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Alignment of the Law on Prohibition of Discrimination with the EU acquis

Expert Analysis on Alignment

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List of abbreviations:

ECR	European Court Reports
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EctHR	European Court of Human Rights
EC/ECJ	European Court/Court of Justice of the European Union
EU	European Union
LPD	Law on Prohibition of Discrimination
OJ	Official Journal of the European Union
TEC	Treaty of the European Community
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union

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1. INTRODUCTION

Discrimination in the legal system of Bosnia and Herzegovina is prohibited at the constitutional level, primarily by the Constitution of Bosnia and Herzegovina, followed by various international treaties and national legislation, including in particular the Law on Prohibition of Discrimination.

Article II of BiH Constitution: Human Rights and Fundamental Freedoms after the list of rights, states that the enjoyment of the rights and freedoms set forth in that Article or in international treaties listed in Annex I of the Constitution is ensured to all persons in Bosnia and Herzegovina, without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with an ethnic minority, property, birth or other status.

With regard to international treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) has a special place in the constitutional order of Bosnia and Herzegovina. The BiH Constitution in Article II: Human Rights and Fundamental Freedoms states that Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms, and then emphasizes that the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols directly apply in Bosnia and Herzegovina and have priority over all other legislation.

On the one hand, it also marks an important position of the principle of in the legal order equality of Bosnia and Herzegovina and given the wide and open list of discriminatory grounds contained in Article 14 of ECHR, it brings a very broad prohibition of discrimination, particularly in terms of the number of discriminatory grounds on which it is prohibited. As BiH also ratified Protocol 12 to the ECHR, prohibiting discrimination in the enjoyment of any rights set forth in the applicable laws, this provision of the Constitution sets a very broad protection from discrimination in the matters of protection. On the other hand, a particularly significant position that the ECHR enjoys in the legal system, makes the access of the Convention to non-discrimination deeply rooted in the legal order of BiH. However, the Convention approach is different from the approach that involves the EU law.[1]

Given however the aspiration of Bosnia and Herzegovina to joining the European Union, and in so far as the harmonization of the legal system of the future Member States with the legal order of the EU is a requirement for membership in the Union, it is necessary to bear in mind the EU anti-discrimination law and the approach it regulates. Indeed, it is necessary to ensure the compatibility of national anti-discrimination legislation with acquis communautaire, including its interpretation and application in accordance with the EU law.

This Policy Paper therefore analyzes the compliance of the Law on Prohibition of Discrimination with the relevant anti-discrimination rules of the EU[2]. First, the

1 Some of the fundamental differences are closed and the limited list of discriminatory grounds in the EU law, exceptions set forth in advance and application areas related to the competences of the EU. Furthermore, in terms of the EU law, i.e. the accession of Bosnia and Herzegovina to the European Union, it is important to note the emphasis in the Constitution that the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall have priority over all other legislation, while the European Union administration law takes precedence over all other sources of law.

2 In preparing the Paper, the author used the earlier work of T. Šimonović Einwalter, Importance of Directives 2000/43 and 2000/78 and the EU Court case-law for the implementation of the Anti-Discrimination Law, IOM, 2011.

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introductory part provides a concise analysis of the basic characteristics and specific features of the EU law and its relevance to the national anti-discrimination law - upon accession to the EU, when the special characteristics of EU law really come to the fore, but even before the membership. Then, the Paper interprets provisions of the EU anti-discrimination law: the primary law, the relevant anti-discrimination directives, in particular Directive 2000/43/EC and Directive 2000/78/EC and the ECJ case law that interprets these directives, while analyzing the compliance of the Law on Prohibition of Discrimination with the anti-discrimination EU legislation and gives recommendations for its alignment with the EU acquis.

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2. IMPORTANCE OF THE EU ACQUIS

The nature of the EU law here exposes only what is the most basic, what is necessary to consider the effects of EU anti-discrimination law.[3] Some of the key characteristics of the EU law that make it special: in case of conflict, the European law prevails over the national law (principle of supremacy)[4], and the European law creates rights the individuals can directly invoke before national courts (the principle of direct effect).[5] Both these principles[6] were created by the European Court of Justice through the preliminary procedure under Article 267 of the TFEU. In fact, in order to ensure a uniform interpretation and application of European law, in the community such as the European Union, national courts were given the opportunity - i.e. an obligation has been set for the courts against whose decisions there is no remedy - that when they are not sure of the interpretation or validity of the norms of the European Union law and feel that they need it to be able to rule in a particular case, to send a preliminary question to the European Court of Justice in Luxembourg. The European Court of Justice has been using this opportunity very successfully to actually "create" a European law through interpretation, and thus has succeeded in striving to create a "new legal order" different from the commonplace international public law - legal order *sui generis,* which as such is accepted by the Member States of the Union.[7]

2.1. Importance of the EU acquis upon accession to the EU

The principles of supremacy and direct effect, but also the principle of indirect effect, are crucial for the significance and effects of the anti-discrimination directives of the European law - Directive 2000/43 and Directive 2000/78, after joining the EU.

Namely, in accordance with the principle of direct effect, if it were to happen that the directives had not been precisely transposed and provided that the relevant legal rules are clear, precise and unconditional,[8] individuals could, before the national courts, directly invoke the text of the directives in order to achieve their rights. The direct effect and the principle of supremacy taken together require the application of the directive also if it means non-application of norms of national law with which the directive provision is in conflict, even if the norm in question is of the constitutional level. However, the directives also yield effects indirectly, in accordance

3 For a more detailed view see Tamara Ćapeta and Sinisa Rodin: Fundamentals of the European Union Law on the basis of the Treaty of Lisbon - A Resource for Lifelong Learning of Lawyers, NN, Zagreb, April 2010. Also, see Ćapeta, Rodin: Fundamentals of the European Union Law, Material for Lifelong Learning of Lawyers, first PDF edition, available on the website of the Department of European Public Law, Faculty of Law, University of Zagreb (http://www.pravo.hr/_download/repository/Osnove_prava_EU_2009_1.pdf)

4 For the principle of supremacy see the judgment 26/62 Van Gend en Loos [1963] ECR 1; 6/64 Costa v ENEL [1964] ECR 585; 11/70 Internationale Handelsgesellschaft; 106/77 Simmenthal [1978] ECR 629; C-10-22 / 97 Ministero delle Finanze v IN.CO.GE [1998] ECR I-6307

5 For the principle of Direct effect see the judgment 26/62 Van Gend en Loos [1963] ECR 1, 43/75 Defrenne v.Sabena [1976] ECR 455; 41/74 Van Duyn [1974] ECR 1337

6 With the principle of supremacy and the principle of direct effect, other important principles of the European law include the principle of limited powers, the principle of subsidiarity, the principle of proportionality, the principle of loyalty to the Union, the principle of autonomy of the EU law, the principle of uniform validity and application of the Union law, the principle of direct application of the Union law, the principle of Member State liability to damages and the principle of non-discrimination.

7 For detailed arguments see chapter entitled 'The Justification for the Claim of "New Legal Order"' p. 32-35 Rodin, Ćapeta, Fundamentals of the European Union Law, supra note 2.

8 In order to create a direct effect, the norm must be clear, complete and specific (the holder of the right can be determined, the holder obligations and what is the content of the rights or obligations) and unconditional (application does not depend on subsequent regulatory activities of a body of the Community or Member State).

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with the principle of indirect effect, which is also critical for the effectiveness of the European law.[9] According to this principle, the national courts of the EU Member States must interpret the national law in the light of the wording and purpose of the EU norms in question, in order to achieve, as far as possible, the results that would arise from a direct application of the EU norms. If the court cannot apply the directive, it may interpret the provision of the national law as close as possible to the meaning and effects of what would arise from a direct application of the directive.[10]

After accession to the EU, the courts have an obligation to protect subjective rights deriving from the EU law, while the legal protection must be effective and equivalent to the protection provided to subjective rights stemming from the national law. Furthermore, the courts must interpret the national law, including the national anti-discrimination law, in the light of the European law. If that would not be possible, and provided the norm of the national law is contrary to the norms of the EU law, the courts must exempt that norm of national law from the application, without having to seek the necessary Constitutional Court decision first. Also, the courts may pose preliminary questions to the European Court when they need interpretation of some norms of the European law in an individual case for the decision, and these must be the highest courts, or the courts with no remedy against their decisions. At the same time, there is state liability for the infringement of the EU law, including also by the national courts.

Therefore, after the EU accession of Bosnia and Herzegovina, the need for the knowledge of the provisions of Directive 2000/43/EC and Directive 2000/78/ EC shall not cease, including the way the ECHR interprets them, given the obligation of national courts to interpret the norms of national anti-discrimination laws, such as the Law on Prohibition of Discrimination, in accordance with provisions of these directives.

Indeed, after accession the focus is expected to quickly shift from the legislative alignment to the specific application of legislation through the case law in the administrative and judicial bodies. Moreover, after the accession, the EU non-discrimination law becomes the primary source of the law for a wide range of regulatory areas, primarily in the labour market. In those regulatory areas that fall within the regulatory jurisdiction of the European Union, the relevant EU anti-discrimination law is superior and directly applicable.

As mentioned briefly above, the principle of supremacy of the EU law requires the national courts and legal authorities to effectively resolve any conflict of non-alignment of national law provisions with the EU acquis. In order to resolve the conflict of non-alignment, the courts will have two approaches at their disposal. First of all, the courts have an obligation to take advantage of any possibility of "friendly interpretation" that is, when possible, with regard to specific legal expression and national procedural rules related to the interpretation and application of the law, ensure the disputed provision of national law through the case law such a meaning that ensures its alignment with the EU law. If such an interpretation is not possible, the national courts are obliged to exempt the specific national law provision from the application in a specific case. The principle of direct applicability of the EU law determines what happens after a national court in a specific case excludes from the

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9 C-14/83 Von Colson v Land Nordrhein-Westfalen [1984] E.C.R. 1891

10 Although the principle of indirect effect, in case law developed in cases where the directive did not have a direct effect, the principle of indirect effect is a feature of directives which emerges independent of the direct effect.

application the non-aligned national law provision. In such cases, in case a non-alignment with the EU legal provision, which was developed by the Court of Justice of the EU under the rules (provision must be clear, precise and unconditional and must pass the implementation deadline) when direct application is possible, a national court is required to resolve the dispute directly on the basis of that provision. In case of non-alignment with the provisions of the EU law which is not directly applicable, a national court has an obligation to find some other applicable provision of the national law whose application will resolve the conflict of non-alignment.

The described implications of the principles of supremacy and direct applicability are not limited to the content material alignment of legal provisions. In principle, Member States have regulatory responsibility to independently regulate their procedural legal rules.[11] However, the ECJ has consistently through its practice demanded the national courts to exclude from the application those provisions of a procedural character, which hindered the effective implementation of the EU provisions of substantive law.[12] In a number of cases, it involved provisions that have been prescribing short deadlines for filing a lawsuit or have been limiting the forms for or compensation amounts.[13] However, probably the most prominent impact of the EU law on the procedural provisions of the Member States in the field of protection against discrimination is the principle of (re)allocation of the burden of proof, which is further elaborated later in this text.

In light of the above, it is clear that the success of the harmonization of anti-discrimination provisions during the pre-accession period will to a significant degree determine the success of the application after the accession.[14] A purely formal legislative harmonization whose achievement would be a removal of language concerns related to the meaning of anti-discrimination guarantees would not be a sufficient guarantee for a successful application of EU anti-discrimination law after the accession to the EU membership. Moreover, it would leave the domestic legal system exposed to the risk of possible sanctions due to an incorrect application of the EU law, despite satisfactory regulated formal legislative discrimination. Namely, the fact that a particular piece of legislation is linguistically aligned with the acquis, but in the actual application receives a specific legal meaning differing from the acquis, makes sufficient grounds for the ECJ to find that it poses a wrong implementation of the EU law, creating an obligation for damages of a Member State toward the party which was not provided with an effective protection of its interests enshrined in a specific EU provision.[15]

RECOMMENDATIONS:

1. *In light of the foregoing, it would be opportune in the pre-accession period that the competent authorities are familiarised with the case law of the actual application of anti-discrimination guarantees in the EU legal order. This*

11 See Richard H. Lauwaars, "The application of Community law by national courts ex officio", Volume 31, Issue 5 Fordham International Law Journal, 2007.

12 C-312/93 Peterbroeck, Van Campenhout & Cie SCS v Belgian State 1995 ECR I-04599.

13 Christa Tobler "Remedies and Sanctions in EC non-discrimination law", European Commission, Luxembourg: Office for Official Publications of the European Communities, 2005.

14 View Kristina Koldinská, 'Case law of the European Court of Justice on sex discrimination 2006-2011' (2011) 48 Common Market Law Review, Issue 5, pp. 1599-1638.

15 C-6/90 and C-9/90 Andrea Francovich and Danila Bonifaci and others v Italian Republic 1991 ECR I-05357

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primarily refers to the case law of the European Court of Justice. Through the accompanying materials (application guidelines, instructions, etc.) it would be useful to accompany each individual guarantee prescribed in the Law on Prohibition of Discrimination with key decisions of the ECJ with a short summary of the judgment to reflect the most important standpoint of the Court.

2. *The alignment process should also address procedural rules in order to eliminate a possibility of infringement of the effective legal protection principle, in the field of application of anti-discrimination material guarantees.*

2.2. Importance of the EU acquis before accession to the EU

European Anti-discrimination Law is very important and should be familiarised with before the accession. Primarily, it is significant in terms of the formulation of national legislation provisions, since the national legislation must be harmonized with the EU acquis communautaire. As a condition of accession to the EU, Bosnia and Herzegovina will be required to fully harmonize its legislation with the EU acquis, which includes the sphere of anti-discrimination law.[16] Experience in the other Member States indicates that the anti-discrimination legislation is high on the priority list of the European Commission.

However, it is also important for the application of provisions of the Law on Prohibition of Discrimination even before the EU membership.[17] The alignment is not achieved merely by adopting a law, but it should be applied in practice, in courts, whereby provisions of European law transposed into the national law are given the meaning of provisions in the directives, and in a manner as the European Court of Justice interprets their provisions.

If the application of the Law on Prohibition of Discrimination would not interpret its provisions in accordance with Directive 2000/43, Directive 2000/78 and the European Court of Justice as interpretive signposts, it could happen that the courts give a different meaning to the norms of the Law on Prohibition of Discrimination. It is widely known that changing the case law, which has already become common in a certain direction, is very difficult. In membership in the European Union such a discrepancy in the case law may lead to proceedings against a Member State and to the state's liability for damages that individuals suffer due to an incorrect application of the harmonized formal rights.[18]

But why is it desirable to achieve interpretation in accordance with EU law before the accession? Before the accession to the European Union, the acquis *per se* does not constitute a formal source of law for the candidate countries. At the same time, a candidate country is not prevented from independently prescribing the

16 For example, the Government of Republic of Croatia in Conclusion dated 31 May, 2007, launched the process of drafting a single anti-discrimination law, precisely in order to align the Croatian legislation in the area of discrimination, and also due to the obligations arising from the Action Plan for alignment of the legislation and creation of the necessary administrative capacity for adoption and implementation of the acquis in the field of negotiation for Chapter 19 - Social Policy and Employment. See Explanation of the Draft Law on Suppression of Discrimination, the Croatian Government, May 2008. Anti-Discrimination Law was adopted in 2008 and entered into force in 2009, as aligned with the EU law. However, the Law in 2012 was amended on the basis of opinion of the European Commission on the need for further alignment.

17 This section carries summarised argument of Prof. Ćapeta, and for a more detailed explanation see: Ćapeta, Tamara, "Directives before accession to the EU", in: Rodin, Siniša; Ćapeta, Tamara, The Effects of the EU Directives in National Law - with the selected judgments of the European Court of Justice in full text and commentary, Judicial Academy, 2008, p. 59-75.

18 C-6 i 9/90 Andrea Francovich and Danila Bonifaci and Others v Italian Republic, (1991) ECR I-5357.

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acquis as a formally valid source of law. This practice has its advantages and disadvantages. On the one hand, providing the formal status to the acquis, the authorities prior to membership encourage the competent implementing authorities to start with practical harmonization early enough and thus come into the membership fully prepared. On the other hand, this formal status of the acquis demands a good institutional preparedness of the bodies implementing the application.

Given the linguistic similarities of some Member States, a large part of the acquis should be understandable to Bosnia and Herzegovina implementing bodies, which would solve the problem of the language barrier that Croatia faced. However, a purposeful application of the acquis requires a good understanding of structural characteristics of the EU legal order. For example, the EU legal order is based on the principles of supremacy, direct applicability and effective legal protection of the EU law which has far-reaching consequences for the relationship of national legislation and the EU legal acts, and thus the manner of conduct of the body working on the application. In simple terms - given that the EU law is superior to any national regulation which does not comply with it, including the Constitution - it is up to the bodies implementing the application to recognize the points of non-alignment and through interpretation in specific cases ensure that the national law has the same meaning and effect present in the relevant EU provisions within the EU legal order.

It is a very challenging method of alignment. To be successful, it is necessary to provide two conditions. First, given that the EU legislation acquires its content primarily through the case law of the Court of the European Union (the Court of Justice), the national judicial and administrative bodies should at least be familiar with the ways of searching and using the decisions of the Court of Justice the European Union. Secondly, the highest judicial and administrative authorities would have to make an extra step and be familiar with the contents of at least the most important decisions of the Court of Justice the European Union to implement them through their decisions and in their authority act upon the lower courts. These two conditions are necessary for a meaningful application of the acquis before the accession. Otherwise, the legal system would be faced with the risk of significant differences in the understanding and application of legal provisions among national courts and/or administrative bodies, which would ultimately likely lead to an avoidance of the EU acquis.

This legislative approach of inclusion of the acquis into a legally binding part of the national legal order has been partially used by Croatia. For example, Article 4 of the Gender Equality Law expressly stipulates that the provisions of that law *"should* not be interpreted or applied in a manner which could limit or reduce the content of guarantees of gender equality arising from the general rules of international law, the acquis communautaire..." However, considering that the foregoing two preconditions were not met, the effect of this provision has not achieved its potential. The available case law indicates that the Croatian courts have arbitrarily used the acquis in discrimination cases in order to provide meaning and effects of these provisions in their domestic regulations, as they have in the legal order of the EU. At the same time, several cases of discrimination where the parties themselves cited the EU acquis, show that the provision of Article 4 of the Law on Gender Equality has not remained a dead letter.[19] In such situations, if the parties have shown the relevant

19 See the decision of the County Court in Zagreb 15 Pnz 6/10-27 dated 24 March 2011 and Pnz 7/10-2 dated 2 May 2011

case law of the Court of Justice of the European Union, the courts would provide due care in concrete decisions and use them as a relevant source of the interpretation of the national provisions. Croatian experience points to the important role of anti-discrimination independent bodies, for whom provisions of this kind provide an opportunity to strengthen the authority of their warnings and recommendations using quality arguments that the Court of Justice of the European Union has developed through its case law, and therefore strengthen a legal authority of a particular institution.

RECOMMENDATION:

1. *Considering the advantages and disadvantages of the acquis inclusion into a legally binding part of the national legal order, it would be useful if Bosnia and Herzegovina were to chose one of the following two options:*

a) *Make the acquis in its full sense a formal source of law in the area of anti-discrimination law, only if it has fulfilled specified institutional conditions, preferably by the Law on Prohibition of Discrimination.*

b) *Introduce a provision into the Law on Prohibition of Discrimination that encourages (without a formal obligation) implementation bodies to take into account the relevant decisions of the Court of Justice of the European Union into interpretation and application of anti-discrimination guarantees, in particular if they face a dilemma that has not been resolved through the case law in the highest national courts.*

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3. ANTI-DISCRIMINATION LEGISLATION OF THE EU

Sources of the EU Law include the primary law and secondary law and also the case law of the Court of Justice of the European Union, and here we refer to those relevant for the prohibition of discrimination.

3.1. Primary law: Founding treaties, principles and Charter of Fundamental Rights of the EU

The primary source of the EU law includes the founding treaties and with the entry into force of the Lisbon Treaty, there are two treaties: Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Given the subject matter of this analysis, it is necessary to point out that along with the founding treaties; the primary law of the European Union also includes the Charter of Fundamental Rights of the European Union[20] and the general principles of the EU law, one of which is the general principle of non-discrimination.

3.1.1. Founding treaties and the general legal principles of the EU

In principle, the legal provisions of the founding treaties are superior to national legislation and are directly applied in both the *vertical relationship* (the relationship between the state/public authorities and individuals) as well as in *horizontal relationship* (the relationships between private legal entities and/or individuals). In other words, in case of conflict of local legal regulations with directly applicable safeguards stipulated in the founding treaties, the national courts of the Member States still have the obligation to exempt the disputed provision of national law (that cannot be aligned by "friendly" interpretation) from the application and directly apply the relevant provisions of the founding treaties.

To combat discrimination, Article 2 of the TEU is important, stating that the Union is founded, among other things, on the values of respect for human dignity, equality and respect for human rights. Member States which severely violate the foregoing values run the risk of sanctions prescribed by Article 7 of the TEU, including the possibility of exclusion from the membership. Of course, the candidate countries that do not fully align their national constitutional and legal systems with the aforementioned foundational values, will not successfully conclude negotiations on entering into the membership.

Furthermore, Article 3 of the TEU states that the EU has an obligation to combat social exclusion and discrimination, promote social justice and protection, equality between women and men, intergenerational solidarity and protection of children's rights.

The above provisions do not have direct applicability and the national courts may use them only as valuable guidance in the interpretation and application of directly applicable EU guarantees or the provisions of national law implementing the

20 For political reasons that resulted in the reservation that some Member States have expressed regarding the applicability of the Charter in their legal systems, the Charter is not formally included in the text of the founding treaties. However, since the practical legal effect of specific reservations is highly questionable, the Charter, in principle has the same legal force or the position as the founding treaties.

EU law. At the same time, although they do not have the character of directly applicable guarantees, the impact of the above provisions is far-reaching. The fact that the founding treaties in a very clear manner specify the founding values of the EU legal order, namely that the fundamental values explicitly include the ideals *of equality, minority rights, non-discrimination and equality between women and men,* the Court of Justice of the European Union is allowed to very broadly set the extent and scope of the directly applicable EU anti-discrimination guarantees.

The provisions of direct relevance to anti-discrimination protection are also found in the Treaty on the Functioning of the European Union. The TFEU in Article 9 stipulates that in defining and implementing its policies and activities, the Union takes into account requirements linked to the fight against social exclusion. The proactive role of the EU in the fight against discrimination can be seen from reading the cited provisions of Article 3 (3) of the TEU together with Article 10 of the TFEU, under which the Union, in defining and implementing its policies and activities, will be combating discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation.

Given that the expansion of one of the most important policies of the European Union, the provision of Article 10 of the TFEU is also a clear message to the candidate countries. Accession negotiations will not be successfully brought to an end without a complete harmonization of the national legislative framework in the part related to combating discrimination with the acquis. **Moreover, the anti-discrimination legislative framework should be supported by the relevant anti-discrimination policies to set clear goals and implementing measures for multi-year periods, promoting the principle of real equality of social groups that enjoy special protection of the European Union (defined through the basis of gender, sexual orientation, racial or ethnic origin, disability, age and religion or belief).**

For the development of anti-discrimination law, Article 19 of the TFEU[21] was particularly significant, which allowed the adoption of the directives to combat discrimination based on racial or ethnic origin, age, disability, religion and sexual orientation - Directive 2000/78 and Directive 2000/78.[22] Prior to that, for decades the fight against discrimination in the EU was limited to combat discrimination based on sex, there were different directives and a very rich case law has emerged. The EU law has long prohibited discrimination on the grounds of nationality, but that only applies to discrimination on the grounds of nationality of another Member State of the European Union with a view to facilitating the free movement of workers. Only in 1997, the adoption of the Treaty of Amsterdam, which the then Article 13 of the EC Treaty (now Article 19 of the TFEU), for the first time introduced a new basis for discrimination in the EU law: racial or ethnic origin, religion or belief, disability, age and sexual orientation, allowing action to combat racial discrimination and other forms of discrimination by adopting the Directive that delivers a framework for combating discrimination on these grounds - Directive 2000/43 and Directive 2000/78.

Furthermore, fundamental human rights are part of the general principles of the EU law and therefore also the primary source of the EU law. In this area, particularly important is the general principle of equal treatment and non-discrimination. It is

21 This Article of TFEU does not have the direct effect, but it is the legal basis which authorizes the enactment of legal acts.

22 See, e.g. Opinion n. o. Mazak of February 15, 2007 in respect of cases of discrimination based on age C-411/05Félix Palacios de la VillavCortefiel Servicios SA.

in the recent judgments in the field of non-discrimination that the Court indicated the extent to which the horizontal situations can rely on the general principles of the EU law. In the decision in the *Mangold* case, the European Court of Justice took the view that the principle of non-discrimination on the basis of age must be regarded as a general principle of the Community law, which was subsequently confirmed in the *Kücükdeveci* case. The Court cited a general principle of non-discrimination in the *Maruko* case, emphasising that when Member States govern those legal relations where the Union does not have regulatory authorities, Member States should respect the general principle of non-discrimination.

3.1.2. Charter of Fundamental Rights of the European Union

With the founding treaties, an extremely important source of non-discrimination law is the Charter of Fundamental Rights of the EU (the Charter). The Charter for some political reasons is not part of the founding treaties themselves, but it is part of the so-called Lisbon package and its legal power is equated with them. Consequently, all national legal acts that in any way implement the EU law must respect the requirements arising from the Charter.

The Charter contains a number of provisions of direct relevance to the question of alignment of the Law on Prohibition of Discrimination with the EU acquis: Article 21 - Non-discrimination,[23] Article 22 - Cultural, Religious and Linguistic Diversity, Article 23 -Equality between Women and Men, Article 24 - Rights of the Child, Article 25 - the Rights of the Elderly and Article 26 - The Integration of Persons with Disabilities.

With regard to those provisions of the Charter, it is useful to point out the following. Provision of Article 21 of the Charter contains a general guarantee of non-discrimination based on a number of grounds. Given the fact that the Charter was created as a form of codification of case law of the Court of Justice of the European Union and as such is a "living" instrument, the list of such grounds is not closed. At the same time, it should be taken into account that the Charter nowhere defines the term "discrimination." Does a certain type of adverse action represent discrimination and under which conditions, is the question that gets the answer primarily through secondary EU law (regulations, directives, decisions) and the case law. Accordingly, it is very likely that the guarantee of non-discrimination will not have the identical content and scope for all discriminatory grounds. In other words, the Charter does not contain a "unique formula" for all the grounds listed in Article 21. This finds its implicit confirmation in the provisions of the founding treaties, as well as in the Charter itself.

Article 19 of the TFEU clearly specifies that the Union is competent to take appropriate actions, including legislative actions, to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. In accordance with the granted competence, the EU has legitimized directives that precisely regulate the content and scope of the prohibition of discrimination solely

23 Article 21 - Non-discrimination
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 Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

on these 6 grounds referred to in Article 19 of the TFEU.

Moreover, the Charter itself suggests that anti-discrimination protection will not necessarily be identical in respect of all the grounds set forth in Article 21. **Therefore, although the provision of Article 21 of the Charter prohibits discrimination based on sex, Article 23 contains a separate provision explicitly guaranteeing the equality of women and men and, moreover, clearly stating that the guarantee of equality includes the possibility of introducing positive action measures. Indeed, the fact that paragraph 1 of Article 23 stipulates that equality between women and men "must be ensured," allows an interpretation under which Member States will be obliged to introduce positive action measures, if such a thing is necessary to ensure gender equality in real life.** Gender equality is not the only area that enjoys a special attention in the Charter. The situation of children, the elderly or persons with disabilities is also the subject of separate guarantees of equality, which indicates that the fact that these persons are treated differently in comparison to some other persons, it will not automatically constitute discrimination under Article 21 of the Charter. In other words, different treatment in itself is not discrimination. In this light, it is useful to note the fact that immediately after the guaranteeing the prohibition of discrimination, the Charter in Article 22 explicitly emphasizes the value of cultural, religious and linguistic diversity that would not be possible without differences in treatment between different groups.

What makes a different treatment discriminatory is an adverse effect it produces for the position of specific groups in a particular society. However, as different social groups do not have the same adverse social position in a particular society, nor have they been historically faced with an equally intense and systematic societal discrimination, it should not be expected that the anti-discrimination protection in terms of - for example - the financial status, would be as "harsh" as the one in the field of sexual or ethnic equality.

The Law on Prohibition of Discrimination will have to take into account the varying scope of protection against discrimination in relation to the way in which Article 5 of the Law on Prohibition of Discrimination regulates the possibility of derogations from the prohibition of discrimination. In view of the existing secondary legislation and case law of the Court of Justice of the European Union, it is clear that the principal provision of Article 5 paragraph 1 of the Law on Prohibition of Discrimination is set too wide, at the very least as far as exceptions to the prohibition of discrimination based on gender and sexual orientation or racial or ethnic origin are concerned.

Furthermore, in the current stage of development of protection against discrimination in the legal order of the EU, the positive action measures to achieve a real gender equality are not considered the exception of the prohibition of discrimination, but the equivalent expression of the principle of equality. Although there is no explicit confirmation by the Court of Justice of the European Union, it is likely that the same view on measures of positive action also applies to the sphere of racial and ethnic equality.

A similar value status enjoys the guarantee of reasonable accommodation in the area of equality of persons with disabilities, which in no case constitutes an exception to the prohibition of discrimination. On the contrary, just as the prohibition of indirect discrimination is the aspect that guarantees equal treatment in the field of

gender equality or ethnic equality, so is the guarantee of reasonable accommodation the aspect that guarantees equal treatment in the field of equality of persons with disabilities.

RECOMMENDATIONS:

1. *Make amendments to Article 5 of the Law on Prohibition of Discrimination so that a possibility of deviations from the prohibition of discrimination in the areas of gender and sexual minorities and racial or ethnic equality would be significantly curtailed, down to the exceptions expressly permitted under Directive 2006/54 and Directive 2000/43.*
2. *Positive action measures should be specifically defined in a special provision of the Law, as the aspect of the principle of equality, rather than an exemption from the prohibition of discrimination, while the requirements for the implementation of the positive action measures should be specified in a clear manner.*
3. *The guarantee of reasonable accommodation should be defined in a special provision of the Law as the aspect of the principle of equality in the matters of equality of persons with disabilities.*
4. *The competent implementing bodies should be familiarised with and trained in the implementation of the doctrine of a "varying" scope of anti-discrimination protection, under which the same legal instruments such as e.g. direct and indirect discrimination have differently set the limits of application, depending on the specific situation of certain groups in society.*

3.2. Secondary law

Secondary legislation consists of legal acts of the EU institutions, such as regulations, directives, decisions, recommendations and opinions.[24] The secondary legislation includes international agreements between Member States, agreements between the EU institutions and international agreements to which signatories are the Union and an international organization or a third country. Of the secondary law of the Union in the matters of combating discrimination particularly significant are: Council Directive 2000/43/EC of June 29, 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and the Council Directive 2000/78/EC of November 27, 2000, concerning the general framework for equal treatment in employment and occupation (and directives related to gender equality, Directive 2006/54/EC and Directive 2004/113/EC, which are exposed to a lesser extent due to the special focus on gender in the BiH Law on Gender Equality).

Regarding relations between directives and national regulations implementing them or the alignment of the Law on Prohibition of Discrimination with these directives, it is significant to note that directives are a form of legal acts characterised by the obligation to the state in terms of results that must be achieved, while the national government is left with the choice of form and methods of achieving this goal. The directive creates the rights, the realization of which may be asked from the state. Unlike regulations, which replace the norms of national laws of the Member States

24 Listed in Article 288 of the TFEU

of the Union in one area with a common European norm, directives to some extent therefore still allow different solutions in different Member States. They are applied by the national law of Member States, for example, by passing laws such as the Law on Prohibition of Discrimination. However, although directives allow a certain degree of diversity of national law, it still must be such so as to achieve the purpose for which the directive was adopted.

3.2.1. Directive 2000/43/EC and Directive 2000/78/EC

3.2.1.1. Directive 2000/43/ EC and Directive 2000/78/ EC - the basic features

In short it is possible to say that the main common features of Directive 2000/43/ EC and Directive 2000/78/EC is that for such forms of discrimination they prohibit direct and indirect discrimination, harassment and incitement to discrimination. The application of *ratione personae* of both directives is to all persons (legal or natural), in the private and in the public sector. Both directives make certain exceptions and allow, but not require, positive measures. Both directives require the state to provide judicial and/or administrative proceedings, reverse the burden of proof, the possibility to participate in the proceedings as representatives or support to the plaintiff, protection against victimization, and the sanctions that are effective, proportionate and dissuasive.

The key difference between these two directives is the fact that Directive 2000/43/EC, related to racial or ethnic origin, has a much wider range of application, and Directive 2000/78/EC concerns: (a) access to employment, (b) access to professional training and development, c) employment and working conditions, and (d) membership and involvement in an organizations of workers or employers. However, Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin applies to: e) social protection, including social security and health care; (f) social incentives; (g) education and (h) goods and services. Greater power of Directive 2000/43 is also reflected in the fact that it is the only one prescribing the obligation to establish bodies for the suppression/prohibition of racial and ethnic discrimination, while the current European law does not require the existence of such a body on other bases.

It is noteworthy that the European Community right now is adopting a new directive aimed at expanding the prohibition of discrimination based on age, disability, sexual orientation and religion or belief, which will mean that in the future, in such additional application areas, the courts will have to interpret the provisions of the Law on Prohibition of Discrimination in accordance with the new directive and with the case law of the European Court of Justice that will emerge.

It should immediately be pointed out that regardless of the existence of European directives and the obligation of alignment of national laws of the Member States with the directives, there are huge differences between some national anti-discrimination laws. This comes from the character of the directive as a form of legal act that specifically leaves the states a degree of freedom in the standardization of a particular legal area. States have the choice to implement the directive through one or more new laws or through amendments to applicable legislation. The degree of freedom exists in the implementation of certain provisions of the directive. For example, Article 15 of Directive 2000/43 and Article 17 of Directive 2000/78 provide that Member States

should adopt rules on sanctions applicable to infringements of national provisions adopted in accordance with provisions of these directives and adopt all measures necessary to ensure their implementation, while with respect to sanctions, it is stated that they must be effective, proportionate and dissuasive. Possible sanctions for the same kind of discrimination will vary from country to country, as for example the amount of the sanctions imposed in similar situations, but they still have to meet the criteria of being efficient, proportionate and dissuasive.

Any national law may be different and this is also because in accordance with Article 6 of Directive 2000/43 and Article 8 of Directive 2000/78, these directives introduce the minimum requirements expected of the Member States in the fight against discrimination, giving Member States the option of introducing or maintaining more favourable provisions. As stated, Member States may introduce or maintain provisions for the protection of the principle of equal treatment more favourable than set out in this Directive. However, it is stipulated that the implementation of these directives under any circumstances cannot be the basis for reducing the level of protection against discrimination, which Member States already provide in the areas covered by these directives.

So, generally speaking, in terms of the alignment of the Law on Prohibition of Discrimination with Directive 2000/43/EC and 2000/78/EC, in order for its provisions to be aligned, they do not need to be identical to the provisions of these directives, nor should they be identical to the law of a Member State, but it is important to achieve the goal for which the directive was adopted and that provisions of the Law on Prohibition of Discrimination meet the minimum standard set by these directives.

3.2.1.2. Grounds for discrimination

The EU directives prohibit discrimination on 6 grounds, namely:

1. sex (including both gender identity and expression according to the case law of the European Court)
2. racial or ethnic origin
3. sexual orientation
4. disability
5. religion or belief
6. age

The Directive 2000/43/EC prohibits discrimination based on racial or ethnic origin, Council Directive 2000/78/EC prohibits discrimination based on the basis of sexual orientation, disability, religion or belief and age, while directive 2006/54/EC and Directive 2004/113/EC on the basis of sex. The Law on Prohibition of Discrimination prohibits discrimination on a very large number of discrimination grounds: on the basis of race, colour, language, religion, ethnicity, national or social origin, association with a national minority, political or other opinion, property status, membership in a trade union or other association, education, social status and sex, sexual expression or sexual orientation, and other circumstances.

As a key difference, we immediately see that even two of the six grounds of the EU law are not explicitly contained in the otherwise very extensive list of discriminatory grounds in the Law on Prohibition of Discrimination: the age and disability. Although, due to the openness of the list of grounds in the Law on Prohibition of

Discrimination of course it is possible that both age and disability have already been covered by the law, in terms of alignment, it would still be necessary for the visibility and the severity of discrimination prohibition on the basis of these two grounds in Article 2, paragraph 1 of the Law on Prohibition of Discrimination, to add the age and disability as the grounds which are explicitly named. This can act as an incentive for a more serious confrontation with these forms of discrimination through better detection and greater reporting of age discrimination and discrimination based on disability.

At the same time, we reiterate that the foregoing applies to discriminatory grounds provided by the EU anti-discrimination directives: the grounds of sex, racial or ethnic origin, age, disability, sexual orientation and religion or belief. With regard to other discrimination grounds contained in the Law on Prohibition of Discrimination, the state from the perspective of European legal obligations is free to independently prescribe the legal rules. It in this course, the state certainly should be in line with the transposed international legal obligations, and because of the special position of the ECHR in the legal order of BiH, in particular therefore the state should be in line with the ECHR and the ECHR case law.

RECOMMENDATION:

1. The list of grounds in Article 2, paragraph 1 should explicitly state the disability and the age as two of the six grounds which specifically prohibit discrimination in the EU.

3.2.1.3. Scope of application

As already mentioned, Directive 2000/43/EC, on racial or ethnic origin, has a broad scope and applies to: (a) access to employment, (b) access to professional training and development, (c) work and working conditions, (d) membership of and involvement in an organization of workers or employers, (e) social protection, including social security and health care; (f) social incentives; (g) education and (h) goods and services.

The Directive 2000/78 in turn in a way poses a certain minimum of protection against discrimination guaranteed by the EU within its legal order, because the scope of protection against discrimination in Directive 2000/78 is the most narrow and is limited exclusively to employment and labour relations, while the anti-discrimination protection in the sphere of gender equality extends to social protection and the market of goods and services, while in the area of racial or ethnic equality it also extends to public education.[25]

Similar to the grounds of discrimination, the scope of the application of the Law on Prohibition of Discrimination is however much broader than the directives. Article 6 states that the law applies in all, especially in the following fields of life:

a) Employment, work and working conditions, including access to employment, occupation and self-employment, working conditions, remuneration, promotions and dismissals;
b) Education, science and sports. Access to education should not depend on

25 Accordingly, Directive 2000/78 carries the appropriate name Framework anti-discrimination directive.

imigration status of children or their parents;

c) Social protection, including social insurance, social benefits, social assistance (housing allowances, allowances for youth, etc.) and ways of treating social protection beneficiaries;
d) Health protection including access to care and treatments, in relation to ways of providing care and treatment of patients;
e) Trainings, including initial trainings and continuous professional training, all sorts and all levels of professional trainings, advanced professional trainings, additional qualifications and requalification, including gaining practical working experience;
f) Judiciary and administration, including activities of police and other law enforcement officers, border control officers, military and prison staff. Concretely, all persons shall be equal before courts and tribunals;
g) Housing, including access to housing, housing conditions and termination of a lease contract;
h) Public information and the media;
i) Membership in professional organizations, including membership in organizations of employers or employees or any other organization whose members perform certain vocation; involvement in such organizations and benefits given by these organizations;
j) Goods and services designated to public and public places, including, e.g. when purchasing goods in a shop, submitting an application for a loan in a bank and in relation to access to discotheques, coffee shops and restaurants;
k) Performing entrepreneurship, including law on market competition, relations between companies, and relations between companies and the state;
l) Participation in cultural and art creations;
m) Equal participation of all citizens in public life;
n) Families, while marital partners shall enjoy full equality of rights and responsibilities in relation to marital union, during marital union and divorce, including rights and responsibilities in raising children, in accordance with provisions of the Family Law;
o) Rights of a child, including measures of protection needed according to their status of minors, by their families, society and the state.

It can be concluded that the Law on Prohibition of Discrimination prohibits discrimination in all areas where it is prohibited in the directives, indeed, and a much wider range of fields. Thus, the courts will have to interpret the Law on Prohibition of Discrimination in accordance with the provisions of the directives and the case law of the European Court of Justice in areas to which directives apply, and also in terms of the grounds covered by directives (because then they apply regulations which are a result of harmonization with the EU acquis). This will be in the area of labour relations in cases of discrimination on all "European grounds," in cases of gender discrimination it will be in the employment, social protection and market goods and services; while in the field of racial or ethnic discrimination it will be in the area of employment, social protection and market goods and services, and in terms of public education.

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3.2.1.4. Forms of discrimination

Both directives guarantee primarily "equal treatment." The principle of equal treatment consists primarily of 1) guarantee of prohibition of direct discrimination and 2) guarantee of the prohibition of indirect discrimination. Direct discrimination is any less favourable treatment in relation to another person (comparator) in a similar position conditioned by one of the "illicit" grounds of difference in treatment. Indirect discrimination is a treatment that is based on the consistent application of seemingly neutral, objective criteria, but leads to discriminatory effects, through practical application i.e. the actual access to a specific benefit is made considerably more difficult for one social group over another. Direct or indirect adverse treatment is based on one of the impermissible grounds with an intent or effect leading to a violation of personal dignity of discriminated person and also creating a hostile work environment that represents harassment as a specific form of violation of equal treatment. In addition, incitement to discrimination is expressly prohibited or, more precisely, it stipulates that every order to discriminate against a person shall be considered as discrimination. Moreover, the directives explicitly oblige Member States to prescribe measures so that those employees who have tried their right to equal treatment protection, using any anti-discrimination instruments or procedure be protected from retaliatory reactions of employer (protection against victimization).

The Law on Prohibition of Discrimination in turn defines indirect discrimination as *"every situation, in which, an apparently neutral provision, criteria or practice has or would have the effect of putting a person or group of persons into an unfavourable or less favourable position comparing to other persons."* This definition differs significantly from the usual understanding of guarantees of prohibition of indirect discrimination, allows the author of the disputed and seemingly neutral, but in reality in effect an unbalanced treatment, a possibility that questionable behaviour be justified as proportionate in the light of the needs of their objective professional (business) needs. Since the first sentence of Article 5, paragraph 1 of the Law on Prohibition of Discrimination is limited to "legal measures and actions," it is not available to employers which the EU directives provide with the opportunity to justify an unbalanced effect of their seemingly neutral practices. The definition of indirect discrimination that would deny employers the possibility to justify unbalanced effects of their seemingly neutral business practices by its necessity and proportionality in relation to the business goals and their importance for the success of business performance, would open a whole range of issues related to socially desirable distribution of the burden of combating systemic or structural discrimination for which the specific employer is probably not directly liable or not liable to any greater extent than other members of society. In other words, such a definition would be problematic in terms of a number of guarantees prescribed in the Charter of Fundamental Rights of the EU.

Also, the directives define harassment as a form of violation of the principle of equal treatment. In this sense, in order to constitute discrimination, a treatment must be unfavourable. The very fact that a "third person" considers a treatment as a violation of one's personal dignity that creates a hostile work environment is not sufficient so that a specific treatment would enter the scope of the guarantee of harassment prohibition. The person who is the subject of the specific treatment must consider it unfavourable. If treatment is not undesirable, it does not constitute

harassment within the meaning of Directive 2000/43/EC or Directive 2000/78/EC, although someone else may consider the treatment degrading or unprofessional. Article 4, paragraph 1 of the Law on Prohibition of Discrimination is much broader in that sense, because it does not require that a person who is the subject of controversial treatment to deem such treatment as unfavourable. From the perspective of the EU law, such a definition of harassment could be questionable from the standpoint of the principle of proportionality.

RECOMMENDATIONS:

1. *Make changes in the definition of indirect discrimination under Article 3 of the Law on Prohibition of Discrimination, to allow a possibility in a clear and explicit way that an unbalanced effect of seemingly neutral treatment tries to be justified as necessary and proportionate, given of the importance of legitimate aim served by seemingly neutral treatment for a particular business.*
2. *Make changes of the definition of harassment under Article 4 paragraph 1, so that the definition of harassment incorporates that behaviour must be deemed unfavourable by the person in question.*

3.2.1.5. Reasonable accommodation, positive measures and exceptions

Positive measures - both directives also prescribe positive measures as a specific expression of the principle of equality which, despite its form being based on one of the principles of prohibited grounds of distinction, does not represent an exception, but goes hand in hand with the guarantee of the prohibition of inequality of treatment.

Thus, it expressly provides that Member States may take positive action measures with a view to achieving full equality in real life. As it will be explained in more detail in the context of Directive 2006/54 later, the Court of Justice of the European Union laid down the criteria that Member States must respect when taking positive action measures, which guarantee that the measure will not exceed the limit and would not grow from the specific expression of the principle of real equality into a violation of the principle of equality in treatment. However, although the Court eventually drew limits for the admissibility of positive action measures in the EU law when it comes to gender equality, so far there is no case law regarding the limits in relation to the positive action measures on other grounds, and it is questionable whether the admissibility limit should be equal for all the grounds.

Reasonable accommodation - one particular expression of the principle of equality, which certainly does not represent an exception, but goes hand in hand with the guarantee of the prohibition of inequality of treatment on the basis of disability, is the reasonable accommodation. The framework Directive expressly states that a guarantee of reasonable accommodation for persons with disabilities is a guarantee of respect for the principle of equality in the treatment of this social group. In other words, reasonable accommodation is not an "exception to the rule," to be interpreted and applied only to the extent strictly necessary in order to achieve a specific goal that allows a deviation from the applicable standards. Reasonable accommodation is the rule. Indeed, in some EU member states, failure to make reasonable accommodation in national legislation is defined as a form of discrimination, and

discrimination emerges by a failure to act or by omission.[26]

Under the Framework Directive, reasonable accommodation is an obligation of the employer where it is needed, with regard to disability specific person, to take appropriate measures to ensure that person has the access to, participates or advances in employment or vocational training, unless such an obligation will impose a disproportionate burden for employer's business. Measures making it possible to gain support within the framework of the national policy of equality of persons with disabilities shall not be considered disproportionate burden.

Exceptions - Each directive but allows for certain exceptions, in which, in contrast to Directive 2006/54 or Directive 2000/43 - the Directive 2000/78 or the Framework Directive which refers to the grounds of age, sexual orientation, religion and disability, prescribes the widest deviations from the guarantee of equal treatment. Thus, this Directive allows Member States to prescribe in laws the measures that democratic societies consider necessary for the purpose of public safety, public order and the prevention of crime, health preservation and protection of the rights and freedoms of others. Therefore, this wide exception is obviously taken from the European Convention for the Protection of Human Rights and Fundamental Freedoms and it is specific for the Framework Directive and as such it is not applicable in the field of gender equality and ethnic and racial equality.

Furthermore, Directive 2006/54, Directive 2000/43 and Directive 2000/78 allow *bona fide* qualifications i.e. the use of prohibited differentiation criterion when considering the nature of the assignment or the context in which the task is performed, this criterion represents a real and decisive factor for success of the fulfilment of specific task, provided that the task is legitimate i.e. that the use of criteria is proportionate to the goal to be achieved by the task.

However, specific to this directive, Directive 2000/78 allows Member States to retain legal provisions that at the time of the adoption of directives were in force, or which were passed after the entry into force of the directive, but legitimise the practices that existed at the time of entry into force of the directive, which is related to activities in churches and public or private organizations whose action is based on the ethos based on religious beliefs and allow a different treatment based on religion or religious beliefs, provided that given the ethos of a particular organization and considering the nature of specific activities or the context in which they are carried out. This differentiation is a real, legitimate and justified criteria for employment. Moreover, the Directive allows these organizations to require their employees to treat its religious ethos or belief in good faith and with respect.

Also specific exception permitted by this directive concerns the treatment based on age. The Directive expressly allows Member States to prescribe that different treatment based on age will not constitute a breach of equal treatment guarantee, if it is reasonably and objectively justified by a legitimate aim in the circumstances of national law - including legitimate employment policy, the objectives of improving the labour market, vocational training objectives - and if the means aimed at achieving this goal are appropriate and necessary.

The special nature of Directive 2000/43/EC is to allow differences in treatment

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26 For example, in the Law on Suppression of Discrimination of Republic of Croatia, the failure to make reasonable accommodation is explicitly stated in the Law as a form of discrimination.

based on nationality,[27] referring of course to the nationality of third countries, given that discrimination on the basis of nationality of the EU Member States is prohibited by the EU primary law.

The way in which the Law on Prohibition of Discrimination regulates exceptions or deviations from the possibility of the prohibition of discrimination is too broad and requires serious changes for alignment.

First of all, Article 5 of the Law on Prohibition of Discrimination defined the guarantee of reasonable accommodation as an "exception from the principle of equal treatment", while the Framework Directive explicitly defines it as the guarantee of applying the principle of equal treatment. Discord at the conceptual level will constitute an aggravating factor in the application by the competent authorities, if for no other reason than because the authorities shall insist that exceptions to the basic standards must be interpreted "strictly" or "narrowly," which will limit the effectiveness of this guarantee for persons with disabilities. Moreover, thanks to the way how the second sentence of paragraph 1. Article 5 of the Law on Prohibition of Discrimination (LPD), is formulated, it stems from it that the employer could argue that measures of reasonable accommodation in principle constitute discrimination against persons without disabilities and can be undertaken only if they are proportionate to the particular circumstances and needs of non-disabled people who are competing for the same position or a labour incentive. From the point of the Framework Directive of such an interpretation represents an unacceptable restriction of the guarantee of reasonable accommodation.

Furthermore, Article 5 of the LPD defined positive action measures as an exception to the principle of equal treatment, while the EU anti-discrimination directives determined a specific form of equal treatment in order to achieve full equality in real life. Moreover, in addition to these conceptual differences, the conditions of admissibility of positive action measures insisted in Article 5 of the LPD do not comply with those developed by the Court of Justice of the European Union through its decisions (at least with regard to gender).

In addition, Article 5 of the LPD is also very vague in terms of the scope of exceptions related to religious organizations or public or private institutions whose activity is based on an ethos based on religious or religious beliefs. From the text of Article 5 of the LPD, it arises that treatment in terms of employment is adversely permitted to religious and religious institutions on the basis of religion or religious beliefs of candidates, although it does not necessarily represent the "real, legitimate and justified criterion" for employment. Moreover, the provision of Article 5 allows religious and faith-based organizations unfavourable treatment, based on any of the prohibited grounds, not only on the grounds of religion or religious beliefs. On the claim that Article 5 of the LPD limits adverse treatment of this type through conditions to "realize a legitimate goal" and "there is a reasonable relation ratio of proportionality between means used and goals to be achieved," it is useful to point out that the same Article 5 in its item (c) provides a reference that both conditions are satisfied "having in mind that every distinction, exclusion or giving advance is done consciously in order not to hurt religious feelings of members of that confession or

27 Article 3, paragraph 2 of Directive 2000/43/EC reads: "This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned."

religion." Given that in terms of employment provisions of Article 5 item (c) allows religious or faith-based organizations virtually unfettered discrimination based on any of the grounds that the Framework Directive provides, it is irreconcilable with the requirements arising from that Directive. The same applies to the provision of Article 5 item (h).

The above provisions should be added to the provision of Article 5 item (g) which after the Croatian Law on Suppression of Discrimination allows unfavourable treatment based on any impermissible basis in principle: *"while defining family rights and obligations, when it is defined by the law and in particular with an aim of protecting the rights and interests of children, which must be justified by a legitimate purpose, protection of public morality, as well as favouring marriage in accordance with the provisions of the family law."* From the perspective of the EU law, this wording will not be a problem only on condition that it be in terms of access to any privilege from the regulatory jurisdiction of the EU (labour rights, pensions, social security, access to market goods and services) nor does it in any way tries to justify unfavourable treatment conditional upon any of the grounds for particular anti-discrimination protection in the EU legal order, such as ethnicity, gender or sexual orientation under the pretext of protecting families and children. Moreover, as explained later in more detail, in terms of the Framework Directive, protection of heterosexual marriage in any way cannot justify unfavourable treatment in respect of access to benefits from employment to persons who are in same sex stable emotional unions. Given that the provision was adopted after the Croatian model, it is useful to refer to the developments in Croatia, which recently adopted the Law on the Life Partnership of the Same Sex whereby Croatian legislation is fully in line with the requirements arising from the Framework Directive and the recent decision of the Court of Justice of the European Union.

RECOMMENDATIONS:

1. *It is necessary to make a far-reaching changes of Article 5 of the LPD, starting from the fact that it is necessary to exclude unfavourable treatment based on sex or gender change or race or ethnicity, out of the reach of the "conventional" exceptions prescribed by the first sentence of Article 5 of the LPD.*
2. *It is necessary to fully redefine provisions of Article 5 items (c) and (h) and the possibility of churches and religious communities, or public or private organizations whose activity is based on an ethos based on religion or religious belief from adverse treatment in terms of labour in such institutions:*
    a) *restrict solely on the basis of religion or religious belief and*
    b) *permit only if given the ethos of a particular organization, and given the nature of specific activities or the context in which they are carried out, such practices represent real, legitimate and justified criteria of successful performance of specific labour relations;*

    In relation to the Article 5 item (g), it should be explicitly prescribed that a specific exception in no way allows that access to any privilege from the regulatory jurisdiction of the EU (labour rights, pensions, social security, access to market goods and services) is trying to justify unfavourable treatment based on any of the grounds that enjoy a

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particular anti-discrimination protection in the EU legal order, especially an unfavourable treatment in respect of access to benefits from employment to persons who are in same sex emotional stable unions;

3. *Provision of Article 5 item (f) should be set aside as a separate, independent provision and the obligation of reasonable accommodation to be expressly defined as a specific guarantee ensuring the implementation of equal treatment of persons with disabilities, and not as an exception from it. Obligation of reasonable accommodation must in no way be conditional upon proportionality;*
4. *Provision of Article 5 item (a) should be set aside as a separate provision and defined as a specific form of equal treatment in order to achieve full equality in real life, and not as an exception to the guarantee of equal treatment.*

3.2.1.6. Burden of proof and other procedural guarantees

Apart from substantive guarantees, the EU anti-discrimination law pays considerable attention to the procedural safeguards to ensure the effective implementation of anti-discrimination protection before the competent implementing authorities. Although the procedural law is in the exclusive regulatory competence of the Member States, the Court of Justice of the European Union did not hesitate to require national courts to use their judicial powers and significantly intervene in their national procedural law, to ensure the effective implementation of the EU law. This part of the analysis will focus solely on those procedural safeguards that are in the LPD. However, it is useful to keep in mind that the EU anti-discrimination directives have a significant effect on those laws which detail procedural guarantees. In principle, any provision of procedural law (e.g. preclusive deadlines, rules of evidence, compensation of litigation expenses or other limits to the amount of damages) that could the make the application of EU anti-discrimination guarantees impossible or unreasonably difficult, shall constitute a breach of the relevant Directive and as such will have to be harmonized with requirements arising from that Directive and the case law of the European Union.

Extremely important procedural safeguard guaranteed by all anti-discrimination directives is the principle of (re)allocation of the burden of proof.[28] The anti-discrimination directives uniformly define the principle of redistribution of the burden of proof and provide that when a party believes that its right to equal treatment was violated, the party presents and proves the facts upon which it may be presumed that discrimination occurred, while the respondent has to prove that they have not violated the guarantee of equality in treatment.[29] The Court of Justice of the European Union addressed the practical application of this principle through a series of cases such as 109/88 *Danfoss,* C-127/92 *Enderby,* C-381/99 *Brunnhofer,* C-54/07 *Feryn,* C-81/12 *Steaua.*[30] In principle, the Court is of the view that the principle of the burden of proof is on the plaintiff. However, the Court has also clearly emphasized the understanding that discrimination is often difficult to prove because of a number of

28 See Lili Farkas, "How to present a Discrimination Claim - Handbook on seeking remedies under the EU Non-discrimination Directives" European Commission, 2011

29 See Fiona Palmer „Re-dressing the Balance of Power in Discrimination Cases: The Shift in the Burden of Proof" European anti-discrimination law review - issue 4 (2006)

30 C-109/88 Danfoss [1989]; C-127/92 Enderby [1993]; C-54/07 Centrum voor gelijkheid van kansen en voor racismebestrijding/Firma Feryn NV; C-381/99 Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG. 2001 ECR I-04961; C-81/12 Asociaia Accept v Consiliul Na ional pentru Combaterea Discriminării 2013 – ECR 00000

obstacles that victims face in terms of access to information and materials that are critical for success in the evidentiary part of the procedure. In this regard, the Court emphasized that plaintiffs should not be punished for the fact that due to objective reasons they did not have solid access to the necessary evidence. Therefore, any form of non-transparency in decision-making or treatment that may constitute discrimination in principle is sufficient so that the burden of proof completely shifts onto the defendant. What will the defendant have to prove in the case, depends on the specific facts of the dispute, and primarily on what the plaintiff could prove and has proven in the first phase of the evidentiary proceedings. However, the case law of the Court of Justice of the European Union is clear that the plaintiff is not required to prove discrimination with certain (high) level of probability, if the plaintiff is not able to do so due to objective reasons.

The way in which Article 15 of the LPD regulates the issue of burden of proof is not fully in line with the approach represented by the Court of Justice of the European Union. Article 15 does not specify any threshold for the presumption of a *prima facie case of* discrimination, after which the burden of proof passes onto the defendant, but simply states that after the plaintiff "states the facts ...corroborating allegations that prohibition of discrimination is violated," it is up to the defendant to prove otherwise. This wording leaves a very wide discretion to the courts themselves to determine the evidentiary threshold for plaintiffs that in principle could be considerably higher than the threshold consisting of facts upon which it is possible to assume that discrimination could have occurred (without having to prove the probability), but also considerably lower allowing the shifting of the burden of proof onto the defendant, although the plaintiff has not put any reasonable effort to prove a *prima facie case of* discrimination.

RECOMMENDATION:

1. *Prescribe in Article 15 of the LPD a clear threshold of a prima facie case of discrimination, based on the obligation of the plaintiff to access, in the light of real possibilities, the evidence in the case at present and to present and prove those facts that allow the court* ***the presumption*** *that discrimination could have occurred.*

3.2.2. Directive 2006/54 and Directive 2004/113

Gender equality has traditionally been the main driver of the development of anti-discrimination law in the legal order of the European Union since the mid-seventies. In principle, almost all the guarantees used in anti-discrimination EU directives are primarily developed in the context of gender equality. In this respect, gender equality and in particular the case law which the Court of Justice of the European Union has developed in this matter, represents a specific type of a role model in the EU anti-discrimination law.

As the LPD is not the main law in the field of gender equality, the specific analysis is focused only on those provisions of the LPD that could be problematic with regard to Directive 2006/54. Most complaints of non-alignment of the LPD with Directive 2006/54 on equal opportunities of women and men in the labour market related to employment, working conditions and social benefits related to labour

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relations and with the Directive 2004/113 on equal treatment of women and men in terms of access to goods and services in market relations has already been identified in the context of the analysis on the basis of Directive 2000/43/EC and 2000/78/EC.

First, the definition of the guarantee of indirect discrimination prohibition under Article 2 of the LPD is not acceptable in terms of Directive 2006/54 and Directive 2004/113, since it does not foresee the possibility of justification of unbalanced impact of seemingly neutral treatment in light of business objectives that this apparently neutral practice serves. The safeguard of indirect discrimination has primarily developed in the context of equal treatment with regard to working conditions for women and men and since the judgment in Case C-170/84 *Bilka*[31] The Court of Justice of the European Union has consistently applied the doctrine under which a mere fact that a seemingly neutral business practice in its implementation produces an unfavourable effect for single gender group over another in similar circumstances does not constitute discrimination itself. The unfavourable effect of a seemingly neutral business practice, constitutes discrimination only if it is not justified by a legitimate business aim that cannot be achieved, i.e. if it is not necessary to achieve the aim. Since the first sentence of Article 5 of the LPD is limited to statutory measures, and Article 5 does not include a specific option to justify an unbalanced effect of a seemingly neutral business practice, the definition of indirect discrimination under Article 2 of the LPD is not compatible with the requirements arising from Article 2 of Directive 2006/54 i.e. Article 2 of Directive 2004/113.

Second, Directive 2006/54 and Directive 2004/113 define harassment based on sex and sexual harassment as unwanted adverse treatment. Given that Article 4 of the LPD does not prescribe unwanted adverse treatment as one of the conditions of harassment or sexual harassment, this provision is inconsistent with the requirements arising from Article 2 of Directive 2006/54 and Article 2 of Directive 2004/113.

Third, Directive 2006/54 allows only one exception to the principle of equal treatment in terms of employment and labour relations, i.e. an exception based on *bona fide* qualifications for a specific employment relationship. Given that it allows a general exception to the principle of equal treatment justified by a relationship of proportionality between the discriminatory conduct and the legitimate aim which it serves with respect to all discriminatory grounds, including sex, Article 5 of the LPD is not in line with the requirements arising from Directive 2006/54.

Furthermore, with regard to permitting adverse treatment as regards access to labour relations in religious institutions based on any grounds, including sex, even when this criteria does not constitute a *bona fide* qualification but its use is justified "consciously in order not to hurt religious feelings of members of that confession or religion," Article 5 item (c) and (h) are inconsistent with the requirements arising from Article 2, 5 and 14 of Directive 2006/54.

Similarly, given that the wording of the provision in principle allows the adverse treatment on the basis of sex in terms of access to goods and services that a religious organization offers through market relations, if so required by religious doctrines, beliefs or goals, Article 5 item (h) is not in line with the requirements of Article 4 of Directive 2004/113.

Fourth, Directive 2006/54 (Article 3) and Directive 2004/113 (Article 6) define positive action measures as a separate expression of the principle of equality in order

31 C-170/84 Bilka Kaufhaus [1986] ECR 1607

to achieve full equality in real life, and not as an exception to the principle of equal treatment.

Moreover, the Court of Justice of the European Union in a series of cases - C-450/93 *Kalanke,* C-409/95 *Marschall,* C-158/97 *Badeck,* C-407/98 *Abrahamson* - deciding on the admissibility of positive action measures, has taken a clear and explicit view that positive action measures are permitted in the form when in terms of access to a particular good or benefit they give preference to a candidate belonging to the under-represented sex, provided that they are both equally qualified candidates (deserving), i.e. that their qualifications and specific personal circumstances were the subject of objective assessment in a transparent process and that the person deciding on the access to a particular benefit (workplace, promotion, professional training) may take into account some specific circumstance of the other candidate that would, due to social importance, be able to overcome the principled advantage of the candidate of underrepresented sex.[32]

Given that positive action measures are defined as an exception to the guarantee of equal treatment and that it does not in a clear manner prescribe the conditions under which positive action measures are consistent with the principle of full equality in real life, the provision of Article 5 item (a) of the LPD is not consistent with the meaning that provision of Article 3 Directive 2006/54, and Article 157, paragraph 4 of the TFEU have acquired in the case law of the Court of Justice of the European Union.

RECOMMENDATIONS:

1. *Given the common doctrinal foundation of the EU anti-discrimination directives, see the recommendations made in the context of Directive 2000/43 and Directive 2000/78;*
2. *Provision of Article 5 item (a) of the LPD should be set aside in a separate independent provision that will define the positive action measures as a separate expression of the principle of equality in order to achieve full equality in real life and in accordance with the ECJ case law clearly specify the conditions under which it is possible to take positive action measures, whereby the access to a certain good or benefit is preferred for people in underrepresented social groups:*
    - *a) significant under-representation;*
    - *b) equal qualifications;*
    - c) *transparent, comprehensive and objective evaluation of qualifications and personal circumstances specific to each candidate.*

3.3. Selected practice of the European Court of Justice on the grounds of discrimination

The case law of the European Court of Justice in Luxembourg has also been a significant source of the EU law. The main task of the Court is to ensure a proper interpretation and application of the EU law, in which the European Court of Justice is

32 C-450/93 Eckhard Kalanke v Freie Hansestadt Bremen 1995 ECR I-03051; C-409/95 Hellmut Marschall v Land Nordrhein-Westfalen 1997 ECR I-06363; C-158/97 Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen 2000 ECR I-01875; C-407/98 Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist 2000 ECR I-05539

not hierarchically superior to the national courts, i.e. it is not a court of appeal for decisions of national courts in matters of the EU law. The Court's judgments are based on the previously accepted legal understanding, and act *inter pares* and *erga omnes* - the interpretation of the European Court of Justice binds Member States in that they have an obligation to implement them and this includes the national courts.

One of the competencies of the European Court of Justice is deciding in preliminary proceedings for the interpretation of the European Union law. In this proceedings, the court decided on preliminary questions put forth under Article 267 of the TFEU by national courts. The preliminary proceedings allows national courts[33] to seek assistance from the European Court of Justice if they are unsure in interpretation or in the validity of the norms of the EU law, after which the European Court of Justice gives its interpretation of the European law, which has the power of the final word, while the decision in the main case remains with a national court. The primary purpose of the preliminary proceedings is to ensure uniform application of the EU law and it is precisely in this procedure where all decisions on discrimination were made and which will be discussed.

The case law of the European Court of Justice in the area of discrimination is very extensive in the matters of gender equality, exceeding 200 cases. It is through court decisions in cases of gender discrimination that concepts of European anti-discrimination law have been developed over the past decades, which were later incorporated into provisions of Directive 2000/43 and Directive 2000/78. To understand the concept of indirect discrimination with respect to racial or ethnic origin as defined in the Directive 2000/43/EC, it is necessary to know the case law related to discrimination based on sex, and the Court has, in a series of cases beginning with the *Bilka*[34] case, developed this concept in detail.[35] Unlike the case law for discriminatory grounds of sex, the European Court of Justice has so far interpreted the two recent anti-discrimination directives in a small number of cases, in particular Directive 2000/43, while it is interesting to note that most cases under Directive 2000/78 include age as discriminatory basis,[36] while no decision refers to religion. Some decisions on the various grounds of discrimination are signed out here. For various reasons, they are important to understand the earlier explained EU anti-discrimination law, and also to understand the concepts of the LPD when transposing

33 The decision whether to put the preliminary question to the European Court of Justice is upon a judge adjudicating the specific dispute. However, when any such question is raised in a case adjudicated in the court of a Member State which provides no remedy against the decision, that court shall bring the matter to the Court.

34 C-170/84 Bilka Kaufhaus [1986] ECR 1607

35 For the concept of indirect discrimination we propose to read the judgments: C-170/84 Bilka Kaufhaus [1986] ECR 1607 i C-171/88 Rinner Kuhn [1989] ECR 2743, and also C-167/97 R v Sec of State for Employment ex p Seymour Smith, (1999) ECR I-623, [1999] ICR 447 and R v Sec of State for Employment ex p Seymour Smith (No 2) [2000] 1 WLR 435, [2000] ICR 244 (HL) and and in particular for possible objective justifications the decisions in Cases C-127/92 Enderby [1993], C-243/95 Hill [1998], C-109/88 Danfoss [1989]) and C-184/89 Nimz [1991].

36 The age concerns the decisions: C-144/04 Werner Mangold/Rüdiger Helm, judgement of November 22, 2005, C-227/04 Lindorfer v Council, judgement of November 30, 2006, C-411/05 Félix Palacios de la Villa/Cortefiel Servicios SA, Judgement of October 16, 2007., C-427/06 Birgit Bartsch/Bosch und Siemens Hausgeräte (BsH) Altersfürsorge Gmb, Judgement of September 23, 2008., C-388/07 The Incorporated Trustees of The National Council on Ageing (Age Concern England)/Secretary of State For Business, Enterprise and Regulatory Reform, Judgement of March 5, 2009., C-88/08 David Hütter/Technische Universität Graz, Judgement of June 18, 2009, C-555/07 Seda Kücükdeveci /Swedex GmbH & Co. KG, Judgement of January 19, 2010., C-229/08 Colin Wolf v Stadt Frankfurt am Main, Judgement of January 12, 2010., C-341/08 Dr Dominica Petersen v Berufungsausschuss für Zahnaerte für den Bezirk Westfalen-Lippe, Judgement of January 12, 2010., C-246/09 Susanne Bulicke v Deutsche Büro Service GmbH, Judgement of July 8, 2010, C-45/09 Gisela Rosenbladt v Oellerking Gebaeudereinigungsgesselschaft, Judgement of October 12, 2010, C-499/08 Ingeniørforeningen and Danmark for Ole Andersen v Region, Judgement of October 12, 2010, C-250/09 Vasil Ivanov Georiev v Tehnicheski Universitet, Judgement of November 18, 2010., C-286/12 Commission v Hungary, Judgement of November 6, 2012.

the EU directives and for their interpretation in accordance with the legal opinion of the Court of Justice of the EU.

3.2.1. With no valid discrimination grounds

The case C-328/04 *Attila Vajnai,* probing whether a provision of the Hungarian Criminal Code, under which the use or public display of the red five-pointed star as a crime - is compatible with the principle of non-discrimination and Directive 2000/43/EC, serves as an example of the case when the European Court of Justice declined jurisdiction, because this provision of national law was not within the scope of the EU law. The *Vajnai* case is an illustration of earlier arguments that the European law will not be applicable in all cases where there may be discrimination under the Law on Prohibition of Discrimination. Given that the LPD contains a large number of discrimination grounds and refers to a number of areas of life, the courts will inevitably find cases where there may be discrimination on the basis of LPD, but not on the basis of the EU law,[37] so even after joining the European Union there will not be an obligation of harmonized interpretation, nor the Court's jurisdiction to give an opinion in the preliminary procedure.

3.2.2. Discrimination based on racial or ethnic origin

Discrimination based on racial or ethnic origin is sometimes difficult to prove, because it rarely manifests itself in a very open manner, as it was in Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding/Firma Feryn NV*, when an employer in public over the media said they will not employ immigrants. This judgment is set aside for several reasons, among others because it is the first judgment[38] where the Court had an occasion to interpret Directive 2000/43/EC. Although in the case is about "immigrants", the Court did not consider whether it is about discrimination on the grounds of "racial or ethnic origin" or on the grounds of nationality, which is interesting in that Directive 2000/43/EC contains an exception regarding discrimination on grounds of nationality. In this judgment, the Court, by omitting to mention this exception, has shown that it will not allow manipulation with this exception in order to avoid dealing with racial or ethnic discrimination under the guise of allowable differential treatment based on the nationality of third country nationals, in accordance with the subject matter exception.

The *Feryn* case is important for defining the concept of direct discrimination and the related notion of discrimination victim. In this case, the Court explained that the existence of direct discrimination does not imply the existence of a particular plaintiff i.e. the victim of discrimination which can be determined. The Court found that the fact that the employer has publicly stated that they will not recruit employees of a particular racial or ethnic origin, as something that will certainly seriously dissuade certain candidates to even apply for such job, whereby preventing their access to the labour market, which constitutes a direct employment discrimination within the meaning of Directive 2000/78/EC.[39]

37 As regards the *Vajnai* case, it should be noted that at that time the EU Charter of Fundamental Rights, in Article 21 prohibits discrimination on the basis of "political or other opinion," while Article 11 guarantees freedom of expression, has a significance of a political document, and now, after the entry into force of the Lisbon Treaty, the Charter has become legally binding (However, the Charter provisions apply to Member States only when they apply the EU law).

38 The court later ruled in Case C-394/11 Belov te C-391/09, Runevič-Vardyn [2011] ECR I- 3787.

39 This wording was presented by AG Poiares Maduro in its opinion and the Court accepted it. Opinion

The judgment further refers as to who is authorized to submit a claim for discrimination, or what are the obligations of states: what options are left for Member States to regulate this matter. The Court explained that, if the Member States so decide, they may authorize bodies and organizations with legal interest to file law suits, i.e. also when not acting on behalf of a particular plaintiff, or when a particular plaintiff/victim of discrimination is impossible to identify. As the Directive has left up to the Member States to decide if they are to provide a possibility of entering into the legal proceedings "in the name of" victims or as a support, this kind of discrimination where there is no identifiable "victim" will be actionable in some Member States, while in others will not - depending on the choice of the state.

For the LPD implementation this case is particularly significant as an example of collective action for protection from discrimination under Article 17 of the LPD, in so far as the *Feryn* case is an excellent example for such lawsuits with an undetermined number of potential victims. Therefore, for future joint actions which will be submitted in BiH, especially those submitted because of public statements, particularly significant is that the European Court of Justice in this case confirmed that there may be direct discrimination, even when there is no specific "victim," but it has also defined when in such a case the burden of proof shifts and it has also listed some of the possible sanctions.

3.3.3. Discrimination on the grounds of sexual orientation

The Court of Justice of the European Union issued a number of decisions - C-249/96 *Grant,* C-117/01 *KB,* C-267/06 *Maruko* C-147/08 *Romer,* C-267/12 *Hay* - related to the question of content and reach of the prohibition of discrimination guarantees based on sexual orientation in the legal order of the European Union.[40] All previous decisions except one - C -199/12 through C-201/12 *X, Y, Z* - were made in the context of implementing the prohibition of direct discrimination guarantee laid down in Directive 76/207/EC on the equality of women and men and the Framework Directive. Judgment in *X,* Y, Z case was made in the context of Directive 2004/83/EC on minimum criteria for the registration and status of third country nationals as refugees or as persons who otherwise need international protection. The Court has so far not commented on the scope of the prohibition of discrimination on grounds of sexual orientation from the Charter of Fundamental Rights.

From the above decisions for the purpose of analyzing the alignment of the LPD with the EU acquis the *Maruko* and *Hay* judgments are crucial.

In *Maruko* case, the Court ruled on the issue of compliance practices in the labour market, according to which the employer is permitted to deny access to retirement from private funds financed by employers on the basis of a collective agreement to persons in a registered as same sex couple, whose deceased spouse was employed in the specific employer, although the same pension is guaranteed to surviving spouses. The Court took the view that such a restriction of access to retirement from the private pension fund would not be in accordance with the guarantee of

n.o. Poiares Maduro of March 12, 2008, in Case C-54/07 Centrum voor gelijkheid out kansen en voor racismebestrijding / Firma Feryn NV.

40 C-249/96 Lisa Jacqueline Grant v South-West Trains Ltd. 1998 ECR I-00621; C-117/01 K.B. v National Health Service Pensions Agency and Secretary of State for Health 2004 ECR I-00541; C-267/06 Tadao Maruko v Versorgungsanstalt der deutschen Bühnen 2008 ECR I-01757; C-147/08 Jürgen Römer v Freie und Hansestadt Hamburg 2011 ECR I-03591; C-267/12 Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres 2013 ECR 0000.

non-discrimination on the basis of sexual orientation from the Framework Directive, if the national court finds that under national law spouses and life partners are in a similar position concerning the purpose of pension rights of deceased partner or spouse. Equally important, the Court has also made it clear that any norm of national legislation, including the adoption of which is a matter of exclusive competence of Member States, which in its effect in any way limits the effective protection of the rights of the EU citizens guaranteed by the EU legal order, enters into the realm of compliance control with the acquis by the Court.

In *Hay* case, the Court went a step further. In this specific case, the Court ruled on the issue of labour law privileges guaranteed by the collective agreement. More specifically, according to the specific collective agreement the employees are entitled to use the time off for the purpose of marriage and the right to a cash bonus for the purpose of entering into marriage while the same option was not provided to same sex couples who entered into the civil unions. Unlike in the *Maruko* case, where the Court left the assessment of similarity of position of same sex marriage and couples to the national court, in the present case the Court took the explicit view that in relation to the specific issue of employment benefit the same sex unions are in the same situation as the marriage, which is why the practice of restricting the same sex unions the access to this right constitutes discrimination based on sexual orientation prohibited under the Framework Directive. For the Court, the key fact was that the institution of marriage in this particular case was available exclusively to heterosexual couples, from which the Court concluded that limiting labour law privileges exclusively to marriage unions constitutes discrimination against same sex couples based on their sexual orientation. The way in which the Court came to this conclusion indicates the willingness of the Court to - in the least - guarantee a minimum access to all labour law and social benefits for stable emotional same sex partners, included in the scope of the Framework Directive equal to that enjoyed by heterosexual couples.

Described judgements bear clear consequences for the LPD.

First, with regard to the *Maruko* judgment, it is clear that the exception for the protection of family relations under Article 5 item (g) of the LPD must not include the situations that would lead to an unfavourable position of stable same sex unions in terms of access to rights, benefits and privileges guaranteed by the EU law in respect to the heterosexual unions, no matter that the Member States have a sole authority to arrange the type and content of family unions.

Second, with regard to the *Hay* judgment, it is clear that the guarantee of non-discrimination based on sexual orientation must have a special efficiency when it comes to relationships falling within the scope of the Framework Directive. More specifically, regardless of whether a Member State has legally admitted some special legal form of same sex couples, those same sex unions that are in the same situation as the marriage unions must have equal access to all rights, benefits and privileges covered by the Framework Directive, just as spouses do. In other words, when it comes to access to labour and social rights for the unions in stable emotional same sex status, the marriage status is a "proxy" for discrimination based on sexual orientation and can be justified as an exception only in accordance with Article 2 paragraph 5 of the Framework Directive.

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3.3.4. Discrimination based on age

The C-144/04 *Werner Mangold / Rüdiger Helm* case is one of the most cited cases of the European Court of Justice in the area of non-discrimination. The reasons for this are that the Mangold Judgement was the first judgment related to Directive 2000/43/EC and 2000/78/EC, in particular for Directive 2000/78/EC, and in it the European Court of Justice declared that the principle of non-discrimination on the grounds of age must be regarded as a general principle of the Community law (European law).[41] In the Mangold case, the provisions of national law restricting the possibility of concluding a contract of employment for a definite period, in order to protect from abuses that come with a successive signing of these agreements. However, the rule does not apply to workers older than 52, with the aim of promoting their employment. The European Court of Justice considered that this exception is not justified, in accordance with Article 6 (1) of Directive 2000/78, given that the setting of the age limit is not objectively necessary to reach the objective of integration of older workers, and therefore it exceeds what is appropriate and necessary in order to achieve a goal that is to be achieved.

Furthermore, as already pointed out, the Mangold case is extremely important for defining the role of fundamental rights as general principles of the law in the EU law. Specifically, the Court articulated that the principle of non-discrimination on the basis of age is the general principle of the EU law. In the cases that followed *Bartsch/Bosch*[42] and *Kücükdeveci*,[43] which the Court was also supposed to interpret the principle of non-discrimination on the basis of age and Directive 2000/78 related to the validity of the provisions of national law, the Court was able to draw a more precise answer to the question when the principle of non-discrimination on the basis of age has a horizontal direct effect.

3.3.5. Discrimination based on disability

Like the other discriminatory grounds, Directive 2000/78/EC does not define the discriminatory basis of disability. The European Court of Justice in the *Chacon Navas*[44] case was given the opportunity to interpret Directive 2000/78 with respect to disability and it drew the line between the disease (which is not one of Europe's discriminatory grounds) and the disability (which is a discrimination ground).

In the *Coleman* case, the Court found that the dismissal of an employees because as a caregiver of a child with disabilities she used more flexible working hours is a direct discrimination on grounds of disability, regardless of the fact that Mrs. Coleman is not a person with a disability, but has been discriminated against because of a disability of her child, thereby the Court expanded the protection against discrimination to people who are associated with persons with disabilities or work with them or care for a person with disabilities.

Given on the one hand an open list and a very broad wording of Article 2 Paragraph 1 of the LPD,[45] is not completely clear whether the LPD implicitly

41 Eng. 'the principle of non-discrimination on grounds of age must ...be regarded as a general principle of Community law'.

42 C-427/06 Birgit Bartsch/Bosch und Siemens Hausgeräte (BsH) Altersfürsorge Gmb, Judgement of September 23, 2008

43 C-555/07 Seda Kücükdeveci /Swedex GmbH & Co. KG, Judgement of January 19, 2010

44 C-13/05 Sonia Chacón Navas/Eurest Colectividades SA, Judgement of July 11, 2006

45 Discrimination, in terms of this Law, shall be every different treatment including every exclusion, limitation or preference based on real or assumed features towards any person or group of persons on grounds of their race,

contains a guarantee of protection against discrimination based on association. At the same time, it is not yet clear, nor weather this obligation exists under the EU law with respect to all six grounds of the EU law or solely with respect to disability. What therefore could be considered is the inclusion of explicit prohibition of discrimination based on association into the LPD, both in immediate and direct terms in line with the judgment regarding disability and persons associated with people with disabilities or who care for them, or even beyond with respect to other grounds. For example, in Article 1 paragraph 2 the Croatian Law on Suppression of Discrimination reads: "Discrimination in terms of this Law is placing at a disadvantage any person on the basis of... and persons associated with this person by family or other association."[46]

And finally, the *Coleman* case is an excellent example of the European Court of Justice's flexibility in the interpretation of the European law and its willingness to extend protection against discrimination in unexpected directions, interpreting provisions of Directive teleologically. The Court shows why it is not enough to interpret the LPD in accordance with Directives 2000/43 and 2000/78, relying solely on the text of the directive, but that it is also necessary to read the case law, in so far as the Court of Justice of the EU with its interpretation sometimes really creates the law.

skin colour, language, religion, ethnic affiliation, national or social origin, connection to a national minority, political or any other persuasion, property, membership in trade union or any other association, education, social status and sex, sexual expression or sexual orientation, and every other circumstance with a purpose or a consequence to disable or endanger recognition, enjoyment or realization, of rights and freedoms in all areas of public life.

46 Discrimination by association is included in the text of the Law on Suppression of Discrimination exactly because of the *Coleman* case. However, at the time of the drafting the Law on Suppression of Discrimination, the European Court of Justice was still ruling on whether Directive 2000/78 protects against discrimination based on association. Pending the decision in accordance with the opinion of Advocate General Poiares Maduro, the Law on Suppression of Discrimination has included the prohibition of discrimination based on association, as finally decided by the European Court of Justice. The prohibition of discrimination on the basis of association in the Law on Suppression of Discrimination is wider, but all elements that it includes are not quite clear.

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4. CONCLUSION

As a requirement for accession into the EU membership, Bosnia and Herzegovina will be required to fully align its legislation with the EU acquis, which includes the sphere of anti-discrimination legislation. It is unlikely that the European Commission will allow the closing of accession negotiations without a complete legislative alignment of national legal acts with 1) anti-discrimination provisions of the founding treaties, 2) anti-discrimination Directives and 3) relevant decisions of the Court of Justice of the European Union.

Therefore, here we have briefly analyzed, as much as the given format allows, the entire *acquis* on the prevention of discrimination, from the primary EU law, through the relevant directives and some selected judgments of the Court of Justice of the EU. The biggest weaknesses of the existing Law on Prohibition of Discrimination have been identified i.e. the provisions that should be aligned and recommendations for harmonization are also provided.

However, once again we highlight that the alignment does not end with a formal adoption or amendments to the law, but it should be applied in practice in such a manner that the European law transposed into the national law is given the meaning of provisions in the directives, and also in a manner as the European Court of Justice interprets those provisions.

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