Twinning project "Implementation of the best European practices with the aim of strengthening the institutional capacity of the apparatus of the Ukrainian Parliament Commissioner for human rights to protect human rights and freedoms (apparatus)" No. EuropeAid/137673/DD/ACT/UA

Activity 2.1.4. Developing new or improving the existing methodologies and procedures to carry out a monitoring of the observance of human rights, ensuring activities of the Ombudsperson in preventing such violations

Document	Methodology on Assessment (Review) of Draft Legal Acts for Compliance with the Anti-discrimination Law
Short description of the document	The Methodology on assessment (review) of draft legal acts for compliance with the anti-discrimination law (hereinafter – the Methodology) aims provide practical guidelines to assist the exercise of Commissioner's function under Article 8 of the PPCDU. Section 1 of the Methodology outlines the key legal questions the expert undertaking the review should answer during the assessment process (material scope of the law, applicable ground of discrimination, the form of discrimination, justification for discrimination), and provides a framework for the review of draft legal provisions. Section 2 outlines general recommendations for the review. The main body of the Methodology is followed by three annexes: Annex I lists international treaties ratified by the Republic of Ukraine, while Annex II and III summarize decisions in the landmark discrimination cases of the ECtHR and the CJEU respectively.
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METHODOLOGY ON ASSESSMENT (REVIEW) OF DRAFT LEGAL ACTS FOR COMPLIANCE WITH THE ANTI-DISCRIMINATION LAW

Table of Contents

LIST OF ABBREVIATIONS

Commissioner	Ukrainian Parliament Commissioner for Human Rights
CoE	Council of Europe
ECHR	European Convention for Human Rights
ECJ	European Court of Justice[1]
ECtHR	European Court of Human Rights
CJEU	European Union Court of Justice
EERWM	Law of Ukraine on Ensuring Equal Rights of Women and Men
ECHR	European Convention on Human Rights
FRA	European Union Agency of Fundamental Rights
PPCDU	Law of Ukraine on Principles of Preventing and Combating Discrimination in Ukraine
UN	United Nations

INTRODUCTION

From the methodological perspective, an assessment (review) of proposed legislation for compliance with the anti-disrimination laws (hereinafter – an assessment or a review) constitutes a part of the equality impact assessment, which aims at systematically incorporating non-discrimination, diversity and equality concerns into all policies, legislation and programmes, and into all organizational policies, procedures and practices.

The equality impact assessment is an anticipatory or *ex-ante* exercise carried out on a proposed design or delivery of a new policy, piece of legislation or programme. It is considered to be a participatory exercise that should ideall involve the organisations of people who experience inequality. If the impact of the policy, legislation or programme is found to be neutral or adverse for groups experiencing inequality then changes can be made in their design or remedial measures can be designed and included.[2]

The legal literatures identifis the following objectives of the equality impact assessment, which, by extention, can be applied to the anti-disrimination review of the draft legal acts:

- To advance equality in terms of redistribution, recognition or representation for different groups across the six grounds.
- To remove the economic, social or institutional barriers to equality experienced by different groups across the six grounds.
- To ensure the practical implications of diversity are taken into account and necessary adjustments are made to accommodate these.
- To foster good relations between groups experiencing inequality and other groups in society and to ensure an experience free from harassment or abuse.
- To ensure compliance with equal treatment legislation.[3]

Under Article 4 of the Law of Ukraine on Ensuring Equal Rights and Opportunities for Women and Men (hereinafter – EERWM), legislation is subject to gender-based legal expert review, which under the Decree of Cabinet of Ministers of Ukraine[4] should be performed by the Ministry of Justice. Such expertise is considered to be a constituent part of legal acts assessment with the compliance to human rights standards. The Ministry of Justice under the same Decree has to prepare a form for the assessment of draft legal act.[5]

Provisions of the Law on Ukraine on the Prevention and Combating Discrimination in Ukraine (hereinafter – PPCDU)[6], foresee the same legal obligation for the draft legal acts to undergo expert review on anti-discrimination. The procedure to conduct expert review of the draft normative legal acts on anti-discrimination issues is determined by the Cabinet of Ministers of Ukraine[7].

Although under the law there is a legal obligation to assess draft legal acts for compliance with the non-discrimination norms, however, the conduct of such expert reviews on anti-discrimination is not foreseen as a mandatory duty of the Commissioner. As it was noted in the international experts' report[8], "[t]here is no role

explicitly set for the Ombudsperson in relation to the "anti-discrimination expertise" and its implementation. The Ombudsperson has interpreted its mandate so as to make a contribution to this process".

Currently there is no methodology put in place by the Commissioner for such reviews. The Methodology on assessment (review) of draft legal acts for compliance with the anti-discrimination law (hereinafter – the Methodology) aims to remedy this gap by providing practical guidelines for carrying compliance reviews. The Methodology may be used by other stakeholders including but not limited to the legislative authority adopting the normative legislative acts as well as national institutions that by law have a duty to perform an analysis of legislative anti-discrimination expertise.

The Methodology is organized in two sections which are supplemented by three annexes. Section 1 of the Methodology outlines the key legal questions the expert undertaking the review should answer during the assessment process (material scope of the law, applicable ground of discrimination, the form of discrimination, justification for discrimination), and provides a framework for the review of draft legal provisions. Section 2 outlines general recommendations for the review. The main body of the Methodology is followed by three annexes: Annex I lists international treaties ratified by the Republic of Ukraine, while Annex II and III summarize decisions in the landmark discrimination cases of the ECtHR and the CJEU respectively.

1. LEGAL ASSESSMENT OF THE DRAFT LAW

1.2. With what laws the reviewed draft law should comply?

The nation draft law under review should first and foremost comply with the national legislation prohibiting discrimination as well as with the international law provisions that form an integral part of national legal system. In addition, it should also comply with the European Union (EU) main anti-discrimination legal acts as well as the jurisprudence of the Court of Justice of the European Union (CJEU).

1.2.1. National laws

The national laws to be analyzed during the review should always include the Constitution of Ukraine, the EERWM and the PPCDU. In certain cases, depending on the draft legal act under review, there might be a need to examine sectoral legislation, such as e.g. laws regulating civil, commercial, or labour relations.[9]

1.2.2. International laws

Although the Republic of Ukraine is not a party to the European Union, however its main legislative acts enshrining the principle of non-discrimination reflect the main legislative acts of EU, and being as a European state the Ukraine does have a goal to join the EU at some point of time. As for other international provisions that do form the integral part of Ukrainian legislative system can be divided in the two main groups as being a part of UN main international treaties comprising legal provisions of non-discrimination and Council of Europe international treaties that have been ratified by Ukraine and form an integral part of national legislative system.

In order to facilitate the review of draft law provisions below in **Annex I** is provided the list of main applicable ratified international treaties.

1.2.2.1. United Nations treaties

Human rights protection mechanisms are, of course, not limited to Europe. As well as other regional mechanisms in the Americas, Africa and the Middle East, there is a significant body of international human rights law that has been created through the United Nations (UN). Ukraine is a party to the following UN human rights treaties, all of which contain a prohibition on discrimination: the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention Against Torture, and the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (UNCRPD).

For example, the UNCRPD contains an extensive list of rights for persons with disabilities, aimed at securing equality in the enjoyment of their rights, as well as

imposing a range of obligations on the State to undertake positive measures. Because of its novelty and comprehensive approach, it is likely to become a reference point for interpreting both EU and ECtHR law relating to discrimination on the basis of disability. For instance, in comparison to the CRPD, the EU law provides a more restrictive definition of disability. Since the EU has ratified the CRPD, it takes precedence over EU secondary laws, and thus the provisions of the Directives must be, as far as possible, read in a manner that conforms with the CRPD.[10] This was affirmed by the CJEU in the case of *HK Danmark*, where the Court departed from its earlier jurisprudence and interpreted the definition of disability provided in the Directive in light of the CRPD. To this end, the Court stated:

Having regard to the considerations set out in paragraphs 28 to 32 above, the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.[11]

Another question where the CJEU is likely to adhere to the conceptual framework provided by the CRPD is the issue of reasonable accommodation. Currently, while the Employment Equality Directive[12] puts on the employers an obligation to introduce reasonable accommodation to employees with disabilities, it does not classify a failure to accommodate the employee's needs as discrimination.[13] The CRPD, on the other hand, extends the concept of discrimination on the basis of disability to cover all forms of discrimination "including denial of reasonable accommodation".[14] If faced with the legal challenge regarding the interpretation of Article 5 of the Employment Equality Directive, the CJEU may be inclined to classify reasonable accommodation as a form of discrimination as per the CRPD.

In addition, the UN Treaty Bodies provide valuable guidance, which assist in understanding the provisions of the respective treaties. These guidance can be found in the jurisprudence of the Treaty Bodies[15] and the General Comments and General Recommendations, and often reflect important consideration are not explicitly referred to in the conventions, but need to be accounted for during the *ex ante* legal review.

An example of such guidance can be found in the CEDAW General Recommendation No. 21:

Some countries provide for different ages for marriage for men and women. As such provisions assume incorrectly that women have a different rate of intellectual development from men, or that their stage of physical and intellectual development at marriage is immaterial, these provisions should be abolished. [16]

1.2.2.2. Council of Europe

The key human rights instrument of the Council of Europe is the ECHR. The main text of the Convention has been supplemented through what are known as "Protocols".[17]

The prohibition of discrimination is guaranteed by Article 14 of the ECHR, which guarantees equal treatment in the enjoyment of the other rights set down in the Convention:[18]

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.

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. 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.[19]

Protocol 12 (2000) to the ECHR expands the scope of the prohibition of discrimination by guaranteeing equal treatment in the enjoyment of any right (including rights under national law):

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.

No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.[20]

According to the Explanatory Report to the Protocol, it was created out of a desire to strengthen protection against discrimination which was considered to form a core element of guaranteeing human rights.[21]

The ECHR has been recognized as having a particular significance in European Union law, and its requirements are to be considered part of the general principles of EU law which the CJEU applies as part of its task of ensuring that the law is respected in the application of the Treaties.[22] Clearly, the case-law of the ECHR should serve as one of the key points for the *ex ante* assessment of the draft legal acts.

Although not a primary focus of the Methodology, it is worth noting that the principle of non-discrimination is a governing principle in a number of other Council of Europe (CoE) documents. Importantly, the 1996 version of the European Social Charter includes both a right to equal opportunities and equal treatment in matters of employment and occupation, protecting against discrimination on the grounds of sex. Additional protection against discrimination can be witnessed in the Framework Convention for the Protection of National Minorities, in the CoE Convention on Action Against Trafficking in Human Beings, and in the CoE Convention on the Access to Official Documents. There is also protection against the promotion of discrimination in the Additional Protocol to the Convention on Cybercrime.[23] Most

recently, the principle of non-discrimination was reaffirmed in the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). Hence, analysis of these laws may be particularly useful when the review of legal acts pertaining to national minorities, access to official documents, or cybercrime is conducted.

1.2.2.3. European Union

The original treaties of the European Communities did not contain any reference to human rights or their protection. It was not thought that the creation of an area of free trade in Europe could have any impact relevant to human rights. However, as cases began to appear before the European Court of Justice (ECJ) alleging human rights breaches caused by Community law, the ECJ developed a body of judge-made law known as the "general principles" of Community Law.[24]

According to the ECJ, these general principles would reflect the content of human rights protection found in national constitutions and human rights treaties, in particular the ECHR. The ECJ stated that it would ensure the compliance of Community Law with these principles.[25] In addition, the primary law (the Treaty of the Functioning of the European Union) provides for an obligation of the Member States to ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.[26]

When the Treaty of Lisbon entered into force in 2009, it altered the status of the Charter of Fundamental Rights to make it a legally binding document. As a result, the institutions of the EU are bound to comply with it.[27] The EU Member States are also bound to comply with the Charter, but only when implementing EU law. Article 21 of the Charter contains a prohibition on discrimination on various grounds:

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.[28]

The main body of EU anti-discrimination law is found in the secondary legislation – the directives. Since 1978, a number of directives were adopted prohibiting discrimination between men and women in different areas of life, such as parental leave, social security, goods and services and others. Currently, there are five directives addressing specifically gender equality.[29]

In 2000, two directives were adopted: the Employment Equality Directive prohibited discrimination on the basis of sexual orientation, religious belief, age and disability in the area of employment; the Race Equality Directive prohibited discrimination on the basis of race or ethnicity in the context of employment, but also in accessing the welfare system and social security, and goods and services. [30]

In 2004, the Gender Goods and Services Directive expanded the scope of sex discrimination to the area of goods and services. However, protection on the grounds of sex does not quite match the scope of protection under the Race Equality Directive (see the comparative table of the protections offered by the EU Equality Directives below).[31] Gender Social Security Directive guarantees equal treatment in relation to social security only and not to the broader welfare system, such as social protection and access to healthcare and education.

Grounds Field	Race	Religion	Disability	Age	Sexual orientation	Sex
Employment & vocational training	Yes	Yes	Yes	Yes	Yes	Yes
Education	Yes	No	No	No	No	No
Goods and services	Yes	No	No	No	No	Yes
Social protection	Yes	No	No	No	No	Yes

When reviewing the draft legal acts, the provisions of the listed directives, the Charter, and the "general principles" of the EU law and their interpretation provided by the CJEU should be taken into account.

1.3. Does draft law falls under the material scope of non-discrimination law?

To be considered, the legal relationship regulated by the draft legal act should fall within the material scope of the anti-discrimination law. According to Article 4 of the PPCDU, the law extends beyond the enumerated areas of social and political activities, civil service and service in bodies of local self-government, justice, labour relations, including the application of the employer of the principle of reasonable adaptation, health protection, education, social protection, housing, access to goods and services, into other areas of "public relations". This could mean that any legal relationship has a potential to fall within the ambit of the national anti-discrimination law, and be subject to review. This is different from the protection afforded by the EU Equality Directives (see part 1.2.2.3. of the Methodology).

1.4. Identification of the applicable ground of discrimination

One of the challenges that the expert is highly likely to face while reviewing legislative acts is that the list of discriminatory grounds in the main legislative act PPCDU is open. This approach to regulation is in line with the ECHR which also provides for a non-exhaustive list of grounds (Article 14 and Protocol 12 to the ECHR), but different from the EU Equality Directives that have a closed list of grounds. It means that the expert, while reviewing the act, has to keep in mind not

only the grounds expressly mentioned in the Article 1(1)(1) of the PPCDU, but also other possible grounds, such as e.g. sexual orientation.

Taking into consideration that in PPCDU the list of grounds of discrimination is open, one should keep in mind the distinction while performing the review of the draft law whether the identified ground is one of the explicitly mentioned in the national and international act or not (see below).

For discriminatory treatment to be established, anti-discrimination law requires a causal link between the less favourable treatment, rule or effect of such rule and the protected ground. In order to satisfy this requirement one merely has to ask this question: would the person have been treated less favourably or would the effect of a particular rule on him would be less favourable had they been of a different sex, of a different race, of a different age, or in any converse position under any one of the other protected grounds? If the answer is yes then the less favourable treatment or effect is being caused by the ground in question.[32]

1.4.1. When ground of discrimination is explicitly mentioned

If the draft legal act under review concerns possible discrimination on the ground listed below, the conclusion should explain how a group of persons sharing certain traits is specifically affected by the regulation in question. In certain cases, the vulnerable group will be clearly identifiable and its classification under Article 1(1)(1) of the PPCDU will be straightforward.

For example, if the law in question imposes certain obligations for women, but no corresponding obligation on men, the differential treatment based on sex may be presumed. On the other hand, if the law excludes from the group of beneficiaries people suffering from obesity, differential treatment based on disability (see CJEU judgment in the case of *Fag og Arbejde (FOA) v Kommunernes Landsforening (KL)*)[33] may not be so clear, and thus require additional explanations that should be provided in the conclusions.

The table below provides an explanation of the grounds enumerated in the PPCDU with additional references to international treaties and landmark case-law.

Ground	**Explanation**	**Relevant references and case-law**
Race, colour of skin	Race is defined based on individual's self-identification with a particular racial group. It may also include individual's self-identification with a particular colour, descent, national or ethnic origin. The ground of "language" can also fall under the "race" ground, [34] as, in certain circumstances, may the grounds of religion and culture.	Article 1 of the UN Convention on the Elimination of Racial Discrimination; General Recommendation VIII of the UN Committee on the Elimination of Racial Discrimination; *Timishev v. Russia* (ECtHR); *Sejdićand Finci v. Bosnia and Herzegovina* (ECtHR)
Political	Political believes are not precisely defined	*Handyside v. UK* (ECtHR),

beliefs	in the case-law, but within Article 10 of the ECHR (freedom of expression), the ECtHR has recognized as such the information or ideas shared as a matter of public interest, that maybe be viewed both favorably, as well as offed, shock of disturb the State or any sector of the population.	*Steel and Morris v. UK* (ECtHR)
Religious or other beliefs	The ECtHR avoided giving precise definition to religion and belief. The Court readily accepted mainstream religions (Christianity, Buddhism, Islam) as well as more recent religious movements (Jehovah's Witnesses, Scientology, Moon Sect) to fall within the notion of "religion". Defining belief, which encompasses both 'philosophy of life' and non-theistic as well as atheistic convictions is a more ambiguous case. While pacifism and veganism can be accepted, belief in assisted suicide is not. Generally, the Court aims to determine whether a particular set of convictions "attain[s] a certain level of cogency, seriousness, cohesion and importance".[35]	*Moscow Branch of the Salvation Army v. Russia* (ECtHR), *Metropolitan Church of Bessarabia and Others v. Moldova* (ECtHR), *Hasan and Chaush v. Bulgaria* (ECtHR); *Jakobski v. Poland* (ECtHR)
Sex	Sex refers to the biological and physiological characteristics that differentiate men and women. Sex discrimination is a differential treatment based on the fact that an individual is either a woman or a man as defined by birth. It may also be interpreted as encompassing gender identity or sexual orientation (UN HRC) According to the CJEU, detriment suffered by an individual due to pregnancy is also classified as sex discrimination.	*Ünal Tekeli v. Turkey* (ECtHR), *Hill and Stapleton* (CJEU); *P. v. S. and Cornwall County Council* (CJEU), *Sarah Margaret Richards v Secretary of State for Work and Pensions* (CJEU), *Toonen vs. Australia* (UN HRC)
Age	Age discrimination is differential treatment or enjoyment that is based on the victim's age, irrespectively of whether it is "young" or "old" age.	*Schwizgebel v. Switzerland* (ECtHR); *Mario Vital Pérez v Ayuntamiento de Oviedo* (ECtHR); *Colin Wolf v Stadt Frankfurt am Main* (CJEU)
Disability	Disability is an evolving concept. It is recognized that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society	Preamble of the UN Convention on the Rights of Persons with Disabilities; *HK Danmark on behalf of Ring v Dansk almennyttigt Boligselskab and HK*

	on an equal basis with others.	*Danmark on behalf of Werge v Dansk Arbejdsgiverforeningr* (CJEU)
Ethnic or social origin	With respect to "ethnic origin", the ECtHR held that "[w]hereas the notion of race is rooted in the idea of the biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds." [36] Social origin refers to a person's inherited social status It may relate to the position that they have acquired through birth into a particular social class or community (such as those based on ethnicity, religion, or ideology), or from one's social situation such as poverty and homelessness.	*Timishev v. Russia* (ECtHR); *Mazurek v. France* (ECtHR); General Comment 20 of the UN Committee on Economic, Social and Cultural Rights.
Nationality	Nationality is defined as the legal bond between a person and a State. Differential treatment of refugees or asylum seekers could be considered under the ground of nationality. In addition, "national origin" may be taken to denote a person's former nationality, which they may have lost or added to through naturalization, or to refer to the attachment to a 'nation' within a State.[37]	Article 2(a) of the Council of Europe's Convention on Nationality, *Zeïbek v. Greece* (ECtHR), *Fawsie v. Greece* (ECtHR), *Saidoun v. Greece* (ECtHR*), Y and Z v Minister voor Immigratie en Asiel* (CJEU)
Family and property status	Family status may be defined in terms of person's status vis-à-vis his or her family members, such as fatherhood or motherhood. When defining "family status", ECtHR case-law with respect to Article 8 (a right to private and family life) explaining the notion of a "family life" can be used as a source. ECtHR has recognized the following relationship as falling within the notion of "family life": between children and their grandparents; between siblings, regardless of their age; between an uncle or aunt and his/her nephew or niece; between parents and children born into second relationships;	*Weller v. Hungary* (ECtHR); *Marckx v. Belgium* (ECtHR), *Olsson v. Sweden* (ECtHR), *Boughanemi v. France* (ECtHR), *Boyle v. the United Kingdom* (ECtHR), *X v. Switzerland* (ECtHR), *Jolie and Lebrun v. Belgium* (ECtHR), *Sommerfeld v. Germany* (ECtHR)

	between adoptive/foster parents and children. The ground of property may relate to one's status in relation to land (such as being a tenant, owner, or illegal occupant), or in relation other property.	
Place of residence	Discrimination based on the place of residence can cover instances of differential treatment based on the domicile abroad, person's registration as a resident, residence in different places of the same country. However, the ECtHR held that regional differences of treatment, resulting from the application of different legislation depending on the geographical location of an applicant, could not to be explained in terms of personal characteristics	*Carson and Others v. UK* (ECtHR); *Giovanni Maria Sotgiu v Deutsche Bundespost* (CJEU)
Linguistic status	The ground of "language" is not clearly defined in the existing international conventions, but the cases alleging discrimination on the basis of language usually refer to the situations where the use of minority language is restricted.	*Belgium Linguistic case* (ECtHR); *Diergaardt v. Namibia* (UN Human Rights Committee)

1.4.2. When ground of discrimination is not explicitly mentioned

The expert conducting the review may consider that the group of individuals sharing a particular characteristic, which is not expressly mentioned under Article 1(1)(1) of the PPCDU, may suffer detriment due to the wording and/or application of the draft legal act. It may be concluded that by creating an open-ended listed of the protected grounds, the legislature had the intention to account for such situations. However, the expert conducting the review, for the purpose of legal clarity and awareness raising, should provide detailed explanation of the "new" ground (especially, if there is not available national case-law recognizing such ground) by references to the comparative case-law and international treaties and by clearly defining the group of individuals "captured" under such ground.

The table below lists grounds which are not expressly mentioned under the PPCDU, but can be derived from the EU law or a case-law of the ECtHR.

Ground	**Explanation**	**Relevant references and case-law**
Sexual orientation	Sexual orientation refers to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate	Yogyakarta Principles, [39] *S.L. v. Austria* (ECtHR), *Sutherland v UK* (ECtHR), *Oliari and Others v. Italy* (ECtHR), *Vallianatos and*

	and sexual relations with, individuals of a different gender or the same gender or more than one gender.[38]	*Others v. Greece* (ECtHR), *X, Y and Z v Minister voor Immigratie en Asiel* (CJEU)
Gender identity	Gender identity is each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.[40]	Yogyakarta Principles, *Christine Goodwin v. the United Kingdom* (ECtHR), *L v. Lithuania* (ECtHR), *P.V. v. Spain* (ECtHR), *Hämäläinen v. Finland* (ECtHR), *P. v. S. and Cornwall County Council* (CJEU), *Sarah Margaret Richards v Secretary of State for Work and Pensions* (CJEU).
Marital status	Differential treatment on the ground of marital status concerns situations where married and unmarried couples are treated differently. It may also include differential treatment accorded to the couples which entred into a registered partnership in any form. According to the Court, "marriage remains an institution which is widely accepted as conferring a particular status on those who enter it".	*Petrov v. Bulgaria* (ECtHR), *Lindsay v. the United Kingdom* (ECtHR), *McMichael v. the United Kingdom* (ECtHR)
Membership in an organisation	A ground of "membership" may concern differential treatment of members and non-members of different trade unions, parties and other associations.	*Danilenkov and Others v. Russia* (ECtHR)
Military rank	A ground of "military rank" can include difference of treatment between persons holding different ranks and	*Engel and Others v. the Netherlands* (ECtHR)

	positions within the armed forces, such as servicemen, commissioned and noncommissioned officers, privates, etc.	

1.5. Identification of discrimination form

1.5.1. Direct discrimination

Under Article 1(1)(6) of the PPCDU, direct discrimination occurs when "the person and/or group of persons for their specific features are treated less favourably than another person and/or a group of persons in a similar situation, except when such treatment has legitimate, objectively reasonable aim, which is achievable in appropriate and necessary way." Direct discrimination requires to meet the following criteria:

Unfavourable treatment

At the heart of discrimination is the unfavourable difference of treatment that an individual is subject to. According to Article 1(1)(1) of the PPCDU, such treatment is when an individual "is deprived of recognition, realization or exercise of rights and freedoms in any form established in this law". Unfavourable treatment is an umbrella term which should be read to include unfavourable provisions of the law, rules of the delegated legislation, as well as their application to a specific situation, as differential treatment is more likely to stem from the application of the law, rather than its letter. Nevertheless, an expert undertaking a legal review of the draft legal act, may come across the following instances of differential treatment, which will require further scrutiny:

- When a certain person, or a group of persons sharing a particular trait, such as gender age, gender, social status, citizenship status or other protected characteristics, are explicitly excluded from the scope of the law.
- When certain right or obligation is vested in a person, or a group of persons, defined by age, gender, social status, citizenship status or other protected characteristics.

For example: "The following may organise meetings under the conditions and in compliance with the procedure laid down by this Law […] capable citizens of the Republic of Lithuania who have reached the age of 18". [41] Such provision precludes a person who are non-citizens of Lithuania, as well as minors, and persons of a limited capacity from organizing peaceful meetings, and hence creates a *prima facie* instance of differential treatment. Depending on the justification for such treatment, provided by the drafter of the law, it will or won't be qualified as prohibited discrimination.

Similar situation (comparator)

When a group of persons are explicitly or implicitly excluded from the scope of the draft legal act, it is needed to ascertain if they are in comparably similar situation to

the one(s) who fall within the scope of the draft legal act. A 'comparator' is, a person in materially similar circumstances, with the main difference between the two persons being the 'protected ground'.[42] The determination of the group to compare with, is decisive for the outcome of that comparison and therefore for the answer to the question if there has been discrimination or not. [43] Such determination is not straightforward in all cases.

For example, national laws often provides certain rights to qualified practicing lawyers, which other persons, who have degree in law, are not provided with. However, these two groups may not necessarily be in comparable situations, as the knowledge, attested by the Bar examination, experience in representing parties that the qualified lawyers possess, ethical and legal rules they are subjected to, are not the same or even comparable to the graduates in law. Thus, such groups cannot be considered as being proper comparators for the purpose of the legal review.[44]

1.5.2. Indirect discrimination

Under Article 1(1)(4) of the PPCDU, indirect discrimination occurs "as a result of the implementation or application of formally neutral regulations, evaluation criteria, rules, requirements or practices a person and/or groups of persons because of their specific features have less favourable conditions or the situation compared to other persons and/or groups of persons". Indirect discrimination requires to meet the following criteria:

A neutral rule, criterion or practice

The first identifiable requirement is an apparently neutral rule, criterion or practice. In other words, there must be some form of requirement that is applied to everybody, without singling out persons in similar situations based on the protected characteristics. For example, the following rules are worded in a neutral way, often related to certain expected behaviour, and may, on their face appear, non-discriminatory:

- Persons must work full-time for a certain number of years in order to qualify for a salary benefit.
- Persons are prohibited from entering public institutions when wearing headgear.
- Persons can qualify for job seekers' allowance only after habitually residing in the country for a certain number of years.

In all of these cases, the ground relied on is formally different from the "protected ground" provided in the law. However, depending on the circumstances, such measures as listed above may lead to apparent indirect discrimination. That is the case if the measure has, actually or potentially, a detrimental effect on people belonging to a protected group. In such a case, the measure in question is only apparently neutral.[45]

Comparator

As direct discrimination, indirect discrimination also requires existence of a comparator (see part 1.5.1. of the Methodology).

Less favourable conditions or a situation

The second identifiable requirement is that the apparently neutral provision places a "protected group" at a particular disadvantage. This is where indirect discrimination differs from direct discrimination in that it moves the focus away from differential treatment to look at differential effects. This part of the indirect discrimination "test" is also known as "detrimental effect" or "disparate impact".

Drawing on the examples provided above, the following detrimental effect can be identified:

- The requirement that a person must have worked fulltime for a certain number of years disadvantages women where, due to the traditional division of roles in the family according to which family and care work is (predominantly or entirely) the task of women, it is predominantly women who perform part-time work. The requirement therefore raises the presumption of indirect discrimination on grounds of sex.
- The requirement that persons do not wear any headgear disadvantages persons who belong to certain religions or ethnic origin and interpret these religions as requiring particular clothing, such as (certain) Muslim women and (certain) Jewish men. The requirement therefore raises the presumption of indirect discrimination on grounds of religion and/or ethnic origin.
- The requirement that a person is habitually resident in a country in order to qualify for job seeker's allowance disadvantages migrant workers holding the nationality of a country other than the one in question, since they are more likely than this country's own nationals to reside in another country when embarking on the search for a job. The requirement therefore raises the presumption of indirect discrimination on grounds of nationality.[46]

In a number of cases, statistical data can be used to understand potential disproportionate disadvantage of an apparently neutral provision of the draft legal act.[47] However, an inquiry into statistical data should not be understood as a mandatory requirement for every legal review (see **Annex III**).

1.6. Whether discrimination can be justified

Article 1(1)(1) PPCDU provides that a discriminatory situation may be justified "when such restriction has legitimate, objectively reasonable aim, which is achievable in appropriate and necessary way". Similar justification for discrimination, also referred to as "general defence", is available with regard to both direct and indirect discrimination under the ECHR, whereas the EU law allows it only with regard to indirect discrimination.[48] 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 realized.[49]

In order to understand of the differential treatment is justified, it must be determined that:

- **the aim** to be achieved is important enough to justify this level of interference (legitimate, objectively reasonable aim).[50] The fact that objective justification is an open-ended concept means that there is a very broad range of potentially acceptable grounds of justification. Indeed, under the CJEU case law on sex equality law, this may even include economic considerations.[51] However, there are important limits, which were summarised in the Court's judgment in the *Nikoloudi* case:[52]
    - first, **purely budgetary considerations can never serve as an objective justification**. Although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination.
    - second, **the aim in question must be unrelated to discrimination**. In *Nikoloudi*, which concerned indirect sex discrimination, the Court explained that where a much higher percentage of women than men is denied the possibility of becoming a permanent member of staff, the argument that part-time work in itself constitutes a sufficient reason, unrelated to sex, to explain the difference in treatment cannot be upheld. In other words, it is not possible to rely on the very fact that causes the disparate impact. Rather, the objective justification must relate to a different factor or aim.[53]
- there is **no other means of achieving that aim** that imposes less of an interference with the right to equal treatment. In other words, the disadvantage suffered must be the minimum possible level of harm needed to achieve the aim sought (appropriate, necessary means). It is a duty of the drafter of the legal act to prove the necessity and proportionality of the means employed.

1.6.1. Genuine occupational requirements

According to the EU Equality Directives, in so far as they deal with the sphere of employment:

Member States may provide that a difference in treatment based on a characteristic related to [the protected ground] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.[54]

Paragraph 18 of the Preamble to the Employment Equality Directive contains a more specific articulation of the genuine occupational requirement defence in relation to certain public services relating to safety and security:

This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.

Typically, this might apply to a situation of refusing certain posts that are deemed to be highly physically demanding to those beyond a certain age, or with a disability.[55]

When conducting the review of the draft legal act, especially in the context of employment, it should be determined if certain differential rule is an expression of bias or stereotypes, or, a genuine and determining occupational requirement which seeks to pursue legitimate aim by proportionate means.

Particular attention should be paid to artistic professions which may require particular attributes that belong to individuals as inherent characteristics, such as requiring a female singer to fit with a taste in performance style, a young actor to play a particular role, or men or women for particular types of fashion modelling. Other examples might include employing an individual of Chinese ethnicity in a Chinese restaurant in order to maintain authenticity or the employment of women in women-only fitness clubs.[56]

1.6.2. Positive action

Article 1(5) of the PPCDU defines positive action as "special temporary measures that have legitimate, objectively reasonable aim to eliminate legal or actual inequality in opportunities for the person and/or group of persons to exercise rights and freedoms granted to them by the Constitution and the laws of Ukraine on equal basis".

The Race Equality Directive and the Employment Equality Directive also refer to positive action as the measures that provide differential treatment on grounds of race or ethnic origin, religion or belief, disability, age or sexual orientation, in order to remedy past inequalities or to compensate for existing inequalities. However, positive action is not worded in exactly the same terms in the Employment Equality Directive and the Race Equality Directive. Whereas the first refers to "removing existing inequalities", the latter is more inclusive and allows Member States to "maintain or adopt specific measures to prevent or compensate for disadvantages"[57].

In the Preamble to Protocol 12 to the ECHR, 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 12 specifies in this respect:

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.[58]

Whether under Article 14 ECHR or under Article 1 of Protocol 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 by virtue of proportionate means. In addition, ECtHR adheres to the view, similar to the one enshrined in the PPCDU that positive measures can only be temporarily. For instance, in *Belgian Linguistic* case the ECtHR observed that difference in treatment intended to 'correct factual inequalities' was permissible only as long as they responded to factual inequality; after factual inequality disappears, the measure should be no longer applied.[59]

If the draft legal act in question envisions a positive measures, the review should analyze three cumulative criteria, namely if:

1. The measures pursues the **legitimate aim** i.e. it should be clear from the text of the draft legal act and/or from its *travaux preparatoire* if the positive measure in question responds to an inequality and how this inequality is defined (e.g. if statistics or any other data can substantiate it);
2. The legitimate aim is pursued by **proportionate means.**

> For example, if the law accorded automatic priority to female candidates applying for promotion, where male and female candidates were equally qualified, such rule could be considered disproportionate. [60]However, if the same rule allowed an individual assessment in each case, taking into account all criteria specific to each candidate and leaving a room for a possibility to override automatic priority if one or more criteria shifted the balance in favour of a male candidate, such rule would be considered meeting the requirement of proportionality.[61]

3. The measure if **temporary**, i.e. how the drafter of the law will determine that the aim pursued by the measure is achieved. Drawing on the example above, the measure in question could stipulate that its aim will be achieved when both sexes are equally represented in the particular sector.

1.7. Framework review of legal act for compliance with non-discrimination law

EXAMPLE[62]

At the material time, Paragraph 24 of the Law on Legal Training of the Federal Republic of Germany stipulated as follows:

1. Postgraduate trainees in the judicial service shall be employed with effect from the first working day in January, March, May, July, September and November, respectively, of each year.

2. Should the number of applications for admission to practical legal training on a particular commencement date received before expiry of the deadline exceed the number of available training places, appointment may be deferred by up to 12 months. This shall not apply if deferment would result in particular hardship. Lots shall be drawn to select the applicants whose admission will be deferred.

Paragraph 14 of the same law stipulated the following:

1. A case of particular hardship for the purposes of Paragraph 24(2) of the Law on Legal Training shall exist where deferment would result in detriment to the applicant (male or female) which, judged by exacting standards, goes significantly beyond the detriment usually associated with refusal.

2. The following, in particular, may be regarded as cases of particular hardship:

(…) the completion of compulsory service pursuant to Article 12(a)(1) or (2) of the Basic Law, or a period of at least two years spent as an overseas aid volunteer within the meaning of the Law on Overseas Aid Volunteers (..) or completion of a voluntary community service year within the meaning of the Law on the Promotion of a Voluntary Community Service Year (…)

REVIEW OF THE EXAMPLE

1. **Material scope of the law.** The law governs access to practical training, which constitutes a period of training and is a necessary prerequisite to access employment in the judicial service or the higher civil service. Such provisions are thus directly related to employment in the public service, which fall within the scope of the EU Equality Law (and, by extension, the PPCDU "labour relations", and the ECHR).
2. **Protected ground.** Paragraph 14(2) of the law provides for an exception from a general rule favouring persons who completed military or substitute service. In other words, the law provides for a preferential treatment of such persons. To understand possible effect of the law, it is necessary to determine how criteria for eligibility for such service is defined, and whether or not such service is mandatory for a certain group of persons. For the purpose of further analysis, it will be examined how the law affects women who were not obliged to perform military or substitute services at the material time. When the rule, in effect, differentiates between women and men, such situation falls under the protected ground of "sex", found in the EU Equality Law (and, by extension, the PPCDU", and the ECHR).
3. **Form of discrimination.** The provision in question establishes a *prima facie* instance of indirect discrimination, considering the following elements:

3.1. A neutral rule. The Law on Legal Training provides for a number of circumstances which may be taken into account for priority access to practical legal training. They include the completion of compulsory military or civilian service. As such, the rules are worded in the neutral terms, without giving explicit preference to women or men.

3.2. Comparator. Female candidates can be compared to male candidates, who are obliged by the law to perform military or substitute service.

3.3. Less favourable effect. Under the relevant national legislation, specifically governing military and substitute service, women are not required to do military or civilian service and therefore cannot benefit from the priority accorded by the abovementioned provisions of the Law on Legal Training to applications in circumstances regarded as cases of hardship.

4. Justification for discrimination:

4.1. ***Legitimate aim.*** The provision in question, which takes account of the delay experienced in the progress of education by male applications who have been required to do military or civilian service, was introduced with the aim to counterbalance to some extent the effects of that delay. Such is can be considered legitimate and objective.

4.2. ***Necessary and proportionate means.*** The advantage conferred on the male candidates, whose enjoyment of priority may operate to the detriment of other applicants only for a maximum of 12 months, does not seem disproportionate, since the delay they have suffered on account of the activities referred to is at least equal to that period.

5. **Conclusion.** By giving priority to male applicants to legal training who have completed compulsory military or civilian service, the provisions in question constitute indirect discrimination on the ground of sex. However, such differential treatment pursues a legitimate aim, i.e. to counterbalance the effects of the delay in training caused by mandatory service, and is limited in time, thus proportionate to the aim pursued. To conclude, such provision of the law is in compliance with the EU Equality Law (and, by extension, PPCDU, and the ECHR).

2. RECOMMENDATIONS FOR CONDUCTING REVIEW

When undertaking the review, it is important to take a comprehensive approach and read the national law in conjunction with other sources.

For instance, it is recommended to review not only the draft of the legal act itself, but also supporting documents and *travaux preparatoire*, such as explanatory memorandum attached to the draft law, any *ex ante* legal assessment concluded by the author(s) of the draft law or by the third parties, such as think tanks or non-governmental organizations. These documents may contain information relevant to the assessment, such as the intention behind the regulation, possible limitations of regulations, and the assessment of the likely risks that the regulation may infer. If, while assessing the law, it is evident that additional information is needed it is advisable to request this information from the relevant state authority[63].

Ideally, *ex ante* legal review should be a participatory exercise, involving the groups likely to be affected by the regulation and/or the organization representing them. Their participation may bring valuable information, which may be particularly relevant for understanding if the draft legal act may result in indirect discrimination of a certain vulnerable group. It also gives additional credibility to the review and support during the advocacy process. Participation of vulnerable groups may be organized by approaching the communities directly, or by hosting a consultation in the Commissioner's premises, or by launching a consultation online. When selecting the best approach to this exercise, the needs and vulnerabilities (such as illiteracy, difficulties in understanding the language, barriers to mobility, etc.) should be taken into account.[64]

The comprehensive assessment should consider the following aspects: [65]

- The aim and the legal basis of the draft legal act in order to determine if the objective of the regulation is defined precisely and unambiguously, or whether it should be broadened or narrowed down.

- The regulatory measures established to understand whether the measures are relevant, necessary and proportionate to the objective pursued, and whether the objective of the proposed regulation could not be achieved by the less restrictive measures.

- The possible impact of the law, for example, if the law would create contradictions or inconsistencies with other regulations; whether relevant timeframe has been foreseen for the implementation of the law; what is the likehood of implementing measures (delegated acts) causing negative consequences to natural persons.

- Legal drafting to determine whether the text of the draft legal act is understandable, clear, unambiguous, and whether the language used in unbiased.

The structure of the conclusion drafted after review should include the introductory, analytical and final parts:

- The introductory part should provide the context for the review listing key national and international legal sources take into consideration during the review, and brief information about the background of the expert who concluded the review.
- The analytical part should reflect the detailed analysis of the draft legal act against the standards of the non-discrimination law (see part 1.7 the Methodology). Any unclear points, doubts and their reasons should be listed and explained in detail.
- The concluding part should give the overall assessment on the compliance of the draft legal act with the non-discrimination law. If the draft legal act is deemed incompliant with the anti-discrimination law, it is recommended to offer suggestions for improvements, and, in case where inaccuracies in the legal drafting are indicated, to list alternative wording of the provision(s). [66]

3. FINAL CONCLUSIONS

An assessment (review) of draft legal acts for compliance with the anti-discrimination law is a powerful tool which assists in embedding the principle of non-discrimination and equal treatment into the national legislation, and thus advancing the rights of the vulnerable groups. The quality legal assessment first and foremost draws on a comprehensive legal analysis and strong legal argumentation. Therefore, during the review process it is important to assess all the key elements of the anti-discrimination review, which include determination pertaining to (i) material scope of the law; (ii) applicable protected ground; (iii) the form of discrimination (direct or indirect discrimination) and (iv) possible justification for differential treatment (legitimate aim and necessary means, or genuine occupational requirements, or positive action). Ideally, and in particular when the draft legal act in question concerns a sensitive area

of social relations, an expert conducting anti-discrimination review should solicit the views of the representatives of a vulnerable group, which is likely to be substantially affected in case the draft is adopted into the law.

ANNEX 1. Table of ratified international treaties

No.	Int'l org.	Name	Date of ratification
1.	UN	International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1969	1969-03-07
2.	UN	International Covenant on Civil and Political Rights (ICCPR), 1966	1973-02-12
3.	UN	International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966	1973-11-12
4.	UN	Conventional on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979	1981-03-12
5.	UN	Convention on the Rights of the Child (CRC), 1990	1991-08-28
6.	UN	Convention for the Protection of all Persons from Enforced Disappearance (CPED), 2010	2015-08-14 [accession only]
7.	UN	Convention on the Rights of Persons with Disabilities (CRPD), 2006	2010-02-04
8.	CoE	Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1950	1997-09-11
9.	CoE	Protocol No. 12 of the ECHR	2006-03-27

ANNEX 2. Case-law of the European Court of Human Rights

Application No.	Name of the case	Brief summary	Ruling
23960/02	***Zeman v. Austria***	The male applicant complained about the reduction of his survivor's pension under the pension law. According to the law, widowers were entitled to receive 40% of the pension their deceased wife had acquired before January 1995 while widows were entitled to 60% of the pension of their deceased husband.	The Court held that there had been a violation of Article 14 (prohibition of discrimination) of the Convention taken together with Article 1 (protection of property) of Protocol 1. According to the Government, the impugned inequality between widows and widowers was linked to their prior differential legal situation which, in itself, was objectively justified. The Court found this did not constitute an "objective and reasonable justification" which was necessary to justify differential treatment of women and men.
55762/00 and 55974/0	***Timishev v. Russia***	A Chechen lawyer had been denied authorisation to pass an administrative border on the basis of an oral instruction from the Ministry of the Interior of the Kabardino-Balkaria Republic not to admit persons of Chechen ethnic origin to the Republic.	The Court noted that the Government had provided no justification of the difference in treatment between persons of Chechen and of non-Chechen origin in the enjoyment of their freedom of movement. It added that, the Court held: "In any event, […] no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures. The Court established a violation of Article 14 in conjunction with Article 2 of Protocol 4 to the Convention.
34406/97	***Mazurek v. France***	An individual who had been born out of wedlock complained that the national law prevented him (as an "adulterine" child) from inheriting more than one	The ECtHR found that this difference in treatment, based solely on the fact of being born out of wedlock, could only be justified by particularly "weighty reasons" While

		quarter of his mother's estate	preserving the traditional family was a legitimate aim it could not be achieved by penalising the child who has no control over the circumstances of their birth.
57325/00	***D.H. and Others v. the Czech Republic***	This case concerned 18 Roma children, all Czech nationals, who were placed in schools for children with special needs, including those with a mental or social handicap, from 1996 to 1999. The applicants claimed that a two-tier educational system created a semi-automatic segregation of Roma children into such schools, which resulted in them following a simplified curriculum.	The Court noted that at the relevant time, the majority of children in special schools in the Czech Republic were of Roma origin. Roma children of average/above average intellect were often placed in those schools on the basis of psychological tests which were not adapted to people of their ethnic origin. The Court concluded that the law at that time had a disproportionately prejudicial effect on Roma children, in violation of Article 14 of the Convention taken in conjunction with Article 2 (right to education) of Protocol 1.
No. 17209/02	***Zarb Adami v. Malta***	The applicant complained that being called to jury service amounted to discrimination since the practice according to which jury lists were compiled made men inherently more likely to be called. Although the national law was neutral with respect to sex, it also had an exemption according to which persons who had to take care of their family could have been exempted from jury service. More women than men could have relied on that provision.	The Court observed that the difference in treatment did not depend on the wording of Maltese law in force at the relevant time, which made no distinction between sexes, both men and women being equally eligible for jury service. The discrimination at issue was based on "a well-established" practice, characterised by a number of factors, such as the manner in which the lists of jurors were compiled and the criteria for exemption from jury service. As a result, only a negligible percentage of women were called to serve as jurors. Statistical information showed that the civic obligation of jury service had been placed predominantly on men. Therefore, there had been a difference in treatment between two groups – men and women – which, with respect to jury service, were in a similar

			situation.
58641/00	***Hoogendijk v. the Netherlands***	By amendments to the law, the Netherlands made receipt of a benefit for incapacity for work subject to the requirement of having received a certain income from or in connection with work in the year preceding the commencement of incapacity. The criterion was not based on sex, however, since a lot of married women did not use to be employed in the Netherlands in relevant time, they were affected by the income criterion much more than men.	The ECtHR investigated whether the different treatment, based on the income requirement as a criterion, was objectively and reasonably justified in respect of women who were disproportionally affected. It concluded that the purpose of amendments was legitimate in view of the necessity to keep the costs of the social insurance scheme within reasonable budgetary limits and due to that they were not contrary to Article 14 of the ECHR.
No. 34369/97	***Thlimmenos v. Greece***	National law barred those with a criminal conviction from joining the profession of chartered accountants, since a criminal conviction implied a lack of honesty and reliability needed to perform this role. The applicant in this case had been criminally convicted for refusing to wear military uniform during his national service. This was because he was a member of the Jehovah's Witnesses, which is a religious group committed to pacifism.	The ECtHR found that there was no reason to bar persons from the profession where their criminal convictions were unrelated to issues of reliability or honesty. The government had discriminated against the applicant by failing to create an exception to the rule for such situations, violating the right to manifest his religious belief (under Article 9 of the ECHR) in conjunction with the prohibition on discrimination.
13444/04	***Glor v. Switzerland***	The applicant was obliged to pay a tax to compensate for failing to complete his military service. To be exempted from this tax one either had to have a disability reaching a level of '40%' or be a conscientious objector. The applicant's disability was such that he was found unfit to serve in the army, but the disability did not	The ECtHR found that the State had treated the applicant comparably with those who had failed to complete their military service without valid justification. This constituted discriminatory treatment since the applicant found himself in a different position (as being rejected for military service but willing and able to perform civil service), and as such the State should have created an exception

		reach the severity threshold required in national law to exempt him from the tax. He had offered to perform the 'civil service' but this was refused.	to the current rules.
31950/06	***Graziani-Weiss v. Austria***	A local district court held a list of possible legal guardians containing the names of all practising lawyers and public notaries in the district. The applicant, whose name was on the list, was appointed legal guardian for a mentally ill person in matters of management of her income and representation before the courts and other authorities. He complained that listing only lawyers and public notaries and excluding other persons who possessed certain knowledge of law from the list of potential guardians had been discriminatory.	The Court established an undeniably been a difference in treatment between practising lawyers and notaries on the one hand, and other legally trained persons on the other, for the purposes of their appointment as a guardian in cases where legal representation was necessary. However, held that those two groups were not in relevantly similar situations, as "other legally trained persons" had not passed relevant examination and had no experience in representing parties before the courts, which was a pre-requisite for the guardianship.
2033/04 and others	***Valkov and Others v. Bulgaria***	The applicants were pensioners, whose pensions were capped in line with the domestic legislation. They complained that they had been discriminated against vis-à-vis those pensioners who had held certain high political office – the President and Vice-President of the country, the Speaker of the National Assembly, the Prime Minister and the judges of the Constitutional Court – whose pensions were exempted from the statutory cap.	The applicants' main argument in support of their assertion that they are in such a situation was in essence that it was impossible to draw a valid distinction, for pension purposes, between the character of the respective employments of the two groups. The Court was "not prepared" to conclude that there was no valid distinction between the applicants and the holders of the high-ranking posts. It said that such matters were policy judgments in principle reserved for the national authorities, which had direct democratic legitimation and were better placed than an international tribunal to evaluate local needs and conditions. It concluded that there was no discrimination

			against the applicants in respect of their property rights.
25951/07	***Gas and Dubois v. France***	The applicants were two cohabiting women. The case concerned the refusal of the first applicant's application for a simple adoption order in respect of the second applicant's child. They maintained that this decision had infringed their right to private and family life in a discriminatory manner.	The Court held that there had been no violation of Article 14 taken in conjunction with Article 8 (right to respect for private and family life) of the Convention. It considered in particular that the applicants' legal situation could not be said to be comparable to that of married couples when it came to adoption by the second parent. It further saw no evidence of a difference in treatment based on the applicants' sexual orientation, as opposite-sex couples who had entered into a civil partnership were likewise prohibited from obtaining a simple adoption order.
31827/02	***Laduna v. Slovakia***, 13 December 2011	Remand prisoners did not have the same visiting rights as convicted prisoners. They were allowed to receive visits for a maximum of thirty minutes a month compared to the two hours allowed to convicted prisoners. Moreover, the length and frequency of visits of convicted prisoners depended on the security level of the prison. In contrast, remand prisoners were all subject to the same regime, regardless of the reasons for their detention and security considerations.	The Court concluded that "in certain cases it may be justified, for security-related reasons or to protect the legitimate interests of an investigation, to have particular restrictions on a detained person's visiting rights", however, such aim "can be attained by other means which do not affect all detained persons regardless of whether they are actually required, such as the setting up of different categories of detention, or particular restrictions as may be required by the circumstances of an individual case". The Court concluded that the restrictions on visits to prisoners by family members during their detention on remand constituted a disproportionate measure in violation of Articles 8 and 14 of the Convention.
32526/05	***Sampanis and Others v. Greece***	In Aspropyrgos, a suburb of Athens, Roma pupils were separated in three prefabricated rooms constituting an annex of the	The Court considered that the competent authorities had not adopted a single, clear criterion in choosing which children to place in the special preparatory

		primary school. They attended preparatory classes there to learn Greek language and to accommodate to school conditions. But, over three years, a period under consideration in the case, they were not moved to regular classes.	classes. In addition, the Court noted that whilst the declared objective of the preparatory classes was for the pupils concerned to attain the level of education which would enable them to enter ordinary classes in due course, there was no evidence that the preparatory classes facilitated this process. As such, conditions of enrollment and placement of children resulted in discrimination against them and constituted a violation of Article 14 of the Convention taken together with Article 2 of Protocol 1.
20060/92	***Van Raalte v. the Netherlands***	The applicant, who had never been married and had no children, alleged that he had been the victim of discriminatory treatment with regard to the obligation to pay contributions under the General Child Care Benefits Act. He claimed that it constituted discrimination on the ground of gender as no similar contributions were exacted from unmarried childless women of that age.	The Court held that there had been a violation of Article 14 of the Convention taken together with Article 1 of Protocol 1. Article 14 required that any measure, as the one in the case, in principle, applied even-handedly to both men and women unless compelling reasons had been adduced to justify a difference in treatment. In the present case the Court was not persuaded that such reasons existed. In this context it had to be borne in mind that just as women over 45 may give birth to children, there are on the other hand men of 45 or younger who may be unable to procreate. The Court further observed that an unmarried childless woman aged 45 or over could well become eligible for benefits under the Act in question; she could, for example, marry a man who already had children from a previous marriage. In addition, the argument that to levy contributions under a child care benefits scheme from unmarried childless women would impose an unfair emotional burden on

			them could equally well apply to unmarried childless men or to childless couples.
57448/00	***Wintersberger v. Austria***	The applicant, who was disabled, had been dismissed from employment by the State. According to national law, persons with disabilities received special protection from dismissal in that prior approval for dismissal had to be received from a special committee. In the case where the employer was unaware of the disability, this approval could be issued retroactively. No such approval was needed for persons without disability. The applicant argued that the fact that approval could be issued retroactively for persons with disabilities, but not for non-disabled persons, amounted to discrimination.	The ECtHR found that this provision in fact existed for the benefit of persons with disabilities and was therefore justified as an example of reverse discrimination. The claim was, accordingly, declared inadmissible
6268/08	***Andrle v. the Czech Republic***	The applicant, a father of two, complained that unlike the position with women, there was no lowering of the pensionable age for men who had raised children.	The ECtHR accepted that the measure at issue pursued the legitimate aim of compensating for factual inequalities and hardship arising out of the specific historical circumstances of the former Czechoslovakia, where women had been responsible for the upbringing of children and for the household, while being under pressure to work full time. Given the gradual nature of demographic shifts and changes in perceptions of the role of the sexes, and the difficulties of placing the entire pension reform in the wider context, the State could not be criticised for progressively modifying its pension system instead of pushing for a complete change at a faster pace. In the specific circumstances of

			the case, the approach of the national authorities continued to be reasonably and objectively justifiable until such time as social and economic changes removed the need for special treatment for women.
41939/07	***Pilav v. Bosnia and Herzegovina***	The case concerned the complaint by a politician residing in the Republika Srpska (one of the two constituent entities of Bosnia and Herzegovina), who declared himself as Bosniac, of the fact that it was legally impossible for him to stand for election to the Presidency of the country.	The Court observed that while Mr Pilav, as being affiliated with one of the "constituent people", had a constitutional right to participate in elections to the Presidency, he would be required to leave his home and move to the Federation of Bosnia and Herzegovina (the other constituent entity of Bosnia and Herzegovina) in order to effectively exercise this right. The Court considered that Mr Pilav's exclusion from election to the Presidency was based on a combination of ethnic origin and place of residence, amounting to a discriminatory treatment in violation of Article 1 of Protocol 12.
34880/12	***Ramaer and Van Willigen v. the Netherlands***	The applicants were the Netherlands nationals in receipt of the Netherlands old-age pensions. They resided in Belgium and Spain respectively. Until 1 January 2006 they had the benefit of Netherlands private health care insurance which entitled them to health care according to Netherlands standards. Following the entry into force of the new law, the applicants became entitled to health care according to the basic health care regimes of their countries of residence. Health care up to the Netherlands standard has, in the applicants' submission, become much	The Court accepted that place of residence constituted "an aspect of personal status" for the purposes of Article 1 of Protocol 12 and that the entry into force of the new health care legislation had created a situation in which the applicants were treated differently from Netherlands residents, and also from each other depending on their respective countries of residence. The applicants were not, however, in a relevantly similar position to those comparator groups. As was apparent from its drafting history, the new law was intended to provide an essentially territorial system for all persons lawfully resident in the Netherlands. As a result of

		more expensive: the applicants had to take out additional private insurance, and some health care expenses were no longer refundable.	their choice to reside in other European Union countries the applicants were entitled in their respective countries of residence to health care under the same regime as the local population. The country concerned was reimbursed for any health care it provided by the Netherlands, which in turn had the right to require the applicants to contribute. Any complementary health care insurance was optional. The Court found no violation of Article 1 of Protocol 12.
27996/06 and 34836/06	***Sejdić and Finci v. Bosnia and Herzegovina***	The applicants, who were both citizens of Bosnia and Herzegovina, were respectively of Roma and Jewish origin and held prominent public positions. Under the 1995 Constitution of Bosnia and Herzegovina– only Bosniacs, Croats and Serbs, described as "constituent peoples", were eligible to stand for election to the tripartite State presidency and the upper chamber of the State Parliament, the House of Peoples. The applicants complained that, despite possessing experience comparable to the highest elected officials in the country, they were prevented by the Constitution from being candidates for such posts solely on the grounds of their ethnic origin.	Whereas Article 14 of the Convention prohibited discrimination in the enjoyment of "the rights and freedoms set forth in [the] Convention", Article 1 of Protocol 12 extended the scope of protection to "any right set forth by law", thus introducing a general prohibition of discrimination. Therefore, whether or not elections to the Presidency fell within the scope of Article 3 of Protocol No. 1, this complaint concerned a "right set forth by law" and Article 1 of Protocol 12 was consequently applicable. The lack of a declaration of affiliation by the present applicants with a "constituent people" had also rendered them ineligible to stand for election to the Presidency. Since the notions of discrimination prohibited by Article 14 and by Article 1 of Protocol 12 were to be interpreted in the same manner, for the same reasons, as the Court found a violation of Article 14 as "constitutional provisions which had rendered the applicants ineligible for election to the Presidency must also be considered discriminator

			in violation of Article 1 of Protocol 12.”

ANNEX 3. Case-law of the European Union Court of Justice[67]

Case No.	Name of the case	Brief summary	Ruling
C-104/09	***Pedro Manuel Roca Álvarez v Sesa Start España ETT SA***	The case concerned a man seeking time off to feed expressed breast milk to his unweaned child. Spanish law provided that if a female employee does not claim the time off work for breastfeeding herself, the child's father may take the time off instead. The father was refused a leave, however, because his child's mother was not an employee but was self-employed.	The CJEU said that the legislation in question was "liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties," and thus was discriminatory and prohibited under the EU law.
C-318/13	***Case of X***	The Finnish legislation governing the calculation of payment for long-term disability used separate actuarial tables for men and women. The claimant, a man, was given compensation for an accident at work that was €279 less than that which would have been payable to a woman of the same age and in a comparable situation.	The CJEU said that the calculation of compensation "cannot be made on the basis of a generalisation as regards the average life expectancy of men and women" since "there is a lack of certainty that a female insured person always has a greater life expectancy than a male insured person of the same age placed in a comparable situation".
C-303/06	***Coleman v. Attridge Law and Steve Law***	A mother claimed that she received unfavourable treatment at work, based on the fact that her son was disabled. Her son's disability led her to be late at work on occasion and request leave to be scheduled according to her son's needs. The complainant's requests were refused and she was threatened with dismissal, as well as receiving abusive comments relating to her child's condition.	The ECJ accepted that claimant's situation could be compared to the one of her colleagues with non-disabled children. The were granted flexibility when requested. It also accepted that claimant's treatment amounted to discrimination and harassment on the grounds of the disability of her child (discrimination by association).
C-83/14	***CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita***	The case concerned the applicant, who ran a shop in a predominantly Roma district of a Bulgarian town, but was not Roma herself. The electricity company put meters in Roma districts considerably higher than in other districts, ostensibly so as	The Court established the principle that indirect discrimination applies to a person who shares a disadvantage, even if they do not share the characteristic of the group that leads to such disadvantage. Accordingly,

	ot diskrimi natsias	to avoid tampering, making them less visible to consumers. The applicant brought a complaint that she was unable to check her electricity meter and that this amounted to discrimination.	where a neutral practice causes a particular disadvantage to members of an ethnic group, anyone who is similarly disadvantaged may bring an indirect discrimination claim even if they are not themselves a member of the group that is particularly disadvantaged.
C-137/09	***Marc Michel Josemans v. Burgemeester van Maastricht***	The case concerned legislation which prohibited the admission of non-residents to coffee shops with the purpose of reducing drug tourism and the public nuisance which accompanied it.	The Court held that the national regulations allowing only residents into coffee shops did constitute indirect discrimination, as non-residents were more likely to be foreigners. The Court found, however, that such regulations were justified in the circumstances. The combat of drug tourism, and the accompanying public nuisance related to it was part of the combat against drugs, and as such was a legitimate aim. The Court found that the measures were suitable and proportionate. They did not prevent non-residents from entering the many cafes which did not sell cannabis. In addition, other measures to limit drug tourism had proved ineffective. The CJEU acknowledged that it was not practical to run a system where non-residents could enter coffeeshops, but not purchase cannabis.
C-237/94	***John O'Flynn v Adjudication Officer***	Social security legislation provided for a benefit to cover the cost of burial or cremation of deceased persons incurred by the person taking responsibility for the arrangements – but only if the burial had taken place in the UK. The applicant, an Irish national working in the UK, was denied this benefit for the costs' of his father's funeral because that was	The Court found that the condition on the making of a funeral grant that the deceased be buried in that country was discriminatory. Specifically, it held: "[u]nless objectively justified and proportionate to the aim pursued, a provision of national law, even if applicable irrespective of nationality, must be regarded

		to take place in Ireland.	as indirectly discriminatory, and hence not complying with the equality of treatment prescribed by Article 7(2), if it is simply intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.”
C-335/11 and C-337/11	***HK Danmark on behalf of Ring v Dansk almennyttigt Boligselskab; HK Danmark on behalf of Werge v Dansk Arbejdsgiverforeningr***	The two claimants had back problems — one had developed constant lumbar pain that could not be treated and the other had suffered whiplash injuries as a result of a road accident.In both cases, the individuals could no longer work full time and so were dismissed, but subsequently they were able to re-commence work on a part-time basis. Both brought complaints to court claiming that their dismissals were discriminatory on the grounds of disability.	The CJEU held that disability can include a long-term impairment that limits the person's ability to participate in working life, and consequently an impairment that prevents an employee from working full time can fall within the definition. In other words, an impairment need not be absolute in order to qualify as a disability. The CJEU also ruled that offering an employee reduced working hours can amount to a reasonable adjustment, depending on the circumstances.
C-256/01	***Allonby v. Accrington and Rossendale College***	The complainant, who worked for a college as a lecturer, did not have her contract renewed by the college. She then went to work for a company that supplied lecturers to educational establishments. This company sent the complainant to work at her old college, performing the same duties as before, but paid her less than her college had done. She alleged discrimination on the basis of sex, saying that male lecturers working for the college were paid more.	The ECJ held that male lecturers employed by the college were not in a comparable situation. This was because the college was not responsible for determining the level of pay for both the male lecturer who it employed directly and the complainant who was employed by an external company. They were therefore not in a sufficiently similar situation.
C-423/04	***Richards v. Secretary of State for Work and***	The complainant had undergone male-to-female gender reassignment surgery. She wished to claim her pension on her 60th birthday, which was the age that women were entitled to pensions in the UK. The government	The ECJ found that because national law allowed an individual to change their gender, then the correct comparator were not “men”, as the government has claimed, but “women”.

	Pensions	refused to grant the pension, maintaining that the complainant had not received unfavourable treatment by comparison to those in a similar situation.	Accordingly, the complainant was being treated less favourably than other women by having a higher retirement age imposed on her.
C-267/06	***Maruko v. Versorgungsanstalt der deutschen Bühnen,***	A homosexual couple had entered into a "life partnership". The complainant's partner had died and the complainant wished to claim the 'survivor's pension' from the company that ran his deceased partner's occupational pension scheme. The company refused to pay the complainant on the grounds that survivors' pensions were only payable to spouses and he had not been married to the deceased.	The ECJ accepted that the refusal to pay the pension amounted to unfavourable treatment and that this was less favourable in relation to the comparator of "married" couples. The ECJ found that the institution of "life partnership" in Germany created many of the same rights and responsibilities for life partners as for spouses, particularly with regard to State pension schemes. It was therefore prepared to find that, for the purposes of this case, life partners were in a similar situation to spouses. The ECJ then went on to state that this would amount to discrimination on the basis of sexual orientation. Thus, the fact that they were unable to marry was indissociable from their sexual orientation.
C-177/88	***Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus***	Ms Dekker applied for a job as a nursery. In the application procedure she informed her potential employer that she was three months pregnant. Nevertheless, a commission of her potential employer recommended her for the job as she seemed to be the "best candidate". Despite this recommendation, Miss Dekker was finally not employed because of her pregnancy and she was informed that her potential employer would not have been able to recoup the sick pay caused by her absence.	The ECJ ruled that the fact that she was not employed because of her pregnancy was a direct discrimination on the ground of sex which could not be justified because of financial costs. The ECJ emphasized with this decision that a less favourable treatment of a woman because of her pregnancy –without the need to find a comparator- had to be called an unlawful discrimination on the grounds of sex *per se* (in itself).
C-4/02 and C-5/02	***Hilde Schönheit v. Stadt***	The pensions of part-time employees were calculated using a different rate to that of full-time employees.This different rate was	The Court accepted that it gave rise to a presumption of indirect discrimination on the basis of sex. The Court also

	Frankfurt am Main and Silvia Becker v. Land Hessen	not based on the differences of the time spent in work. Thus, part time employees received a smaller pension than full-time employees. This neutral rule on the calculation of pensions applied equally to all part-time workers. Statistical evidence was brought to show that 87.9% of part-time employees were women. As the measure, although neutral, negatively affected women disproportionately to men	reiterated that budgetary considerations cannot justify discrimination against one of the sexes. According to the Court, "[t]o concede that such considerations may justify a difference in treatment between men and women which would otherwise constitute indirect discrimination on grounds of sex would mean that the application and scope of a rule of Community law as fundamental as that of equal treatment between men and women might vary in time and place according to the state of the public finances of Member States."
C-127/92	***Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health***	A woman was employed as a speech therapist by the health authority. She complained of sex discrimination saying that at her level of seniority within the national health service, members of her profession which was overwhelmingly a female profession, were appreciably less well paid than members of comparable professions in which at an equivalent professional level there were more men than women. In particular she was comparing herself with two men – a clinical psychologist and pharmacist.	The Court found that the fact that the rates of pay for two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, are decided by collective bargaining processes conducted separately for each of the two professional groups concerned, without any discriminatory effect within each group, does not, where the results of those processes show that two groups with the same employer and the same trade union are treated differently, preclude a finding of *prima facie* discrimination. If the employer could rely "on the absence of discrimination within each of the collective bargaining processes taken separately as sufficient justification for the difference in pay, he could easily circumvent the principle of equal pay by using separate bargaining processes."
C-	***Leopold***	Austrian legislation for pay in the	The Court said that the

530/13	***Schmitzer v Bundesministerin für Inneres,***	public sector provided that payments based on length of service did not take into account periods of service prior to age 18. The Government explained that such approach enshrined in the law was due to by the budgetary limitations.	budgetary constraints are not a defence in themselves. According to the Court, "while budgetary considerations may underpin the chosen social policy of a Member State and influence the nature or extent of the measures that that Member State wishes to adopt, such considerations cannot in themselves constitute a legitimate aim within the meaning of Article 6(1) of Directive 2000/78".
C-165/82	***Commission v. UK***	The case concerned limited access of men to the profession of midwife.	The Court held that this limitation was in conformity with the allowed exceptions to the principle of equal treatment, in view of the fact that "personal sensitivities" could play an important role in the relationship between a midwife and a patient.
C-285/98	***Kreil v. Bundesrepublik Deutschland***	The complainant applied to work as an electrical engineer in the armed forces. However, she was refused a post since women were barred from any military posts involving the use of arms and could only participate in the medical and musical services of the forces.	The Court found that this exclusion was too wide since it applied to almost all military posts simply because in those posts women might at some point have to use weapons. Any justification should be more closely related to the functions typically performed in particular positions. The credibility of the government's justification was also questioned because, even in those posts that were open to women, they were still obliged to undergo basic weapon training for the purposes of self-defence or defence of others. The measure was therefore not proportionate to achieving its aim. Furthermore, distinctions should not be made between women and men on the basis that women require greater protection, unless these relate

			to factors specific to the circumstances of women, such as the need for protection during pregnancy.
C-450/93	***Kalanke v. Freie Hansestadt Bremen***	This case concerned legislation adopted at the regional level, which accorded automatic priority to female candidates applying for posts or promotions. Where male and female candidates were equally qualified, and where female workers were deemed to be under-represented in that sector, female candidates where to be given preference. Under-representation was deemed to exist where female workers did not make up at least half of the staff in the post in question. In this case an unsuccessful male candidate, Mr Kalanke, complained that he had been discriminated against on the basis of his sex before the national courts.	It was accepted that the rule pursued the legitimate aim of eliminating inequalities present in the workplace. However, the ECJ held that Article 2(4) of the Equal Treatment Directive of 1976 (the predecessor to Article 3 of the Gender Equality Directive on "positive action") must be read restrictively. Thus, national rules such as those in the legislation in question which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and are outside the ambit of the exception in Article 2(4). It followed that Article 2(1) and 2(4) of the Directive preclude national rules such as in this case.
C-409/95	***Marschall v. Land Nordrhein-Westfalen***	The rule in question stated that equally qualified women should be given priority 'unless reasons specific to an individual male candidate tilt the balance in his favour'. Mr Marschall, who was rejected for a post in favour of a female candidate, contested the legality of this rule	The Court held that the rule of this nature was not disproportionate to the legitimate aim of eliminating inequality as long as "in each individual case, it provides for male candidates who are equally as qualified as the female candidates a guarantee that their candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate". Thus, discretion built into the rule, prevented the priority from being absolute and was

			therefore proportionate to achieving the aim of addressing inequality in the workplace.
C-407/98	***Abrahamsson and Leif Anderson v. Elisabet Fogelqvist***	The rule under Swedish law stated that a candidate of an under-represented sex who possessed sufficient qualifications to perform the post should be accorded priority, unless "the difference between the candidates' qualifications is so great that such applications would give rise to a breach of the requirement of objectivity in the making of appointments".	The Court found that in effect the legislation automatically granted priority to candidates from the under-represented sex. The fact that the provision only prevented this where there was a significant difference in qualifications was not sufficient to prevent the rule from being disproportionate in its effects.

[1] From 2009 it is called the European Union Court of Justice.

[2] Equinet, "Equality impact assessment: an introduction", http://www.equineteurope.org/IMG/docx/equinet_euality_impact_assessment_presentation.docx, p. 2

[3] Equinet, "Equality impact assessment: an introduction", http://www.equineteurope.org/IMG/docx/equinet_euality_impact_assessment_presentation.docx, p. 5

[4] Кабінет Міністрів України, "Про проведення ґендерно-правової експертизи", від 12 квітня 2006 р. N 504, http://zakon2.rada.gov.ua/laws/show/504-2006-п.

[5] *Ibid.*, para. 3

[6] Article 8 of the PPCDU.

[7] Article 8 (3) of the PPCDU.

[8] Niall Crowley, "Assessment of the Operational Capacities of the Ukrainian Parliament Commissioner for Human Rights in the Realisation of Non-Discrimination Advocacy", 2015, http://library.euneighbours.eu/content/assessment-operational-capacities-ukrainian-parliament-commissioner-human-rights-realisation, p. 68.

[9] See example from Міністерства юстиції України, "Методичні рекомендації щодо проведення гендерно-правової експертизи проектів нормативно-правових актів", https://minjust.gov.ua/m/str_15653, paras. 2-3

[10] CJEU, *HK Danmark on behalf of Ring v Dansk almennyttigt Boligselskab; HK Danmark on behalf of Werge v Dansk Arbejdsgiverforeningr*, C-335/11 and C-337/11, http://curia.europa.eu/juris/document/document.jsf?text=&docid=136161&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=304756, 11 April 2013, para. 32

[11] *Ibid*., para. 38

[12] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 02/12/2000 P. 0016 – 0022, *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML*

[13] Article 5 of the Employment Equality Directive

[14] Article 2 of the UN Convention on the Rights of Persons with Disabilities

[15] Database of the jurisprudence of the United Nations Treaty Bodies: http://juris.ohchr.org/

[16] UN CEDAW, General Recommendation No. 21, http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm, para. 38,

[17] Council of Europe and the EU Fundamental Rights Agency, Handbook on European non-discrimination law (2011), http://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG_01.pdf, p. 12

[18] *Ibid.*

[19] European Commission, "The prohibition of discrimination under European human rights law, Relevance for the EU non-discrimination directives – an update", 2011,

http://ec.europa.eu/justice/discrimination/files/the_prohibition_of_discrimination_under_european_human_rights_law_update_2011__en.pdf, p. 15

[20] Article 1 of Protocol 12 to the European Convention of Human Rights, http://www.echr.coe.int/Documents/Convention_ENG.pdf

[21] *Ibid.*

[22] European Commission, "The prohibition of discrimination under European human rights law, Relevance for the EU non-discrimination directives – an update", 2011, http://ec.europa.eu/justice/discrimination/files/the_prohibition_of_discrimination_under_european_human_rights_law_update_2011__en.pdf, p. 9

[23] Council of Europe and the EU Fundamental Rights Agency, Handbook on European non-discrimination law (2011), http://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG_01.pdf, p. 13

[24] *Ibid*., p. 15

[25] *Ibid.*

[26] Article 157 of the Treaty of the Functioning of the European Union, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2016.202.01.0001.01.ENG&toc=OJ:C:2016:202:FULL#C_2016202EN.01004701

[27] *Ibid.*

[28] Charter of Fundamental Rights of the European Union, OJ C 326, 2012, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT

[29] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast); Council Directive 2010/18/EU implementing the revised Framework; Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC; Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. See Academy of European Law, "Background documentation EU gender equality law", http://www.era-comm.eu/oldoku/SNLLaw/kiosk/pdf/Table_of_Content_GENDER_EN.pdf

[30] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180 , 19/07/2000 P. 0022 – 0026, http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32000L0043

[31] From Academy of European Law, "EU anti-discrimination law. Module 1: the Race and Framework Directives", https://www.era-comm.eu/anti-discri/e_learning/module1_1.html

[32] Council of Europe and the EU Fundamental Rights Agency, Handbook on European non-discrimination law (2011), http://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG_01.pdf, p. 26

[33] CJEU, *Fag og Arbejde (FOA) v Kommunernes Landsforening (KL),* Case C‑354/13, 18 December 2014, http://curia.europa.eu/juris/celex.jsf?celex=62013CJ0354&lang1=en&type=TXT&ancre=

[34] *Ibid.*, p. 105

[35] Jim Murdoch, Freedom of Thought, Conscience and Religion (Directorate General of Human Rights and Legal Affairs of the Council of Europe 2007), pp. 11–12

[36] See more in European Commission, "The meaning of racial or ethnic origin in EU law: between stereotypes and identities" (January 2017), http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54924, p. 70

[37] Council of Europe and the EU Fundamental Rights Agency, Handbook on European non-discrimination law (2011), http://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG_01.pdf, p. 107

[38] Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, 2007, http://data.unaids.org/pub/manual/2007/070517_yogyakarta_principles_en.pdf, p. 8. See also Human

Rights Education Associates, "Study guide: sexual orientation and human rights", http://hrlibrary.umn.edu/edumat/studyguides/sexualorientation.html

[39] The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles) document about human rights in the areas of sexual orientation and gender identity, published as the outcome of an international meeting of human rights groups in Yogyakarta, Indonesia, in November 2006. The Principles were supplemented in 2017, expanding to include new grounds of gender expression and sex characteristics, and a number of new principles.

[40] Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, 2007, http://data.unaids.org/pub/manual/2007/070517_yogyakarta_principles_en.pdf, p. 8

[41] Republic of Lithuania, "The Law on Meetings", No I-317, version of June 2008, http://www.legislationline.org/download/action/download/id/4799/file/Lithuania_law_meetings_1993_am2008_en.pdf (please note that the law was subsequently amended)

[42] *Ibid.*, 23-25

[43] Interights et al., "Strategic litigation of race discrimination in Europe: from principles to practice", 2004, http://www.migpolgroup.com/public/docs/57.StrategicLitigationofRaceDiscriminationinEurope-fromPrinciplestoPractice_2004.pdf, p. 164

[44] See e.g. ECtHR, *Graziani-Weiss v. Austria*, App no 31950/06, 18 October 2011.

[45] European Commission, "Limits and potential of the concept of indirect discrimination", 2008, http://www.equalitylaw.eu/downloads/2720-limpot08-en, pp. 29-30

[46] European Commission, "Limits and potential of the concept of indirect discrimination", 2008, http://www.equalitylaw.eu/downloads/2720-limpot08-en, pp. 30-31

[47] ECtHR, *D.H. and Others v. the Czech Republic* [GC] (No. 57325/00), 13 November 2007

[48] Council of Europe and the EU Fundamental Rights Agency, Handbook on European non-discrimination law (2011), http://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG_01.pdf, p. 43

[49] See e.g. ECtHR, *McMichael v United Kingdom*, App no 16424/90, 24 February 1995, http://hudoc.echr.coe.int/eng?i=001-57923, para. 97

[50] CJEU, *Bilka-Kaufhaus GmbH v. Weber Von Hartz*, Case 170/84 [1986]

[51] European Commission, "Limits and potential of the concept of indirect discrimination", 2008, http://www.equalitylaw.eu/downloads/2720-limpot08-en, p. 33

[52] CJEU, *Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE*, C-196/02, 10 March 2005

[53] European Commission, "Limits and potential of the concept of indirect discrimination", 2008, http://www.equalitylaw.eu/downloads/2720-limpot08-en, p. 33. For the legitimate aims accepted by the CJEU, see p. 34

[54] Article 14(2), Gender Equality Directive (Recast); Article 4, Racial Equality Directive; Article 4(1) Employment Equality Directive

[55] Council of Europe and the EU Fundamental Rights Agency, Handbook on European non-discrimination law (2011), http://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG_01.pdf, p. 48

[56] *Ibid*., p. 47

[57] Interights et al., "Strategic litigation of race discrimination in Europe: from principles to practice", 2004, http://www.migpolgroup.com/public/docs/57.StrategicLitigationofRaceDiscriminationinEurope-fromPrinciplestoPractice_2004.pdf, p. 168

[58] European Commission, "The prohibition of discrimination under European human rights law, Relevance for the EU non-discrimination directives – an update", 2011, http://ec.europa.eu/justice/discrimination/files/the_prohibition_of_discrimination_under_european_human_rights_law_update_2011__en.pdf, p. 31

[59] ECtHR, *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v. Belgium*, App nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 23 July 1968, para 10

[60] CJEU, *Kalanke v. Freie Hansestadt Bremen*, Case C-450/93 [1995] ECR I-3051, 17 October 1995

[61] CJEU, *Marschall v. Land Nordrhein-Westfalen*, Case C-409/95 [1997]

[62] Based on the case CJEU, *Julia Schnorbus v Land Hessen*, Case C-79/99, 7 December 2000, http://curia.europa.eu/juris/celex.jsf?celex=61999CJ0079&lang1=en&type=TXT&ancre=

[63] Such practice applied by the Republic of Latvia Ombudsman Office; communication of 23 May 2017.

[64] Equinet, “Equality impact assessment: an introduction”, http://www.equineteurope.org/IMG/docx/equinet_euality_impact_assessment_presentation.docx, p. 5

[65] Adapted from “Methodology for evaluation of draft legal acts from the perspective of personal data protection”, see section “General observations regarding evaluation of draft acts”

[66]Adapted from Міністерства юстиції України, “Методичні рекомендації щодо проведення гендерно-правової експертизи проектів нормативно-правових актів”, https://minjust.gov.ua/m/str_15653, para. 5

[67] Until 2009 was called the European Court of Justice.