-discrimination. This is not to say that affirmative action could be upheld only on the basis that it is combating discrimination, as a remedial or backward-looking measure. The Court views a “democratic society” as one based on the values of diversity and tolerance. This would seem to imply that it would allow forms of positive action which are not premised on pre-existing discrimination they seek to respond to or compensate for, but are justified by the aim of organizing diversity. It is however likely that it would consider positive action as a disproportionate restriction of the right to formal equality where it would not correspond to the criteria set forth in the relevant international human rights treaties<sup>42</sup>, in particular where the measure would not be temporary but would risk leading, instead, to the creation and maintenance of separate rights.

## 2. The Scope of Application of Article 14 ECHR

Article 14 of the European Convention on Human Rights does not create an independent protection from discrimination. It may only be invoked in combination with another substantive provision of the European Convention on Human Rights or of one of its additional Protocols : it is only when discrimination is found to exist *in the enjoyment of the rights and freedoms set forth in the Convention* that it will come into play. This is not to say that Article 14 ECHR has no autonomous function to fulfil in the system of the Convention. On the contrary, it supplements all the other substantive provisions by adding the requirement that they be applied and implemented without discrimination. In the case “*relating to certain aspects of the laws on the use of languages in education in Belgium*” v. *Belgium* (the « *Belgian Linguistics Case* »), the Court famously noted that, although the right to obtain from the public authorities the creation of a particular kind of educational establishment could not be inferred from Article 2 of Protocol No. 1,

... nevertheless, a State which had set up such an establishment could not, in laying down entrance requirements, take discriminatory measures within the meaning of Article 14. [Thus, similarly,] Article 6 of the Convention does not compel States to institute a system of appeal courts. A State which does set up such courts consequently goes beyond its obligations under Article 6. However it would violate that Article, read in conjunction with Article 14, were it to debar certain persons from these remedies without a legitimate reason while making them available to others in respect of the same type of actions. In such cases there would be a violation of a guaranteed right or freedom as it is proclaimed by the relevant Article read in conjunction with Article 14. It is as though the latter formed an integral part of each of the Articles laying down rights and freedoms. No distinctions should be made in this respect according to the nature of these rights and freedoms and of their correlative obligations, and for instance as to whether the respect due to the right concerned implies positive action or mere abstention.<sup>43</sup>

<sup>41</sup> European Commission of Human Rights, case of *East African Asians (Patel et al.)*, decision of 10 October 1970, *Ann. Conv.*, vol. 13, p. 995; Eur. Ct. H.R., *Abdulaziz, Cabales and Balkandali v. United Kingdom*, judgment of 29 May 1985, Series A n°94, p. 42, §§ 90-91; Eur. Ct. H.R., *Smith and Grady v. United Kingdom*, judgment of 27 September 1999, § 121.

<sup>42</sup> See for a summary of the position adopted by the relevant international instruments Sub-Commission on the Promotion and Protection of Human Rights (53d session), United National Commission on Human Rights, Prevention of Discrimination, “The concept and practice of affirmative action”, final report submitted by Mr Marc Bossuyt, Special Rapporteur, in accordance with the Sub-Commission Resolution 1998/5, E/CN.4/Sub.2/2002/21 (21 June 2002).

<sup>43</sup> Eur. Ct. HR, judgment of 23 July 1968, Series A no. 6, pp. 33-34, § 9.

Thus, the application of Article 14 ECHR does not presuppose a breach of another right or freedom of the Convention : a violation of the non-discrimination clause may be found, even if, considered independently from that clause, the provision it is combined with is not violated. For it to be cognizable under Article 14 ECHR – and, thus, justiciable by the European Court of Human Rights –, it nevertheless remains required that the discrimination occurs « within the ambit of » one or more other rights of the Convention. The European Court of Human Rights formulates this restriction by stating that « Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to ‘the enjoyment of the rights and freedoms’ safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter ». <sup>44</sup>

Therefore, unless an alleged discrimination occurs in the enjoyment of a right protected under the European Convention on Human Rights (for instance, in the protection of the home or of the right to social security benefits considered as part of the right to property<sup>45</sup>) or is based on the exercise of a right protected under the Convention (such as, for instance, freedom of religion or the freedom to choose one’s sexual orientation),<sup>46</sup> Article 14 ECHR will be inapplicable. As a result, a number of instances of discrimination in access to employment will not be considered to fall under the scope of application of Article 14 ECHR. <sup>47</sup>

Although Article 14 ECHR thus has a limited scope of application, this is in part compensated in the system of the Convention by a number of factors. First, Article 8 ECHR protects the « right to respect for private and family life ». Because of the broad understanding which has been given to this provision in the case-law of the European Court of Human Rights, the requirement of non-discrimination extends to a diversity of situations which would have been excluded under a literal – and more restrictive – reading of the Convention.<sup>48</sup> For instance, this could imply that the modalities according to which allowances are afforded to persons with a disability should respect Article 14 ECHR, excluding systems under which such allowances would

<sup>44</sup> This formulation is constant in the case-law of the Convention. See, e.g., Eur. Ct. HR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Series A no. 94, p. 35, § 71; Eur. Ct. HR, *Inze v. Austria* judgment of 28 October 1987, Series A no. 126, p. 17, § 36; *Karlheinz Schmidt v. Germany*, 18 July 1994, Series A no. 291-B, p. 32, § 22; Eur. Ct. HR, *Van Raalte v. the Netherlands*, judgment of 21 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 184, § 33; Eur. Ct. HR, *Petrovic v. Austria*, 27 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 585, § 22; Eur. Ct. HR, *Haas v. the Netherlands* (Appl. N° 36983/97), judgment of 13 January 2004, § 41.

<sup>45</sup> See Eur. Ct. HR, *Gaygusuz v. Austria*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1141 ; Eur. Ct. HR (2nd section), *Koua-Poirrez v. France* (Appl. N° 40892/98), judgment of 30 September 2003.

<sup>46</sup> Robert Wintemute, “‘Within the Ambit’: How Big Is the ‘Gap’ in Article 14 European Convention on Human Rights?”, (2004) E.H.R.L.R. 366, at p. 371. See Eur. Ct. HR (GC), *Thlimmenos v. Greece* (Appl. N° 34369/97), judgment of 6 April 2000, § 42 (Article 14 ECHR invoked successfully in combination with Article 9 ECHR by a Jehovah’s Witness denied access to the profession of chartered accountant because of a past criminal conviction for having refused to serve in the army for religious motives). Article 14 ECHR may be presumed to apply – whichever the nature of the disadvantage inflicted or of the advantage which is denied – where the discrimination penalizes persons for having sought to defend their rights before a court (Article 6 ECHR), for having chosen a sexual orientation or a particular lifestyle or for being in a particular family status (Article 8 ECHR), for having exercised their religion (Article 9 ECHR), for opinions they have expressed (Article 10 ECHR), for having joined an association or having refused to join an association (Article 11 ECHR), for having married or refused to enter into a marital relationship (Article 12 ECHR).

<sup>47</sup> In certain extreme cases where across-the-board prohibitions are imposed, the inability of the individual to have access to certain professions may constitute an interference with the right to respect for private life. See Eur. Ct. HR (2nd sect.), *Sidabras and Dziautas v. Lithuania* (Appl. N° 55480/00 and 59330/00), judgment of 27 July 2004, § 48.

<sup>48</sup> See, e.g., Eur. Ct. HR, *Petrovic v. Austria* (Appl. no. 20458/92), judgment of 27 March 1998, §§ 26-27 (Article 14 ECHR in combination with Article 8 ECHR applicable to the granting of a parental leave allowance).

Esselien | 1935

be granted in a discriminatory fashion.<sup>49</sup> However, the European Court of Human Rights has considered that public authorities were not obliged under Article 8 ECHR to take measures in order to facilitate the social or professional integration of persons with disabilities, for instance by ensuring the accessibility of private sea resorts<sup>50</sup> or public buildings to persons with limited mobility<sup>51</sup> or by providing them with certain equipment which would diminish their dependency on others.<sup>52</sup> The Court concluded that, because Article 8 ECHR was inapplicable in such cases, Article 14 ECHR could not be invoked either.

Second, if combined with the right of each individual to the « peaceful enjoyment of his possessions » protected by Article 1 of Protocol n°1 ECHR, Article 14 ECHR prohibits any discrimination in the allocation of benefits, whether in contributory or in non-contributory schemes. This implies that the European Convention on Human Rights in fact prohibits any discrimination in the field of social security or social aid. This case-law however does not extend the scope of application of Article 14 ECHR beyond situations where there is an established right to certain benefits, rather than mere expectations of future gains.<sup>53</sup>

Third, where it attains a certain level of severity, discrimination based on race or ethnic origin,<sup>54</sup> sex,<sup>55</sup> religion<sup>56</sup> or sexual orientation<sup>57</sup> may constitute a degrading treatment prohibited in absolute terms (i.e., without the possibility of justification) under Article 3 ECHR.<sup>58</sup> The impact of any particular treatment, rather than simply the intention of the author of the treatment, may suffice to constitute its « degrading » character. Therefore, in certain situations at least, the refusal to take into account the specific needs of a person with a disability in order to accommodate those needs may constitute a form of « degrading » treatment : in *Price v. the United Kingdom*,<sup>59</sup> the Court concluded that despite the absence of any “positive intention to humiliate or debase the applicant,” “to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment contrary to Article 3 of the Convention”<sup>60</sup>.

Despite these qualifications, and the possible further extension in the future of the scope of application of Article 14 ECHR in combination especially with Article 8 ECHR and Article 1 of Protocol n°1 ECHR, the prohibition under the European Convention on Human Rights of discrimination « in the enjoyment of the rights and freedoms » it sets forth remains limited. In particular, unless it is based on the exercise of a right or freedom of the Convention –

<sup>49</sup> See the dissenting opinion of judge Molinari to Eur. Ct. HR (2nd section), *Koua Poirrez v. France* judgment of 30 September 2003 (Appl. N° 40892/98) (allowance to adults with a disability which had been denied to the applicant on the grounds of his nationality). The Court decided in this case that there had been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

<sup>50</sup> Eur. Ct. HR, *Botta v. Italy* judgment of 24 February 1998.

<sup>51</sup> Eur. Ct. HR, *Zehlanova and Zehnal v. the Czech Republic* decision of 14 May 2002 (Appl. N° 38621/97). See the commentary by A. Hendriks in *NJCM-Bull.* 2003, p. 321.

<sup>52</sup> Eur. Ct. HR, *Sentges v. the Netherlands* decision of 8 July 2003 (Appl. N° 27677/02).

<sup>53</sup> See, e.g., Eur. Comm. HR, *Wanda Paruszevska v. Poland* (Appl. N° 33770/96), decision (inadmissibility) of 12 April 1998 (Article 14 ECHR does not apply to legal regulations obliging a person to retire, entailing a loss of future salaries for that person).

<sup>54</sup> See the report adopted on 14 December 1973 by the Commission under former Article 31 ECHR in the *East African Asians v. the United Kingdom* (Decisions and Reports 78-A, p. 62).

<sup>55</sup> See Eur. Ct. HR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Series A no. 94, at p. 42, § 91

<sup>56</sup> Eur. Ct. HR (GC), *Cyprus v. Turkey* (Appl. N° 25781/94), judgment of 10 May 2001, § 309

<sup>57</sup> Eur. Ct. HR (3d sect.), *Smith and Grady v. the United Kingdom* (Appl. N° 33985/96 and 33986/96), judgment of 27 September 1999, § 121.

<sup>58</sup> According to which, “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”

<sup>59</sup> Eur. Ct. HR (3d section), *Price v. the United Kingdom* judgment of 10 July 2001 (Appl. N° 33394/96) (applicant suffering from phocomelia due to thalidomide, committed to a short prison term for contempt of court).

<sup>60</sup> *Price*, para. 30.

in which case it will generally be analyzed, rather than under the non-discrimination clause of Article 14 ECHR, as an interference with rights such as the right to choose one's sexual orientation or lifestyle (Article 8 ECHR),<sup>61</sup> to exercise one's religion (Article 9 ECHR),<sup>62</sup> to express one's opinions (Article 10 ECHR),<sup>63</sup> to join or to refuse to join an association (Article 11 ECHR),<sup>64</sup> to marry or to refuse to enter into a marital relationship (Article 12 ECHR) – , discrimination in employment and occupation will in principle not fall under the scope of application of Article 14 ECHR. It is in order to expand the protection from discrimination in the system of the European Convention on Human Rights that Protocol n°12 additional to the ECHR was drafted and opened for signature on 4 November 2000.

### 3. Protocol n°12 to the ECHR (2000)

Article 1 of Protocol n°12 to the European Convention on Human Rights contains a general prohibition of discrimination :

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Although Article 1 of Protocol n°12 to the ECHR concerns only the « enjoyment of any right set forth by law », the protection from discrimination thus afforded by the Protocol goes beyond that afforded by Article 14 ECHR.<sup>65</sup> Social security matters being covered under Article 1 of Additional Protocol n°1 to the ECHR since *Gaygusuz*, the areas concerned shall be, in particular, access to public places, access to goods, provision of services, access to nationality, and in certain cases access to employment. Where the discrimination is based on other grounds than on the exercise of rights protected under the ECHR, the European Court of Human Rights might rely on Protocol n°12 in order to extend its jurisdiction to those situations which, presently, are not covered under Article 14 ECHR.

<sup>61</sup> Eur. Ct. HR (3d section), *Smith and Grady v. the United Kingdom* (Appl. N° 33985/96 and 33986/96), judgment of 27 September 1999 (homosexuals discharged from the British Army, after investigations had revealed their homosexuality); Eur. Ct. HR (3d section), *Lustig-Prean and Beckett v. the United Kingdom* (Appl. N° 31417/96 and 32377/96), judgment of 27 September 1999 (same).

<sup>62</sup> See, e.g., Eur. Ct. HR, *Kalaç v. Turkey* (Appl. N° 20704/92), judgment of 1 July 1997, Rep. 1997-IV, p. 1209 (judge advocate in the Turkish air force forced to retire for what the Turkish authorities considered to constitute breaches of discipline and scandalous conduct: the applicant had adopted « unlawful fundamentalist opinions », in becoming a member of the Muslim fundamentalist Süleyman sect); *Dahlab v. Switzerland* (Appl. no. 42393/98, ECHR 2001-V (dismissal of a schoolteacher converted to Islam and wishing to wear a headscarf).

<sup>63</sup> Eur. Ct. HR, *Vogt v. Germany*, judgment of 20 November 1995 (dismissal of the applicant from her post as a schoolteacher in the public educational system for having persistently refused to dissociate herself from the German Communist Party, as she considered that membership of that party was not incompatible with the duty of loyalty to the German Constitution imposed on all public servants : the Court considered that this constituted a violation of the freedoms of expression and association protected by the Convention, respectively in Articles 10 and 11).

<sup>64</sup> Ibid.

<sup>65</sup> See generally J. Schokkenbroek, "A New European Standard Against Discrimination: Negotiating Protocol n° 12 to the European Convention on Human Rights", in J. Niessen and Isabelle Chopin (eds.), *The Development of Legal Instruments to Combat Racism in a Diverse Europe*, Martinus Nijhoff Publ., Leiden/Boston, 2004, pp. 61-79.

Article 1 of Protocol n°12 to the ECHR imposes direct obligations only on public authorities (whether they belong to the executive, the legislative or the judicial branches). However, the States may have to adopt measures in order to prohibit discrimination by private parties. A positive obligation may be imposed on State Parties to adopt measures in order to prohibit discrimination by private parties, in situations where the failure to adopt such measures would be clearly unreasonable and result in depriving persons from the enjoyment of rights set forth by law. The Explanatory Report to Protocol n°12 mentions « a failure to provide protection from discrimination in [relations between private persons] might be so clear-cut and grave that it might engage clearly the responsibility of the State and then Article 1 of the Protocol could come into play ».<sup>66</sup> Although certain positive obligations may thus be imposed on States to protect from discrimination in the relationships between private parties, States parties may not, under the pretext of protecting from discrimination, commit disproportionate interferences with the right to respect for private or family life, as guaranteed by Article 8 ECHR. Therefore, a tripartite division is required, between three kinds of legal relations : in the interactions between the public authorities and private individuals, the former are prohibited from discriminating against the latter ; in the interactions between private individuals occurring in the context of market relationships, the State authorities may be under an obligation to intervene in order to prevent the most flagrant cases of discrimination and offer remedies to the victims thereof ; finally, in the interactions between private individuals which concern the private sphere, in the original meaning of private and family life which restricts this notion to the sphere of intimacy, the public authorities shall be prohibited from intervening, even if their objective in doing so is to better protect from discriminatory acts. It is in the intermediate or semi-public sphere where the obligations of the State are the least clearly defined : there, discriminatory behaviour may be regulated in order to outlaw discrimination, but whether or not this is an obligation under Article 1 of Protocol n°12 ECHR may in certain cases be debated.

<sup>66</sup> Explanatory Report, § 26.



## Part II

# The European Social Charter

The European Social Charter was initially signed on 18 October 1961 as the complement, in the field of economic and social rights, to the European Convention on Human Rights. It then included fundamental social rights of workers such as the right to work, the right to just conditions of work and to safe and healthy working conditions, the right to a fair remuneration, the right to organize and to bargain collectively, the right of children and young persons to protection, the right of employed women to protection, the right to vocational guidance and training, but also rights beyond the sphere of employment such as the right to protection of health, the right to social security, to social and medical assistance and to social welfare services, the right of disabled persons to vocational training, rehabilitation and social resettlement, the right of the family to social, legal and economic protection, the right of mothers and children to social and economic protection, the right to take an occupation in the territory of other Contracting States and the right of migrant workers and their families to protection and assistance. The European Social Charter however has been undergoing deep transformations since 1988. The initial list of 19 rights protected was expanded by the adoption of the Additional Protocol of 1988, which adds four rights closely inspired by developments in the social legislation of the European Community (the right to equal opportunities and equal treatment in employment and occupation without discrimination on the grounds of sex, the right to information and consultation, the right to take part in the determination and improvement of the working conditions and working environment, and the right of the elderly to social protection). On 3 May 1996, the Revised European Social Charter further expanded the list of rights to cover an increasingly large number of issues going beyond the protection of workers and their families, including the right of workers to protection in cases of termination of employment, the right of workers to protection of their claims in the event of the insolvency of their employer, the right to dignity at work, the right to reconcile employment and family responsibilities, the protection of workers' representatives, the right of workers to be informed and consulted in collective redundancy procedures, the right to protection against poverty and social exclusion and the right to housing. The effectiveness of the Charter has been improved with the entry into force, on 1 July 1998, of the Additional Protocol to the European Social Charter providing for a System of Collective Complaints<sup>67</sup>. The following paragraphs examine the potential contribution of the European Social Charter to the understanding of discrimination under the EC directives. Although the 1961 Charter already imposed a protection from discrimination in employment under the right to work (1.), the recent developments have improved that protection beyond the sphere employment, on the basis both of the general non-discrimination clause of Article E of the Revised European Social Charter and specific provisions aimed at the integration and social protection of persons with disabilities and of elderly persons (2.).

<sup>67</sup> Signed on 9 November 1995 (ETS, n° 158).

## 1. The European Social Charter of 1961

The European Social Charter of 1961 does not contain an explicit provision on equal treatment or non-discrimination,<sup>68</sup> although the Preamble does mention that « the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin ». However, the States parties to the ESC or those which have accepted Article 1(2) of the European Social Charter<sup>69</sup> undertake thereby to « protect effectively the right of the worker to earn his living in an occupation freely entered upon ». The Committee of Independent Experts, now renamed European Committee on Social Rights (ECSR), has read this clause – in combination with the Preamble of the Charter – as prohibiting all forms of discrimination in employment.<sup>70</sup> It considers that para. 2 of Article 1 of the Charter requires States to

legally prohibit any discrimination, direct or indirect, in employment. Stronger protection may be provided in respect of certain grounds, such as gender or membership of a race or ethnic group. The discriminatory acts and provisions prohibited by this provision are all those which may occur in connection with recruitment and employment conditions in general (mainly remuneration, training, promotion, transfer, dismissal and other detrimental action).<sup>71</sup>

In order to comply with para. 2 of Article 1 of the Charter, States which have accepted that provision should therefore « take legal measures to safeguard the effectiveness of the prohibition of discrimination », <sup>72</sup> ensuring to all the persons covered by the European Social Charter – which comprises the nationals of the States concerned and of the other States parties to the Charter, but not third-country nationals<sup>73</sup> – that they will have access to employment and be treated in occupation without discrimination (1.1.). Moreover, States are encouraged to ensure that the legal framework will be effective, a requirement from which the ECSR has derived a number of supplementary requirements (1.2.). Finally, beyond legal measures, policy measures promoting the professional integration of certain target groups are considered to complement the adaptation of the legal framework to the requirements of an effective prohibition of discrimination (1.3.).

<sup>68</sup> Article 4(3) however recognizes “the right of men and women workers to equal pay for work of equal value”. Article 1 of the Additional Protocol to the European Social Charter, 1988 (ETS, n° 128; entered into force on 4 September 1992) guarantees the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex. This guarantee is detailed in terms closely inspired by the existing *acquis* of the European Community.

<sup>69</sup> Para. 2 of Article 1 of the Revised European Social Charter opened for signature on 3 May 1996 contains an identical clause. Therefore the commentary of this clause is valid under both instruments.

<sup>70</sup> See, e.g., Concl. 2002, pp. 22-28 (France).

<sup>71</sup> See also Concl. XVI-1, vol. 2 (Luxembourg), pp. 377-380, although those conclusions do not include a list of measures “promoting the full effectiveness of the efforts to combat discrimination” according to Article 1 § 2 of the Revised Charter.

<sup>72</sup> *Ibid.*

<sup>73</sup> See the Appendix to the Social Charter, “Scope of the Social Charter in terms of persons protected”: foreigners are included under the substantive provisions of the Charter “only insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned (...)”.

## 1.1. The legal framework prohibiting discrimination

According to the European Committee of Social Rights, the legal framework<sup>74</sup> prohibiting discrimination in employment must protect from discrimination either on all grounds or, at least, on the grounds of political opinion, religion, race, language, sex, age and health.<sup>75</sup> The ECSR occasionally has expressed doubts as to the compatibility with para. 2 of Article 1 ESC of a legislation outlawing discrimination only with respect to certain of these grounds, the list of which, notably, goes beyond that of Article 13 EC.<sup>76</sup> The Committee has considered however, that arrangements for exemptions from the non-discrimination principle authorised for undertakings specifically established to promote a particular political view or religious belief and recalls that it considered that these did not pose any problems of compliance with Article 1 § 2 of the Charter.<sup>77</sup>

The legal framework protecting from discrimination must present at least four characteristics in order to comply with Article 1 § 2 of the Charter. First, the legal framework must ensure that any legal obstacles to the access to employment of workers protected be removed:<sup>78</sup> the European Committee of Social Rights has repeatedly held that Article 1 § 2 of the Charter requires Contracting Parties to rescind any statutory, regulatory or administrative provisions that violate the principle of equal treatment,<sup>79</sup> and that non-application of national legislation does not suffice to demonstrate a State's compliance with the Charter.<sup>80</sup> The legal framework must provide moreover that any provision contrary to the principle of equal treatment which appears in collective labour agreements, in employment contracts or in firms' own regulations may be declared null or be rescinded, abrogated or

<sup>74</sup> In Conclusions relating to the Netherlands Antilles, the ECSR has made it clear that that the direct application of Article 14 of the European Convention on Human Rights and Article 26 of the International Covenant on Civil and Political Rights constitutes an insufficient legal basis and that employment discrimination must be the subject of a more precise legal prohibition : see Concl. XVI-1, vol. 2, pp. 464-467. Nor does a general non-discrimination clause in the national Constitution appear sufficient : "specific legislation on discrimination in employment (...) that is sufficiently detailed to protect employees in all aspects of their working lives" should be introduced (with respect to the protection afforded under Article 10 of the 1982 Turkish Constitution : see Concl. XVI-1, vol. 2 (Turkey), pp. 637-640).

<sup>75</sup> In recent Conclusions relating to Italy, the European Committee of Social Rights examined the provisions which protect from discrimination in employment in the Italian legal system. Finding that neither Article 3 of the Constitution nor Article 15 of Act No. 300/1970 (the Workers' Statute) – which prohibits any agreement or act discriminating against a worker because of his or her political opinions, religion, race, language or sex – offer a protection against discrimination based on age or health, the ECSR concluded that this omission should be remedied under para. 2 of Article 1 of the Charter (Concl. 2002 (Italy), p. 75). In its Conclusions relating to Romania on the same provision of the Charter and during the same cycle of control, the ECSR noted expressly that health-based discrimination was prohibited in the Romanian legal system, despite it not being explicitly mentioned in the applicable regulations (Concl. 2002 (Romania), pp. 117-121).

<sup>76</sup> See, e.g., Concl. XVI-1, vol. 2 (Belgium), pp. 56-63.

<sup>77</sup> Concl. XVI-1, vol. 1 (Denmark), pp. 164-168 (remark made in relation to section 6 of Act No. 459 of 12 June 1996, which prohibits any discrimination in the labour market).

<sup>78</sup> For instance, as the prohibition of discrimination in employment under Article 1 para. 2 ESC extends to the prohibition of discrimination on grounds of nationality where nationals of States parties are concerned (under the ESC, the only jobs from which foreigners may be banned under Article 31 of the Charter are those that are inherently connected with the protection of the public interest or national security and involve the exercise of public authority), the ECSR noted with respect to Poland that "under the Medical Profession Act of 5 December 1996, foreign nationals who are permanently resident and have obtained their medical qualifications in Poland must also seek authorisation to practise there. The granting of such authorisation is apparently entirely at the discretion of the professional body of the relevant district. The Committee considers that this could constitute discrimination in employment contrary to Article 1 § 2 of the Charter" (Concl. XVI-1, vol. 2, pp. 524-528).

<sup>79</sup> Concl. XIII-5, p. 253.

<sup>80</sup> Concl. XIII-3, p. 66. See also Concl. XVI-1, vol. 2 (Austria), pp. 22-27.

amended. Second, appropriate and effective remedies must be available in the event of an allegation of discrimination. In Conclusions relating to Romania, the ECSR thus expressed its regret at the finding that : « No provision for easing the burden of proof is made where an allegation of discrimination is raised. The alleged victim bears the entire burden of proving that infringement of the anti-discrimination provisions has occurred. The Committee considers that this situation is apt to impair the effectiveness of the prohibition of discrimination in employment. It recalls that the Charter prohibits all discrimination, whether evident in a clearly expressed rule or occurring in practice, and stresses that in the event of de facto discrimination it is often difficult if not impossible for the complainant to establish the existence of a difference in treatment ».<sup>81</sup> In Conclusions concerning Malta, the Committee requested from that State information on « the rules governing evidence in cases of alleged discrimination and asks whether employer intent is deemed by the courts to be a determining factor in establishing discrimination ».<sup>82</sup> Third, the legal framework must ensure « protection against dismissal or other retaliatory action by the employer against an employee who has lodged a complaint or taken legal action ».<sup>83</sup> Fourth, in the event of a violation of the prohibition of discrimination, the law must provide for « sanctions that are a sufficient deterrent to employers as well as adequate compensation proportionate to the damage suffered by the victim ».<sup>84</sup>

## 1.2. The legal measures promoting the full effectiveness of the prohibition of discrimination

Apart from these specific requirements which the Committee considers to flow directly from Article 1, para. 2 of the Charter, the Committee mentions a number of measures which should be encouraged because, in its own words, they « promote the full effectiveness of the efforts to combat discrimination according to Article 1 § 2 of the Revised Charter ». The States bound by this provision should in that respect recognize « the right of trade unions to take action in cases of discrimination in employment, including on behalf of individuals ». They should allow for « the possibility of collective action by groups with an interest in obtaining a ruling that the prohibition of discrimination has been violated ».<sup>85</sup> They should also set up a specialised body to « promote, independently, equal treatment, especially by providing discrimination victims with the support they need to take proceedings ».<sup>86</sup>

<sup>81</sup> Concl. 2002 (Romania), pp. 117-121.

<sup>82</sup> Concl. XVI-1, vol. 2 (Malta), pp. 408-411.

<sup>83</sup> In Conclusions concerning Romania, the ECSR asked « which specific safeguards are prescribed in Romanian law against possible dismissal and other retaliatory measures by an employer against an employee who has lodged a complaint of discrimination or instituted judicial proceedings » (Concl. 2002 (Romania), pp. 117-121).

<sup>84</sup> The Committee seeks to assess whether compensation is "proportionate to the damage suffered by the victim" (Concl. XVI-1, vol. 1 (Czech Republic), pp. 125-129). A compensation equal to remuneration during the period of notice appears to be insufficient to the Committee : see Concl. XVI-1, vol. 2 (Poland), pp. 524-528.

<sup>85</sup> See Concl. 2002 (Italy), p. 75

<sup>86</sup> Concl. 2002 (Slovenia), pp. 174-176.

### 1.3. Policy measures intended to improve professional integration of target groups

Though necessary, legal measures may not be sufficient in the view of the Committee : concrete measures should moreover be taken in order to encourage complete equal treatment in employment.<sup>87</sup> The Committee therefore encourages the States parties to conduct an active labour policy seeking to promote the integration of minorities.<sup>88</sup> The ECSR has occasionally referred in that respect to the Guidelines adopted in the framework of the European Employment Strategy, one pillar of which concerns the integration of disadvantaged groups into the employment market.<sup>89</sup> The insistence by the Committee on this dimension of non-discrimination is based on its general understanding of the requirements of para. 2 of Article 1 of the Charter that « although a necessary requirement, appropriate domestic legislation that is in conformity with the Charter is not sufficient to ensure the principles laid down in the Charter are actually applied in practice. It is not sufficient therefore merely to enact legislation prohibiting discrimination (...) as regards access to employment; such discrimination must also be eliminated in practice ».<sup>90</sup> Where the situation on the labour market of women or certain minorities remains unsatisfactory, the Committee considers that this demonstrates that the measures taken to date are not sufficient.

It should therefore not be surprising that already in its first cycle of control, the Committee of Independent Experts remarked that acceptance of paragraph 2 of Article 1 of the Charter « placed the Contracting States under an obligation, inter alia, to provide appropriate education and training to ensure the full exercise of the right guaranteed therein ».<sup>91</sup> Indeed, as the ECSR examines on the basis of that provision of the Charter not only the adequacy of the *legal framework* prohibiting discrimination, but also the *results* which are achieved in the integration of certain target groups traditionally excluded from the labour market, providing training and education to the members of those groups constitutes a means for the States parties to comply with their obligations under that provision.<sup>92</sup>

It is noteworthy that the ECSR has frequently encouraged the States parties who have accepted to be bound by para. 2 of Article 1 of the European Social Charter to comply with the obligations imposed under European Union law in the field of non-discrimination in employment<sup>93</sup>: indeed, as demonstrated by its emphasis on a legal

<sup>87</sup> In its first conclusions adopted about Italy, the Committee of Independent Experts noted “regretfully” that it has been “unable to find in the first report of the Italian Government sufficient particulars on the admission of women to certain posts, notably in the civil service; it considered that the rights guaranteed by the Charter, especially in the matter of non-discrimination against women, required not only that the State remove all legal obstacles to admission to certain types of employment, but also that positive, practical steps be taken to create a situation which really ensured complete equality of treatment in this respect” (Concl. I (released on 1.1.1970), at p. 15-16). See also the conclusions adopted during that same cycle of control on the United Kingdom : Concl. I (released on 1.1.1970), at p. 16.

<sup>88</sup> See Concl. XVI-1, vol. 2 (Norway), pp. 485-487.

<sup>89</sup> See, e.g., Concl. XVI-1, vol. 2 (Spain), pp. 602-606; Concl. XVI-1, vol. 1 (Germany), pp. 236-242. See also Concl. XVI-1, vol. 1 (Czech Republic), pp. 125-129 (reference to the national employment action plan 1999-2000).

<sup>90</sup> Concl. XVI-1, vol. 2 (Spain), pp. 602-606.

<sup>91</sup> Concl. I (released on 1.1.1970), at p. 15.

<sup>92</sup> See, with respect to the need to provide training and education to the Roma population, underrepresented in the labour market, Concl. XVI-1, vol. 1, pp. 125-129.

<sup>93</sup> For instance, in Conclusions relating to Germany, the Committee « considers (...) that the fragmentary nature of the employment laws and the fact that the burden of proof rests entirely with the plaintiff are a major barrier to employees exercising their rights. The Committee asks whether the German authorities plan to bring in legislation or specific procedures to remedy this problem, e.g. when Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation is incorporated into national law » (Concl. XVI-1, vol. 1, pp. 236-242). This reference to Union law is by no means exceptional in the case-law of the ECSR.

framework protecting from discrimination which presents the required effectiveness, including with regard to the burden of evidence in discrimination cases and the role of unions and organisations having an interest in combating discrimination, developments in the case-law of the ECSR seem to have been influenced by the evolution of European Community anti-discrimination law.

## 2. The Revised European Social Charter of 1996

The adoption of the Revised European Social Charter in 1996, one of the main results of the « revitalisation » of the Charter launched in 1990, led not only to expand the list of substantive rights protected under the new instrument, but also to two modifications important from the point of view of combating discrimination. First, Article E was included in Part V of the Revised Charter – which contains « horizontal » clauses applicable to the generality of its substantive clauses –. According to Article E :

The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

In its decision on the merits of Collective complaint n°13/2002 directed by Autism-Europe against France, the European Committee of Social Rights concluded by 11 votes to 2 that France had violated Articles 15 § 1 (obligation to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes whenever possible) and article 17 § 1 (right to education by the provision of institutions and services sufficient and adequate) of the revised European Social Charter, either alone or in combination with Article E (non-discrimination), because the proportion of children with autism being educated in either general or specialist schools is much lower than in the case of other children, whether or not disabled, and because of the chronic shortage of care and support facilities for autistic adults. In adopting that decision, the Committee underlined that « the insertion of Article E into a separate Article in the Revised Charter indicates the heightened importance the drafters paid to the principle of non-discrimination with respect to the achievement of the various substantive rights contained therein ». It considered that this provision should be read per analogy with Article 14 ECHR the wording of which it replicates, as protecting from discrimination in the enjoyment of the substantive rights of the Charter, on all grounds not limited to those explicitly enumerated in that provision. It should be emphasized that, although Article E of the Revised European Social Charter therefore has no independent existence (it may only be invoked in combination with substantive provisions of the Charter), nevertheless the scope of the protection it offers is much wider than that of Article 14 ECHR, because of the range of rights protected under the Charter – which includes, e.g., the right to work, to vocational guidance or training, to protection of health, to the social protection of the elderly, to protection against poverty and social exclusion, or to housing –. This will contribute to the influence the jurisprudence developed by the European Committee of Social Rights may have on the development of the EC directives.

Even more importantly, the Committee cited the judgment of the European Court of Human Rights in *Thlimmenos v. Greece* to the effect that the principle of non-discrimination « is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different », and concluded :

in other words, human difference in a democratic society should not only be viewed positively but should be responded to with discernment in order to ensure real and effective equality.

Eva | 1980

In this regard, the Committee considers that Article E not only prohibits direct discrimination but also all forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.<sup>94</sup>

While acknowledging that the realisation of certain rights having important budgetary implications could require an effort in time, the European Committee of Social Rights considered – clearly inspired here by the approach adopted by the UN Committee on Economic, Social and Cultural Rights with respect to the obligations of the Covenant on Economic, Social and Cultural Rights which are to be progressively realized<sup>95</sup> – that

when the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for others persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings.<sup>96</sup>

The Committee found that, « notwithstanding a national debate going back more than twenty years about the number of persons concerned and the relevant strategies required », France has failed to achieve sufficient progress in advancing the provision of education for persons with autism. It therefore was in violation of the Revised European Social Charter, not simply because of its failure to achieve a particular result, but because it had not proven that it had adopted measures to the maximum extent of its available resources in order to address as a matter of priority the situation of vulnerable groups such as persons with disabilities. This decision illustrates how the requirement of non-discrimination may lead to guide the realisation of socio-economic rights such as the right to education by identifying the categories which, because of their particular vulnerability, deserve special attention.

A second contribution of the Revised European Social Charter has been to modify Article 15 of the Charter, in order to reinforce the right to independence, social integration and participation in the life of the community of persons with disabilities and go beyond an approach centred (in the 1961 version of that provision) on rehabilitation and social resettlement. In its first interpretations of Article 15 of the Revised European Social Charter, the Committee said of this provision that it “advances the change in disability policy that has occurred over the last decade away from welfare and segregation and towards inclusion and choice”. It considers accordingly that Article 15 of the Revised ESC embodies a requirement of non-discrimination. For instance,<sup>97</sup>

in so far as Article 15 par. 1 of the Revised Charter explicitly mentions ‘education’, (...) the existence of non-discrimination legislation [is necessary] as an important tool for the advancement of the inclusion of children with disabilities into general or mainstream educational schemes. Such legislation should, as a minimum,

<sup>94</sup> At § 52.

<sup>95</sup> See in particular CESCR, General comment No. 5: Persons with disabilities, adopted at the 11th session of the Committee (1994) (UN doc. E/1995/22), in *Compilation of general comments and general recommendations adopted by human rights treaty bodies* (UN doc. HRI/GEN/1/Rev.7, 12 May 2004), p. 26: “since the Covenant’s provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant. In addition, insofar as special treatment is necessary, States parties are required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability”.

<sup>96</sup> At § 53.

<sup>97</sup> Concl. 2003-1, p. 159 (France – Article 15 para. 1) ; Concl. 2003-1, p. 292 (Italy – Article 15 para. 1) ; Concl. 2003-2, p. 498 (Slovenia – Article 15 para. 1) ; Concl. 2003-2, p. 608 (Sweden – Article 15 para. 1).

require a compelling justification for special or segregated educational systems and confer an effective remedy on those who are found to have been unlawfully excluded or segregated or otherwise denied an effective right to education.

Article 15 par. 3 of the Revised European Social Charter concerns the integration and participation of persons with disabilities in the life of the community. According to the European Committee on Social Rights, this provision requires the adoption of positive measures to achieve integration in housing, transport, telecommunications, cultural and leisure facilities. As Article 15 par. 3 of the Revised Charter refers to participation of persons with disabilities, the European Committee on Social Rights also requires that “persons with disabilities and their representative organisations should be consulted in the design, and ongoing review of such positive action measures and that an appropriate forum should exist to enable this to happen”<sup>98</sup>. Moreover, Article 15 par. 3 of the Revised European Social Charter “requires the existence of anti-discrimination (or similar) legislation covering both the public and the private sphere in the fields such as housing, transport, telecommunications, cultural and leisure activities, as well as effective remedies for those who have been unlawfully treated”<sup>99</sup>.

Article 23 of the Revised European Social Charter guarantees the right of elderly persons to social protection<sup>100</sup>. The Committee reads this provision as requiring the introduction of non-discrimination legislation protecting elderly persons against discrimination on grounds of age.<sup>101</sup> It also insists on the provision of adequate resources to the elderly, by pensions or other financial assistance where they perceive no salary, or by an adequate level of wages ; on the provision of services and facilities, including home help services and day care centres in particular for elderly persons suffering from Alzheimer’s disease ; on health care programmes and services specifically aimed at the elderly ; on the inclusion of the needs of elderly persons in national or local housing policies ; on the availability, accessibility and quality of residential institutions for elderly persons ; and on the possibility for elderly persons, their families, and social and trade union organisations to make complaints about care and treatment in the institution.

<sup>98</sup> Concl. 2003-1, p. 168 (France – Article 15 para. 3) ; Concl. 2003-1, p. 507 (Slovenia – Article 15 para. 3).

<sup>99</sup> Concl. 2003-1, p. 170 (France – Article 15 para. 3) ; Concl. 2003-1, p. 298 (Italy – Article 15 para. 3) ; Concl. 2003-2, p. 508 (Slovenia – Article 15 para. 3) ; Concl. 2003-2, p. 614 (Sweden – Article 15 para. 3).

<sup>100</sup> This provision has no exact equivalent in the 1961 Charter. It has been introduced initially as Article 4 of the Additional Protocol of 4 May 1988, which added 4 rights to the original list contained in the 1961 Charter.

<sup>101</sup> Concl. 2003, vol. 1 (Italy), p. 314.

## Part III

# A Comparison with the EC Directives : Key Interpretive Challenges

As already noted, the adoption in 2000 within the European Community of the 'Race' and Framework Directives have influenced both the European Court of Human Rights in its interpretation of Article 14 ECHR and the European Committee of Social Rights : the insistence by the European Court of Human Rights in *Nachova* on the need to adapt the evidentiary rules to facilitate the proof of discrimination is explicitly related by the Court to the EC Directives ; when presented with reports by Member States of the European Union, the European Committee of Social Rights insists that, in order to promote the full effectiveness of the efforts to combat discrimination according to Article 1 § 2 of the (Revised) Charter, the States having accepted that provision should implement fully the 'Race' and Framework Directives, especially the procedural clauses thereof relating to the role of organisations having an interest in combating discrimination and, in the context of the 'Race' Directive, of equality bodies. Here, it is the reverse question we are asking : what influence may the case-law briefly described exercise on the interpretation of the Directives adopted on the basis of Article 13 EC ?

A first observation which is to be made concerns the consequences of the choice by the Member States which ratified the Treaty of Amsterdam to provide for a power by the Council to adopt measures against discrimination based on a limited number of grounds : race or ethnic origin, sex, sexual orientation, religion or belief, disability and age ; and of the choice of the Council, later, to offer a broader protection against discrimination based on race or ethnic origin, than on the other grounds mentioned in Article 13 EC. As we have seen, the European Committee of Social Rights has on occasion insisted that the legal framework prohibiting discrimination in employment must protect from discrimination either on all grounds or, at least, on the grounds of political opinion, religion, race, language, sex, age and health. We are left to wonder, then, whether the omission of both political opinion and language from Article 13 EC and, therefore, from the Directives, will not create a risk of non-compliance with Article 1 para. 2 of the European Social Charter (or of the Revised European Social Charter) by the Member States having accepted that provision in either of those instruments, where they have chosen not to expand the scope of the protection afforded to persons under their jurisdiction to those grounds. We may also ask whether a prohibition of discrimination based on « disability » as in Directive 2000/78/EC is sufficient, or whether it should be implemented preferably as a prohibition from discrimination based on the ground of « health » (or, perhaps, « physical or mental condition »), under a symmetrical rather than a non-symmetrical approach. Although the European Committee of Social Rights has explicitly recognized that a stronger protection may be provided in respect of certain grounds (and it cited in that respect gender or membership of a race or ethnic group), it may be less justifiable for States parties to the Charter to offer no protection at all from discrimination based on certain grounds not mentioned in the Directives.<sup>102</sup>

The following observations examine, for each ground covered by the 'Race' and Framework Directives, which lessons may be drawn from the case-law presented above, and – more often – from the case-law of the European Court of Human Rights on other bases than the non-discrimination clauses of the ECHR, in order to address certain outstanding questions of interpretation of the requirements of the directives.

It will be noted from the outset that Article 2(5) of the Framework Directive states that this instrument is “without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others”. Although modelled on Article 9(2) ECHR, which defines the conditions under which freedom of religion may be restricted, Article 2(5) of the Framework Directive is narrower in the justifications it allows for, as it does not refer to the “protection of morals” as a legitimate objective the pursuance of which might justify restrictions to the rights attributed by the Directive. Apart from that difference (which implies that certain restrictions on religious freedom may be found in

<sup>102</sup> This, it will be noted, is the position adopted by the constitutional court of Belgium (Cour d'arbitrage) (judgment n° 157/2004 on 6 October 2004).

violation of the Framework Directive even though compatible with Article 9 ECHR), where the Member States seek to rely on Article 2(5) of the Framework Directive, guidance may be sought in the case-law of the European Court of Human Rights in order to interpret that clause. Indeed, although Article 14 ECHR (or Article 1 of Protocol n°12) do not contain such an explicit clause on the allowable restrictions to the guarantee of non-discrimination, the reading of these provisions by the European Court of Human Rights, as we have seen, follows a similar structure when the Court has to evaluate whether certain differences of treatment are acceptable : it then examines whether these differences between situations otherwise comparable pursue a legitimate objective, and if so, whether they are proportionate (or in certain cases even “necessary”) to the fulfilment of that aim. The case-law derived from the ECHR is therefore made even more relevant to the interpretation of the Framework Directive due to the wording of Article 2(5).

## 1. Race or ethnic origin

The judgment of the European Court of Human Rights in *Nachova and others v. Bulgaria* is the first in which it found discrimination on the ground of race. This is not despite of, but rather because of the strong condemnation of racial discrimination in the Council of Europe : in order to avoid condemning States Parties for racial discrimination unless there exist sufficiently strong indicia that such discrimination has occurred, the Court will only reluctantly arrive at that conclusion in the face of such allegations.

The ‘Race’ Directive does not contain a provision on the reasonable accommodation of the specific needs of the members of certain ethnic groups, leaving unresolved the question whether a failure to provide reasonable accommodation should be considered a form of prohibited discrimination under the Directive. There are indications in the case-law of the European Court of Human Rights that this may be a direction to be explored in the future. The reasoning of the Court in *Thlimmenos* – which this report has presented above as a judgment requiring the reasonable accommodation of members of particular religious minorities – could be applied, for instance, to those accommodations that Gypsies could require in order to be able to pursue their traditional, nomadic or semi-nomadic, lifestyle, by the provision of certain exceptions in generally applicable regulations.

Representative cases presented to the European Court of Human Rights concerned the application of regulations relating to land use, without taking into account the particular needs of the Gypsies arising from their tradition of living and travelling in caravans.<sup>103</sup> The majority of the members of the Court in those cases have failed to correctly rely on the notion of effective accommodation. When, on 18 January 2001, the Grand Chamber of the European Court of Human Rights dismissed five applications concerning that question, refusing in particular to consider that the United Kingdom authorities had failed to treat differently the Gypsies living in caravan homes whose situations were allegedly different from that of the rest of the population, it based in part its reasoning on the fear that « to accord to a Gypsy who has unlawfully stationed a caravan site at a particular place different treatment from that accorded to non-Gypsies who have established a caravan site at that place or from that accorded to any individual who has established a house in that particular place would raise substantial problems under Article 14

<sup>103</sup> See Eur. Ct. HR(GC), *Chapman v. the United Kingdom* (Appl. N°27238/95), judgment of 18 January 2001, at §§ 127-130 (where the Court does not exclude this reasoning, concluding however that there was no discrimination in that case); Eur. Ct. HR (GC), *Beard v. the United Kingdom* (Appl. N°24882/94), judgment of 18 January 2001, at §§ 129-132 (same); Eur. Ct. HR (GC), *Coster v. the United Kingdom* (Appl. N°24876/94), judgment of 18 January 2001, at §§ 139-142 (same); Eur. Ct. HR (GC), *Jane Smith v. the United Kingdom* (Appl. N°25154/94), judgment of 18 January 2001 (same); Eur. Ct. HR (GC), *Lee v. the United Kingdom* (Appl. N° 25289/94), judgment of 18 January 2001, at §§ 126-130 (same).

of the Convention ».<sup>105</sup> In the view of the author of this report, this confuses the obligation to provide effective accommodation (or to treat differently situations which require such differential treatment) with a form of positive action, which it is not. In *Chapman*, seven judges<sup>106</sup> filed a joint dissenting opinion contesting the approach of the majority, as exhibited in the extract cited above. This approach, the dissenters noted,

ignores the fact, earlier acknowledged by the majority, that in this case the applicant's lifestyle as a Gypsy widens the scope to Article 8, which would not necessarily be the case for a person who lives in conventional housing, the supply of which is subject to fewer constraints. The situations would not be likely to be analogous. On the contrary, discrimination may arise where States, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different (see *Thlimmenos v. Greece*, no. 34369/97, § 44, ECHR 2000-IV).

The obligation to take into account relevant differences in situation in drafting legislations of a general scope of application should not be confused with the introduction of positive action measures. Indeed, under Article 4 of the Council of Europe Framework Convention for the Protection of National Minorities,<sup>107</sup> where States parties are led to adopt, « adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority », taking due account in this respect of « the specific conditions of the persons belonging to national minorities », such measures are specifically designated as not being discriminatory in character.

## 2. Disability

Two outstanding questions of interpretation of the provisions of Directive 2000/78/EC relating to the equal treatment of persons with disabilities in employment and occupation may be illuminated by the relevant case-law of the European Court of Human Rights. A first question of interpretation concerns the imposition of health and safety requirements creating an obstacle to the recruitment, or the retainment, of workers with a certain disability putting either themselves or the co-workers or the general public at risk under certain conditions of employment.<sup>108</sup> It is well documented that occupational health and safety regulations may constitute a significant barrier to the access to employment of workers with disabilities or to their retention.<sup>109</sup> Article 8 ECHR protects the right to respect for private life, and has been interpreted broadly by the European Court of Human Rights to restrict not only the power of the States Parties to interfere with the right to privacy of the individual understood as the sphere of intimate matters – and, in particular, to seek information he or she wishes to see remain

<sup>104</sup> See however, for a finding of violation of Article 8 ECHR because of the lack of procedural safeguards in the eviction of the applicant from a caravan site on which he and his family had lived for fourteen to fifteen years, Eur. Ct. HR (1st sect.), *Connors v. the United Kingdom* (Appl. N° 66746/01), judgment of 27 May 2004.

<sup>105</sup> Eur. Ct. HR(GC), *Chapman v. the United Kingdom* (Appl. N° 27238/95), judgment of 18 January 2001, at § 95.

<sup>106</sup> Mr Pastor Ridruejo, Mr Bonello, Mrs Tulkens, Mrs Strá\_nická, Mr Lorenzen, Mr Fischbach and Mr Casadevall.

<sup>107</sup> ETS, n° 157. Opened for signature on 1 February 1995, and entered into force on 1 February 1998.

<sup>108</sup> These questions are developed in detail in the report commissioned by the EC Network of experts on disability discrimination for the Commission of European Communities, DG Employment and Social Affairs : O. De Schutter, *Pre-Employment Inquiries and Medical Examinations as Barriers to the Employment of Persons with Disabilities : Reconciling the Principle of Equal Treatment and Health and Safety Regulations under European Union Law*, August 2004, 54 pp.

<sup>109</sup> See in particular *The extent of use of health and safety requirements as a false excuse for not employing sick of disabled persons*, study prepared by IRS Research for the Health and Safety Executive and the Disability Rights Commission, HSE Research Report 167, 2003,

confidential – , but also their ability to process personal data, i.e., any information relating to an identified or identifiable individual. Under the former aspect, Article 8 ECHR embodies a protection laid out in further detail in the 1997 Council of Europe Convention on Human Rights and Biomedicine<sup>110</sup> . Under the latter, it embodies a protection of the individual with respect to the processing of personal data which is developed in the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981,<sup>111</sup> and which Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>112</sup> further details for the Member States of the European Union.

An adequate regulation of pre-employment inquiries and medical examinations has a crucial role to play if we wish to prevent occupational health and safety requirements from becoming unjustified barriers to the employment of persons with disabilities. In the cases most significant statistically, the disability will only be revealed by such inquiries or such medical examinations. It is therefore on the basis of such inquiries or examinations that the discrimination may occur ; and it is by better protecting the privacy of the individual, through the strict regulation of the conditions under which information may be sought from that individual concerning his or her health, physical condition, or impairment, that we may hope to limit the number of circumstances where the disability will be known to the employer under conditions where this may lead to unjustified reactions from his/her part – reactions resulting from fear or prejudice, or from overprotective attitudes, which the employer will seek to justify by a misrepresentation of the obligations of the employer under health and safety regulations. Article 8 ECHR prohibits any medical examination which constitutes an unjustified interference with private life<sup>114</sup>, and which, in particular, when the examination is performed in the context of

<sup>110</sup> Convention for the Protection of Human Beings and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine opened for signature in Oviedo on 4 April 1997 (ETS n° 164). Like Article 5 of that Convention, Article 8 ECHR requires in principle that any medical intervention be authorized by the free and informed consent of the individual concerned. See also *Medical Examinations Preceding Employment and/or Private Insurance : A Proposal for European Guidelines*, Council of Europe, April 2000, p. 30. In the case-law of the European Court of Justice, which protects the right to respect for private life by including Article 8 ECHR among the general principles of EC Law, see Case C-404/92 P, *X v. Commission*, ECR [1994] 4737 (judgment of 5 October 1994). For a commentary, see O. De Schutter, "Les examens médicaux à l'embauche de la Commission européenne", *Observations sous C.J.C.E.*, 5 octobre 1994, *X c. Commission des C.E.*, *Revue trimestrielle des droits de l'homme*, 1995, pp. 97-122.

<sup>111</sup> ETS, n° 108. In the case-law of the European Court of Human Rights, the traditional right to respect for private life has been enriched by the inclusion of a purely informational dimension : it now guarantees the individual not only against the unwanted subtraction of confidential information, but also against the systematic processing of information relating the individual : see Eur. Ct. HR, *Rotaru v. Romania*, judgment of 4 May 2000, § 43. For a commentary, see O. De Schutter, "Vie privée et protection de l'individu vis-à-vis des traitements de données à caractère personnel", *Revue trimestrielle des droits de l'homme*, n°45, 2001, pp. 137-183.

<sup>112</sup> OJ L 281 of 23.11.1995, p. 31.

<sup>113</sup> Or, arguably, of Article 1 para. 2 of the European Social Charter : see esp. Concl. VIII, p. 28 (interpreting this provision as implying a right of the candidate employee not to be subjected to requirements which bear no defensible relationship to the job to be performed, and which therefore are discriminatory).

<sup>114</sup> See, e.g., Eur. Comm. H.R., Appl. n°8239/78, *X v. the Netherlands*, dec. of 4 December 1978, D.R., 16, p. 184; Eur. Comm. H.R., Appl. n° 8278/78, *X v. Austria*, dec. of 13 December 1979, D.R., 18, p. 154; Eur. Comm. H.R., Appl. n°21132, *Peeters v. the Netherlands*, dec. of 6 April 1994, D.R., 77-A, p. 75; Eur. Comm. H.R., Appl. n° 20872/92, *A.B. v. Switzerland*, D.R., 80-A, p. 66. See generally M. van de Kerchove, "La protection de la santé publique par le droit pénal et les restrictions qui en découlent par rapport aux autres droits fondamentaux. Examen de la jurisprudence de la Cour et de la Commission européenne des droits de l'homme", *Revue de science criminelle et de droit pénal comparé*, 1996, esp. pp. 103-105.

employment, is not strictly tailored to the needs of the task to be performed.<sup>115</sup> The requirements of the European Convention on Human Rights in this respect should be taken into account, in particular, when an interpretation is required of the prohibition of indirect discrimination, as defined in Article 2(2)(b) of the Framework Directive, as well as of the safeguard clauses contained in Article 7(2) of the Framework Directive, which states that

with regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

As well as in Article 2(5) of the Framework Directive, which authorizes the Member States to adopt measures « which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others ». Existing or future<sup>118</sup> health and safety regulations should be immunized, under these clauses, from being challenged as in violation of the non-discrimination requirements of the Directive, and as having therefore to be abolished,<sup>117</sup> only if they comply with the requirements of Article 8 ECHR as interpreted by the European Court of Human Rights.

A second question of interpretation of these provisions concerns the obligation imposed on employers to provide effective accommodation in order to ensure that workers with disabilities may be recruited or retained, unless this imposes a « disproportionate burden » on the employers concerned. It will suffice to say in the context of this report that the right to peaceful enjoyment of possessions guaranteed under Article 1 of Protocol n°1 to the ECHR does not constitute an obstacle to the imposition of such an obligation on the employer, especially when combined with the proviso that it should not lead to imposing a disproportionate burden.

In the absence of a case-law of the monitoring bodies of the Convention relating specifically to this issue, the case of *Mellacher and Others v. Austria* should be considered as guiding. The applicants, landlords in Austria, complained of an infringement of their property rights under Article 1 of Protocol No. 1 to the Convention by reason of the allegedly excessive reduction in rents allowed to their tenants under the 1981 Rent Act which restricted agreements on the basic rent for premises covered to the amount regarded as reasonable with reference to the size, type, layout, location, fittings and condition of the premises and laid down maximum limits for the most common types of apartments. The Court rejected the argument of the applicants that the infringement with their property rights was disproportionate, observing in particular that « in remedial social legislation and in particular in the field of rent control (...) it must be open to the legislature to take measures affecting the further execution

<sup>115</sup> The recent case-law of the European Court of Human Rights on this issue shows, however, that the States parties to the ECHR are recognized a certain margin of appreciation in this regard : see Eur. Ct. HR (1st sect.), dec. of 7 November 2002, *Madsen v. Denmark*, Appl. n° 58341/00 (inadmissibility of manifestly ill-founded application alleging in a violation of Article 8 ECHR by the crewmember of a Danish shipping company subjected to mandatory alcohol and drug tests justified by safety reasons); and Eur. Ct. HR (4th sect.), dec. of 9 March 2004, *Wretlund v. Sweden*, Appl. n° 46210/99 (inadmissibility of the application lodged by an office cleaner at a nuclear plant obliged to comply with a drug testing aimed at detecting the presence of cannabis).

<sup>116</sup> Despite the fact that the Framework Directive, while authorizing the member States to introduce or maintain measures more favourable to the realization the principle of equal treatment – as it lays down minimum requirements for combating discrimination, based *inter alia* on disability, as regards employment and occupation –, specifically states that the implementation of the Directive « should not serve to justify any regression in relation to the situation which already prevails in each Member State » (Preamble, Recital 28), it is clear from both Article 7(2) and Article 2(5) of the Directive that the Member States may introduce further requirements aiming at the protection of health and safety at work even though such measures may impact negatively upon the access to employment of persons with disabilities.

<sup>117</sup> Art. 16 of the Framework Directive.

of previously concluded contracts in order to attain the aim of the policy adopted ». <sup>118</sup> This judgment is characteristic in that the Court usually affords a wide margin of appreciation to the States parties to the Convention when they restrict the right to property for public interest purposes. The individualized character of the test – whether or not the effective accommodation requested imposes a disproportionate burden on the employer, and should therefore be considered « unreasonable » - would seem to constitute, in that respect, a supplementary guarantee which shields national legislation implementing the Framework Directive from challenges brought on the basis of Article 1 of Protocol n°1 to the ECHR. <sup>119</sup>

### 3. Sexual orientation

The Framework Directive does not clearly specify whether differences in treatment based on civil status – in particular, on whether or not a person is married – may be tolerated or whether, in countries where civil marriage is not open to same-sex partners, such differences in treatment should be considered as a form of discrimination based on sexual orientation. Recital 22 of the Preamble to the Framework Directive mentions that this instrument is « without prejudice to national laws on marital status and the benefits dependent thereon ». It is clear that it is compatible with the Framework Directive to define marriage exclusively as a civil union between a man and a woman, even though the consequence is that individuals with a homosexual sexual orientation will thereby be excluded from that institution and the benefits which are attached to the status of married persons. In the opinion of this author, it remains an open question however, whether, in the Member States where same-sex marriage is not recognized (this includes all the Member States with the exception of Belgium, the Netherlands, and Spain) and where homosexuals are therefore excluded from the institution of marriage, it is compatible with the Framework Directive that they have access to no form of recognition of their union with another person of the same sex (in the form of a registered partnership, a civil union, or legal cohabitation for instance) and remain therefore deprived of the advantages they would be recognized if they had entered into a heterosexual marriage.

Of course, where certain advantages recognized to married couples are extended to different-sex couples living under a form of stable *de facto* cohabitation (or legal cohabitation) but refused to same-sex couples, this would constitute a direct discrimination based on sexual orientation <sup>120</sup>: where such advantages are part of « employment and working conditions, including dismissals and pay » (Article 3(1), c) of the Framework Directive), they are prohibited under Article 2(1) and (2)(a) of the Framework Directive. However, are we in the presence of a

<sup>118</sup> Eur. Ct. HR, *Mellacher and Others v. Austria*, judgment of 19 December 1989, at § 36. See also § 56: “It is undoubtedly true that the rent reductions are striking in their amount, (...). But it does not follow that these reductions constitute a disproportionate burden. The fact that the original rents were agreed upon and corresponded to the then prevailing market conditions does not mean that the legislature could not reasonably decide as a matter of policy that they were unacceptable from the point of view of social justice.”

<sup>119</sup> See Eur. Ct. HR, *Sporrong and Lönnroth v. Sweden* judgment of 23 September 1982, Series A no. 52, pp. 26-27, §§ 70-71; and Eur. Ct. HR (GC), *Immobiliare Saffi v. Italy* (Appl. N° 22774/93), judgment of 28 July 1999, at § 56.

<sup>120</sup> See Eur. Ct. HR (1st sect.), *Karner v. Austria* (Appl. N° 40016/98), judgment of 24 July 2003. As Section 14 of the Austrian Rent Act (Mietrechtsgesetz) provided that on the death of the main tenant of a flat, a spouse, a life companion, relatives in the direct line including adopted children, and siblings of the former tenant, could succeed the tenant, and defined 'life companion' as “a person who has lived in the flat with the former tenant until the latter's death for at least three years, sharing a household on an economic footing like that of a marriage”, thus excluding companions of the same sex as the deceased tenant, the Court considered that such an exclusion could not be justified by the objective of promoting the traditional notion of family, because the measure was disproportionate to the fulfilment of that aim (§ 41).

prohibited discrimination, either direct or indirect,<sup>121</sup> where homosexual couples are denied advantages reserved to married couples, just like non-married heterosexual couples are denied those advantaged, although only homosexuals have not choice to marry ?

The case-law of the European Court of Human Rights is not favourable to such reasoning. In a case where a woman who had cohabited during 17 years with a man who died in an industrial accident, had been denied the advantages she would have been recognized if she had been a widow despite the fact that her companion had contributed to the relevant fund during his lifetime. The European Court of Human Rights stated that although « there may well now be an increased social acceptance of stable personal relationships outside the traditional notion of marriage, (...) marriage remains an institution which is widely accepted as conferring a particular status on those who enter it. The situation of the applicant is therefore not comparable to that of a widow ». <sup>122</sup> Recalling its case-law according to which the promotion of the traditional concept of family constitutes a legitimate aim which a State Party to the ECHR may pursue,<sup>123</sup> the Court noted that « marriage remains an institution that is widely accepted as conferring a particular status on those who enter it and, indeed, it is singled out for special treatment under Article 12 of the Convention ». It concluded that « the promotion of marriage, by way of limited benefits for surviving spouses, cannot be said to exceed the margin of appreciation afforded to the respondent government ».

Although this case-law concerns a situation where the applicant had the choice whether or not to marry her life companion, and chose deliberately to remain outside the institution of marriage although this institution was accessible to the couple, thus leaving open, then, the question whether such conclusion would also apply where a homosexual couple – to whom the institution of marriage is closed – would be deprived of certain advantages reserved to married couples, the later case-law of the European Court of Human Rights simply transposed the same solution to this arguably different context. In the case of *Mata Estevez v. Spain*, the applicant complained of the difference of treatment regarding eligibility for a survivor's pension between de facto homosexual partners and married couples, or even unmarried heterosexual couples who, if legally unable to marry before the divorce laws were passed in 1981, are eligible for a survivor's pension.<sup>124</sup> He submitted that such difference in treatment amounted to unjustified discrimination which infringed his right to respect for his private and family life. The Court however considered that application inadmissible, noting that the Spanish legislation relating to eligibility for survivors' allowances « does have a legitimate aim, which is the protection of the family based on marriage bonds » and that, therefore, « the difference in treatment found can be considered to fall within the State's margin of appreciation ».

This inadmissibility decision, very poorly reasoned on the specific issue discussed in the present report, implies that an interpretation of the Framework Directive which would not condemn reserving advantages to married

<sup>121</sup> It could be argued that the prohibition of indirect discrimination is a prohibition not to treat differently situations which call for a differential treatment, as the European Court of Human Rights and the European Committee of Social Rights have done in *Thlimmenos and Autisme-Europe* respectively. Under this reasoning, homosexual couples are in a situation different than heterosexual couples, because only the former, having no access to marriage, have not chosen not to marry. Alternatively, this situation could be described as an instance of direct discrimination on the basis of the reasoning that, just like difference of treatment based on pregnancy as a form of direct discrimination based on sex, because only women – not men – may become pregnant (see Case C-177/88, *Dekker* [1990] ECR I-3941, Recital 12 (judgment of 8 November 1990)), an advantage recognized to married couples is direct discrimination based on sexual orientation, because only homosexuals cannot marry.

<sup>122</sup> Eur. Ct. HR, *Shackell v. the United Kingdom* (Appl. N° 45851/99), decision of 27 April 2000 (inadmissibility for manifest ill-foundedness of the application).

<sup>123</sup> See Eur. Ct. HR, *Mazurek v. France* (Appl. N° 34406/97), § 50; Eur. Ct. HR, *F v. Switzerland*, judgment of 18 December 1987, Series A n°128, § 36.

<sup>124</sup> Eur. Ct. HR (4th sect.), *Mata Estevez v. Spain* (Appl. N° 56501/00), dec. (inadmissibility) of 10 May 2001, Rep. 2001-VI.

couples as a form of discrimination based on sexual orientation would be compatible with Article 14 ECHR, read in combination with either Article 8 ECHR (right to respect for private life) or Article 1 of Protocol n°1 to the ECHR (right to property, including to social benefits). This case-law however does not create an obstacle to the interpretation of the Framework Directive going further than required under the ECHR, in its reading of the requirements of the prohibition of discrimination based on sexual orientation.

## 4. Religion or belief

The main question of interpretation which the national authorities will likely be facing in the implementation of the Framework Directive with respect to the application of the principle of equal treatment of persons having a particular religion or belief concerns the conditions under which a generally applicable regulation, criterion or practice, targeting no particular religious belief, should nevertheless be considered a form of indirect discrimination on the ground of religion because of its disadvantageous impact on the members of certain religious groups. Under the ECHR, such a situation would be framed as a question of freedom of religion (Article 9 ECHR)<sup>125</sup> rather than as a question of discrimination (Article 14 ECHR in combination with Article 9 ECHR). In the opinion of this author however, where under Article 9 ECHR an apparently neutral provision, criterion or practice leads to an unjustified interference with freedom of religion, this should be seen as a form of indirect discrimination in the meaning of Article 2(2)(b) of Directive 2000/78/EC, because both these articles require that any measure impacting upon the freedom to manifest one's religion be justified as means both appropriate and necessary for the fulfilment of a legitimate aim.

The judgment of the European Court of Human Rights in the case of *Thlimmenos v. Greece*, described in section 1.3. above as signalling the emergence of the notion of indirect discrimination in the jurisprudence of Article 14 ECHR, illustrates that where practices based on religious beliefs enter into conflict with certain legally imposed obligations, a State may have to provide the possibility of certain exemptions, the absence of which may lead to a form of indirect discrimination.<sup>126</sup> Indeed, although the guarantee in Article 9 ECHR of freedom of thought, conscience and religion primarily protects the inner faith of the individual (*the forum internum*), it also offers a protection to the external manifestations of this inner faith, as it translates into words or acts.<sup>127</sup> Of course, such an obligation to offer reasonable accommodation to the religious beliefs of an individual – insofar as these beliefs translate into certain practices linked to those beliefs – is not unlimited.<sup>128</sup> In the context of employment, it would appear that three factors need to be taken into account in order to ensure an adequate balance between freedom of religion on the one hand and the interests of the employer on the other hand in imposing certain apparently

<sup>125</sup> See especially C. Evans, *Freedom of Religion under the European Convention on Human Rights*, Oxford Univ. Press, 2001, chap. 8 ("Neutral and Generally Applicable Laws").

<sup>126</sup> Eur. Ct. HR, *Thlimmenos v. Greece* judgment of 6 April 2000 (Appl. N° n° 34369/97), § 44.

<sup>127</sup> Eur. Ct. HR, *Otto-Preminger-Institut v. Austria* judgment of 20 September 1994, Series A n° 295-A, p.17, § 47 ; Eur. Ct. HR, *Kokkinakis v. Greece* judgment of 25 May 1993, § 31.

<sup>128</sup> See, e.g., Eur. Ct. HR (3d section), *Pichon et Sajous v. France* (Appl. n° 49853/99), decision (inadmissibility) of 2 October 2001 (refusal of pharmacologists to deliver medically prescribed contraceptives, and invoking their religious convictions to justify this refusal : the Court considers manifestly ill-founded an allegation that the sanctioning of this attitude is in violation with freedom of religion protected under Article 9 ECHR). According to the European Court of Human Rights, the obligation for a teacher to observe normal working hours which, he asserts, clash with his attendance at prayers, may be compatible with the freedom of religion (see *Ahmad v. the United Kingdom*, Appl. N° 8160/78, Commission decision of 12 March 1981, D.R. 22, p. 27), as may the obligation requiring a motorcyclist to wear a crash helmet, which in his view is incompatible with his religious duties (see *X v. the United Kingdom*, no. 7992/77, Commission decision of 12 July 1978, D.R. 14, p. 234).

Jair | 1993

neutral regulations. These factors are the centrality of the particular religious manifestation to the religious belief in question ; the burden of providing an exception to the general rule in order to accommodate that religious manifestation ; and the question whether the employee has voluntarily accepted the regulation imposing the restriction to his or her religious manifestation, implying a waiver of his/her right to free exercise of religion<sup>125</sup>.

The case of *Kalaç* illustrates these different dimensions.<sup>130</sup> The applicant, a judge advocate in the Turkish air force, complained that he had been ordered to retire, together with two other officers and twenty-eight non-commissioned officers, for what the Turkish authorities considered to constitute breaches of discipline and scandalous conduct: the conduct and attitude of Mr Kalaç had led these authorities to conclude that he had adopted « unlawful fundamentalist opinions », in becoming a member of the Muslim fundamentalist Süleyman sect. Declining the invitation of the applicant to find a breach of Article 9 of the Convention protecting freedom of religion, the European Court of Human Rights considered, on the contrary, that in choosing to pursue a military career Mr Kalaç was « accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians », <sup>131</sup> and it noted that « the applicant, within the limits imposed by the requirements of military life, was able to fulfil the obligations which constitute the normal forms through which a Muslim practises his religion »:<sup>132</sup>

30. The Supreme Military Council's order was, moreover, not based on Group Captain Kalaç's religious opinions and beliefs or the way he had performed his religious duties but on his conduct and attitude [the applicant had allegedly participated in the activities of the Süleyman community, had given it legal assistance, had taken part in training sessions and had intervened on a number of occasions in the appointment of servicemen who were members of the sect]. According to the Turkish authorities, this conduct breached military discipline and infringed the principle of secularism.

31. The Court accordingly concludes that the applicant's compulsory retirement did not amount to an interference with the right guaranteed by Article 9 since it was not prompted by the way the applicant manifested his religion.

The question of the wearing of the headscarf by Muslim women constitutes another example<sup>133</sup>. In a judgment of 29 June 2004 which the applicants are at the time of writing seeking to have referred to the Grand Chamber of the Court, a Chamber constituted within the 4th section of the European Court of Human Rights, the applicant

<sup>129</sup> On this latter criterion, see *Ahmad v. the United Kingdom*, Appl. N° 8160/78, Commission decision of 12 March 1981, D.R. 22, p. 27 (schoolteacher having converted to Islam when already employed, and then requesting from his employer to be authorized to attend the Friday prayers); a similar reasoning is followed by the European Court of Justice in Case 130/75, *Prais v. Council*, ECR [1976] 1599. See also P. Frumer, *La renonciation aux droits et libertés. La Convention européenne des droits de l'homme à l'épreuve de la volonté individuelle*, Bruxelles, Bruylant, 2001, pp. 381-394.

<sup>130</sup> Eur. Ct. HR, *Kalaç v. Turkey* (Appl. N° 20704/92), judgment of 1 July 1997, Rep. 1997-IV, p. 1209.

<sup>131</sup> Referring to its judgment of 8 June 1976 in the case of *Engel and Others v. the Netherlands* (Series A no. 22, p. 24, para. 57), the Court recalled that « States may adopt for their armies disciplinary regulations forbidding this or that type of conduct, in particular an attitude inimical to an established order reflecting the requirements of military service ».

<sup>132</sup> *Kalaç*, § 29. The Court remarked that "For example, he was in particular permitted to pray five times a day and to perform his other religious duties, such as keeping the fast of Ramadan and attending Friday prayers at the mosque."

<sup>133</sup> For recent studies on this issue, see E. Brems, "De hoofddoek als constitutionele kopzorg", *Tijdschrift voor Bestuurs- en Publiekrecht*, 2004, pp. 323-360; E. Bribosia and I. Rorive, "Le voile à l'école: une Europe divisée", *Rev. trim. dr. h.*, 2004, pp. 951-984; T. Loenen, "Hoofddoeken voor de klas en in de rechtbank: op weg naar een multicultureel publiek domein?", *NJCM-Bull.*, 2001, pp. 851-869; C.W. Maris van Sandelingenambacht, "Private deugden en publieke ondeugden: hoofddoekjes in de openbare school?", *NJCM-Bull.*, 2004, pp. 992-998.

complained that a ban on wearing the Islamic headscarf in higher-education institutions violated her rights and freedoms under Articles 8, 9, 10 and 14 of the Convention, and Article 2 of Protocol No. 1.<sup>134</sup> The Court expands here on the previous case-law of the monitoring bodies of the ECHR on this topic, which concerns not only the wearing of headscarves by adolescents or by women attending school or higher-level educational institutions,<sup>135</sup> but also the wearing of a headscarf in the context of employment : in *Dahlab v. Switzerland*,<sup>136</sup> the applicant, a primary-school teacher in the Swiss canton of Geneva, had converted to Islam after that appointment and began wearing an Islamic headscarf, her stated intention being to observe a precept laid down in the Koran whereby women were enjoined to draw their veils over themselves in the presence of men and male adolescents. This however appeared to the authorities to be in violation of section 6 of the Canton of Geneva Public Education Act of 6 November 1940, which provides that the public education system « shall ensure that the political and religious beliefs of pupils and parents are respected ». After she was formally requested to cease wearing a headscarf when on duty, Ms Dahlab failed to have that decision annulled by the Swiss courts. The European Court of Human Rights refused to consider that this resulted in a violation of Article 9 ECHR, which protects freedom of religion. While acknowledging the difficulty to « assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children », the Court noted that the applicant's pupils were aged between four and eight, « an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the [Swiss] Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils ».

The inadmissibility decision of the Court emphasizes « the tender age of the children for whom the applicant was responsible as a representative of the State ». It is uncertain to which extent the solution reached in *Dahlab*, which is the outcome of a delicate weighing of all the interests involved, will be transposed to other cases where the right of an employee to manifest his or her religion will conflict with certain interests of the employer – or, like in *Dahlab*, with the separation between Church and State where public employers are concerned. Even the more recent judgment in *Leyla Sahin* does not settle the issue<sup>137</sup>. That judgment concerns Turkey, a predominantly Muslim society in which, therefore, the risk is high that women left « at liberty » to choose whether or not to wear a headscarf will be pressured by their families or communities to conform to the dominant norms of the majority religion<sup>138</sup>. In other contexts, similar across-the-board prohibitions may not be equally acceptable.

<sup>134</sup> Eur. Ct. HR (4th sect.), *Leyla Sahin v. Turkey* (Appl. N° 44774/98) judgment of 29 June 2004. See *inter alia* on this case the commentaries by N. Chauvin, in *Revue française de droit administratif*, May-June 2003, pp. 536-54, and by J.-F. Flauss, A.J.D.A., n°5, 2001, pp. 482-484.

<sup>135</sup> See Eur. Comm. HR, *Karaduman v. Turkey* (Appl. no. 16278/90, Commission decision of 3 May 1993, DR 74, p. 93; and Eur. Comm. HR, *Bulut v. Turkey* (Appl. no. 18783/91, Commission decision of 3 May 1993).

<sup>136</sup> Appl. no. 42393/98, ECHR 2001-V.

<sup>137</sup> Apart from the fact that *Leyla Sahin* still is not final at the time of closing this report.

<sup>138</sup> See already, anticipating on the judgment in *Leyla Sahin*, Eur. Ct. HR (GC), *Refah Partisi and Others v. Turkey* (Appl. nos 41340/98, 41342/98, 41343/98 and 41344/98), at § 95 : "In a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practise that religion or on those who belong to another religion may be justified under Article 9 § 2 of the Convention" (emphasis added).

## 5. Age

The author of this report could identify no case-law of the monitoring bodies of the European Convention on Human Rights having dealt with age-based discrimination. This is illustrative of the novelty of the prohibition of discrimination on this ground, which – like disability, health or sexual orientation – forms part of second generation rights to equal treatment, the prohibition of discrimination based on sex, race or ethnic origin, religion or belief, political opinion and perhaps nationality, forming first generation rights in this field. The lack of case-law from the European Court of Human Rights on this issue only raises the importance of any developments in the jurisprudence of the European Committee of Social Rights on the basis of Article 23 of the Revised European Social Charter (or Article 4 of the 1988 Additional Protocol to the European Social Charter), which concerns the right of elderly persons to social protection, especially since the European Committee on Social Rights has read into this provision a requirement to adopt legislation prohibiting discrimination based on age.<sup>139</sup>

<sup>139</sup> See above, note 102.



# Part IV

## Conclusions

In the progressive development of anti-discrimination law in Europe, there are reasons to believe that, despite the important influence traditionally exercised by the European Convention on Human Rights on fundamental rights in the legal order of the Union, the European Social Charter will become of rising importance. This is due, not only to the restricted scope of application of Article 14 ECHR – for which the entry into force of Protocol n°12 to the ECHR, due to the limited number of State ratifications it has for the moment attracted, will hardly compensate –, but also to the fact that, being presented with State reports which make it possible to follow on a regular basis the progress made in the realisation of the rights of the Charter and with collective complaints which target general legislations and policies and the effect they produce on groups, the European Committee on Social Rights may be better placed than the European Court of Human Rights to develop a jurisprudence on the need for an active labour policy aimed at the integration of target groups and, more generally, on the need for affirmative action – in the field of employment but also in the fields of education, housing, or social policy – directed towards the social and professional integration of the most vulnerable segments of the population.

The quasi absence of any case-law of the European Court of Human Rights deriving positive obligations from Article 14 ECHR and the timidity of the drafters of Protocol n°12 to the ECHR on the issue of positive action contrasts, as we have seen, with the insistence of the European Committee of Social Rights that legislation prohibiting discrimination actually produces effective integration, and with the requirement that the States parties monitor closely the impact their policies have on the situation of the most vulnerable groups. Combating discrimination requires more than prohibitions : it requires an active social and employment policy commensurate to the aim of realizing integration<sup>140</sup>. It is in this direction which recent evolutions within the European Social Charter point at. On the other hand, the case-law of the European Court of Human Rights under Article 14 ECHR may encourage an understanding of the prohibition of indirect discrimination on the grounds of race or ethnic origin which includes the requirement to take into account relevant differences between racial or ethnic groups, per analogy with the approach taken towards religion-based discrimination in the case of *Thlimmenos*.

In sum, the reference to the jurisprudence of the European Social Charter and the European Convention on Human Rights could lead to move beyond the explicit definition of indirect discrimination under Articles 2(2)(b), of both the 'Race' and the Framework Directives. In the directives, indirect discrimination is defined only in reference to one of the three potential understandings of that concept distinguished in section 1.3. of Part I of this report : it is seen to occur where apparently neutral regulations, criteria or practices appear to be particularly disadvantageous to the members of a certain category, if the provision creating the disadvantage is not objectively and reasonably justified (a). Neither disparate impact discrimination, as demonstrated by statistics (b), nor the failure to treat differently a specific individual or category by providing for an exception to the application of the general rule (c), are explicitly included in that definition. The jurisprudence of the European Committee of Social Rights however strongly encourages the States to combat institutional discrimination by authorizing the statistical proof of discrimination and by measuring the impact of the laws and policies they implement. And the *Thlimmenos* case-law of the European Court of Human Rights illustrates why, although the Framework Directive only mentions a requirement of reasonable accommodation with respect to persons with disabilities, the failure to take into account relevant differences could be seen as a form of indirect discrimination even though it may not be falling clearly within the definition of Article 2(2)(b) of the directives. With respect to religion, as shown in section 4 of Part III of this report, this could be a consequence of the freedom of religion guaranteed under Article 9 ECHR, without it being necessary to rely on Article 14 ECHR.

An examination of the case-law of the European Court of Human Rights relevant to the questions relating to the specific grounds envisaged in the directives leads to the following main results. In the context of the Framework Directive, the requirements deriving from Article 8 ECHR may have a decisive role to play in order to counter the

<sup>140</sup> C. McCrudden, *Institutional Discrimination*, Oxford J. Legal Studies, (1981) 2, pp. 303-67

risk of discrimination against workers with disabilities resulting from the imposition of health and safety requirements creating an obstacle to their recruitment or their retainment, where allegedly their occupation would put themselves, their co-workers or the general public at risk. The same provision of the Convention, insofar as it protects the right to respect for private life to which the sexual orientation of a person belongs, may contribute to the effectiveness of the prohibition of direct discrimination on the ground of sexual orientation<sup>141</sup>. On the other hand, the European Court of Human Rights has not considered that reserving advantages to married couples should be treated as discrimination based on sexual orientation in violation of Article 14 ECHR, read in combination with either Article 8 ECHR (right to respect for private life) or Article 1 of Protocol n°1 to the ECHR (right to property, including to social benefits), even under jurisdictions where marriage is not available to same-sex couples. As these last examples suggest, the European Convention on Human Rights may have more to contribute to the further implementation of the EC Directives, by guiding their interpretation, through provisions other than the non-discrimination clause of Article 14 ECHR.

<sup>141</sup> Paradoxically perhaps, the protection of private life may also constitute an obstacle to the promotion of diversity in the workplace, in housing or in education, insofar as the processing of sensitive data is subject to specific restrictions both under Convention n°108 of the Council of the Europe and under Directive 95/46/EC of 24 October 1995, cited above.

Soekradije | 1951

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