Implementing European standards:
The right of specialised bodies to combat racism and racial discrimination to deal with individual cases

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EHRENWÖRTLICHE ERklärUNG

Ich erkläre ehrenwörtlich, dass ich die vorliegende Arbeit selbstständig und ohne fremde Hilfe verfasst, andere als die angegebenen Quellen nicht verwendet und die den Quellen wörtlich oder inhaltlich entnommenen Stellen als solche kenntlich gemacht habe. Ich versichere ferner, dass ich diese Diplomarbeit bisher weder im In-
noch im Ausland in irgendeiner Form als wissenschaftliche Arbeit vorgelegt habe.

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Oslo, November 2012
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination Against Women</td>
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<tr>
<td>CERD</td>
<td>Committee on the Elimination of All Forms of Racial Discrimination</td>
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<tr>
<td>CPE</td>
<td>Commissioner for the Protection of Equality</td>
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<tr>
<td>ECJ</td>
<td>Court of Justice of the European Union</td>
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<td>ECRI</td>
<td>European Commission against Racism and Intolerance</td>
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<td>ECFR</td>
<td>Charter of Fundamental Rights of the European Union</td>
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<td>ECHR</td>
<td>Convention for the Protection of Human Rights and Fundamental Freedoms</td>
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<td>ECHR</td>
<td>European Court of Human Rights</td>
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<td>EEA</td>
<td>European Economic Area</td>
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<td>EEC</td>
<td>European Economic Community</td>
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<td>EFTA</td>
<td>European Free Trade Area</td>
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<td>EP</td>
<td>European Parliament</td>
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<td>ESC</td>
<td>European Social Charter</td>
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<tr>
<td>GPR</td>
<td>General Policy Recommendation</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>ICERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ILO</td>
<td>International Labour Organization</td>
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<tr>
<td>INGO</td>
<td>International non-governmental organisation</td>
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<td>LDN</td>
<td><em>Likestillings- og diskrimineringsnemda</em>, Equality and Discrimination Tribunal</td>
</tr>
<tr>
<td>LDO</td>
<td><em>Likestillings- og diskrimineringsombud</em>, Equality and Discrimination Ombud</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>NHRI</td>
<td>National Human Rights Institution</td>
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<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
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<tr>
<td>OPCAT</td>
<td>Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
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<tr>
<td>SAA</td>
<td>Stabilisation and Association Agreement</td>
</tr>
<tr>
<td>TEC</td>
<td>Treaty establishing the European Community</td>
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<tr>
<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<tr>
<td>UNCRPD</td>
<td>United Nations Convention on the Rights of Persons with Disabilities</td>
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<tr>
<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
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<tr>
<td>UNSCR</td>
<td>United Nations Security Council Resolution</td>
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INTRODUCTION

TOPIC AND RESEARCH QUESTIONS

The basis of all human rights is human dignity, and there is a global consensus on fundamental values of dignity, freedom and (social) equality. Non-discrimination is an imperative prerequisite for human dignity and integrity\(^1\), as well as the fulfilment of all humans' potentials. The prohibition of racial discrimination is one of the core human rights which are not only incorporated in human rights treaties, but are accepted to have become international customary law. As such, they are today considered to constitute *ius cogens*.\(^2\)

Despite this fundamental consensus that discrimination, and particularly racial discrimination, is a “social evil”\(^3\), the response to such phenomena has been quite diverse. In public international law, human rights treaties provide that the enjoyment of human rights must be guaranteed without discrimination. States must not only abstain from human rights violations, but have an obligation to ensure that no such violations occur between individuals. They must put in place effective remedies, or sanction mechanisms, in the case of violations.\(^4\) National legislation often contains constitutional, public and civil as well as criminal law provisions prohibiting racial discrimination, reflecting a variety of aims and concepts of equality. In addition, “effective implementation mechanisms”\(^5\) are paramount to a realisation of equality in all its facets.

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\(^1\) See Kirsten Ketscher, “Diskrimineringsforbud: Nogle generelle overvejelser”, in Anne Hellum and
\(^2\) See Anne Hellum and Kirsten Ketscher, “Introduksjon til diskriminerings- og likestillingsretten”, in Anne Hellum and Kirsten Ketscher (eds.), *Diskriminerings- og likestillingsrett*, (Universitetsforlaget, Oslo, 2008), 17-30, 18
\(^3\) Rikki Holtmaat, “Catalysts for Change? Equality bodies according to Directive 2000/43/EC – existence, independence and effectiveness” (Office for Official Publication of the European Communities, Luxembourg, 2007), 14
\(^4\) See Emmanuelle Bribosia and Isabelle Rorive, “In search of a balance between the right to equality and other fundamental rights” (Office for Official Publication of the European Communities, Luxembourg, 2007), 14
\(^5\) Mark Kelly, *ECRI. 10 years of combating racism in Europe: A review of the work of the European Commission against Racism and Intolerance* (Council of Europe Publishing, Strasbourg, 2004), 35
In fact, high thresholds, fear of victimisation and lack of institutional support have led to under-reporting of racial discrimination cases. This is harmful to the individual victim of racial discrimination, perpetuates discriminatory behaviour and structures, and makes it difficult to estimate the real existence of racial discrimination in many States.

Therefore, a new type of institution to combat racial discrimination at a national level has been created in recent years. Specialised public law bodies to combat racism and racial discrimination have been introduced in many States, tasked amongst others to assist victims of discrimination and decide on discrimination cases. Europe has been particularly active in devising international and supranational standards in this field. Both the Council of Europe’s European Commission against Racism and Intolerance (ECRI) and the European Union (EU) introduced a set of standards. ECRI’s General Policy Recommendation N° 2 (complemented by its General Policy Recommendation N° 7 and 14, hereinafter referred to as GPR N° 2, 7 and 14 respectively) contains a number of protected grounds as well as competences to be given to a specialised body. Four Directives, Council Directives 2000/43/EC and 2004/113/EC as well as Directives 2000/43/EC and 2004/113/EC.

7 In public international and European law, “standard” may have several meanings, the most prominent referring to technical specifications developed by international expert bodies. In the context of this thesis, standards mean general soft law principles developed and consistently applied by international bodies or European institutions. Standards are typically used in contrast to binding rules, although standards may also be authoritative. They may indicate goals to be achieved rather than baseline obligations. EU Directives are of binding nature and fall therefore within the remit of “rules”. However, the provisions of importance in this thesis are vague, thus requiring recourse to considerations relating to underlying principles. For the definition of principles, rules and standards see Rüdiger Wolfrum, “General International Law (Principles, Rules, and Standards)”, in Max Planck Encyclopedia of Public International Law, at [http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1408&recno=1&searchType=Quick&query=standard]
rective 2006/54/EC\textsuperscript{11} and 2010/41/EU\textsuperscript{12} of the European Parliament and of the Council request the introduction of an “equality body” in relation to the grounds covered by these Directives. In addition, while Council Directive 2000/78/EC\textsuperscript{13} does not request the establishment of a specialised body, many EU member States have decided to expand the mandate of their specialised body so as to cover the grounds protected by this Directive.\textsuperscript{14}

As this diploma thesis will only deal with European standards relating to specialised bodies to combat racism and racial discrimination, a number of grounds protected in the EU Directives mentioned above will not be taken into account. As regards the competences of the specialised body, reference will only be made to EC Directive 2000/43/2000, as the other Directives concern the mandate of “equality bodies” regarding other protected grounds.

This diploma thesis will attempt to show that the standards on specialised bodies partly overlap and are mutually reinforcing. The interaction between these European standards and their implementation in national legislation will be the central topic of this diploma thesis.\textsuperscript{15} Given the binding effect of EU law on EU member States, the soft-law quality of ECRI’s recommendations and the merely persuasive nature of EU law on non-member States, it is legitimate to ask how and to what extent Austria, Norway and Serbia have implemented the European legal standards regarding the


\textsuperscript{14} The terms specialised body and equality body can be used interchangeably as they refer to the same functionality. However, for the sake of clarity this thesis will primarily use the term “specialised bodies to combat racism and racial discrimination”, as ECRI’s standards cover almost all European States. The term “equality body” will be used only when reference is made uniquely to the Directives.

\textsuperscript{15} Implementation is understood as “the process of putting [international or European] obligations into practice”. Compliance, by contrast, is “the conformity of behaviour of states with a specified legal rule”. Compliance is the desired result of implementation, but does not necessarily require specific implementation measures, for instance if the obligation has direct effect. In the context of this thesis, the main national mode of dealing with obligations and standards is through specific implementation measures and continuous application of such measures. André Nollkaemper, “The Role of National Courts in Inducing Compliance”, in Marise Cremona (ed.), Compliance and the Enforcement of EU Law (Oxford University Press, Oxford, 2012), 157-194, at 160; see also Michael Zürn, “Introduction: Law and compliance at different levels”, in Michael Zürn and Christian Joerges, Law and Governance in Postnational Europe. Compliance beyond the Nation-State (Cambridge University Press, Cambridge, 2005), 1-40, at 8
capacity of specialised bodies to combat racial discrimination in relation to deal with individual cases, i.e. in cases with an identifiable victim. More precisely, how have they implemented the standards regarding the capacity to provide assistance; to apply to courts; to hear complaints; to issue binding or non-binding decisions; and to award compensation? Which human rights impact does the implementation of the European standards have?

This diploma thesis will examine relevant equality models which have led to the introduction of innovative modes of redress in discrimination cases. It will go beyond the classical dichotomy between equality of opportunities and equality of results.

Specialised bodies to combat racism and racial discrimination are not a goal in themselves. States and the international system cannot content themselves with written promises; rather, specialised bodies must be effective. Victims of racial discrimination are always persons; the main aim must be to provide them with effective complaints mechanisms to get access to justice, and thus to make a real difference in people’s lives. Specialised bodies should be “meaningful institutions”\(^\text{16}\).

*Austria* is an interesting example because it has for the most part confined itself to minimum implementation of the Directives, and it will be interesting to examine the reasons and the implications of predominantly informal and non-binding proceedings.

*Norway* has, without being bound by the Directives, introduced a number of interesting competences, including the capacity to make binding decisions and to act as amicus curiae. Norway follows a dualist system, which means that all international instruments need to be transformed into domestic law.\(^\text{17}\)

*Serbia* has, in the framework of the Stabilisation and Association Agreement (SAA) with the European Union and the EU accession process, introduced a new institution which, in law, has a broad variety of competences. However, its functioning is seriously hampered by budgetary constraints and the combination of multiple functions in one body may compromise its impartiality.

All three States have recently introduced new mechanisms (Serbia) or strongly expanded the existing mechanism (Austria and Norway). The choices made in these

\(^{16}\) Kelly, *op.cit.* note 5, 87

\(^{17}\) *Ibid.*, 21
processes also reflect the influence of supra- and international law on national legislators.

2001 and the terrorist attacks on the World Trade Center marked a turning point in the political climate; political discourse hardened, and xenophobia is on the rise. The economic crisis contributed to the exacerbation of perceived and real differences, and to the decline in political support for the fight against racism. As a consequence, a double discourse has gained ground: While legislators continue passing eloquent declarations (and even relatively strong binding legal texts such as the Recast Directive 2006/54/EC in the field of gender discrimination, and other examples), budget cuts and other material or legal barriers (lack of training and awareness; prohibition to collect data) hinder the full deployment of the arsenal in the fight against racism. There is in other words a strong contrast between the structural components – many relatively satisfactory laws are in place – and the process and outcome dimensions: Racism and perceptions of otherness and cultural cleavages are on the rise, and while there is increased recourse to specialised bodies to combat racism and racial discrimination, concrete limitations in terms of resources and independence of specialised bodies must be imputed to the political leaders.

This diploma thesis will primarily look at structural elements, in particular the analysis of the applicable standards and their implementation into national law. However, it would be dissatisfying to completely ignore process and outcome dimensions, as even the most perfect implementation of standards would not make any difference in real life without the adequate realisation of these standards.

LIMITATIONS

In geographical terms, this diploma thesis primarily examines European standards and their implementation in European States. Given the multiple layers of influence and obligations, universal public international law cannot be neglected. However, one of the aims of the thesis is to concentrate on the specifically European developments and the model role of the European standards for subsequent developments at universal level.
This diploma thesis will focus on the capacity of specialised bodies to deal with individual cases, i.e. cases in which there is an identifiable victim. European standards relating to the accessibility of specialised bodies, their relation with the government, their resources, structure (in particular their independence), and their general ability to influence political decisions through human rights impact assessments will only be dealt with in a summary manner. These standards are certainly relevant to the overall topic of the thesis, but their exhaustive analysis would exceed the extent of the thesis. Neither will the diploma thesis deal with structural discrimination, class actions or actio popularis.

In addition, the diploma thesis will only look at the specialised bodies’ capacity to deal with discrimination cases on the following grounds: “race”, colour, language, religion, nationality or national or ethnic origin. However, multiple discrimination combining one or more of these elements with other discrimination grounds will also be included.

It will not be possible to look deeply into the alternative systems for redress in individual cases, in particular into the justice system.

Given the fact that any legislative act and implementation thereof is embedded in a broad societal context, the establishment of causality chains is extremely difficult. Even if a State makes direct reference to ECRI or introduces a specialised body subsequent to the reception of a letter from the European Commission opening infringement proceedings, the choice of a concrete form and concrete competences of a specialised body is most probably the outcome of a larger deliberative process and reflects also domestic concerns and developments. Therefore, the level of “impact” of the Directives and GPR N° 2 is difficult to measure. In this sense, it will be a historian’s or a political scientist’s task to examine the question as to “why” a certain choice has been made.

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18 This is the non-exhaustive enumeration contained in ECRI GPR N° 7, note 8. It is important to note that the grounds covered by the EC Directives diverge from GPR N° 7. Council Directive 2000/78/EC, note 13, prohibits discrimination on the grounds of religion or belief, disability, age or sexual orientation in the fields of employment and occupation. Thus, the three latter grounds will not be taken into account in this paper. Council Directive 2000/43/EC, note 9, prohibits discrimination on the grounds of racial or ethnic origin in all fields, but excludes explicitly differential treatment based on nationality.
This diploma thesis uses, on the one hand, an analysis of the European standards relating to specialised bodies, and on the other hand, a comparison of (legal and factual) measures to implement these standards.

The first part provides a general overview of the legal context in which the European standards relating to specialised bodies are placed. For the second part, the European legal texts have been thoroughly examined and compared so as to establish the European standards relevant for this paper. In particular, ECRI’s monitoring work has been taken into account so as to examine how ECRI applies its GPRs to individual situations. Additional international sources have been international treaties; case-law by the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (ECJ); reports by treaty-based bodies, in particular the Committee on the Elimination of All Forms of Racial Discrimination (CERD); and publications by the European Commission, the European Parliament and ECRI.

For the third part of the diploma thesis, three cases have been selected to illustrate the implementation of the European standards. Structural, process and outcome indicators have been developed for the standards derived from the textual basis. These indicators are focused on the research questions and allow for an analysis of implementation of the standards and for the comparison of the three countries.

Structural indicators form the main part of the analysis; most process and outcome indicators used are events-based data, and some socioeconomic data.

The analysis of the implementation of the European standards in domestic law rely on the national constitutional and ordinary laws; travaux préparatoires; international documents, in particular monitoring reports; national human rights impact assessments; (I)NGO documents; case-law and publications by the specialised bodies; scientific literature; articles from printed and online journals; websites; and newsletters. For the Norwegian and Austrian sources, both original language versions and translations have been taken into account as available; for Serbia, English language documents were the main sources.
Comparison is an enterprise with many pitfalls. Therefore, particular attention is given to neutrality and the need to contextualise legal provisions by placing them in a legal culture.

**PART 1: HUMAN RIGHTS AND THE EUROPEAN CONSTITUTIONAL FOUNDATIONS**

There are several levels of law translating different but complementary concepts of equality which influence European standards on specialised bodies. The 1990s up to the World Conference against Racism held in Durban in 2001 marked a window of opportunity for action to combat racial discrimination in Europe. Anti-racism became political mainstream; it was mentioned in the Vienna Summit Declaration in 1993, leading to the establishment of ECRI, and in the Treaty of Amsterdam in 1997, providing for a general competence of the EU in the field of racial discrimination. This chapter introduces the “European constitutional framework” and the context in which standards to combat racial discrimination, and specifically those designing specialised bodies, were developed. The underlying concepts of equality will be analysed, and the ECRI’s and the EU’s standards will be compared as regards their scope of application, binding force and review mechanisms.

A. **PROHIBITION OF DISCRIMINATION**

To what extent does international human rights law as well as primary EU law constitute a source of and framework for European standards regarding specialised bodies?²⁰

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²⁰ An exhaustive analysis of the prohibition of discrimination and equality concepts in international human rights treaties would exceed the scope of this diploma thesis. However, reference should be made to the following provisions: Article 2 (1), 20 (2) and 26 International Covenant on Civil and Political Rights, 23 March 1976, 999 U.N.T.S. 171 (ICCPR), Article 2 (2) International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3 (ICESCR), Discrimination
The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)\textsuperscript{21} lays down the prohibition of discrimination in the enjoyment of the rights guaranteed in the ECHR on grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (Article 14). This open-ended list of discrimination grounds is repeated in Protocol 12 to the ECHR which provides for a general prohibition of discrimination. Through its almost complete implementation in Europe and its rising importance for the EU legal order, the ECHR “is emerging as an expression of a ‘European public order’”\textsuperscript{22}.

The ECHR is the core human rights document of the Council of Europe. Human rights, democracy and rule of law constitute the three fundamental and interlinked values of the Council of Europe. These overarching principles influence all Council of Europe activity, including standard-setting. Its value-driven approach is reflected in the strengthened framework for the protection of national minorities, the strong attention paid to social rights and social cohesion, and the creation of ECRI.

By contrast, one of the European Economic Community’s (hereinafter referred to as EEC) initial goals was the construction of a single market. Non-discrimination of nationals of member States was a cornerstone of the EEC. It was seen as a necessary element of the achievement of free movement of goods, capital, persons and services\textsuperscript{23} and is now laid down in Article 18 TFEU.

\begin{flushright}

On a European level, relevant regional treaties include the Council of Europe Framework Convention for the Protection of National Minorities, CETS No. 157 and the European Charter for Regional or Minority Languages, CETS No. 148, and Article E Revised Social Charter, CETS No. 163. The concept of “nationality” used by ECRI refers to the European Convention on Nationality, CETS No. 166.


\end{flushright}
Going beyond the mere notion of eliminating economic barriers between nationals of its member States, ever since the Treaty of Rome 1957, the EEC has been competent to legislate regarding gender equality in the field of employment. A number of Directives (Equal Pay Directive\textsuperscript{24}, Equal Treatment Directive\textsuperscript{25}, amongst others) have been passed in the past 40 years. On the basis of the Equal Pay Directive, the ECJ developed its notions of direct and indirect discrimination (see below 2.C.6.a.), and gradually moved from a merely economic angle to a human rights perspective.

In the Treaty of Amsterdam 1997, the competence of the EC in the anti-discrimination field was significantly broadened.\textsuperscript{26} The new Article 13 EC covers “sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” It stipulates that the Council is competent to pass “adequate measures” to combat discrimination on these grounds. Article 13 EC was upheld in the following Treaties of Nice\textsuperscript{27} and Lisbon\textsuperscript{28}; the latter broadens the powers of the European Parliament (EP) by establishing a special legislative procedure and a necessary EP consent regarding these measures. Article 13 EC (now Article 19 TFEU) is the basis of Directives 2000/43/EC and 2000/78/EC. Today, Article 19 TFEU is considered a human rights provision rather than an open market provision.

There is dissent as to whether Article 13 EC (and consequently also Article 19 TFEU) is a competence norm or a substantial norm prohibiting discrimination.\textsuperscript{29} While Article 19 TFEU does not expressly contain a general prohibition of racial discrimination, the extension of the normative content of this article through the European Court of Justice is possible: Like in its Mangold\textsuperscript{30} judgment in relation to age discrimination,

\begin{itemize}
\item \textsuperscript{24} Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L 45, 19 February 1975
\item \textsuperscript{26} Treaty establishing the European Community, OJ C 340 10 November 1997
\item \textsuperscript{27} OJ 2001/C 80/1, 10 March 2001
\item \textsuperscript{28} Now Article 19 TFEU, Treaty on the Functioning of the European Union, OJ C 83/47, 9 May 2008
\item \textsuperscript{29} For the controversy, see Christoph Grabenwarter, “EGV Art. 13 Antidiskriminierungsmaßnahmen (Nizza-Fassung)”, in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds.), Das Recht der Europäischen Union (40th ed., C.H. Beck, Munich, 2009), at 4 et seq.
\item \textsuperscript{30} Case C-144/04 Mangold v Rüdiger Helm, judgment of 22 November 2005, [2005] ECR I-9981
\end{itemize}
the ECJ could establish that the prohibition of racial discrimination is a general principle of Community law.  

The Lisbon Treaty conveys a more comprehensive concept of equality. Article 10 TFEU provides for the mainstreaming of anti-discrimination in all EU policies. Article 6 (3) TEU establishes that the fundamental rights contained in the ECHR and in common constitutional traditions of the Member States constitute general principles of the Union’s law. The Treaties are complemented by the Charter of Fundamental Rights of the European Union (ECFR) which has the rank of primary law. Article 21 ECFR states that

“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.”

Contrary to Article 19 TFEU, Article 21 ECFR contains an open-ended list of discrimination grounds.

European institutions and member States implementing EU law are bound by the ECFR (Article 51 ECFR). Therefore, the ECFR is directly applicable to states implementing and applying the Directives, and individuals may invoke Article 21 ECFR.

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31 See Zahn, op.cit. note 19, 13
32 See the symbolical declarations in the Preamble to the TFEU and in Article 2 TEU.
33 Charter of Fundamental Rights of the European Union, OJ C 364/1
34 Article 6 TEU in the version of the Lisbon Treaty
35 These are often referred to as “suspect grounds” or “status”.
against national authorities. However, it is not part of the EEA Agreement and does not bind EFTA States when implementing EU/EEA law.

The relationship between Article 21 ECFR and Article 19 TFEU (ex-Article 13 EC) is the subject of the explanatory report to the ECFR. Article 21 ECFR is not intended to extend the content of Article 19 TFEU.

B. UBI IUS, IBI REMEDIO: LINKING THE PROHIBITION OF DISCRIMINATION WITH EFFECTIVE REMEDIES

Effective implementation of substantial human rights requires the introduction of remedies at international and national level to counter rights violations. Often, the umbrella term “access to justice” is used to cover related areas such as the right to a fair trial, the right to an effective remedy, access to a court, due process, judicial protection, and redress. The individual right to a remedy is itself a human right. The term “remedy” refers on the one part to an institutional and procedural set-up, and on the other to concrete measures to compensate or prevent human rights violations. In institutional terms, effective national remedies are not limited to courts, but include administrative institutions and National Human Rights Institutions (NHRIs) with quasi-judicial functions. The ECtHR gradually extended the definition of “civil rights” in Article 6 ECHR, so that it now covers a large part of administrative law. Article 47 ECFR has an open wording and thus also covers administrative law. Public international law as well as EU law increasingly regulates the content of remedies, including access to compensation. A number of principles of EU law limit the national procedural autonomy in relation to remedies to enforce EU law. In particular, the principle

38 See, for instance, Articles 2(3) ICCPR, 2 (c) CEDAW, 6 ICERD, 13 ECHR and 47 ECFR
40 See Staberock, op.cit. note 22, para. 28 et seqq.
41 See European Union Agency for Fundamental Rights, “Access”, op.cit. note 37, 17
of effectiveness asks for “national legal systems to provide for a substantive minimum content [of national remedies] that would guarantee the enforcement of European rights in national courts.” The exercise of rights conferred upon individuals by EU law must not be impossible in practice. In the field of equal treatment, the ECT stated that if remedies are limited to monetary compensation, these sanctions must be proportional and dissuasive. In parallel, the principle of equivalence states that national procedural law must provide remedies in case of violation of European rights which are “not less favourable than those relating to similar actions of a domestic nature.”

C. FROM THE PROHIBITION OF DISCRIMINATION TO SPECIALISED BODIES

Where does the idea of “specialised bodies”, designed as “semi-autonomous administrative agencies” established under public law and benefitting of a relative independence, come from? De Witte traces four factors which led to the establishment of “equality bodies” under EU anti-discrimination Directives: First, the 1980s and 1990s marked an increased transformation of the Nordic ombudsman institution into legal systems in the whole of Europe. This was, according to de Witte, due to the growing awareness that a watchdog was needed to address maladministration. Second, the 1993 UN General Assembly Resolution 48/134 calling for the establishment of NHRIs (“Paris Principles”) reflected the understanding that “international human rights require not only international monitoring mechanisms and domestic judicial enforcement, but also [independent] dedicated national institutions.” NHRIs should be equipped with institutional guarantees regarding their independence, resources and competences; however, the capacity to hear complaints and make binding decisions is

42 Schütze, op. cit. note 36, 387; see Case C-312/93, Peterbroeck Van Campenhout SCS & Cie v. Belgian State, judgment of 15 December 1995, [1995] ECR 1-04599
46 de Witte, op. cit. note 45, 57
only optional.\footnote{See Additional principles concerning the status of commissions with quasi-jurisdictional competence, General Assembly Resolution 48/134 of 20 December 1993. The optional competences include: \( (a) \) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality; \( (b) \) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them; \( (c) \) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law; \( (d) \) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.} The Paris Principles bear witness of the marked increase in international standards relating to the quality and competences of national remedies.\footnote{See Christopher McCrudden, “International and European Norms Regarding National Legal Remedies for Racial Inequality”, in Sandra Fredman (ed.), \textit{Discrimination and Human Rights. The Case of Racism}, (Oxford University Press, Oxford, 2001), 251-308, 288 et seq.} Deviating from the traditional approach of leaving the means of implementation of international obligations to the States, independent administrative bodies were seen as a good means of ensuring national implementation of international standards.\footnote{Ibid., 278 et seq.} NHRI’s scope of activities is much broader than that envisaged by ECRI’s GPR N° 2 and the Directives. The latter two introduce bodies who are specifically tasked (and therefore also trained) to deal with discrimination on a number of grounds.\footnote{Even though there are some specialised bodies or equality bodies that also fulfil the function of NHRI (such as the Danish and the British bodies), this is not the case for the Austrian, Norwegian and Serbian bodies. See Margit Ammer, Niall Crowley, Barbara Liegl, Elisabeth Holzleithner, Katrin Wladasch and Kutsal Yesilkagit, “Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC”, Human European Consultancy in partnership with the Ludwig Boltzmann Institute of Human Rights, 2010, 55} It should be noted hat CERD explicitly refers to the Paris Principles in its General Recommendation N° 17 on national institutions to facilitate implementation of ICERD. It is recognised that the Paris Principles may also apply to specialised bodies.\footnote{See Gay Moon, “Discrimination grounds”, in Dagmar Schiek, Lisa Waddington and Mark Bell (eds.), \textit{Cases, Materials and Texts on National, Supranational and International Non-Discrimination Law} (Hart Publishing, Oxford, Portland, 2007), 871-966, at 937} Third, member States increasingly established functionally independent administrative bodies for specific public interest functions, and fourth, EU Directives and regulations required the introduction of independent instances, for instance regarding data protection.\footnote{See de Witte, \textit{op.cit.} note 45, 54 et seq.}
Rights Act of 1964. This idea was then “migrated” to the United Kingdom\(^5\) and on to the Netherlands\(^4\), where similar institutions were set up, albeit with contextualised and adapted structure and competences. In the 1990s, a coalition of NGOs (the partly European Commission-funded Starting Line Group, now ENAR) strongly advocated the introduction of anti-discrimination provisions in European Union primary law, and they succeeded with the introduction of Article 13 EC (now Article 19 TFEU) in the Treaty of Amsterdam in 1997.\(^5\) Also in 1997, ECRI published its soft-law General Policy Recommendation N° 2, which created more awareness of this innovative institution. In the negotiations leading to Directive 2000/43/EC the United Kingdom pushed forward the idea of an equality institution similar to its own Commission on Racial Equality.\(^6\) These joint developments paved the ground for states’ readiness to establish specialised bodies at national level.

According to de Witte, the creation of equality bodies in EU member States constituted “imposed” legal transfer.\(^5\) “However, what has been transferred is not much more than the idea of an equality institution”\(^8\); States were free to go beyond the minimum standards of the Directives and to choose the appropriate structure for the equality body. De Witte finds a “considerable degree of bricolage, meaning that the national political actors were able to re-contextualize the innovative European ideas by wrapping them in layers of existing national practices and adapting them to domestic political preferences.”\(^9\)

The introduction of appropriate national remedies for victims of discrimination and an institutional framework to promote equality were intensely discussed in various preparatory seminars for the Durban World Conference against Racism 2001.\(^6\) At the European Conference against Racism, it was agreed that the establishment of national

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\(^5\) Establishment of the Equality Commission in 1976 through the Race Relations Act 1976
\(^4\) Establishment of the Commission for Equal Treatment in 1994
\(^6\) See Chalmers in Fredman, *op.cit.* note 55, 211
\(^7\) See de Witte, *op.cit.* note 45, 69
\(^8\) Ibid., 69
\(^9\) Ibid., 69
\(^6\) See McCrudden in Fredman, *op.cit.* note 48, 297 et seqq.
specialised bodies to combat racism and intolerance should be suggested at the Durban World Conference against Racism. The recommendations developed at this conference go far beyond Directive 2000/43/EC; in fact, they contain all functions of ECRI GPR N° 2 and make explicit reference to GPR N° 2 which is annexed to the General Conclusions. However, the establishment of specialised bodies is included in the section of policy measures, instead of the section on legal measures to be taken as a follow-up to the Conference.

At the Durban World Conference against Racism, States urged to “establish, strengthen, review and reinforce the effectiveness of independent national human rights institutions” and “other bodies” in the field of racism.

An interesting factor in the process of Europeanisation of the model of specialised bodies is the interaction between national specialised bodies at European level. There is a high degree of exchange between the European and national level: ECRI organises regular seminars for specialised bodies; the Commission organizes meetings; and Equinet, a formal organisation of equality bodies is sponsored by the European Community Programme for Employment and Social Solidarity (2007-2013) provides for a forum for mutual learning and policy formulation. This high degree of vertical and horizontal exchange, which goes beyond the EU member States, contributes to further mainstreaming of structures and practices. In fact, the beneficial impact of mutual exchange was taken into account for the draft of the new Directive 2010/41/EU.

62 See EUROCONF(2000)7 final, note 61, para. 21
63 See EUROCONF(2000)1 Political Declaration adopted by Ministers of Council of Europe member States on Friday 13 October 2000 at the concluding session of the European Conference against Racism, 16 October 2000, 6, at <http://www.coe.int/t/dghl/monitoring/ecri/European_Conference/1-Documents_adopted/Poli
tical%20Declaration.pdf>
65 According to Radaelli, “Europeanisation consists of processes of a) construction, b) diffusion and c) institutionalisation of formal and informal rules, procedures, policy paradigms, styles, ‘ways of doing things’ and shared beliefs and norms which are first defined and consolidated in the EU policy process and then incorporated in the logic of domestic (national and subnational) discourse, political structures and public policies.” Claudio Radaelli, “Europeanisation: Solution or problem?”, in European Integration online Papers, 8 2004, 16
Directive mandates equality bodies to exchange information with corresponding bodies at European level.66

According to McCrudden, the responses legal systems provide to discrimination depend on the concept of equality upheld by the legislator. Remedial structures reflect the respective model of equality:

Through the individual justice model, legislators seek to “secure[…] fairness for the individual”67 by addressing the perpetrator’s wrongdoing and taking account of the sense of grief caused to the victim. Enforcement can be assigned to civil or criminal courts, or to “specialized agencies”68. This individualistic approach can be criticised for not taking into account the group level and underlying structural shortcomings leading to discrimination. By taking the effects of structures on groups into consideration, indirect discrimination can be detected (understood as practices or rules disproportionately affecting certain groups). Equality, rather than discrimination, is the main object of the Group justice model. There is overlap between enforcement of the individual and the group justice model insofar as resolving individual cases also serves the purpose of achieving group justice, and as in practice group considerations are inherent in the dealing with individual cases. An enforcement mechanism specific to the group justice model is the capacity of associations or other bodies to act in reference to cases where there is no concrete victim (actio popularis).69 On a third level, the “equality as participation” model provides for mainstreaming of non-discrimination in all fields of public policy.70

Along similar lines, Fredman outlines four aims of equality: a) the redistributive dimension of equality, in which “the cycle of disadvantage associated with status or out-groups”71 is broken; b) the recognition dimension, which is associated with the concept of dignity; c) the transformative dimension, aiming at “accommodating differ-

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66 See Article 11 (2) Directive 2010/41/EU, note 12
67 McCrudden in Fredman, op.cit. note 48, 253
68 Ibid., 254
69 See McCrudden in Fredman, op.cit. note 48, 254 et seqq.
70 See McCrudden in Fredman, op.cit. note 48, 257 et seqq.
71 Fredman, Law, op.cit. note 23, 25
ence” and leading to structural change; and d) the participative dimension, allowing for inclusion in society.

Both analyses go beyond the concepts of “equality of results” and “equality of opportunities”, presenting concrete aims linked with a complex term. Specialised bodies to combat racism and racial discrimination predominantly execute tasks related to the individual justice model or redistribution and dignity, and the group justice model or transformative dimension. In some limited ways, they are also intended to contribute to achieving equality as participation.

PART 2: EUROPEAN STANDARDS

This part introduces the standards set by ECRI and the Council Directives 2000/43/EC and 2000/78/EC in relation to specialised bodies to combat racism and racial discrimination. First, the General Policy Recommendations and Directives are presented separately. Their evolution and effect on national legal systems is examined. Then, the GPRs and Directives are compared so as to establish whether they are complementary or contradictory. While the functions of specialised bodies constitute the main object of comparison, other elements such as discrimination grounds, fields covered by the standards and burden of proof will also be taken into account. All of these elements have direct impact on the access to an effective remedy for individual victims of discrimination.

A. ECRI’s General Policy Recommendations N° 2, 7 and 14

1. Standards set by a monitoring mechanism

\[72\] Ibid., 25
\[73\] Ibid., 25 et seqq.
ECRI was created by the first Summit of Heads of State and of Government in Vienna (1993). Following the 2000 European Conference against Racism, ECRI was given a formal Statute.\textsuperscript{74}

ECRI is tasked to combat racism, racial discrimination, xenophobia, antisemitism and intolerance in greater Europe.\textsuperscript{75} Contrary to other Council of Europe monitoring mechanisms, ECRI is not a convention-based body. Rather, the material basis for its work is Article 14 ECHR, Additional Protocol 12 which is the result of ECRI’s strong advocacy\textsuperscript{76}, and related ECtHR case-law.\textsuperscript{77}

Its concrete tasks are to review member States’ legislation, policies and other measures to combat racism, xenophobia, antisemitism and intolerance, and their effectiveness; to propose further action at local, national and European level; to formulate General Policy Recommendations to member States; and to study international legal instruments applicable in the matter with a view to their reinforcement where appropriate\textsuperscript{78}.

In the framework of its first task, ECRI conducts regular country visits and publishes country-by-country reports based on a broad variety of sources. These reports contain constructive recommendations addressed to the national authorities. Each country is visited every 4-5 years; however, implementation of three “interim follow-up recommendations” is reviewed two years after publication of the country report. These recommendations are agreed upon with the respective national authorities so as to encourage compliance. ECRI’s 4\textsuperscript{th} monitoring cycle will be completed in 2012\textsuperscript{79}.

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{74}] Committee of Minister Resolution Res(2002)8 on the Statute of the European Commission against Racism and Intolerance (adopted on 13 June 2002)
\item[\textsuperscript{75}] Article 1 Appendix to Res(2002)8, note 74
\item[\textsuperscript{77}] Article 1 Appendix to Res(2002)8, note 74
\item[\textsuperscript{78}] Article 1 Appendix to Res(2002)8, note 74
\item[\textsuperscript{79}] See CRI(2012)23 Annual Report on ECRI’s Activities covering the period from 1 January to 31 December 2011, 2012, 15 et seq., at <http://www.coe.int/t/dghl/monitoring/ecri/activities/Annual_Reports/Annual\%20report\%202011.pdf>
\end{itemize}
\end{footnotesize}
reviews the same set of issues in each country; however, the country-by-country (CBC) reports differ given the variety of issues at stake in the States.\textsuperscript{80}

ECRI publishes General Policy Recommendations (GPRs) on issues of general concern. GPRs are developed on the basis of research and knowledge gained through the country monitoring work, in an inclusive manner. For instance, GPR N° 7 is the product of a broad review of existing international and national instruments and jurisprudence in the field and a large number of consultations with governmental and nongovernmental actors.\textsuperscript{81} They are addressed to all Council of Europe member States\textsuperscript{82}. GPRs are adapted over time so as to reflect societal changes and changes in perception of anti-racism work.\textsuperscript{83} Three GPRs are particularly important in the context of this diploma thesis: GPR N° 2 on Specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level\textsuperscript{84} and GPR N° 7 on National legislation to combat racism and racial discrimination\textsuperscript{85} and GPR N° 14 on combating racism and racial discrimination in employment.\textsuperscript{86}

ECRI’s “solid and positive contribution to the fight against contemporary expressions of racism in Europe is undeniable.”\textsuperscript{87} “Undoubtedly, one of ECRI’s strong points is that it has striven to avoid conflict with other bodies involved in the fight against racism or the protection of human rights in general. On the contrary, ECRI has been at pains to build on what already exists, using a global and multidisciplinary approach.”\textsuperscript{88} ECRI “has carved out a distinct role for itself.”\textsuperscript{89}

\textsuperscript{80} See Hollo, \emph{op.cit.} note 76, 38 et seqq.
\textsuperscript{81} \textit{Ibid.}, 98 et seq.; Gianfranco Cardinale, “The Preparation of ECRI General Policy Recommendation No.7”, in Jan Niessen and Isabelle Chopin (eds.), \textit{The Development of Legal Instruments to Combat Racism in a Diverse Europe} (Martinus Nijhoff Publishers, Leiden, Boston, 2004), 81-93, at 83
\textsuperscript{83} Hence, ECRI General Policy Recommendation N° 13 on Combating anti-Gypsyism and discrimination against Roma adopted on 19 September 2011 replaced ECRI General Policy Recommendation N° 3 on Combating racism and intolerance against Roma/Gypsies adopted on 6 March 1998
\textsuperscript{84} ECRI GPR N°2, note 8
\textsuperscript{85} ECRI GPR N°7, note 8
\textsuperscript{86} ECRI GPR N° 14, note 8
\textsuperscript{87} Walter Schwimmer, “Foreword”, in: Kelly, \emph{op.cit.} note 5, 11
\textsuperscript{88} Kelly, \emph{op.cit.} note 5, 138
\textsuperscript{89} Bell, \textit{Anti-Discrimination Law, op.cit.} note 55, 85
2. Evolving standards going beyond the GPRs?

Generally, ECRI’s standards as set out in its GPRs are non-binding but “authoritative” soft law yardsticks to evaluate national legislations and policies. The soft law quality allows for a great deal of flexibility; however, they are not non-law, but represent a certain degree of converging opinions and commitment on human rights issues which are constantly at flux. Council of Europe member States are obliged to consider ECRI’s recommendations and General Policy Recommendations in good faith. GPRs constitute “implementation standards” (as opposed to the norm standards forming the basis of ECRI’s work, i.e. the ECHR and Additional Protocols).

However, it would be interesting to explore to what extent The GPRs may, through uniform application and conviction of their authority (consuetudo and opinio iuris), become regional customary law. It would also be interesting to examine to what extent ECtHR reference to ECRI’s soft-law standards increases the authority of the latter. In addition, such reference to ECRI’s standards could increase ECRI’s effect on EU law after EU accession to the ECHR. However, the assumption that soft law has become customary international law should be employed with caution. There is a great difference between soft law stemming from expert bodies like ECRI or political bodies composed of government representatives. According to Simma, “the fact that

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92 See Staberock, *op. cit.* note 22, para. 5.

93 See Ammer et al., *op. cit.* note 50, 58.

94 Kicker et al., *op. cit.* note 82, 463.

95 This question is the topic of an on-going research project conducted by Prof. Renate Kicker.

lawyers want something very much and believe that something is very necessary should not lead them to declaring that something is customary international law.”

ECRI’s recommendations in CBC reports are also soft law. By contrast to the GPRs, recommendations are of individual nature and do therefore not aspire to become standards applicable to other than the concrete situation under review. They apply existing standards and may develop them further. Hollo cites a number of examples where ECRI’s individual recommendations are “consistent”, including the need to prohibit indirect discrimination and to take positive measures. Some consider that ECRI has developed a “body of jurisprudence” or “corpus of standards” consisting of both GPRs and recommendations in CBC reports. Hannikainen adds that “ECRI with its general policy recommendations and country reports plays an important role in the development of higher legal standards because many human rights standards promoted by ECRI can in fact be treated as standards with a legal content.” Soft law is considered to have a strong impact in cases where States are prepared to act upon the soft law standards, and where proliferation is avoided.

Both GPRs and country-specific recommendations provide clear guidelines which serve as reference and interpretative framework for the given national rule or policy, to both national and international actors. For instance, the ECtHR (European Court of Human Rights) has, on various occasions, made direct reference to ECRI’s reports and GPRs. This is particularly interesting as the ECtHR’s case-law serves as guideline for the interpretation of the ECHR, which the EU soon will be party to. Already before accession to the ECHR, the rights enshrined in the Convention form part of the

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97 Bruno Simma, lecture held at University of Oslo, 10 September 2012
98 See Hollo, op.cit. note 76, 76 et seqq.
99 Ibid., 74
100 Kelly, op.cit. note 5, 138
102 See Bell, *Anti-Discrimination Law*, op.cit. note 55, 214 et seq.
103 Hollo, op.cit. note 76, 74; Kelly, op.cit. note 5, 138
104 According to Article 6 (2) TEU, the EU is required to accede to the ECHR. This is made possible through new Article 59 (2) ECHR as amended by Protocol 14 to the ECHR. The accession agreement of the EU must be ratified by all Council of Europe member States and the EU itself.
EU’s General Principles of Law protected by the European Court of Justice. In relation to CERD, it is argued that a consistent practice of identical recommendations issued to a large number of States over a longer period of time increases the authority of such recommendations. It would be interesting to investigate to what extent this holds true for a regional monitoring body like ECRI. A clear difference is the fact that CERD is a treaty-based organ (it monitors the implementation of ICERD), whereas the basis for ECRI’s work is primarily the ECHR (see above 2.A.1.).

An interesting question relates to the EU’s and Council of Europe’s different approaches to human rights questions. These different positions are reflected in the ECJ’s and ECtHR’s jurisdictions. The EU, which is composed of States with a relatively high degree of coherence, insists more on streamlined, if not uniform, application of EU law and human rights. The Council of Europe, due to its more diverse membership uniting a wider range of legal cultures, traditions and value sets, leaves a broader margin of appreciation to States and is more hesitant in stating that there is consensus among States regarding a specific question.

B. EC Directives

Directives 2000/43/EC and 2000/78/EC establish a common set of values. Anti-discrimination is seen as necessary to achieve “democratic and tolerant societies”, “equal opportunities for all” and “the full participation of citizens in economic, cultural and social life”. Explicit reference is made to the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cul-

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105 See Bribosia/Rorive, op.cit. note 4, 5
106 Anne Hellum, Diskriminerings- og likestillingsrett, lecture held at University of Oslo, 4 September 2012
107 See this topic Ketscher in Hellum/Ketscher, op.cit. note 1, 52 et seq.
108 See Chalmers in Fredman, op.cit. note 55, 195
109 Recital 12 Directive 2000/43/EC, note 9
110 Recital 9 Directive 2000/78/EC, note 13
111 UN General Assembly Resolution 217A (III), U.N. Doc. A/810 at 71 (1948)
tural Rights (ICESCR), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the International Labour Organisation ILO Convention N° 111.\footnote{112}

In November 1999, the European Commission submitted a proposal package for a set of anti-discrimination Directives and a programme of action to the Council of the European Union\footnote{113}. Broader anti-discrimination legislation should be part of the *acquis communautaire* before new EU member States should be admitted.\footnote{114} It was expected that the adoption of such a package would meet strong resistance from governments and the private sector. However, in early 2000 the right-wing Freedom Party (FPÖ) became part of the government coalition in Austria. This triggered fear of a right-wing surge in governmental power. Governments were quick to consent to innovative and far-reaching obligations for the public and private sector to ban discrimination on a range of grounds, including racial and ethnic origin, religion and belief.\footnote{115}

Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin\footnote{116} was adopted unanimously after an exceptionally quick discussion process on 6 June 2000\footnote{117}; shortly after, on 27 November 2000, the “horizontal”\footnote{118} Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation was adopted, covering amongst others religion and belief. The European Commission proposed a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in 2008.\footnote{119} The

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\item \footnote{112}{Recital 3 Directive 2000/43/EC, note 9, recital 4 Directive 2000/78/EC, note 13}
\item \footnote{114}{See Evelyn Ellis, *EU Anti-Discrimination Law* (Oxford University Press, Oxford, 2005), 211}
\item \footnote{115}{See Bell, *Anti-Discrimination Law*, op.cit. note 55, 113; Niessen/Chopin, op.cit. note 55, 107; Barbara Liegl, Bernhard Perching (sic) and Birgit Weyss, “Combating Religious and Ethnic Discrimination in Employment. From the EU and International Perspective”, European Network Against Racism, 2004, 8, at \texttt{<http://cms.horus.be/files/99935/MediaArchive/pdf/discrim_employ_04_en.pdf>}}
\item \footnote{116}{OJ L 180, 19.7.2000, p. 22}
\item \footnote{118}{Waddington, MJ 1 (1999), 2, cit. in: Grabenwarter, *op.cit.* note 29, 16}
\end{itemize}
Commission aimed at streamlining the protection against discrimination on all grounds contained in Article 13 EC (now Article 19 TFEU). Hence, protection on the grounds contained in Directive 2000/78/EC should be extended to all fields covered by Directive 2000/43/EC. In addition, the Commission Proposal proposed the introduction of an equality body also for these discrimination grounds (Article 12). However, this Directive has not yet been adopted.\textsuperscript{120}

The reason for the development of two separate Directives with different scopes of protection is the lack of political will to ensure extensive protection against discrimination for all discrimination grounds. Article 13 EC (now Article 19 TFEU) requires unanimity in the Council of the European Union; therefore, the two Directives are the product of compromises and a process of watering down.\textsuperscript{121}

While Directive 2000/78/EC is limited to employment, Directive 2000/43/EC provides protection against discrimination in additional fields, such as social protection.\textsuperscript{122} The Commission's argumentation for the broadening of scope is, initially, one linked to economic factors and social cohesion. However, the social perspective quickly shines through: Only full participation in work, education and social security can ensure integration. In addition, protection against discrimination is associated with human rights and dignity.\textsuperscript{123} Directive 2000/43/EC constitutes a step forward in EU anti-discrimination legislation because it detaches protection against discrimination from purely economic considerations.\textsuperscript{124} In recital 3, it refers to the Universal Declaration of Human Rights and a number of international human rights treaties; thereby, it puts the Directive clearly in a human rights, and not uniquely in an economic perspective.\textsuperscript{125} It is therefore consistent that Ellis and Somek place EU anti-discrimination legislation in the field of “social legislation”\textsuperscript{126}.

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\textsuperscript{120} Outstanding issues are amongst others justification for discrimination on the ground of disability, an implementation plan and “legal certainty as a whole”. See Pres/11/471 Press release, 3131\textsuperscript{rd} Council meeting, 1 December 2011, at \url{http://europa.eu/rapid/press-release_PRES-11-471_en.htm?locale=en}

\textsuperscript{121} See Liegl et al., \textit{op.cit.} note 115, 9 et seq.

\textsuperscript{122} See COM(2006) 643 final, note 6, 2 et seqq.

\textsuperscript{123} See COM(1999)566, note 113, 5

\textsuperscript{124} See Ringelheim, \textit{op.cit.} note 117, 17

\textsuperscript{125} See also the identical recital 4 to Directive 2000/78/EC, note 13

\textsuperscript{126} See Ellis, \textit{op.cit.} note 114, 1
EU law has primacy over national law. In addition, the ECJ pronounced itself on the question whether EU law has direct effect on the member States. While this question was quickly resolved in the affirmative regarding primary law and regulations, the question was not obvious regarding Directives – which by definition require implementation in national law. The ECJ explains that Directives have direct effect if a number of conditions are met: non-implementation, belated implementation or incomplete implementation; expiry of the implementation period; and the wording of the directive is determined, meaning that it “imposes clear, complete and precise obligations on Member States, does not lay down any conditions other than precisely defined ones and does not leave the Member States any margin of discretion in the performance of the obligation.”

Another question relates, then, to the horizontal direct effect of Directives: Can a Directive place burdens on individuals and can an individual invoke a Directive in a dispute with another individual? In its Marshall and Faccini Dori judgments, the ECJ ruled that this was not the case. Like all Directives, the Directives providing for Equal Treatment do not have direct horizontal effect. However, in Mangold and Küçükdeveci, the ECJ stated that general principles of EU law do have direct horizontal effect. Both cases relate to age discrimination and Directive 2000/78/EC. According to the Court, “the principle of non-discrimination on grounds of age is a general principle of European Union law in that it constitutes a specific application of the general principle of equal treatment.”

Thus, even if the Directive is not or poorly implemented in national legislation, and even before expiry of the trans-
position period, national courts are obliged to apply the EU principle, which has primacy over national law and also applies in horizontal cases. It would be consistent to extend the horizontal direct effect of the principle of equal treatment also to belief, racial and ethnic origin. General principles of EU law apply to all areas of EU legislation. Thus, arguably, the difference of scope of the two Directives examined here will become less significant: National legislators implementing Directive 2000/43/EC in the field of, for instance, education, will also have to abide by the general principle of EU law established in relation to the discrimination grounds contained in Directive 2000/78/EC. However, the principle of non-discrimination on the ground of age as established by the ECJ does not cover procedural provisions of Directive 2000/78/EC. Therefore, such a principle, if extended to the other discrimination grounds covered by EU legislation, would not cover provisions relating to enforcement, burden of proof, and – in Directive 2000/43/EC – equality bodies.

Non-implementation of Directives through EU Member States is sanctioned through infringement procedures by the European Commission and ultimately leads to ECJ judgments. The Directives are not binding on third countries, nor are they part of the EEA Agreement.

C. COMPARISON OF STANDARDS

GPRs N° 2 and 7 as well as Directive 2000/43/EC require the introduction of a specialised body competent to deal with individual cases. In this section, the standards providing for the scope of specialised bodies’ action will be examined.

Both Directive 2000/78/EC and GPR N° 2 contain minimum standards. States are encouraged to introduce more favourable provisions, but they may not go below the level of protection provided for in the Directives and GPR N° 2. In its GPR N° 7,

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138 Ibid., 306 et seq.

139 Article 6 Directive 2000/43/EC, note 9, Article 8 Directive 2000/78/EC, note 13, para. 5 Explanatory Memorandum to ECRI general policy recommendation N° 7 on national legislation to combat racism and racial discrimination, note 8
ECRI takes note of Directives 2000/43/EC and 2000/78/EC\textsuperscript{140} and situates the GPR as one element “alongside”\textsuperscript{141} other European and international initiatives to combat racism and intolerance.

1. \textit{Territorial scope}

All 47 Council of Europe member States are covered by ECRI’s standards.\textsuperscript{142} Serbia is a Council of Europe member State. When the Council of Europe makes reference to Kosovo, it does so with the note that “[a]ll reference to Kosovo, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo”.

Directives are binding on EU Member States. Due to resistance from EFTA EEA member States, Directive 2000/43/EC and 2000/78/EC are not part of the EEA Agreement.\textsuperscript{143} They are therefore not binding on EFTA States. However, Directives 2002/73/EC, 2004/113/EC, 2006/54/EC and 2010/41/EU\textsuperscript{144}, which all provide for equality bodies, have become part of the EEA Agreement. The Directives are not binding on third countries.

2. \textit{Functions of specialised bodies}

Following the individual justice and the group justice model (see above 1.3.), ECRI’s GPR N° 2 and Directive 2000/43/EC detail specialised bodies with both reactive and

\textsuperscript{140} Recital 11, preamble to GPR N° 7, note 8
\textsuperscript{141} Recital 20, preamble to GPR N° 7, note 8
\textsuperscript{142} Res(2002)8, note 74
\textsuperscript{143} See Ketscher in Hellum/Ketscher, \textit{op.cit.} note 1, 40 et seq. Note that the EC and EU Directives providing for gender equality are part of the EEA Agreement and binding on Norway through the Agreement’s Article 69. See Agreement on the European Economic Area (hereinafter referred to as EEA Agreement), OJ No L 1, 3 January 1994, 3, Annex XVII
\textsuperscript{144} Directive 2010/41/EU, note 12
proactive functions. On the one hand, specialised bodies provide assistance to victims of past discrimination, conduct investigations and decide on complaints. On the other hand, they should conduct surveys, offer advice to policy-makers and evaluate legislative proposals so as to prevent future discrimination. The individual means of redress serve a double goal: That of rectifying a violation, and that of revealing discriminatory practices, structural discrimination and other dysfunctions that could impede the realisation of the overarching goal of equality.

Purely adversarial proceedings are considered to present too high a threshold for discrimination victims, as they fear facing their discriminator. Proceedings before specialised bodies are termed out to present a number of advantages. Solutions can be found at an earlier stage of a conflict, and the two-sided process may have a stronger educational effect on perpetrators. Greater expertise leads to a high quality of decisions, and the greater flexibility of proceedings allows for adaptation to individual constellations.

3. “Assistance to victims” and competence to deal with individual cases

While ECRI contains a comprehensive catalogue of possible functions of specialised bodies directed towards individual victims, Directive 2000/43/EC only contains one vague provision. It will be analysed to what extent these standards overlap.

GPR Nº 2 contains a number of qualifications: It recommends that States “consider carefully the possibility of setting up a specialised body” (emphasis added). “[S]ubject to national circumstances, law and practice”, specialised bodies should contain “as

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145 In this context, the term “function” means the activities or means employed to achieve the purposes attributed the specialised bodies. The author also uses the term “competence” to describe a specialised body’s power to bind itself or others.
146 See Holtmaat, op.cit. note 3, 57; McCrudden in Fredman, op.cit. note 48, 294
147 See on this topic Chalmers in Fredman, op.cit. note 55, 215 et seqq.
148 See Fredman, Law, op.cit. note 23, 294
149 See Liegl et al., op.cit. note 115, 31

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“many as possible” of the enumerated functions\textsuperscript{151} (emphasis added). In its country-by-
country monitoring work, ECRI consistently recommends the establishment of a spe-
cialised body.\textsuperscript{152} It does not consider national “circumstances, law and practice” to
justify failure to introduce a specialised body, or a general human rights monitoring
body, at all.\textsuperscript{153} ECRI’s standards in relation to specialised bodies’ competence to deal
with individual cases have evolved over time. Principle 3 GPR N° 2 (1997) provides
in relation to individual cases that specialised bodies should be able
\begin{itemize}
  \item[d.] to provide aid and assistance to victims, including legal aid, in order to
  secure their rights before institutions and the courts;
  \item[e.] subject to the legal framework of the country concerned, to have re-
course to the courts or other judicial authorities as appropriate if and when
  necessary;
  \item[f.] to hear and consider complaints and petitions concerning specific cases
  and to seek settlements either through amicable conciliation or, within the
  limits prescribed by the law, through binding and enforceable decisions;
  \item[g.] to have appropriate powers to obtain evidence and information in pur-
suance of its functions under f. above.\textsuperscript{154}
\end{itemize}

According to Paragraph 24 GPR N° 7 (2002), specialised bodies should have the fol-
lowing functions:

“[A]ssistance to victims; investigation powers; the right to initiate, and
participate in, court proceedings; monitoring legislation and advice to leg-
islative and executive authorities; awareness-raising of issues of racism

\textsuperscript{151} Article 1, Principle 3 GPR N° 2, note 8

\textsuperscript{152} General caveat as regards individual ECRI recommendations used in the following section: Despite
in-depth research and consultation of various actors, ECRI cannot dispose of exhaustive information. It
does therefore not always cover all critical issues in all states. Even if it disposes of information on
problems, it must sometimes, for the sake of conciseness, limit itself to highlighting the most urgent
issues. Therefore, the numbers of recommendations are not necessarily representative of the prevalence
of particular problems. In addition, recommendations are indicative of a perceived need for change.
ECRI sees itself as an assistant in change, and is therefore cautious to give context-specific recommenda-
tions whose implementation is acceptable and feasible in the given country. Therefore, it should not
necessarily be deducted from recommendations that certain topics are most critical, but that their reso-
lution is most realistic. Certainly, recommendations point to rectifying existing shortcomings; they
provide in no way information as to the number of States in which the situation is deemed satisfactory.

\textsuperscript{153} See Principle 3 GPR N° 2, note 8

\textsuperscript{154} Principle 3 GPR N° 2, note 8
and racial discrimination among society and promotion of policies and practices to ensure equal treatment.”

“Assistance to victims” is seen to cover “provision of general advice to victims and legal assistance, including representation in proceedings before the courts. It also covers assistance in seeking friendly settlement of complaints.” Investigation powers should include the capacity to “request[…] the production for inspection and examination of documents and other elements; seizure of documents and other elements for the purpose of making copies or extracts; and questioning persons.” In addition, the specialised body should be able to “intervene in legal proceedings as an expert.”

ECRI’s GPR N° 7 states that “another body could be entrusted with the adjudication of complaints through legally-binding decisions, within the limits prescribed by the law.” This division of tasks corresponds to the necessity for bodies with adjudicative functions to be perceived as impartial. ECRI’s position is that a first-instance body should be entrusted with tasks related to public authorities’ and employers’ positive duties. The monitoring and enforcement of compliance with positive duties is not considered to require impartiality. It appears therefore clear that in cases where only one single specialised body is being set up – which is in conformity with GPR N° 2, this single body would not be required to make binding decisions.

In its 2012 GPR N° 14 on combating racism and racial discrimination in employment, ECRI recommends that specialised bodies should be empowered “to bring cases before the courts and to intervene in legal proceedings as an expert.” Assistance to victims includes powers “to enable them to pursue their complaints including legal advice, support to take legal action and legal representation.”

By contrast, Article 13 EC Directive 2000/43/EC states:

155 Paragraph 24 GPR N° 7, note 8
156 Para. 51 Explanatory Memorandum to GPR N° 7, note 8; Explanatory Memorandum to GPR N° 14, note 8, 26
157 Para. 52 Explanatory Memorandum to GPR N° 7, note 8
158 Para. 52 Explanatory Memorandum to GPR N° 7, note 8
159 Para. 55 Explanatory Memorandum to GPR N° 7, note 8
160 See Cardinale in Niessen/ Chopin, op.cit. note 81, 92
162 Paragraph 9 GPR N° 14, note 8
163 Explanatory Memorandum to GPR N° 14, note 8, 26
1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.

2. Member States shall ensure that the competences of these bodies include:

- without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,

- conducting independent surveys concerning discrimination,

- publishing independent reports and making recommendations on any issue relating to such discrimination.

No further explanation is given for what “to provide independent assistance” means. Such an open formulation has the advantage of allowing Member States to flexibly design specialised bodies in national law. However, its permissiveness creates the risk of incomplete or minimum implementation. The EU principles of adequacy, effectiveness and equivalence provide guidance as to how Directives must be implemented (see above 2.B.). Hence, the mere “setting up of one or two people in a small office able to send out leaflets to the victims, conduct one or two small surveys and produce an annual report making one or two recommendations on race discrimination” would not be sufficient. So, which competences are required under the Directive?

As the Directives refer to a number of international treaties, these are of particular relevance to gauge the normative content of the terms of the Directives. In addition, other EU anti-discrimination and anti-racism instruments assist interpretation. Both the non-binding travaux préparatoires and ECRI’s soft-law GPRs can be used to interpret Article 13 Directive 2000/43/EC. They contribute “to greater legal certainty

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164 Moon in Schiek et al., op.cit. note 51, 890
165 Holtmaat, op.cit. note 3, 15
Very little information can be obtained from the Commission’s infringement proceedings on the basis of Directive 2000/43/EC. Only two proceedings were initiated in relation to equality bodies (Spain and Malta). Spain failed to establish a specialised body, whereas the Commission criticized the body’s lacking independence in relation to Malta. Infringement proceedings regarding equality bodies established in the field of gender discrimination offer more insight into necessary competences. In an infringement proceeding against Portugal, Italy, Hungary and Lithuania, the Commission was dissatisfied with the “competences of the national equality body”\(^\text{168}\). In relation to Denmark, the Commission expressed “concern as regards the role and powers of the equality body in charge of the promotion of equal treatment between men and women, in particular as regards the rights of victims of discrimination to seek redress before the equality body”\(^\text{169}\).

The following will examine whether ECRI’s standards concretise the Directive or whether they go beyond what is required by EU law. In the latter case, do ECRI’s standards contradict the Directive? The point of departure of the analysis is ECRI’s enumeration of functions in its GPRs. Concretely, this concerns the following functions: Providing legal advice to victims of discrimination (Principle 3 lit d GPR N° 2, Paragraph 24 GPR N° 7); representing discrimination victims in legal proceedings and/or applying to courts and administrative bodies in the specialised body’s own name (Principle 3 lit e GPR N° 2, Paragraph 24 GPR N° 7); receiving complaints (Principle 3 lit f GPR N° 2); conducting investigations in relation to individual cases

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\(^{166}\) Ammer et al., *op.cit.* note 50, 183


(Principle 3 lit g GPR N° 2, Paragraph 24 GPR N° 7); promoting amicable conciliation (Principle 3 lit f GPR N° 2, Paragraph 24 GPR N° 7); and making binding or non-binding decisions (Principle 3 lit f GPR N° 2).

(a) Assistance to victims: Legal advice

ECRI requires that specialised bodies provide “legal aid”\textsuperscript{170} or “legal advice”\textsuperscript{171}. In its 4\textsuperscript{th} monitoring cycle, ECRI issued three recommendations to enable the specialised body to provide legal aid.\textsuperscript{172} The European Commission proposal initially had intended to attribute the function of “receiving and pursuing complaints from individuals [and] commencing investigations or surveys” to equality bodies.\textsuperscript{173} The Commission explained that this included “support to complainants, observation, enquiry, recommendations”\textsuperscript{174}. However, this provision was watered down, and at the next reading of the proposal,\textsuperscript{175} the more general wording “assisting victims of discrimination in pursuing their complaints about discrimination on grounds of racial or ethnic origin, commencing investigations or surveys” was introduced. The Commission explained that equality bodies should have “no judicial or quasi-judicial functions, merely assistance to victims, i.e. consultative functions”\textsuperscript{176}. Assistance is seen to include “providing information and support in pursuing [victims’] complaints”\textsuperscript{177}. According to the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{170} Principle 3 (d) GPR N° 2, note 8
\item \textsuperscript{171} Paragraph 9 GPR N° 14, note 8
\item \textsuperscript{172} CRI(2009)31 Fourth report on Greece (interim follow-up recommendation), 15 November 2009, para. 34; CRI(2010)4 Fourth report on Estonia, 2 March 2010, para. 67; CRI(2012)9 ECRI Conclusions on Norway
\item \textsuperscript{174} Council of the European Union, Interinstitutional File: 99/0253 (CNS), 6435/00, 21/22 February 2000, footnote 26, at \texttt{<http://register.consilium.europa.eu/pdf/en/00/st06/st06435.en00.pdf>}
\item \textsuperscript{175} See Council of the European Union, Interinstitutional File: 99/0253 (CNS), 6942/00, 14 March 2000, 18, at \texttt{<http://register.consilium.europa.eu/pdf/en/00/st06/st06942.en00.pdf>}
\item \textsuperscript{176} See 99/0253 (CNS), 6942/00, note 175, footnote 46
\end{enumerate}
\end{footnotesize}
Fundamental Rights Agency, the minimum requirements regarding “assistance” cover information on how to pursue complaints and legal advice.\textsuperscript{178}

(b) Assistance to victims: Representation in legal proceedings

Directives 2000/43/EC and 2000/78/EC require the introduction of “judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures”, to deal with discrimination cases. Likewise, GPR N° 7 recommends the introduction of “easily accessible judicial and/or administrative proceedings, including conciliation procedures”.\textsuperscript{179}

The law should provide for representation of victims by “associations, organisations or other legal entities, which have […] a legitimate interest in ensuring that the provisions of this Directive are complied with”. This group action is subject to the victim’s consent, which has been criticised as an overly narrow provision.\textsuperscript{180} Associations acting on behalf or in support of a complainant can be private or public law bodies. They are partial; their role is not to mediate between the parties, but to stand on one side before a formal institution (court, administrative body).

It could be inferred from the wording of Article 13 (2) Directive 2000/43/EC that equality bodies should be able to file complaints or represent victims: “[…] without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance in pursuing their complaints[…]” (emphasis added). Their competence would exist alongside other institutions’ representation competences as stipulated in Article 7 (2). However, there is no legal obligation for Member States to confer upon their equality body the power


\textsuperscript{179} Paragraph 10 ECRI GPR N° 7, note 8

\textsuperscript{180} Article 7 (2) Directive 2000/43/EC, note 9, Article 9 (2) Directive 2000/78/EC, note 13

\textsuperscript{181} See Grabenwarter, \textit{op.cit.} note 29, 17 et seqq., Fredman, \textit{Law}, \textit{op.cit.} note 23, 285. Note that Paragraph 25 GPR N° 7, note 8, provides for actio popularis claims brought by associations and other legal entities (“bring civil cases, intervene in administrative proceedings or make criminal complaints”).
to represent victims in legal and/or administrative proceedings.\textsuperscript{182} In fact, it was the Commission’s intention to leave it to the Member States to designate associations, organisations or entities.\textsuperscript{183} The European Commission explains that equality bodies “may” belong to the group of “legal entities” having a legitimate interest to pursue complaints.\textsuperscript{184}

If equality bodies are vested with a competence to file complaints, they are not obliged to act upon every complaint.\textsuperscript{185} Thus, strategic litigation is possible. However, the Directives do not provide for class actions or actio popularis (arg. “[organisations with a legitimate interest] may engage, \textit{either on behalf or in support} of the complainant, with his/her approval, […]”, emphasis added)\textsuperscript{186}. In 2007, the European Parliament recommended “that Member States make use of the best practices of other Member States, such as allowing equality bodies to initiate legal proceedings on behalf of victims or participate as \textit{amicus curiae} in legal proceedings.”\textsuperscript{187} This soft-law statement indicates a preference for the competence to represent victims before ordinary courts.

GPR \textsuperscript{7} and 14 go beyond the Directives. Specialised bodies should be able to “have recourse to the courts or other judicial authorities as appropriate if and when necessary”\textsuperscript{188}, “initiate, and participate in, court proceedings” subject to the victim’s consent\textsuperscript{189} and “intervene in legal proceedings as an expert”\textsuperscript{190}. In ECRI’s 4\textsuperscript{th} monitoring cycle, eight recommendations concerned the right to initiate proceedings, four the

\footnotesize{\textsuperscript{182} See Bjørn Dilou Jacobsen, \textit{Assistance to Victims of Discrimination by Equality Bodies of the EU Member States – a Scandinavian Perspective}. Legal issues arising from combining the function of providing assistance to victims of discrimination with the function of hearing and investigating complaints (DJØF Publishing, Copenhagen, 2010), 85 et seqq.  
\textsuperscript{183} See Adam Tyson, “The Negotiation of the EC Directive on Racial Discrimination”, in Jan Niessen and Isabelle Chopin (eds.), \textit{The Development of Legal Instruments to Combat Racism in a Diverse Europe} (Martinus Nijhoff Publishers, Leiden, Boston, 2004), 111-130, at 124  
\textsuperscript{184} See 99/0253 (CNS), 6942/00, note 175, 18; see also European Union Agency for Fundamental Rights, \textit{“Access”}, op.cit. note 37, 39  
\textsuperscript{186} Article 7 (2) Directive 2000/43/EC, note 9, Article 9 (2) Directive 2000/78/EC, note 13  
\textsuperscript{188} Principle 3 lit e GPR \textsuperscript{7}, note 8  
\textsuperscript{189} Paragraph 24 GPR \textsuperscript{7}; Paragraph 3 (e) GPR \textsuperscript{14}, note 8  
\textsuperscript{190} Paragraph 9 GPR \textsuperscript{7}; Para. 52 Explanatory Memorandum to GPR \textsuperscript{7}, note 8}
competence to participate in proceedings. Only one explicitly recommends that cases should be brought “on behalf of alleged victims”\textsuperscript{191}. It is not clear from the wording of the other recommendations whether actio popularis should be possible. The wording “enable [specialised bodies] to apply to the courts whenever they deem necessary”\textsuperscript{192} indicates a preference for actio popularis: It is specialised bodies’ tasks to promote equality. Therefore, they must be empowered to bring structural discrimination cases with or without identifiable victims in their own name. The capacity to have recourse to courts ranks relatively high on ECRI’s agenda, with four interim follow-up recommendations in this field.\textsuperscript{193}

(c) Assistance to victims: Receiving complaints

Another question is whether “independent assistance to victims” excludes considering complaints. ECRI’s GPRs 2 and 7 provide for functions which require not only independence, but also a position at equidistance to both parties to a case: Hearing and investigating complaints, promoting a friendly settlement, and rendering binding or non-binding decisions. Can assistance, even if offered by a functionally independent body, be compatible with functions requiring guarantees of impartiality?

On the one hand, there is a real danger of compromising the perception of bodies’ independence if they have functions relating to assistance to victims and the promotion of equality, and quasi-judicial functions.\textsuperscript{194} On the other hand, others believe that combination is acceptable as long as the specialised body does not render a binding or non-binding decision.\textsuperscript{195}

Furthermore, the systematic separation between Article 13 and Article 7 (1) Directive 2000/43/EC is no coincidence. Article 7 (1) requires the introduction of (impartial) judicial and/or administrative procedures including conciliation procedures if appro-

\textsuperscript{191} CRI(2012)2 Fourth report on Italy, 21 February 2012, para. 33
\textsuperscript{192} CRI(2010)2 Fourth report on Austria, 2 March 2010, para. 41
\textsuperscript{193} CRI(2009)20 Fourth report on Slovakia, 26 May 2009, para. 31; CRI(2010)2 Austria, note 192, para. 41; CRI(2012)2 Italy, note 191, paras. 42, 38
\textsuperscript{195} See Holtmaat, \textit{op.cit.} note 3, 27
appropriate. It figures under the Directive’s Chapter II (“Remedies and enforcement”), whereas Article 13 forms a separate Chapter III (“Bodies for the promotion of equal treatment”). In the drafting process, the Commission explained that assistance would not imply conferring upon equality bodies “judicial or quasi-judicial functions”\textsuperscript{196}. These considerations could indicate a preference for unilaterally victim-oriented equality bodies.

On the other hand, Directive 2000/43/EC intentionally contains an open wording. Article 7 (1) requires procedures resulting in a binding decision. Conciliation may be introduced in addition to judicial and/or administrative procedures. This points to a broad margin of appreciation regarding the concrete national procedures available to victims of discrimination. National legislators are not precluded from conferring upon their specialised bodies the powers described in Article 7 (1) (administrative procedures, conciliation). The principles of effectiveness and equivalence need to be borne in mind in this regard. Jacobsen argues that the wording of Article 13 Directive 2000/43/EC leaves it to the Member States to decide on the concrete range of competences. It should enable States to uphold their existing systems of specialised bodies, which also included bodies with quasi-judicial functions.\textsuperscript{197} Assistance to victims can also be understood to include hearing complaints, as individual victims have an additional avenue for getting redress in their case.\textsuperscript{198} Moreover, the Commission’s statement intended to underline that the Directive did not oblige Member States to introduce judicial or quasi-judicial functions. Therefore, Member States providing for both functions would be in line with the Directive.

ECRI’s GPRs N° 2 and 7 recommend both victim-oriented and objective complaints proceeding competences. They provide for a solution regarding the (im)partiality problem in relation to quasi-judicial functions. While GPR N° 2 lists unilaterally supportive functions and impartial decision-making functions on an equal footing, GPR N° 7 differentiates between these functions and recommends conferring them upon different bodies (see above 2.C.3.).

Last, the interpretation of assistance to include consideration of complaints is confirmed by practice. A large number of specialised bodies in EU Member States have

\textsuperscript{196} See 99/0253 (CNS), 6942/00, note 175, footnote 46
\textsuperscript{197} See Jacobsen, \textit{op.cit.} note 182, 82
\textsuperscript{198} See Jacobsen, \textit{op.cit.} note 182, 331
this competence. There are no infringement procedures criticizing such functions (see above 2.C.3.).

Thus, there is no contradiction between GPRs N° 2 and 7 and Directive 2000/43/EC. The Directive’s purposeful silence leaves a great deal of flexibility to Member States. The GPRs, on the other hand, offer guidance as to the concrete design of functions attributed to specialised bodies.

(d) Investigating complaints

Directive 2000/43/EC contains no provision on investigatory functions. Thus, Member States are free to choose to implement ECRI’s proposal, which reads: “to have appropriate powers to obtain evidence and information in pursuance of its [complaints review] function”\(^\text{199}\). GPR N° 7 adds that investigation powers should include the capacity to “request[…] the production for inspection and examination of documents and other elements; seizure of documents and other elements for the purpose of making copies or extracts; and questioning persons.”\(^\text{200}\) In most instances, ECRI does not separate reception and investigation of complaints, stressing their interrelatedness.\(^\text{201}\) It recommended 4 States to confer upon specialised bodies the power to hear complaints.\(^\text{202}\) ECRI understands investigatory functions to include research into indirect discrimination\(^\text{203}\) involving statistical data\(^\text{204}\) and the capacity to hear oral testimony\(^\text{205}\).

In cases where discrimination also constitutes a criminal offence, the capacity to impose disclosure of information must be understood restrictively. In these cases, a per-

\(^{199}\) Principle 3 lit g GPR N° 2, note 8
\(^{200}\) Para. 52 Explanatory Memorandum to GPR N° 7, note 8
\(^{203}\) Para. 34 CRI(2010)1 Fourth report on Albania, 2 March 2010, para. 34
\(^{204}\) CRI(2011)19 Third report on Azerbaijan, 31 May 2011, para. 49
\(^{205}\) CRI(2012)25 Fourth report on Denmark, 22 May 2012, para. 44
son is seen to be “charged” in the sense of Article 6 ECHR and the principle against self-incrimination applies.206

(e) Promotion of friendly settlements

If a specialised body is competent to receive – and investigate – complaints, the aim of proceedings could be either an informal or binding friendly settlement achieved by the parties, or a unilateral decision by the specialised body. Both the Directives and ECRI GPR N° 7 provide for reconciliation procedures before judicial and/or administrative bodies.207 Directive 2000/43/EC does not demand that specialised bodies should be able to provide conciliation procedures. GPR N° 2 and 7, to the contrary, do require the introduction of such a competence.208 If the competence to impartially deal with complaints is seen to be compatible with Directive 2000/43/EC, it follows that the proposal of conciliation procedures is also covered by Article 13 Directive 2000/43/EC.

(f) Non-binding or binding decisions

It follows from the design of specialised bodies as impartial institutions that they could be enabled to make decisions on individual rights. Such decisions can be non-binding or binding. In particular in the latter case, specialised bodies act as “quasi-courts”209.

207 Article 7 (1) Directive 2000/43/EC, note 9, Article 9 (1) Directive 2000/78/EC, note 13, leave it to the national legislator to determine whether conciliation procedures would be “appropriate”. GPR N° 7 establishes that the prohibition of discrimination should cover all areas of life, and requires “easily accessible judicial and/or administrative proceedings, including conciliation procedures” for “all victims of discrimination”. In this perspective, GPR N° 7 has higher requirements for formal procedures.
208 Principle 3 lit f GPR N° 2, Paragraph 24 GPR N° 7. Note that Paragraph 3 (f) GPR N° 14 requires the introduction of mediation, conciliation or arbitration mechanisms, without stating whether the specialised body should be able to provide such procedures.
209 See Banulescu-Bogdan/Givens, *op.cit.* note 194, 7; see also Holtmaat, *op.cit.* note 3, 5
GPR N° 2 recommends that specialised bodies be able to make “binding and enforceable decisions” “within the limits prescribed by the law”\(^{210}\). In order to ensure impartiality, such tasks should be conferred on a separate body.\(^{211}\) In its country-by-country work, ECRI has not been consistent regarding the necessity to separate victim-oriented and quasi-judicial functions. In some reports, it recommended to entrust bodies with quasi-judicial functions with the competence to bring complaints to courts.\(^{212}\)

Article 13 Directive 2000/43/EC does not require that equality bodies act as quasi-courts. The question has been raised whether specialised bodies should or could provide the procedures required by Article 7 (1) Directive 2000/43/EC, namely “judicial and/or administrative procedures […] for the enforcement of obligations under this Directive”. The European Commission indicated that equality bodies were not required to have “judicial or quasi-judicial functions”\(^{213}\). It is however agreed that specialised bodies may have such functions. Article 13 Directive 2000/43/EC contains no requirements regarding the structure of specialised bodies, and therefore accepts that they take the form of administrative bodies in the sense of Article 7 (1). The bodies may then also be vested with powers satisfying Article 7 (1). The Fundamental Rights Agency considers that the capacity to make binding decisions is compatible with Article 13 Directive 2000/43/EC.\(^{214}\) Moreover, if a State opts for a specialised body with quasi-judicial functions, it is preferable to empower it to make binding rather than non-binding decisions in order to enhance its effectiveness.\(^{215}\)

ECRI also welcomes specialised bodies’ competence to attribute compensation to victims of racial discrimination.\(^{216}\) It has made one recommendation in this respect.\(^{217}\)

In another case, ECRI recommended the use of sanctions available to specialised bod-

\(^{210}\) Principle 3 lit f GPR N° 2, note 8
\(^{211}\) See para. 55 Explanatory Memorandum to GPR N° 7, note 8; see also CommDH(2011)2 Opinion of the European Commissioner for Human Rights on national structures for promoting equality (2012), 19
\(^{212}\) See CRI(2011)38 Fourth report on Lithuania, 13 September 2011, para. 55; CRI(2009)20 Slovakia, note 182, para. 31
\(^{213}\) See 99/0253 (CNS), 6942/00, note 175, footnote 46
\(^{214}\) See European Union Agency for Fundamental Rights, “Access”, op.cit. note 37, 46; Jacobsen, op.cit. note 37, 46; Jacobsen, op.cit. note 182, 331
\(^{215}\) See CommDH(2011)2, note 211, 15
\(^{216}\) See Kelly, op.cit. note 5, 42
\(^{217}\) CRI(2009)4 Norway, note 161, para. 41
ies. In its GPR N° 14, ECRI clearly distinguishes between paragraph 8 ("Sanctions") and paragraph 9 ("Strengthen powers and role of specialised body"). States should ensure that courts and tribunals have the power to, amongst others, order compensation; punish persistently offending employers through imposing additional fines; or order reinstatement or change. Taking up the wording from Directives 2000/43/EC and 2000/78/EC, sanctions should be effective, proportionate and dissuasive. In addition, “relevant state bodies” should be able to make declarations of non-compliance with anti-discrimination law. This points to a need for clear delimitation of competences between ordinary courts and specialised bodies, but should not be understood as excluding that specialised bodies also award compensation.

It is interesting to note that the subsequent Directives in the field of gender discrimination, which also call for the establishment of equality bodies, maintain the wording of Directive 2000/43/EC. Reflecting a concern for uniformity, alternative suggestions to task the equality bodies to “receive[e] and pursu[e]” or to “examine” complaints were rejected. It can therefore be argued that it was the Council’s explicit intention to provide for an open wording, thus leaving a great deal of flexibility to the Member States.

To conclude, “impartial assistance to victims” contains minimum standards regarding the information and support of victims of discrimination. The vague formulation leaves it to EU Member States to decide whether specialised bodies should be able to submit complaints to courts or administrative bodies. GPR N° 2 and 7 are more precise and cover all areas of activity initially intended to figure in Article 13 Directive 2000/43/EC. Given the Directive’s flexibility, all functions contained in GPR N° 2 and 7 can be subsumed under Article 13. There is thus no contradiction between the standards.

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218 CRI(2011)38 Lithuania, note 212, para. 57
219 Paragraph 8 (a) GPR N° 14, note 8
220 Paragraph 8 GPR N° 14, note 8
221 Paragraph 8 (b) GPR N° 14, note 8
222 Stephanos Stavros, Executive secretary of ECRI, e-mail of 16 November 2012
223 See Jacobsen, op.cit. note 182, 83 et seqq.
224 Ibid., 89
It can be said that the GPR N° 2 is partially strengthened by EC Directive 2000/43/EC in the areas where there is overlap. However, ECRI’s standards may also become diluted by the Directive in the sense that States bound by the Directive confine themselves to minimum implementation of the Directive.

4. Structural elements

Both Article 13 EC Directive 2000/43/EC and Principle 2 of the GPR N° 2 accept that specialised bodies may take different forms and may be part of an organ with a broader competence (e.g. National Human Rights Institution, Ombudsperson etc.). One reason for this is to allow States to “adapt the form to the legal and administrative modus operandi of the country.”\(^{225}\) However, ECRI believes that it is preferable not to double up the duties of existing bodies, but rather to establish a separate independent body which can truly specialise in the field of racial discrimination.\(^{226}\) ECRI has pointed to the risks of “loss of expertise and/or dilution of the message”\(^{227}\). In the same vein, specialised bodies voiced concern as to the possible “downgrading” of the discrimination grounds they had traditionally been mandated to deal with for the benefit of new grounds.\(^{228}\) It appears though that there are a number of arguments to introduce a body tasked with more discrimination grounds than those contained in GPR N° 2, so as to be able to deal with multiple discrimination.\(^{229}\)

\(^{225}\) Marcel Zwamborn, “Equal Treatment Commission of the Netherlands, Specialised bodies”, Presentation made at the ENAR Conference, Berlin, 30 January 2003, p.6
\(^{226}\) See Kelly, op.cit. note 5, 39
GPR N° 2 contains clear provisions concerning representativeness\(^{230}\), independence\(^{231}\), resources\(^{232}\), accountability\(^{233}\), accessibility\(^{234}\) and effectiveness\(^{235}\). Principle 1 (1) GPR N° 2 requires that specialised bodies have a “constitutional or other legislative” basis. Principle 5 (3) GPR N° 2 requires that personal independence of members of specialised bodies should be enshrined in the terms of reference. Unlike GPR N° 2, Directive 2000/43/EC does not give any indications in relation to working procedures or structure. It remains silent regarding independence and accessibility safeguarded by law, as well as sufficient resources. Article 13 Directive 2000/43/EC only provides for independent exercise of functions, not for the independence of the equality bodies themselves. The Commission explained that equality bodies’ independence needed to be “enshrined in legislation”\(^{236}\). In addition, the wording “body or bodies” (article 13 (1) Directive 2000/43/EC) makes it clear that Member States may set up more than one body. The European Parliament recommended “that the Commission carefully monitor the independent functioning of equality bodies, for which purpose it can use as a reference the Principles relating to the Status of National Institutions (‘the Paris Principles’) as adopted by the UN General Assembly in its resolution 48/134 of 20 December 1993, which include principles on the adequate financing of such bodies.”\(^{237}\) The European Union Agency for Fundamental Rights (hereinafter referred to as FRA) examines accessibility and independence of equality bodies.\(^{238}\)

Creating several bodies with competence to deal with only one discrimination ground each may have disadvantages, in particular regarding costs; sharing of knowledge; capacity to deal with structural or multiple discrimination; complexity and lack of visibility.\(^{239}\) However, ECRI is in favour of at least ensuring that a specifically com-

\(^{230}\) Principle 4 GPR N° 2, note 8  
\(^{231}\) Principle 5 (2) GPR N° 2, note 8  
\(^{232}\) Principle 5 (1) GPR N° 2, note 8  
\(^{233}\) Principle 5 (3) GPR N° 2, note 8  
\(^{234}\) Principle 6 GPR N° 2, note 8  
\(^{235}\) Principle 7 GPR N° 2, note 8  
\(^{236}\) See 99/0253 (CNS), 6942/00, note 175, footnote 42  
\(^{237}\) P6_TA(2007)0422, note 187, para. 31  
\(^{238}\) See European Union Agency for Fundamental Rights, RED, note 178, 11 et seq.  
petent section of a global anti-discrimination body is tasked with racial discrimi-

ation.\textsuperscript{240}

5. Personal scope

ECRI’s General Policy Recommendations and country-by-country recommendations as well as the Directives are addressed to the 47 Council of Europe or the 27 EU Member States respectively.

It is necessary to establish who should be the addressees and beneficiaries of national legislation established in accordance with the European standards. This has an impact on the scope of the specialised bodies’ activities.

GPR N° 7 recommends that national legislation to combat racial discrimination should cover all natural and legal persons in the public and private sector, and all fields of life. Specialised bodies should be established in conformity with this broad concept.\textsuperscript{241} Thus, GPR N° 7 recommends that legislation state that all persons may be both beneficiary and obligated party.

Directives 2000/43/EC and 2000/78/EC require that national legislation apply to all persons, in the public and private sector, in the fields mentioned in their respective Article 3 (1). Directive 2000/43/EC covers natural persons and, “where appropriate, and in accordance with their national traditions and practice, protection for legal persons where they suffer discrimination on grounds of the racial or ethnic origin of their members”\textsuperscript{242}.

The common Article 3 (2) of the two Directives explicitly excludes differences of treatment based on nationality from the scope of application. It has been shown that protection of EU citizens against discrimination on the ground of nationality is a prime concern in EU law. However, regarding third-country nationals, it was considered necessary to be able to uphold restrictions in relation to access to the territory and the labour market. Therefore, third-country nationals benefit from the protection

\textsuperscript{240} CRI(2011)36 Annual Report 2010, note 227, 15

\textsuperscript{241} Paragraphs 7, 24 GPR N° 7; see also Paragraph 1 (a) GPR N° 14, note 8

\textsuperscript{242} Recital 16 to Directive 2000/43/EC, note 9
against discrimination on the grounds contained in the Directives. But they cannot base claims regarding i.e. access to the labour market on the Directives. This is one of the areas in which the aforementioned relation between Article 21 ECFR and Article 19 TFEU becomes evident. Article 21 ECFR prohibits discrimination on the ground of nationality, whereas Article 19 TFEU does not cover nationality. Article 21 ECFR cannot be used to extend the scope of Article 10 TFEU (see above 2.B.).

6. Material scope

After having examined the territorial and personal scope of the European standards as well as their provisions relating to the competences and structure of specialised bodies, it is necessary to explore the material scope of the anti-discrimination standards to as to analyse in relation to which situations specialised bodies are competent to act.

(a) Discrimination

Direct and indirect discrimination are central concepts developed initially by the ECJ on the basis of the gender Directives. Directives 2000/43/EC and 2000/78/EC, like ECRI’s GPR N° 7, took up the two concepts. ECRI drew inspiration on both the Directives and the case-law of the ECtHR.

Direct discrimination, in the sense of the Directives, is considered to occur “where one person is treated less favourably than another is, has been or would be treated in a comparable situation […]”. According to GPR N° 7, direct racial discrimination is “any differential treatment [based on the discrimination grounds]”. The Directive does not require actual treatment – in fact, the possibility of less favourable treatment suffices. On the other hand, GPR N° 7 is broader than the Directives in the sense that it covers any “differential” instead of “less favourable” treatment.

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243 See Bell, Anti-Discrimination Law, op.cit. note 55, 77, Fredman, Law, op.cit. note 23, 63
244 See COM(2006) 643 final, note 6, 3; Ringelheim, op.cit. note 117, 21
245 See para. 8 Explanatory Memorandum to GPR N° 7, note 8
246 Common Article 2 (1) Directives 2000/43/EC and 2000/78/EC, notes 9 and 13
247 Paragraph 1 (1) lit b GPR N° 7, note 8
The different standards also leave different room for justification of “differential” or “less favourable” treatment. The Directives state that direct discrimination can only be justified by genuine and determining occupational requirements (Article 4 (1) Directives 2000/43/EC and 2000/78/EC). Article 4 (2) Directive 2000/78/EC adds that religious organisations (“churches or other public or private organisations the ethos of which is based on religion or belief”) may justify differential treatment with genuine occupational requirements related to the nature of the activities. It is not necessary, according to the wording of Article 4 (2), that the occupational requirement is “determining”, thus leaving more leeway to religious organisations. Article 2 (5) Directive 2000/78/EC contains a number of justification grounds for (direct and indirect) discrimination, namely public security, the maintenance of public order, the prevention of criminal offences, the protection of health and the protection of the rights and freedoms of others. GPR N° 7 is narrower, as direct, like indirect discrimination, can be subject to an objective and reasonable justification. In this context, a justification is objective and reasonable if it follows a legitimate aim and is proportional. This broader possibility for justification of direct discrimination is in line with Article 14 ECHR, and is confirmed by the ECtHR’s case law. It is partly a consequence of the wording of GPR N° 7, which on the outset does not refer to the detrimental effect of the treatment (it is worded objectively: “differential treatment”). It is also a result of the fact that GPR N° 7 contains discrimination grounds where more exceptions to the prohibition of direct discrimination appear acceptable (language, nationality).

However, ECRI expects that there are only rare occasions where such an objective and reasonable justification actually applies.

Therefore, less favourable treatment is generally considered to be discriminatory in the Council Directives (with few exceptions), whereas discrimination can be ruled out by a justification test in GPR N° 7. The Directives are characteristic of the view that any direct differential treatment is harmful to a person’s dignity, whereas ECRI’s justification test allows for contextualisation of a situation.

248 Paragraph 1 (1) lit b GPR N° 7, note 8
249 See Ketscher in Hellum/Ketscher, op.cit. note 1, 45
250 See Cardinale in Niesse/ Chopin, op.cit. note 81, 83
251 See Explanatory Memorandum to GPR N° 7 on national legislation to combat racism and racial discrimination para. 8, note 8
252 Fredman, Law, op.cit. note 23, 196 et seqq.
In the terminology of the Directives, indirect discrimination only occurs if “an apparently neutral provision, criterion or practice would put a person at a *particular* disadvantage compared with other persons”\(^{253}\) (emphasis added). For ECRI, indirect discrimination occurs if an apparently neutral factor “cannot be as easily complied with by, or disadvantages” a person.\(^{254}\) Indirect discrimination is not always easy to identify; it relates to results, and a comparator is needed to establish whether a factor affects members of a certain group disproportionately. If no comparator can be found, a recurrent practice targeting one group can also indicate the existence of indirect discrimination.\(^{255}\) The Directives do not require a current comparator. They do not even necessarily require a consistent practice (arg. “would put persons […] at a particular disadvantage”\(^{256}\)). If there is a certain probability that the conduct would put persons sharing a certain status at a particular disadvantage, this conduct constitutes discrimination. In this respect, the ECJ Feryn case\(^ {257}\) is particularly relevant. It concerned a public declaration of an employer that persons of Moroccan origin would not be hired. According to the ECJ, conduct which does not (yet) affect concrete persons can constitute discrimination, if it “dissuades members of certain groups from applying in the first place, hindering their access to the labour market.”\(^ {258}\) This adds a prospective dimension to the concept of indirect discrimination, namely that it is not necessary to wait until discrimination in the sense of Article 2 (2) Directive 2000/43/EC has taken place. The ECJ justifies this stance with a teleological argumentation: Allowing such public announcements would hinder the establishment of a “socially inclusive labour market”\(^ {259}\).

The justification test for indirect discrimination is described similarly in GPR N° 7 and Directives 2000/43/EC: The justification must be objective; it must follow a reasonable (Directives) or legitimate (GPR) aim; and the means employed must be proportional, which in the wording of the Directives is subdivided in appropriateness and

\(^{253}\) See Article 2 Directives 2000/43/EC, 2000/78/EC, notes 9 and 13
\(^{254}\) Paragraph 1 lit c GPR N° 7, note 8
\(^{255}\) See Chalmers in Fredman, *op.cit.* note 55, 212 et seq.; Ringelheim, *op.cit.* note 117, 21
\(^{256}\) Common Article 2 (2) lit b Directives 2000/43/EC, 2000/78/EC, notes 9 and 13
\(^{257}\) Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, judgment of 10 July 2008, OJ C 223, 30 August 2008, 11
\(^{258}\) Fredman, *Law*, *op.cit.* note 23, 286
\(^{259}\) Recital 8 to Directive 2000/43/EC, note 9
necessity. Directive 2000/78/EC provides for additional justification grounds, such as public security and public order.

The ECtHR defined indirect discrimination for the first time in 2007. It extended the proportionality test provided for in Article 14 ECHR and evaluated disproportionate negative effects of measures on certain groups.

For both the Directives and GPR N° 7, intention to discriminate is not a condition. GPR 7 and the Directives prohibit harassment, discrimination by association and incitement or instruction to discriminate. GPR N° 7 also prohibits segregation, announced intention to discriminate, and aiding to discriminate.

(b) Discrimination grounds

Specialised bodies are tasked to combat “racism” and “racial discrimination”. The following will examine the meaning of the vague terms contained in the exhaustive list of discrimination grounds in the Directives as well as in ECRI’s open-ended list.

According to GPR N° 7, discrimination on grounds “such as race, colour, language, religion, nationality or national or ethnic origin” should be prohibited. Directive 2000/43/EC prohibits discrimination on the grounds of “racial or ethnic origin”, and Directive 2000/78/EC covers “religion and belief”.

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260 Common Article 2 (2) Directives 2000/43/EC and 2000/78/EC, notes 9 and 13, Paragraph 1 (c) GPR N° 7, note 8
262 ECtHR, Application N° 57325/00, D.H. and Others v. the Czech Republic, Grand Chamber judgment of 13 November 2007
263 See Fredman, Law, op.cit. note 23, 223 et seq.
264 Paragraph 6 GPR N° 7, note 8; common Article 2 (3) Directives 2000/43/EC, 2000/78/EC, notes 9 and 13
265 Paragraph 6 GPR N° 7, note 8; Case C-303/06 S. Coleman v Attridge Law, Steve Law (Grand Chamber), judgment of 17 July 2008, OJ C 223, 30 August 2008, 6. This case concerned disability, but the argumentation may be extended to the other discrimination grounds contained in Article 19 TFEU. See Herbert Hopf, Klaus Mayr and Julia Eichinger, GlBG-Novelle 2011 (Manz Verlag, Vienna, 2011), 156
266 Paragraph 6 GPR N° 7, note 8; common Article 2 (4) Directives 2000/43/EC, note 9, and 2000/78/EC, note 13
267 Paragraph 6 GPR N° 7, note 8
268 Paragraph 1(b) ECRI GPR N° 7, note 8
Concerning the term “racial and ethnic origin”, there is broad consensus that “races” in a biological sense, implying genetical, physiological or evolutionary differences, do not exist\(^{269}\). However, most international human rights treaties use the term “race”. It is perceived to still be needed to be able to subsume cases of discrimination based on the wrongful belief that races exist.\(^{270}\) ECRI, in its General Policy Recommendation, keeps its distance from the term by refuting the biologist idea of the existence of races. It justifies the inclusion of the term in its list of discrimination grounds by the importance “to ensure that those persons who are generally and erroneously perceived as belonging to “another race” are not excluded from the protection provided for by the legislation.”\(^{271}\) Likewise, Recital 6 Directive 2000/43/EC reads: “The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term "racial origin" in this Directive does not imply an acceptance of such theories.” However, the use of the term is far from going uncriticised: It is considered to contribute to perpetuating categorisations.

The ambiguity of the term “racial origin” leaves the question of the constitutive factors of “race” unclear. It has been admitted that an exhaustive definition of these context-dependent and socially situated terms is a challenging, if not counterproductive enterprise\(^{272}\). In recitals 7, 10 and 11, reference is made to prior measures to combat “racism” and “xenophobia”, two terms which themselves are not defined. EU criminal law provisions contribute to blurring the terminology. The Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law\(^{273}\) does not contain a definition of the terms “racism” and “xenophobia”, but covers race, colour, religion, descent

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\(^{271}\) ECRI GPR N° 7, note 8, footnote 1


\(^{273}\) OJ L 328 , 06/12/2008, 55
or national or ethnic origin. It will therefore be up to the ECJ to delimit the terms “racial and ethnic origin”.

Ellis considers that the connotation of “racial origin” refers to physiological features, while “ethnic origin” concerns “sociological or cultural distinctions.” Howard argues that the term “ethnicity” is employed to underline that “cultural traits are also included,” whereas “race”, despite its being a social construct, relies more heavily on observable differences between people, such as skin colour. “Ethnic origin” is considered extremely vague, where it “can be asserted that it covers religion, language, and other cultural or social traits.”

The ECtHR also had to decide on this terminological question:

“Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.”

This argumentation, if applied to the Directives, would imply that “racial or ethnic origin” in the terminology of Directive 2000/43/EC also covers skin colour. Two arguments, one factual and one legal, support this view: Firstly, skin colour is used as an “indicator of race/racial or ethnic origin.” Secondly, relevant European legal texts associate race with colour. It is true that the legal basis for Directive 2000/43/EC, Article 13EC (now Article 19 TFEU) contains an exhaustive list of discrimination grounds, which does not cover colour. However, Article 21 ECFR does contain both “race” and “colour”, as do Article 14 ECHR, Article 1 Additional Protocol 12 to the

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274 Article 1 (1) (a) 2008/913/JHA Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328, 28 November 2008
275 See Liegl et al., op.cit. note 115, 9
276 Ellis, op.cit. note 114, 30
277 Howard, op.cit. note 272, 11
278 Ibid., 10
280 ECtHR, Applications nos. 55762/00 and 55974/00, Timishev v. Russia, judgment of 13 December 2005, para 55
281 Howard, op.cit. note 272, 27
ECHR, Article 1 ICERD (ratified by most European and all EU member States), and GPR N° 7.

It is interesting to examine whether the same holds true for language. Linguistic difference is one of the main markers to determine a person’s otherness. Article 14 ECHR and Article 26 ICCPR explicitly include language in their open-ended lists of discrimination grounds. It features in the list of protected grounds in GPR N° 7. However, given that neither the ECFR nor Article 13 EC (now Article 19 TFEU) refer to language, Holgersen does not consider language to be covered by Directive 2000/43/EC. Moreover, certain languages would certainly not be associated with ethnicity, in particular sign language.

Apart from features which can be subsumed under “racial and ethnic origin”, GPR N° 7 includes two additional elements in the enumeration of protected grounds: Nationality and religion or belief. Here, significant differences – if not contradictions – between ECRI’s GPRs and the Directives can be noticed.

According to ECRI, differential treatment based on nationality constitutes prohibited racial discrimination subject to a justification test. Contrary to the simple regulatory omission of the term “skin colour”, nationality is explicitly excluded from the scope of Directives 2000/43/EC and 2000/78/EC, and can therefore not be understood to be included in the meaning of “racial or ethnic origin”. There are a number of arguments justifying ECRI’s inclusion of nationality in the list of discrimination grounds. First, the open-ended lists of Article 27 ICCPR and Article 14 ECHR can be understood to include nationality, even though a number of exceptions would be needed in fields where differential treatment of citizens and non-citizens is objectively

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282 See Holgersen in Hellum/Ketscher, op.cit. note 270, 178
283 Ronald Craig, Likesstillings- og diskrimineringsrett, lecture held at University of Oslo, 11 September 2012
284 Article 3 (2)
285 Article 3 (2)
286 See ECtHR, Application N° 17371/90, Gaygusuz v. Austria, judgment of 16 September 1996; Application N° 40892/98, Koua Poirrez v. France, judgment of 30 September 2003; Application N° 58453/00, Niedziecki v. Germany, judgment of 25 October 2005. Note the development of the Court’s jurisprudence. In the first two cases, it considered that only “very weighty reasons” could justify differential treatment. In its last case, it abandoned the strict justification test.
justified. Second, CERD considers that discrimination between foreign nationals cannot be justified.\textsuperscript{287} Religion or belief are not covered by “racial or ethnic origin”, because they are the object of Directive 2000/78/EC – albeit only in the field of employment. Both Directives 2000/43/EC and 2000/78/EC have been developed as part of one package, and it can therefore not be assumed that it was the European legislators’ intention to extend the normative content of Directive 2000/43/EC (which provides for a far greater material scope) to the grounds of religion or belief. This creates a hierarchy of discrimination grounds which is difficult to justify, given the fact that religion and belief are included in Article 13 EC (now Article 19 TFEU) alongside racial and ethnic origin.\textsuperscript{288} However, it must be stated that Article 13 EC (now Article 19 TFEU) puts the Council of the European Union and the European Parliament under no obligation to put in place measures, and even less to create measures which do not differentiate between discrimination grounds.\textsuperscript{289}

It remains for the ECJ to determine what precisely is covered by the notion of “religion and belief”.

\section*{(c) Multiple discrimination}

The question arises whether and how the bodies can deal with cases involving more than one discrimination ground. More precisely, it needs to be clarified whether and to what extent specialised bodies should be able to deal with cases of multiple (additive) and intersectional discrimination involving grounds which are \textit{not} contained in the respective standard.

Multiple discrimination reflects humans’ multi-faceted identities. Multiple or additive discrimination concerns cases in which differential treatment is based on more than

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{287} See Holgersen in Hellum/Ketscher, \textit{op.cit.} note 270, 162 et seq.
  \item \textsuperscript{289} See Grabenwarter, \textit{op.cit.} note 29, 9
\end{itemize}
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one discrimination ground. These grounds add up. Intersectional discrimination is considered to be qualitatively different. Here, the unique combination of discrimination grounds makes a person vulnerable, as the choice of a comparator becomes particularly difficult.\textsuperscript{290} Such a person can be exposed to discrimination from persons she/he shares one element of her/his status with. As Fredman explains, “while white women may be the victim of sex discrimination, they may also be the beneficiaries and even the perpetrators of racism. The relationship of dominance between white ‘madams’ and black ‘maids’ is a well-known example. Conversely, black men may experience racism but be the beneficiaries and perpetrators of sexism.”\textsuperscript{291}

ECRI’s standards increasingly reflect a concern for protection against multiple discrimination. ECRI’s GPR N° 7, which is the basis for specialised bodies’ scope of activities, is an open-ended list (see above 2.C.6.b.). However, the grounds on which a specialised body to combat racism and racial discrimination should be active is, at the first glance, confined to all imaginable discrimination grounds which can be subsumed under “racism” in the sense of Article 1 (1) lit a GPR N° 7. ECRI has expressed concern about multiple discrimination, often involving a gender perspective.\textsuperscript{292} In its employment-related GPR N° 14, ECRI is aware of the multiple forms of discrimination against groups of concern to ECRI including on the basis of age, disability, gender, gender identity or sexual orientation. Thus, ECRI asks Council of Europe member States to introduce legislation against discrimination on more than one ground to provide protection in this respect.\textsuperscript{293}

The situation is even more complex and multi-layered in relation to the Directives. In its recital 14, Directive 2000/43/EC explicitly makes reference to women’s increased vulnerability to multiple discrimination, and calls for cross-sectorial measures to eliminate discrimination based on racial or ethnic origin while upholding the European Union’s goal of equality between men and women (Article 8 TFEU). Recital 3 Di-

\textsuperscript{292} See CRI(2012)23 Annual Report 2011, note 79, 12
\textsuperscript{293} Recital 23, Paragraph 1 (c) GPR N° 14, note 8
Directive 2000/78/EC states that the Community (now: the Union) should promote equality between men and women by implementing the principle of equal treatment. Moreover, Directive 2002/73/EC (now replaced by the recast Directive 2006/54/EC) calls for the establishment of an equality body in the field of gender. The functions of the equality bodies established under the two frameworks could therefore be merged. As regards discrimination on the grounds of religion and belief, age, disability and sexual orientation, it must be borne in mind that Directive 2000/78/EC does not require the establishment of an equality body. Bell finds this difference “particularly difficult to justify”\textsuperscript{294}. There is no EU legislation in relation to other grounds. Like GPRs N\textsuperscript{o} 2 and 7, Directive 2000/43/EC contains minimum standards, and enables member States to exceed the baseline protection provided by the Directive.\textsuperscript{295}

All over Europe, there is a trend towards harmonisation of the national anti-discrimination mechanisms for a number of discrimination grounds: Similar mechanisms apply whether a person is discriminated against on the ground of gender, skin colour, or age. This leads to the creation of “integrated institution[s]”\textsuperscript{296}. Today, there is still no consensus as to whether multiple discrimination should lead to multiple compensation, or whether compensation should be equal regardless of the discrimination ground(s) involved.\textsuperscript{297}

(d) Fields covered

GPR N\textsuperscript{o} 7 provides that States should prohibit discrimination in all areas in relation to public authorities as well as private natural or legal persons both in the private and public sectors. ECRI explicitly mentions employment; membership of professional organisations; education; training; housing; health; social protection; goods and services intended for the public and public places; exercise of economic activity; and public services.\textsuperscript{298} The latter are intended to cover law enforcement border control, the

\textsuperscript{294} Bell, *Anti-Discrimination Law*, op.cit. note 55, 114
\textsuperscript{295} The European Commission favours an approach taking into consideration intersectionality. See COM(2008)420 final, note 177, 9
\textsuperscript{296} Skjeie in Schiek/Chege, *op.cit*. note 229, 306
\textsuperscript{297} See Ketscher in Hellum/Ketscher, *op.cit*. note 1, 50
\textsuperscript{298} Paragraph 7 GPR N\textsuperscript{o} 7, note 8
army and prisons. Both Directives apply a narrower scope: Discrimination on the grounds of racial or ethnic origin is prohibited in the public and private sector in relation to employment (understood broadly and including access to employment, working conditions, dismissal, involvement in a workers’ or employers’ organisation, and vocational training); social protection; social advantages; education; and access to and supply of goods and services available to the public. Directive 2000/78/EC, which prohibits amongst others discrimination on the grounds of religion and belief, is confined to employment.

(e) Burden of proof

A significant change introduced by the Burden of Proof Directive 97/80/EC\textsuperscript{302}, which was taken up by ECRI GPR N° 7 and Directives 2000/43/EC and 2000/78/EC, concerns the rules on the burden of proof in discrimination cases. While it is generally for the complainant to prove her/his allegation, the (identical) European standards provide for a shared burden of proof. The complainant must “establish […] facts from which it may be presumed that there has been direct or indirect discrimination”, and it shall then “be for the respondent to prove that there has been no breach of the principle of equal treatment.”\textsuperscript{303} This rule builds on the understanding that victims of discrimination often lack access to documentation to prove discrimination, whereas the defendant often disposes of such evidence and is in a position to use it to prove that she/he has not violated the principle of equal treatment. The rules on the burden of proof apply in proceedings before courts “and other competent authorities”, which includes specialised bodies. They are considered to be a significant step towards an effective protection against discrimination, even though the new rules pose challenges to the application of the law. More concretely, it is up to the national courts and bodies ap-

\textsuperscript{299} Para. 26 Explanatory Memorandum to GPR N° 7, note 8
\textsuperscript{300} Article 3 (1) Directive 2000/43/EC, note 9
\textsuperscript{301} Article 3 (1) Directive 2000/78/EC, note 13
\textsuperscript{302} Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ L 014, 6
\textsuperscript{303} Article 8 (1) Directive 2000/43/EC, note 9, Article 10 (1) Directive 2000/78/EC, note 13, Paragraph 11 GPR N° 7, note 8
plying the law to establish which level of certainty is required in order to presume that there has been discrimination.  

D. EUROPE AS A PROMOTER OF SPECIALISED ANTI-DISCRIMINATION BODIES IN INTERNATIONAL TREATY BODIES

In the aftermath of the Durban World Conference, UN bodies have been active in identifying areas to follow up on the conclusions of the Durban Declaration. A specific Working Group has been set up by the then Commission on Human Rights. Following an evaluation of gaps in the legal framework, the Working Group recommended that CERD conduct an evaluation of “procedural gaps” in the legal framework to combat racism and racial discrimination, and that the Office of the High Commissioner for Human Rights (OHCHR) select a group of experts to evaluate the “substantive gaps in the existing international instruments”. The experts should focus on the possible elaboration of a new optional protocol to ICERD.

Based on the result of these studies, on 8 December 2006 the UN Human Rights Council established an Ad hoc Committee on the Elaboration of Complementary Standards with the task to define further standards to strengthen the international and national framework for the fight against racism, racial discrimination, xenophobia and related intolerance. These standards should take the form of “either a convention or additional protocol(s)” to ICERD.

One of the Committee’s priorities has been the “Establishment, designation or maintaining of national mechanisms with competences to protect against and prevent all forms and manifestations of racism, racial discrimination, xenophobia and related

305 United Nations Commission on Human Rights resolution 2002/68
306 See A/HRC/4/WG.3/7 Study of the Committee on the Elimination of Racial Discrimination
307 See A/HRC/4/WG.3/6 Study of the Experts
308 See A/HRC/7/WG.3/2 Update on the present work of the Intergovernmental Working Group on the effective implementation of the Durban Declaration and Programme of Action
intolerance”. This topic, proposed by the European Union, has been the object of a number of Ad hoc Committee meetings. At the time of writing, the discussions are on-going and no consensus as to the role of such “national mechanisms” has been reached. In the meetings, the European Union strongly advocated mechanisms with competences similar to those of equality bodies. The focus of these mechanisms should be victim-oriented, and the mechanisms should be effective, representative and independent.

Parallel to this development, the Committee on the Elimination of Racial Discrimination published its General Recommendation N° 33, in which it recommended that states “[c]onsider establishing or strengthening national monitoring and evaluation mechanisms to ensure that all appropriate steps are taken to follow up on the concluding observations and general recommendations of the Committee.”

The UN Convention on the Rights of Persons with Disabilities (UNCRPD), the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), CEDAW and ICERD require the establishment of national bodies to monitor the implementation of the international obligations within member States, and to report to the respective treaty body. For instance, UNCRPD required the introduction of “independent mechanisms” to “promote, protect and monitor” the implementation of the UNCRPD. States should “take into account” the Paris Principles when establishing such bodies. No reference is made to specialised bodies established under the EU Directives or ECRI GRP N° 2. However, several state parties decided to mandate their equality body established under


312 CERD General Recommendation N° 33, para. I lit. k


314 Article 33(2) UNCRPD, note 313
Directive 2000/43/EC to fulfil the tasks of a national mechanism in the sense of Article 33 (2) UNCRPD\textsuperscript{315}. The European Union ratified the Convention on 23 December 2010.\textsuperscript{316}

**PART 3: IMPLEMENTATION OF THE STANDARDS IN AUSTRIA, NORWAY AND SERBIA**

This section covers implementation by Austria, Norway and Serbia of the European standards and places the national solutions in a broader European comparative perspective. It will be demonstrated that implementation required adaptation of administrative, civil and civil procedure law in these three States. They found different solutions to ensure that the functions required by the European standards are in place in national law. According to their legal culture and style as well as other (political, social and economic) factors they emphasise different functions. Comparison should always focus on functionality.

The Austrian and Serbian legal systems are seen to belong to the Germanic family of law, which is characterised by a high level of abstraction and relatively similar legal institutions. Norway belongs to the more pragmatic Nordic sub-system, where custom and reasonableness are predominant. There is a greater focus on unwritten rules. The *travaux préparatoires*, as well as practice and considerations of equity constitute fundamental legal sources to gauge the normative content of a law.\textsuperscript{317}

A. STATES’ INTERNATIONAL OBLIGATIONS

In order to examine the mode and result of implementation of European standards in Austria, Norway and Serbia, it is first necessary to examine the impact of the Europe-


\textsuperscript{316} See Chart of Ratifications, at <http://www.un.org/disabilities/countries.asp?navid=12&pid=166>

an standards on the national legal systems. All three States are party to the relevant international human rights treaties. They are party to the ICCPR; the ICESCR; the ICERD; the ILO Convention N° 111; the ECHR; and the revised European Social Charter. Austria and Serbia have ratified the UNCRPD; Norway is due to ratify the Convention by 1 July 2013. Norway and Serbia, but not Austria, have ratified the United Nations Educational, Scientific and Cultural Organization’s Convention against Discrimination in Education.

1. All States are covered by ECRI’s General Policy Recommendations

ECRI’s non-binding country-by-country recommendations and General Policy Recommendations are addressed to the governments of Council of Europe member States. Austria, Norway and Serbia are members of the Council of Europe and therefore covered by ECRI’s standards.

2. EC Directives

In 1992, Norway and Austria signed the EEA Agreement. In the Austrian referendum on the federal constitutional law empowering the constitutional organs to conclude a state treaty on Austria’s accession to European Union on 12 June 1994, 66,58% of

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voters voted in support of accession.\textsuperscript{321} Austria became member of the European Union on 1 January 1995.\textsuperscript{322} Norway refused EU accession by means of a referendum in 1994.\textsuperscript{323}

Austria is bound by the EC Directives (see above 2.B.). Infringement proceedings were initiated against Austria due to non-implementation of Directives 2000/43/EC and/or 2000/78/EC. In 2004, the ECJ concluded that Austria had violated its treaty obligations by not implementing the Directive.\textsuperscript{324} Additional infringement proceedings were closed after Austria included in its Equal Treatment Act adequate provisions on compensation in discrimination cases.\textsuperscript{325}

The impact of the Directives on Norway and Serbia merits some attention.

Norway follows a dualist system, which means that all international instruments (including the EEA Agreement) need to be transformed into domestic law.\textsuperscript{326} Ketscher points to the current shift in perspective, leading to a situation where incorporation no longer is necessary to establish an international treaty’s binding effect.\textsuperscript{327} The EEA Agreement has been transformed into Norwegian law and has priority over other ordinary laws.\textsuperscript{328} Through the EEA Agreement, “Norway is in practice bound to adopt

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\textsuperscript{322} Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Kingdom of Norway, the Republic of Austria, the Republic of Finland, the Kingdom of Sweden, concerning the accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union, OJ 94/C 241/07

\textsuperscript{323} See Statistisk sentralbyrå, “EF/EU-avstemningene. Resultatet av avstemningen”, at <http://statbank.ssb.no/statistikkbanken/Default_FR.asp?PXSid=0&nv=true&PLanguage=0&tilside=s&selecttab=overblikk&KortnavnWeb=euvalg>

\textsuperscript{324} C-335/04, not published in the OJ; See Grabenwarter, \textit{op.cit.} note 29, 16


\textsuperscript{326} See Kelly, \textit{op.cit.} note 5, 21

\textsuperscript{327} See Ketscher in Hellum/Ketscher, \textit{op.cit.} note 1, 37 et seq.

\textsuperscript{328} See §§ 1 and 2 Law on the implementation in Norwegian law of the main part of the Agreement on the European Economic Area, LOV 1992-11-27 nr. 109
EU policies and rules on a broad range of issues.\textsuperscript{329} In cases of contradictions between EEA Directives and Norwegian law, Norway is obliged to ensure the precedence of the formers.\textsuperscript{330} This is not the case for the equality Directives concerning discrimination on other grounds than gender.\textsuperscript{331} Due to resistance from the other EFTA EEA member States, Directive 2000/43/EC and 2000/78/EC are not part of the EEA Agreement.\textsuperscript{332} However, “the Norwegian legislator decided unilaterally to abide by the Directives.”\textsuperscript{333} Even though the Norwegian Equal Treatment Law is only “inspired by the Directives”,\textsuperscript{334} the Norwegian Supreme Court refers to the ECJ case law on these Directives and interprets the Equal Treatment Law as if it were the result of a transposition of the Directives.\textsuperscript{335} According to Holgersen, the Norwegian Discrimination Act is “meant to implement the Racial Discrimination Directive”\textsuperscript{336}.

Due to Norway’s dualist system, the national law incorporating an international treaty may collide with the evolving normative content of the international norm through dynamic interpretation.\textsuperscript{337} A growing challenge for the interpretation of Norwegian implementation measures is the fact that the EEA Agreement and the TEU and TFEU are drifting apart. In 1992, large parts of the EEA Agreement and the then EC were identical. The Treaties have evolved since, whereas the wording of the EEA Agreement remained unchanged. Even literally identical provisions have now a new mean-


\textsuperscript{331} The gender-related Directives are binding for Norway through Article 69, 70 EEA Agreement. This means that interpretation of the anti-discrimination laws insofar as they implement EEA Directives may only to a lesser degree rely on the travaux préparatoires.

\textsuperscript{332} See Ketscher in Hellum/Ketscher, \textit{op.cit.} note 1, 40 et seq. Note that the EC and EU Directives providing for gender equality are part of the EEA Agreement and binding on Norway through the Agreement’s Article 69. See EEA Agreement Annex XVII


\textsuperscript{334} NOU 2012: 2 Norwegian, note 333, 496 et seq.

\textsuperscript{335} \textit{Ibid.}

\textsuperscript{336} “er ment å implementere rasediskrimineringsdirektivet”. Holgersen in Hellum/Ketscher, \textit{op.cit.} note 270, 159

\textsuperscript{337} See Sejersted et al., \textit{op cit.} note 330, 114 et seq.
ing in EU law, for instance if they have to be read in the light of the ECFR. The EFTA Court has rejected the suggestion to use the EC by analogy to interpret the EEA Agreement.\textsuperscript{338}

“Theory’s form of association with the EU has not been a model for others.”\textsuperscript{339} At the 2003 Council of Thessaloniki, it was established that the EU should conclude European Partnerships with Western Balkan countries, “as a means to materialise the European perspective”\textsuperscript{340} of these countries. In January 2006, a European Partnership was adopted with Serbia including Kosovo under UNSCR 1244.\textsuperscript{341} Following Kosovo’s declaration of independence on 17 February 2008, the Council repealed Decision 2006/56/EC; however, the European Partnership still includes Kosovo. The implementation of the European Partnership is reviewed in the Commission’s Progress reports.\textsuperscript{342}

On 29 April 2008, the Stabilisation and Association Agreement (SAA) between the EU member States and Serbia was signed. When Serbia applied for EU membership in December 2009\textsuperscript{343}, two parallel processes began to unfold: In Summer 2010, the EU member States decided to submit the SAA to their national parliaments for ratification; at the same time, the European Commission was asked to prepare an opinion on Serbia’s progress in meeting the Copenhagen criteria and in implementing the \textit{acquis communautaire}.\textsuperscript{344}

In case of EU accession, Serbia would be required to implement the entire \textit{acquis} in its internal legal order. All EU primary and secondary law would become binding upon Serbia. The 1993 Copenhagen criteria for EU membership include the corner-

\textsuperscript{338} Case E-1/02 \textit{EFTA Surveillance Authority v Norway}, 24.01.2003, [2003] EFTA Court Report, 1

\textsuperscript{339} NOU 2012:2 English, note 329, 8


\textsuperscript{342} Article 2 Council Decision 2008/213/EC, note 340


\textsuperscript{344} See Council conclusions on the Western Balkans, 3023rd Foreign Affairs Council meeting, Luxembourg, 14 June 2010, 2
stones rule of law, respect for human rights, and the protection of national minorities. A precondition for accession to the EU is the abidance by these standards.

However, also the SAA obliges Serbia to gradually harmonise its legal order with European Union law. The Law on the Prohibition of Discrimination is meant to comply with the EU anti-discrimination Directives.  

In its 2011 Opinion, the European Commission recommends to grant Serbia the status as candidate country, because it has made significant and satisfactory progress. At the time of writing, no decision has been taken in this respect.

The recent establishment of specialised bodies in the anti-discrimination field cannot be explained by the binding force of the Directives alone. First, almost all European States have introduced or strengthened anti-discrimination institutions in the past 15 years. Many of these States were not bound by the Directives, and were under no immediate political pressure from the EU to do so. Second, almost all States, EU members or not, have conferred upon these bodies powers which go beyond the minimum standards of the Directives. This reflects to a certain extent the understanding that specialised bodies need to have more comprehensive powers in order to be effective, which is also underlined in ECRI’s GPR N° 2. Third, EU member States and non-members alike receive continuous input from ECRI as regards competences, structure and functions, whereas the only guidelines provided for by the EU is the (rather alienating) result of infringement proceedings. ECRI provides a framework for mutual learning, whereas the EU pursues a top-down approach, mixed with the financing of Equinet as a forum for exchange between European specialised bodies.


\[347\] See statement by Stephanos Stavros, note 150, 17
B. NATIONAL LEGAL FRAMEWORK

1. Legal basis

(a) Constitutional basis

Austria has a number of constitutional provisions prohibiting discrimination: Articles 2 Basic State Law\(^{348}\), 7 Federal Constitutional Law\(^{349}\) containing a general prohibition of discrimination of nationals; Articles 66 and 67 Treaty of St Germain of 1919\(^{350}\) providing for equality of Austrian citizens; and Articles 6 and 7 Treaty of Vienna of 1955\(^{351}\). Incorporating Article 1 ICERD, Article 1 Federal Constitutional Law on Racial Discrimination\(^{352}\) provides for a general prohibition of discrimination applying to non-nationals. In addition, the ECHR\(^{353}\) with its Article 14 has constitutional rank. These provisions have no horizontal effect.\(^{354}\) However, they bind the legislator and the executive as well as collective agreements.\(^{355}\) ECRI noted the differences in scope of the various constitutional provisions and recommended the introduction of one unambiguous prohibition of discrimination covering also discrimination based on nationality.\(^{356}\)

Austria is a federal state. Therefore, the competence to pass legislation to implement the Directives is divided between the federal state and the Länder. The federal state is allocated the competence to legislate in the fields of civil law\(^{357}\), matters pertaining to

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\(^{348}\) Basic State Law, Staatsgrundgesetz, Official Gazette, RGBl. Nr. 142/1867, last amended by BGBl. Nr. 684/1988


\(^{350}\) Treaty of St Germain, Official Gazette StGBl 1920/303

\(^{351}\) Treaty of Vienna, Federal Law Gazette BGBl 1955/152, last amended by BGBl I 2008/2


\(^{353}\) European Convention for Human Rights, BGBl 1958/210 idF BGBl III 2010/47

\(^{354}\) See Theo Öhlinger, *Verfassungsrecht* (8th ed., facultas.wuv, Vienna, 2009), 360

\(^{355}\) See Michaela Windisch-Graetz, “Vor § 16”, in Robert Rebhahn (ed.), *Kommentar zum Gleichbehandlungsgesetz GIBG und GBK-GAW-G* (Springer, Vienna, 2005), 414-422, at 419

\(^{356}\) CRI(2010)2 Austria, note 192, para. 12

\(^{357}\) Article 10 (1) 6 Federal Constitutional Law, note 349
trade and industry\textsuperscript{358}, labour and social law\textsuperscript{359}, and health law\textsuperscript{360}. The federal state passes legislation as regards the principles, whereas the Länder pass implementing laws, in the fields of social welfare\textsuperscript{361} and employment in agriculture and forestry\textsuperscript{362}. In education, the legislative competence is partly incumbent on the Federation, partly it is shared or incumbent on the Länder\textsuperscript{363}.

In Norway, there is no constitutional prohibition of discrimination, which has been criticised by ECRI.\textsuperscript{364} The Constitution\textsuperscript{365} only contains Articles 2 and 110c which oblige the Constitution and the State’s authorities to respect human rights; more detailed regulation shall take the form of ordinary laws. The ECHR, ICCPR and ICESCR, CEDAW and the United Nations Convention on the Rights of the Child have been incorporated into Norwegian law. They have precedence over ordinary law.\textsuperscript{366} ICERD, on the other hand, has only been incorporated in the ordinary Discrimination Act.

The Serbian Constitution prohibits “[a]ll direct or indirect discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability” (Article 21).\textsuperscript{367} Additional articles promoting equality between citizens (Article 1), women and men (Article 15) and prohibiting discrimination against members of national minorities (Article 76) should be mentioned.

(b) Anti-discrimination legislation

Austria drafted the Equal Treatment Act\textsuperscript{368} and the Equal Treatment Commission and

\textsuperscript{358} Article 10 (1) 8 leg.cit., note 349
\textsuperscript{359} Article 10 (1) 11 leg.cit., note 349
\textsuperscript{360} Article 10 (1) 12 leg.cit., note 349
\textsuperscript{361} Article 12 (1) 1 leg.cit., note 349
\textsuperscript{362} Article 12 (1) 6 leg.cit., note 349
\textsuperscript{363} Article 14 leg.cit., note 349
\textsuperscript{364} CRI(2009)4 Norway, note 161, para. 26
\textsuperscript{365} Constitution of the Kingdom of Norway, Kongeriget Norges Grundlov, LOV 1814-05-17
\textsuperscript{366} See §§ 2 and 3 Human Rights Act, Lov om styrking av menneskerettighetenes stilling I norsk rett, LOV 1999-05-21 nr. 30
\textsuperscript{368} BGBl. I Nr. 66/2004, last amended by BGBl. I Nr. 7/2011
the Office of the Equal Treatment Ombudspersons Act in parallel. The Equal Treatment Act upholds the division of discrimination grounds in EU law. The successive amendments of the Equal Treatment Act strictly kept to the minimum requirements contained in EC and EU Directives and resulted in a complex structure within the Equal Treatment Act. Discrimination on the ground of handicap is dealt with in a separate law. Discrimination in relation to public employment forms the object of the Federal Equal Treatment Act. The Länder have each introduced anti-discrimination laws providing protection against discrimination occurring during the exercise of Länder’s sovereign and private activities. In addition, they have passed laws to protect victims of discrimination in public employment with the Land.


An illustrative example is the failure to provide for equal protection on all discrimination grounds in the course of the amendment of the Austrian Equal Treatment Act in 2009. The initial ministerial proposal provided for a relative broadening of the protection against discrimination on the grounds of religion and belief, age, and sexual orientation. However, this extension was dropped in the course of drafting the amendment with the argument that it would be wiser to see whether the Commission proposal 2008/426 final would be adopted. See Ministerial bill 179/ME XXIV. GP – Ministerialentwurf – Begutachtungsentwurf Erläuterungen, 1, 8; Government bill, 938 BlgNR XXIV. GP - Regierungsvorlage – Erläuterungen: Bundesgesetz, mit dem das Gleichbehandlungsgesetz, das Gesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft, das Behinderteneinstellungsgesetz und das Bundes-Behindertengleichstellungsgesetz geändert werden, 1047 der Beilagen zu den Stenographischen Protokollen des Nationalrates XXIV. GP

Part I deals with equal treatment of women and men in the field of employment. Part II concerns equal treatment in the field of employment irrespective of ethnic belonging, religion or belief, age or sexual orientation. Part III deals with equal treatment irrespective of gender or ethnic belonging in other fields, which are confined to the areas explicitly mentioned in Directive 2000/43/EC and the Recast Directive.


total, there are around 50 federal and Länder laws dealing with discrimination.\(^{375}\) This fragmentation of protection measures and discrimination grounds has been strongly criticised.\(^{376}\) It has also been considered unconstitutional, since there appears to be no objective reason for distinguishing between the discrimination grounds.\(^{377}\)

According to ECRI, the complexity of the Austrian legislation “cannot be explained by the country’s federal structure alone and […] is liable not only to alienate the public but also to undermine its effectiveness.”\(^{378}\) Therefore, ECRI recommended a simplification and harmonisation of the legislation.\(^{379}\)

In Norway, discrimination is the object of a number of laws.\(^{380}\) The Norwegian Discrimination Act\(^{381}\) entered into force in 2005. It deals with discrimination on the grounds of ethnicity, national origin, descent, colour, language, religion or belief. The Equality Act\(^{382}\) deals with discrimination on the ground of gender. Several additional regulations can be found in the Law on Labour Conditions\(^{383}\), the Law on Discrimination and Accessibility\(^{384}\) and laws relating to housing. The Discrimination Act covers the private and public sector, including police and border control.

“The Republic of Serbia quite hastily ratified numerous international conventions, wanting to demonstrate its orientation to the principle of equality”\(^{385}\), without having national laws to implement the international obligations. One of the short-term priori-

\(^{377}\) Abweichende persönliche Stellungnahme gemäß § 42 Abs. 5 GOG der Abgeordneten Mag. Brigid Weinzinger und Mag. Terezija Stoïsits, 499 der Beilagen XXII. GP - Ausschussbericht NR - Abw. pers. Stellungnahme, 3
\(^{378}\) CRI(2010)2 Austria, note 192, para. 39
\(^{379}\) Ibid., para. 40
\(^{380}\) See Holgersen in Hellum/Ketscher, op.cit. note 270, 155 et seqq.
\(^{381}\) Discrimination Act, Lov om forbud mot diskriminering på grunn av etnisitet, religion mv., LOV 2005-06-03 nr. 33
\(^{382}\) Equality Act, Lov om likestilling mellom kjønnene, LOV 1978-06-09 nr. 45
\(^{383}\) Law on Labour Conditions, Lov om arbeidsmiljø, arbeidstid og stillingsvern, LOV 2005-06-17 nr. 62
\(^{384}\) Law on Discrimination and Accessibility, Lov om forbud mot diskriminering på grunn av nedsatt funksjonsevne, LOV 2008-06-20 nr. 42
\(^{385}\) CPE, Annual Report 2010, note 345, 7
ties for Serbia was to “[a]dopt comprehensive anti-discrimination legislation and ensure appropriate institutional support for victims.” The 2009 Law on the Prohibition of Discrimination was considered to be the fulfilment of Serbia’s obligations “taken with the ratification of the relevant international treaties and standards for stabilisation and accession to the European Union.” Implementation of the anti-discrimination legislation constituted a medium-term priority. Anti-discrimination policy remains one of the main sector objectives for EU support in 2011-2013.

Serbia has introduced and strengthened a number of laws prohibiting discrimination: Law on prohibition of discrimination (2009), Law on gender equality (2009), Law on protecting rights and freedoms of national minorities (2002), Law on employment (2005), and the Law on churches and religious communities (2006).

The following will only deal with anti-discrimination provisions contained in the most relevant and revealing national laws: The Austrian Equal Treatment Act, the Norwegian Discrimination Act and the Serbian Law on the Prohibition of Discrimination.

(c) Legislation regarding specialised bodies

Like the vast majority of European States, all three States laid down the terms of reference of their institutions in ordinary law, thus satisfying ECRI’s and the Directives’ requirement in this respect.

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387 CPE, Annual Report 2010, note 345, 11
390 Official Gazette of the Republic of Serbia, No. 22/2009
391 Official Gazette of the Republic of Serbia, No. 104/09
393 Official Gazette of the Republic of Serbia, nos. 24/05 and 54/09
394 Official Gazette of the Republic of Serbia, No. 36/06
395 Reference will be made to part II and III of the Act.
396 An exception is, for instance, Monaco. See CRI(2011)3 Fourth report on Monaco, 8 February 2011, para. 51; see also Ammer et al., op.cit. note 50, 59
The relevant laws referred to are the Austrian Office of the Equal Treatment Ombudspersons and Equal Treatment Commission Act\textsuperscript{397}; the Norwegian Equal Treatment and Discrimination Ombud and the Equal Treatment and Discrimination Tribunal Act\textsuperscript{398}; and the Serbian Law on the Prohibition of Discrimination\textsuperscript{399}. Thus, Austria and Norway have separate laws establishing their specialised bodies, whereas the Serbian specialised body was created by the anti-discrimination law. In Austria, it was hoped to reach agreement on providing a constitutional basis for the Office of the Ombudspersons, which required the drafting of a separate law in addition to the Equal Treatment Act. In Norway, it was considered preferable to lay down a separate law for the specialised bodies so as to prevent the impression that one of the laws the specialised bodies apply has precedence over the others.\textsuperscript{400}

2. Structure

(a) Number of bodies and relation between bodies

In most European States, new specialised bodies were created, while some States chose to extend the mandate of existing bodies (e.g. Denmark, Germany, Romania). There are only few States with single-ground bodies (e.g. Denmark, Bulgaria), while other States chose to task a more general Ombudsperson to act as specialised body as required by the Directives and ECRI’s standards (e.g. UK, France, Armenia, Bosnia and Herzegovina).\textsuperscript{401} Only few States still have no specialised body at all (e.g. Azerbaijan, Turkey).\textsuperscript{402} In Austria, a number of laws establish several specialised bodies

\textsuperscript{397} Austrian Act on the Equal Treatment Commission, note 369
\textsuperscript{398} Equal Treatment and Discrimination Ombud and the Equal Treatment and Discrimination Tribunal Act, LOV 2005-06-10 nr. 40; in the following: LDO Act
\textsuperscript{399} Official Gazette of the Republic of Serbia, note 390
\textsuperscript{400} See Norwegian proposition to the Parliament Ot.prp.nr.34 (2004-2005), 37 et seq.
\textsuperscript{401} See Martina Benecke, “Rechtsvergleich der europäischen Systeme zum Antidiskriminierungsrecht”, Antidiskriminierungsstelle des Bundes, 59 et seqq., at
\textsuperscript{402} See CRI(2011)19 Azerbaijan, note 204, 44 et seq.; CRI(2011)5 Fourth report on Turkey, 8 February 2011, para. 58
for different areas and discrimination grounds, at federal and Länder level. The initial Austrian Equal Treatment Ombudsperson and Equal Treatment Commission dealing with gender discrimination were expanded in the course of the transposition of Directives 2000/43/EC and 2000/78/EC. They now consist of an Office of the Ombudspersons for Equal Treatment comprising three Ombudspersons, and three Senates at the Commission whose competences correspond to those of the Ombudspersons. There is no real separation into two instances. Rather, the Ombudspersons and the Commission have different, and sometimes overlapping, competences.

Today, the structure is as follows:

a. Equal Treatment Ombudsperson for Equal Treatment and Equal Opportunities for Women and Men in Employment (hereinafter referred to as Ombudsperson I; the corresponding Senate will be referred to as Senate I);
b. Equal Treatment Ombudsperson for Equal Treatment irrespective of Ethnicity, Religion or Belief, Age or Sexual Orientation in Employment (hereinafter referred to as Ombudsperson II; the corresponding Senate will be referred to as Senate II);
c. Equal Treatment Ombudsperson for Equal Treatment irrespective of Ethnicity in other Areas and Equal Treatment between Women and Men in the area of Goods and Services (hereinafter referred to as Ombudsperson III; the corresponding Senate will be referred to as Senate III).

The Federal Equal Treatment Act created a Federal Equal Treatment Commission. Discrimination based on disability is dealt with by a separate body, the Federal Office for Social Affairs and Disability Affairs, and there are regional attorneys and specialised bodies at Länder level. "§ 40c Equal Treatment Act obliges the Länder to introduce independent agencies for the promotion, analysis, monitoring and support of the principle of equal treatment of all persons without discrimination on the ground of ethnic belonging in areas of their competence. The concrete minimum requirements to be guaranteed in Länder legislation are a literal reproduction of Article 13 Directive 2000/78/EC for non-EU members."

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403 § 23 Federal Austrian Equal Treatment Act, note 373
404 Bundesamt für Soziales und Behindertenwesen, Federal Disability Equality Act, note 372
405 The establishment of regional offices is provided for in § 7 Austrian Act on the Equal Treatment Commission, note 369
2000/43/EC. Due to page limitations, this diploma thesis will only focus on the specialised bodies created by the Office of the Equal Treatment Ombudspersons and Equal Treatment Commission Act.

Norway’s institutional framework provides for two specialised bodies: The Equality and Discrimination Ombudsperson (LDO) as a first instance and the Equality and Discrimination Tribunal (LDN) acting as a second instance. They were created in 2005 and build upon the older Equality Ombudsperson and Equality Tribunal tasked only with discrimination on the ground of gender. The previous structures in the field of ethnic discrimination were discontinued.

The Serbian Commissioner for the Protection of Equality (CPE) is the only entirely new institution. It is not based on older bodies, but Serbia used the experience gained from existing Ombudsman structures when designing the new body. Serbia has a relatively complex structure of bodies tasked to deal with individual complaints in the field of human rights. In particular, the state-level Ombudsman as well as a number of regional and local ombudspersons may receive complaints by individuals in the fields of human rights and minority protection. Overlap with the tasks of the Commissioner for the Protection of Equality has been solved by an informal agreement between the CPE and the Ombudsman on the division of competences. According to Article 47 Law on the Prohibition of Discrimination, the Ministry of Human and Minority Rights “shall monitor the implementation of th[e] Law”.

Initially, there was concern that the independence of the CPE is jeopardized. In practice, there are no structural ties between the now Office of Human and Minority Rights and the Commissioner.

In conclusion, Austria provides for a certain division of tasks between the Ombudspersons and the Commission, but no real division into two instances. Norway has a two-level system, with the LDN competent to act only after the LDO has passed an

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408 Interview with Kosana Beker, Head of Department for complaint Proceedings, Commissioner for the Protection of Equality, 12 November 2012
The LDN may review and diverge from the LDO’s opinion. In Serbia, the CPE is a single body whose decisions may not be appealed. The specialised bodies act as stand-alone institutions. They are not integrated into a broader human rights institution. This satisfies ECRI’s preference for specialised anti-discrimination bodies (see above 2.C.4).

(b) Legal qualification of bodies

In all three States, the specialised bodies are administrative bodies. It is necessary to examine more deeply whether they also are considered to be public authorities. This is the case for the Norwegian LDO and LDN as well as the Serbian CPE. They are competent to issue legally binding administrative acts (see below 3.G.9). They apply the respective administrative procedure acts. In Austria, the Ombudspersons are not considered to be public authorities, because they are not competent to act with imperium.410 As regards the Equal Treatment Commission, different positions have been put forward. In organisational terms, it is “part of a public authority”, namely the Federal Chancellery.411 The Commission applies a number of provisions of the General Administrative Procedure Law (AVG) and may issue binding procedural decisions.412 The Commission is obliged to issue a binding (and opposable) decision following a request for transmission of the records of a hearing before the Commission.413 However, most scholars reject the thesis that the Commission is a public authority.414 The Commission’s suggestions and orders415 are not considered to be binding indi-

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409 See Norwegian official report, NOU 2011:18 Struktur for likestilling, 155
410 See Herbert Hopf, Klaus Mayr and Julia Eichinger, GlBG Gleichbehandlung – Antidiskriminierung. Kommentar (Manz Verlag, Vienna, 2009), 763
413 Austrian Constitutional Court, 27 June 2007, V 3/07, Official Collection (VfSlg.)18.180. Hattenberger considers that through its competence to issue binding decisions and relative autonomy, the Commission partially is a public authority. See Hattenberger, op.cit. note 411, 555
414 See references in Hopf et al., GlBG, op.cit. note 410, 744
415 § 12 Austrian Act on the Equal Treatment Commission, note 369
individual administrative acts because they lack “considerable legal effect”\textsuperscript{416}. The public authority has at its disposal a number of types of acts, and may not act using hybrid forms. The \textit{travaux préparatoires} negate that the Equal Treatment Commission is a public authority.\textsuperscript{417} Therefore, the Commission’s acts are not binding individual administrative acts, but have the status of expert opinions.

The Norwegian LDN is considered to satisfy the criteria for a “tribunal” in the sense of Article 6 ECHR. Its independence and impartiality are enshrined in law. Its members are appointed for a fixed period, as required by Article 6 ECHR.\textsuperscript{418} It may order courts to collect evidence, summon witnesses and experts\textsuperscript{419}, and conduct a legal review.\textsuperscript{420} Both equality of arms and publicity of proceedings are guaranteed.\textsuperscript{421} The contradictory proceedings are not necessarily oral\textsuperscript{422}, but this is not an absolute requirement under Article 6 ECHR.\textsuperscript{423} Thus, the Norwegian two-instance mechanism is meant to fully implement Article 7 (1) Directive 2000/43/EC which requires the introduction of a judicial and/or administrative procedure.\textsuperscript{424}

(c) Internal structure

Specialised bodies can be classified according to whether they are made up of a collegiate body or a “single-apex leadership”\textsuperscript{425}.

The separate Austrian Equal Treatment Ombudspersons, the Norwegian LDO and the Serbian CPE are single-headed institutions. In Norwegian law, Ombudspersons are traditionally monocratic institutions with the capacity to pronounce themselves on

\textsuperscript{416} „erhebliche Rechtswirkungen”, Austrian Constitutional Court, 12 December 1996, B 2903/05, B 2934/95, B 3662/95, Official Collection (VfSlg.) 14.713; Austrian Constitutional Court, 3 March 1994, G 116/93, Official Collection (VfSlg.) 13.699
\textsuperscript{417} See Government bill, RV 285 BlgNR XXII.GP Regierungsvorlage, 15f
\textsuperscript{418} See ECtHR Application N° 2614/65, \textit{Ringeisen v. Austria}, judgment of 16 July 1971
\textsuperscript{419} § 15 Ordinance on the LDO and the LDN, Forskrift om organisasjon og virksomhet for Likesstillings- og diskrimineringsombudet og Likesstillings- og diskrimineringsnemda fastsatt ved kgl.res. 16.12.2005
\textsuperscript{420} § 17\textit{leg.cit.}, note 419; see ECtHR Application N° 20641/92 20641/92, \textit{Terra Woningen v. the Netherlands}, judgment of 17 December 1996
\textsuperscript{421} §§ 15, 19 Ordinance on the LDO and the LDN, note 419
\textsuperscript{422} §§ 15, 16\textit{leg.cit.}, note 419
\textsuperscript{423} See NOU 2011:18, note 409, 160 et seq.
\textsuperscript{424} See Ot.prp.nr.34 (2004-2005), note 400, 63
\textsuperscript{425} Ammer et al., \textit{op.cit.} note 50, 71
issues of concern without issuing binding decisions. In the two countries with a separation of tasks between two institutions, the second specialised body, the Austrian Equal Treatment Commission and the Norwegian LDN, are collegiate bodies. Both bodies have more far-reaching authoritative competences than their “lower” instances. At the same time, tasks such as participation in political discourse, advice on draft legislation, and awareness-raising activities are reserved for the lower instances. The Equal Treatment Commission and the LDN are considered to have a higher degree of authority and representativeness. This is reflected in their composition.

The LDN is an independent administrative collegiate organ with 8 members. The introduction of the LDN reflects a general trend towards the establishment of specialised administrative bodies in Norway. The Austrian Commission’s Senates have different compositions corresponding to their scope of review. All of them have members appointed by relevant federal ministries and the workers’ and employers’ organisations. Two of the members of the Commission’s Senate II are appointed by the federal government (one by the Chancellor and one by the Federal Ministry of Economy and Labour – now Federal Ministry of Labour, Social Affairs and Consumer Protection). Senate III consists of 2/3 government-appointed members (8 out of 12). There are no formal requirements as regards members’ qualifications. This stands in stark contrast to the Norwegian approach. Norway’s official report on Equality structures explicitly rejects the suggestion to secure seats in the LDN for the workers’ and employers’ organisations. Members’ professional qualifications should be the determining factor for their appointment. The president and the vice-president must be lawyers with the qualifications necessary to hold the post of judge.

The legislation on the Serbian CPE reflects a different view. The CPE should fulfil all the functions provided for in the Law on the Prohibition of Discrimination. Like the

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426 See Ot.prp.nr.34 (2004-2005), note 400, 40; it should be noted though that the LDO has the competence to make binding decisions in cases of urgency (see 3.G.9.).
427 § 5 (3) Norwegian LDO Act, note 398
428 Anne Hellum, Diskriminerings- og likestillingsrett, lecture held at University of Oslo, 4 September 2012
429 §2 (3) lit. 5 and 6 Austrian Act on the Equal Treatment Commission, note 369
431 §2 (4) lit. 3 to 10 Austrian Act on the Equal Treatment Commission, note 369
432 See NOU 2011:18, note 409, 157
433 § 5 (2) Norwegian LDO Act, note 398
Austrian and Norwegian legislator, the Serbian legislator was aware of the threats to the perception of multi-function bodies’ independence. It was initially intended to establish a Commission for protection of equality consisting of three members. However, it was finally decided that a single-headed body would suffice and that the Commissioner’s integrity and seriousness would guarantee its independence and impartiality. Contrary to the government- or social partner appointed members of the Austrian Equal Treatment Commission and the Norwegian LDO, the CPE is appointed and dismissed by a majority in Parliament.

3. Independence

It has been outlined that ECRI’s requirements regarding independence are more far-reaching than those of the Directives (see above 2.C.4.). However, the need for structurally, functionally and financially independent institutions is recognised in literature, as independence enhances the bodies’ legitimacy.

A large number of specialised bodies are stand-alone bodies or part of a similar structure, e.g. an Ombudsperson. Only few bodies are part of a government ministry, which is deemed to reduce their independence.

The Serbian CPE has no structural ties with government bodies. In organisational terms, the LDO and LDN come under the authority of the King and the Ministry of Children and Equality. Many members of the LDO’s staff are seconded by the Ministry. The Austrian Equal Treatment Ombudspersons and Equal Treatment Commissions are located in the Federal Chancellery (§§ 1 (1), 3 (1) Equal Treatment Act), which “presents a potential conflict of interest”. Therefore, special provision for the

434 See CDL-AD(2008)001, note 407, 6
435 Articles 28, 30 Serbian Law on the Prohibition of Discrimination, note 399
436 See Holtmaat, op.cit. note 3, 5 et seqq.; Ammer et al., op.cit. note 50, 106
439 Banulescu-Bogdan/Givens, op.cit. note 194, 8; see also paras. 38, 41 CRI(2010)2 Austria, note 192, para. 38; Amnesty International, “Stellungnahme“, note 376, 5 et seq.
independence of the bodies’ functions (as required by Directive 2000/43/EC) or the bodies themselves (as required by GPR N° 2) have been enacted.

Article 20 (2) Austrian Federal Constitutional Law stipulates that certain functionaries may, by ordinary law, be exempt from being bound by instructions of their superior functionaries. The Equal Treatment Commission comes under the category of functionaries tasked with expert review, while the Ombudspersons are considered to belong to the category of functionaries whose independence is required by EU law. The Federal Chancellor acts as supervisory authority with the power to receive information about the independent functionaries’ activities and the capacity to dismiss functionaries for important reasons. The Ombudspersons are only formally independent as regards the competence to offer advice and support to persons who feel discriminated against. The institution as such has no guarantee of its independence. It is considered problematic that the members of the Commission do not receive any salary for their work; only expenses are covered. Conflicts of interest may arise for those Commission members who have been appointed by the employers’ and workers’ organisations.

The LDO’s and LDN’s professional independence is laid down in law. Neither the Ministry of Children and Equal Treatment nor the King may pass orders to the LDN. In Norwegian law, the establishment of administrative organs which are not bound by instructions is justified by the need for legal security in cases in which individual rights are at stake. State interests should not play a part in such administrative decisions. In addition, professional independence is seen as a guarantee of effectiveness.

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440 Article 20 (2) 1, 8 Federal Constitutional Law, note 349; see Government bill RV 938 BlgNR XXIV.
441 §§ 2 (7), 3 (5a), 10 (1c) Austrian Act on the Equal Treatment Commission, note 369
442 Arg. “responsible for the advice and support of persons who feel discriminated against in the sense of part II of the Austrian Equal Treatment Act. [The Ombud] is not subject to directives, autonomous and independent in the exercise of this activity” (emphasis added). “zuständig für die Beratung und Unterstützung von Personen, die sich im Sinne von Teil II GlBG diskriminiert fühlen. Er/sie ist in Ausübung dieser Tätigkeit weisungsfrei, selbständig und unabhängig.”
443 § 10 (1) Austrian Equal Treatment Act, note 368; see Amnesty International, “Stellungnahme”, note 376, 9
444 §§ 2, 5 Norwegian LDO Act, note 398
445 See Ot.prp.nr.34 (2004-2005), note 400, 42
446 See Hans Petter Graver, Alminnelig forvaltningsrett (Universitetsforlaget, Oslo, 2007), 176 et seqq.
The Serbian CPE is an independent state organ.\textsuperscript{447} The Commissioner enjoys the same immunities as a Member of Parliament.\textsuperscript{448} Furthermore, the CPE has internal autonomy as regards staff matters and is thus independent of government appointments.\textsuperscript{449}

In conclusion, all three States provide for the independence of the exercise of the specialised bodies’ functions as required by Directive 2000/43/EC. However, only Serbia fully meets ECRI’s standards relating to the independence of the institutions as such. ECRI criticised the lack of autonomy of the Austrian specialised bodies in an interim follow-up recommendation.\textsuperscript{450} In Norway, like in Austria, members of the specialised bodies are not appointed by Parliament, but by the government. This is considered to compromise their independence (see above).

C. DEFINITION OF DISCRIMINATION IN NATIONAL LEGISLATION

The specialised bodies should be able to act in cases of discrimination. Hence, it is necessary to examine the definitions of discrimination in the three States.

All three States prohibit direct and indirect discrimination. Direct discrimination is considered to occur if a person “receives a less favourable treatment”\textsuperscript{451}, is “treated worse”\textsuperscript{452} or “placed in a less favourable position”\textsuperscript{453} than a person in a “comparable”\textsuperscript{454}, “corresponding”\textsuperscript{455} or “similar”\textsuperscript{456} situation, based on prohibited grounds.

While Austria refers to a discriminatory “treatment”, the Norwegian law prohibits actions or omissions. The Serbian law prohibits acts, actions or omissions. They are intended to cover the whole spectrum of activities and provide the same level of protection as the Austrian law. Thus, the definitions of direct discrimination are similar.

\textsuperscript{447} Article 1 (2) Serbian Law on the Prohibition of Discrimination, note 399  
\textsuperscript{448} Article 31 (2) \textit{leg.cit.}, note 399  
\textsuperscript{449} Article 32 \textit{leg.cit.}, note 399  
\textsuperscript{450} See CRl(2010)2 Austria, note 192, para. 41  
\textsuperscript{451} “eine weniger günstige Behandlung erfährt”, § 19 (1) Austrian Equal Treatment Act, note 368  
\textsuperscript{452} “blir behandlet dårligere”, § 4 (2) Norwegian Discrimination Act, note 381  
\textsuperscript{453} Article 6 Serbian Law on the Prohibition of Discrimination, note 399  
\textsuperscript{454} “in einer vergleichbaren Situation”, § 19 (1) Austrian Equal Treatment Act, note 368  
\textsuperscript{455} “tilsvarende”, § 4 (2) Norwegian Discrimination Act, note 381  
\textsuperscript{456} Article 6 Serbian Law on the Prohibition of Discrimination, note 399
There are some differences regarding the justification of direct discrimination. In Austria, justification of differential treatment follows the Directives 2000/43/EC and 2000/78/EC. Hence, less favourable treatment can be justified by genuine and determining occupational requirement, with a broader scope for justification in relation to religion and belief.\footnote{\cite{457}} In Norway, both direct and indirect discrimination are open to justification if a measure is objective, necessary and proportional\footnote{\cite{458}}, thereby, the Discrimination Act diverges from the Directives and follows GPR N° 7. However, given that the Norwegian Discrimination Act is meant to implement Directives 2000/43/EC and 2000/78/EC, justification grounds will be restricted to those mentioned in the Directives insofar as the Discrimination Act can be subsumed under the Directives.\footnote{\cite{459}} The Serbian law provides for special justification tests in a number of fields, such as belief. Conduct of priests is generally not considered to be discrimination.\footnote{\cite{460}} “[T]he exceptions granted to religious institutions are [considered to be] too wide”\footnote{\cite{461}} to comply with the \textit{acquis communautaire}.

There are divergences in the definition of indirect discrimination. The Austrian and Norwegian formulations are generally in line with the Directives and GPR N° 7. They refer to apparently neutral “provisions, criteria or practice”\footnote{\cite{462}} or “provisions, criteria or practice, action or omission”\footnote{\cite{463}}. The Serbian law considers indirect discrimination to occur in the case of an “act, action or omission that is apparently based on the principle of equality and prohibition of discrimination”\footnote{\cite{464}}. This provision is narrower, which has been criticised by the European Commission.\footnote{\cite{465}} Provisions, criteria, practices or actions constitute indirect discrimination if they “can put a person at a particular disadvantage in comparison to others”\footnote{\cite{466}}. if persons “are put at a particular disad-

\begin{footnotes}
\footnote{\cite{457}} § 20 (1), (2) Austrian Equal Treatment Act, note 368
\footnote{\cite{458}} § 4 (4) Norwegian Discrimination Act, note 381
\footnote{\cite{459}} See Holgersen in Hellum/Ketscher, \textit{op.cit.} note 270, 175 et seq.
\footnote{\cite{460}} Article 18 (2) Serbian Law on the Prohibition of Discrimination, note 399
\footnote{\cite{462}} “dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren”, § 19 (2) Austrian Equal Treatment Act, note 368
\footnote{\cite{463}} “tilsynelatende noytral bestemmelse, betingelse, praksis, handling eller unnlatelse”, § 4 (3) Norwegian Discrimination Act, note 381
\footnote{\cite{464}} Article 7 Serbian Law on the Prohibition of Discrimination, note 399
\footnote{\cite{465}} COM (2012)600 final Serbia 2012 Progress Report, 16
\footnote{\cite{466}} „gegenüber anderen Personen in besonderer Weise benachteiligen können“, § 19 (2) Austrian Equal Treatment Act, note 368
\end{footnotes}

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vantage in comparison to others”467, or if provisions “place [a person or group of persons] in a less favourable position”468. The Serbian formulation (“less favourable position”) is broader than the Austrian and the Norwegian one (“particular disadvantage”). However, it should be noted that the Austrian law, contrary to the Norwegian and Serbian ones, only requires a potential negative impact (arg. “can put”). Therefore, Austria provides for a broader protection in this respect.

All three States prohibit instruction to discriminate469, victimisation470, and harassment471.

Austria and Norway prohibit discrimination by association as required by GPR No 7.472 Participation in discrimination is prohibited in Norway and Serbia.473

D. DISCRIMINATION GROUNDS COVERED BY THE SPECIALISED BODIES’ MANDATE

Only few European States introduced specialised bodies capable only to deal with the racial and ethnic origin and gender, i.e. the minimum requirements of the Directives (e.g. Italy, Spain). Many countries go even beyond the additional grounds contained in Directive 2000/78/EC (e.g. Bulgaria, France, the Netherlands, Sweden, UK).474

The Austrian Equal Treatment Ombudspersons cover the following grounds: gender, ethnic belonging; in the field of employment, they also cover religion or belief, age and sexual orientation.475 The discrimination grounds which come under the remit of ECRI’s standards and Directives 2000/43/EC and 2000/78/EC are ethnic belonging, religion and belief.

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467 „blir stilt særlig ufordelaktig sammenliknet med andre“, § 4 (3) Norwegian Discrimination Act, note 381
468 Article 7 Serbian Law on the Prohibition of Discrimination, note 399
470 §§ 27, 35 Austrian Equal Treatment Act, note 368, § 9 Norwegian Discrimination Act, note 381, Article 9 Serbian Law on the Prohibition of Discrimination, note 399
472 §§ 19 (4) 32 (4) Austrian Equal Treatment Act, note 368; Ot.prp. nr. 33 (2004-2005), 79; Paragraph 6 GPR N° 7, note 8
474 See Ammer et al., op.cit. note 50, 67
475 § 3 (2) Austrian Act on the Equal Treatment Commission, note 369
The Norwegian Equal Treatment and Discrimination Ombud deals with gender, disability, ethnicity, national origin (to be understood as place of birth rather than citizenship or membership of a national minority), descent, skin colour, language, and religion and belief. In the field of employment, it also covers political views, membership in a workers’ organisation, sexual orientation and age. The discrimination grounds of relevance here are ethnicity, national origin, descent, skin colour, language, religion and belief.

The Serbian Law on the Prohibition of Discrimination prohibits discrimination on more than 20 grounds, including race, skin colour, citizenship, national affiliation of ethnic origin, language, and religious beliefs. In addition, Article 2 (1) Law on the Prohibition of Discrimination emphasises that differential treatment based on other “real or presumed personal characteristics” may also constitute discrimination. Serbia is thus the only one of the States under review that contains an open-ended list of discrimination grounds on which the CPE operates. The categories relevant for this diploma thesis are those having a common basis with the discrimination grounds listed in ECRI’s GPR No 7: Race, skin colour, citizenship, national affiliation (meaning belonging to a national minority), ethnic origin, language, and religious beliefs.

Explicit protection by discrimination grounds

<table>
<thead>
<tr>
<th></th>
<th>Race or ethnicity</th>
<th>National origin</th>
<th>Citizenship</th>
<th>National affiliation</th>
<th>Language</th>
<th>Descent</th>
<th>Skin colour</th>
<th>Religion</th>
<th>Belief</th>
</tr>
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<tbody>
<tr>
<td>Austria</td>
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<td></td>
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<tr>
<td>Norway</td>
<td>X</td>
<td>X</td>
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<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
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<tr>
<td>Serbia</td>
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<td></td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
<td>X</td>
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</tbody>
</table>

All three laws reflect the terminological difficulties regarding “race” and “ethnicity”. Only Serbia uses the term “race”. In relation to Norway, this exclusion of one of the

\[476\] See Norwegian proposition to the Parliament Ot.prp.nr.33 (2004-2005), 88; § 3 (1) Norwegian LDO Act, note 398

major discrimination grounds in ICERD was criticised by CERD.478 “Ethnic belonging” is understood to cover “persons who are perceived as strange due to distinct differences” based, essentially, on “differences perceived as natural due to certain myths of descent or belonging and which the persons concerned cannot modify themselves”.479 This is seen to cover skin colour and mother tongue as well as culture, customs, and descent. Hence, even though Austria is the only of the three States which does not expressly prohibit discrimination on the grounds of language and colour, “ethnic belonging” is understood to comprise these grounds. In Norway, “ethnicity” is assumed to have a strong relational component. A common identity, based on culture, religion, language, or place of birth is used to demarcate a group’s otherness.480 Descent covers cases in which a person is born into a specific social group, “such as caste, clan, tribe”481. In Serbia, “race” is rarely invoked as discrimination ground. Rather, individuals base themselves on discrimination on the ground of “national affiliation”. This term covers membership of national minorities which make up 17% of the population.482

As the Austrian law provides for a narrower scope of protection on the ground of religion and belief (see below 3.E.) and the Serbian and Norwegian laws stipulate broader exceptions on these grounds (see above 3.C.), a delimitation between “race” and “ethnicity” on the one hand and “religion and belief” on the other is necessary. In Austria, “religion and belief” is understood broadly.483 It is interesting to note that the explanatory report to the government proposal mentions “religion” as one element of ethnicity.484 This would mean that religion could also be covered by the broader prohibition of discrimination on the ground of ethnic belonging in other areas, as long as there is a

478 CERD/63/CO/9 Concluding Observations on Norway
479 “[…] Personen, die als fremd wahrgenommen werden, weil sie auf Grund bestimmter Unterschiede von der regionalen Mehrheit als nicht zugehörig angesehen werden. [Die Diskriminierung] knüpft überwiegend an Unterschiede an, die auf Grund von Abstammungs- und Zugehörigkeitsmythen als natürlich angesehen werden und die die betroffenen Personen selbst nicht ändern können.“ Austrian Government bill, 307 der Beilagen XXII. GP – Regierungsvorlage – Materialien, 14
480 See Ot.prp.nr. 33 (2004-2005), note 475, 87 et seq.
481 “kaste, klan, stamme”. Holgersen in Hellum/Ketscher, op.cit. note 270, 163
482 Statistical Office of the Republic of Serbia, Results of the 2002 Census, at <http://webrzs.stat.gov.rs/axd/Zip/VJN3.pdf>. Given the continuing tensions between the majority population and members of national minorities and the low number of migrants from other countries than those of former Yugoslavia, racism and racial discrimination is predominantly directed against members of national minorities, such as Roma, Ashkali and Egyptians, Albanians and Bosniaks. See CRI(2011)21 Second report on Serbia, 31 May 2011, para. 89 et seqq.
483 See Austrian Government bill, note 479, 14 et seq.
484 Ibid.
link with ethnicity.\textsuperscript{485} The difference in scope of protection poses challenges to enforcement of anti-discrimination legislation.\textsuperscript{486} The Norwegian legislator also explains that there may be significant overlap between ethnicity and religion, and decided to guarantee equal protection for both discrimination grounds.\textsuperscript{487} Serbia only covers “religious beliefs”. This is narrower than the other States’ laws and the European standards, which also include secular and atheistic beliefs. However, given the non-exhaustive character of the list of discrimination grounds, the list could be extended to a wider notion of belief.

Multiple discrimination increasingly poses a challenge to European specialised bodies. Only few bodies are seen to be competent and capable of tackling this phenomenon (e.g. France, the Netherlands, Bulgaria).\textsuperscript{488} Specialised bodies in all three countries examined in this thesis are able to deal with multiple discrimination. Austria is the only State with an express legal provision in this respect\textsuperscript{489}, while the Norwegian LDO shall “increase its capacity to deal with multiple discrimination.”\textsuperscript{490} The Serbian CPE also deals with additive and intersectional discrimination in practice.\textsuperscript{491}

In conclusion, Norway and Austria fully comply with the discrimination grounds contained in the Directives, while Serbia does not explicitly include “belief”. Only Serbia provides for protection on the ground of nationality, as required by GPR N° 7.

E. EMPLOYMENT ONLY, OR ALL AREAS OF LIFE? FIELDS COVERED BY THE SPECIALISED BODIES’ MANDATE

ECRI believes that “mandates should extend to combating discrimination in all fields

\textsuperscript{485} Note, however, that Windisch-Graetz differentiates between discrimination in relation to an “inner conviction”, which would only be prohibited in employment, and “appearance and behavior”, which could be subsumed under “ethnicity” and thus benefit from a broader protection. Windisch-Graetz, \textit{op.cit.} note 355, 431
\textsuperscript{486} See Equinet, “Establishing Single Equality Bodies”, 2004, 29
\textsuperscript{487} See Ot.prp.nr. 33 (2004-2005), note 475, 90 et seq.
\textsuperscript{488} See Ammer et al., \textit{op.cit.} note 50, 68 et seq.
\textsuperscript{489} § 1 (3) Austrian Act on the Equal Treatment Commission, note 369
\textsuperscript{490} § 2 Ordinance on the LDO and the LDN, note 419; see Ot.prp.nr.34 (2004-2005), note 400, 32, Hedlund/Djupvik Semner, \textit{op.cit.} note 438, 440
of life” 492, whereas the Directives have a limited material scope of application. In a European perspective, most States prohibit discrimination in the field of employment. Some States go beyond the requirements of the Directives and prohibit discrimination even in private contracts (e.g. Italy, Slovenia). Germany has a restrictive interpretation of “goods and services available to the public”, where discrimination in the field of housing is only prohibited if more than 50 flats are being rented. 493

The Equal Treatment Ombudspersons and the Equal Treatment Commission are competent to act in relation to discrimination in fields covered by the Equal Treatment Act. 494 The Norwegian LDO and LDN provide protection in cases of discrimination prohibited by the laws listed above (3.B.1.b). 495 The CPE acts upon discrimination in the fields covered by the Law on the Prohibition of Discrimination. 496

All bodies can act in relation to employment and vocational training. 497 In relation to Austria, ECRI expressed its “deep disappointment” with the different levels of protection afforded in relation to the discrimination grounds. 498 A recent ministerial proposal provides for a “levelling up” so as to extend protection against discrimination on all grounds contained in the Equal Treatment Act to fields outside employment. 499 At the time of writing, Parliament has not yet dealt with the government proposal. Ombudsperson II and Senate II (dealing amongst others with religion and belief) can only act in relation to employment and vocational training. The Austrian Ombudsperson III and Senate III (ethnic belonging) as well as the Norwegian LDO and LDN and the Serbian CPE may act in the fields of access to goods and services available to the public and education. 500 Social security, health and housing are not covered by the

492 Kelly, op.cit. note 5, 40
493 See Benecke, op.cit. note 401, 18; CRI(2009)19 Germany, note 201, para. 27
494 §§ 5 (1), 6 (1) Austrian Act on the Equal Treatment Commission, note 369
495 § 1 Norwegian LDO Act, note 398
496 Article 33 Serbian Law on the Prohibition of Discrimination, note 399
497 § 16 Austrian Equal Treatment Act, note 368; § 3 Norwegian Discrimination Act, note 381; Article 16 Serbian Law on the Prohibition of Discrimination, note 399
499 Ministerial bill 407/ME XXIV. GP - Ministerialentwurf - Begutachtung Erläuterungen, 4
500 In Austria, the Austrian Equal Treatment Act covers education only insofar as it belongs to the legis-lative competence of the federal state. See § 30 (2) Austrian Equal Treatment Act, note 368
Serbian Law on the prohibition of discrimination. This has been criticised by ECRI.\textsuperscript{501} Therefore, only the Ombudsperson III and Senate III, the LDO and the LDN are competent to deal with discrimination in these fields.\textsuperscript{502} However, the Austrian provisions do not apply in relation to private and family life and advertisement, except for housing advertisement.\textsuperscript{503} On the other hand, the CPE, like the LDO and the LDN, but contrary to the Austrian specialised bodies, is competent to act in relation to the public administration at large, including law enforcement, police, and border control.

Thus, the Norwegian specialised bodies clearly have the broadest mandate. They may act in relation to “all areas of society with the exception of family life and personal affairs”\textsuperscript{504}. In relation to religion and belief, broader exceptions concern actions or activities by religious or belief communities or businesses with a religious or belief-related aim. The exclusion of family and personal life has several reasons. First, the legislator considered that these areas were specifically protected under Article 8 ECHR. Second, proof of discrimination would be particularly difficult in these fields. Third, discrimination in the private sphere was estimated to be less likely.\textsuperscript{505}

Fields covered by the specialised bodies’ mandate

<table>
<thead>
<tr>
<th></th>
<th>Employment</th>
<th>Vocational training</th>
<th>Social security</th>
<th>Education</th>
<th>Goods and services available to the public</th>
<th>Housing</th>
<th>Public administration</th>
<th>Other fields</th>
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\textsuperscript{501} See CRI(2011)21 Serbia, note 482, para. 20  
\textsuperscript{502} § 30 (2) Austrian Equal Treatment Act, note 368  
\textsuperscript{503} §§ 30 (3), 36, 37 Austrian Equal Treatment Act, note 368  
\textsuperscript{504} § 3 Norwegian Discrimination Act, note 381  
\textsuperscript{505} See Ot.prp. nr. 33 (2004-2005) 75 et seqq.
F. WHO MAY APPROACH THE SPECIALISED BODY?

This section examines the victim status. All three States ensure that both natural and legal persons are protected by the prohibition of discrimination. They can submit requests for advice and/or complaints to the specialised bodies. Furthermore, all three States have restrictions as regards foreign nationals. The Austrian Equal Treatment Act follows Articles 3 (2) of the Directives in that provisions and conditions for the access to and residence in the national territory are not covered by the prohibition of discrimination.\textsuperscript{506} In Norway, the prohibition of discrimination may be limited by the Aliens Law.\textsuperscript{507} Like in Austria, this concerns primarily access to the territory and access to the labour market. The Serbian Law on the Prohibition of Discrimination applies to all individuals present on the territory of the Republic of Serbia and legal entities registered or operating on the State territory.\textsuperscript{508}

Another important question in this respect is who may bring individual cases (i.e. cases with identifiable victims) to the attention of the specialised bodies?

In Austria, anyone may approach the soft-law Ombudspersons, while complaints to the Equal Treatment Commission may be brought by the victim; the employer; the works council; the employers’ and workers’ organisations; the Ombudspersons; and the regional attorneys.\textsuperscript{509} Any person may bring cases before the Norwegian LDO, and the LDO may also initiate investigations ex officio. In Serbia, the application may be brought by the victim or by an organisation engaged in the protection of human rights or another person on behalf and with consent of the victim.\textsuperscript{510} In cases involving discrimination against groups of persons, the complaint may also be brought by a human rights association in its own name.\textsuperscript{511}

\textsuperscript{506} §§ 17 (2), 31 (4) Austrian Equal Treatment Act, note 368
\textsuperscript{507} See Ot.prp. nr. 33 (2004-2005) 79 et seq.
\textsuperscript{509} § 12 (1) Austrian Act on the Equal Treatment Commission, note 369
\textsuperscript{510} Article 35 (3) Serbian Law on the Prohibition of Discrimination, note 399
\textsuperscript{511} Article 15 (3) Rules of Procedure of the CPE, del.br.574/2011, 16 May 2011
If cases are brought before the Austrian Equal Treatment Commission or the Norwegian LDO by non-parties to the conflict, special rules apply. In Norway, consent by both parties is necessary for the LDO to continue investigations. In Austria, generally the victim’s consent is necessary. However, the Ombudspersons may also request examinations of individual cases before the Equal Treatment Commission without the consent of the victim. This has been criticised, as the Ombudspersons may “use” a person as a victim in order to initiate a review of a collective agreement.

G. FUNCTIONS

1. Overview

As outlined in Part 2, the European standards provide for a number of functions of specialised bodies. Article 13 EC Directive 2000/43/EC is very vague, leaving it to the national legislator to decide which concrete competences a specialised body should have. In a comparative perspective, many States have introduced a variety of the competences featured in ECRI GPRs N° 2 and 7 when implementing Directive 2000/43/EC. Therefore, many states have exceeded what was strictly needed to comply with the Directive.

Specialised bodies can be classified according to their functions. Some bodies are predominantly victim-oriented (promotional type), whereas others are quasi-judicial bodies requiring impartiality guarantees (tribunal type bodies). In order to comply with the Directives and ECRI GPRs, (preferably separate) bodies should have tasks belonging to both types of functions.

Promotional-type functions are victim-oriented or have a more political scope. Hence, the representation of victims comes under this category, as well as the capacity to apply to courts in the interest of the objective law. In addition, promotional-type bodies

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512 § 3 para. 4 Norwegian LDO Act, note 398
513 See Ammer et al., op.cit. note 50, 79 et seq.
514 For this classification, see Equinet, “Challenges”, note 437, 7
515 See CommDH(2011)2, note 211, 19
intervene in public discourse, conduct surveys on discrimination and pronounce themselves on draft laws. Tribunal-type bodies consider complaints and issue decisions. They must therefore be impartial and have certain competences to collect evidence.

While some European States only rely on promotional-type bodies (e.g. Germany, Malta, Montenegro), others only have tribunal-type bodies (e.g. the Netherlands, Bulgaria, Estonia). Few States have one promotional- and one tribunal-type body (e.g. Finland, Iceland, Ireland).\textsuperscript{516}

Norway has a relatively classical division of tasks between its two specialised bodies. The LDO has promotional tasks including the promotion of equal treatment, monitoring the implementation of international obligations under CERD and CEDAW, and contributing to national policy development and legislation through critical analyses.\textsuperscript{517} The LDO also hears complaints and issues non-binding decisions. The government considered that the functions would be mutually reinforcing.\textsuperscript{518} However, the overlap of functions has been criticised for putting at risk the perception of the LDO’s independence and legitimacy.\textsuperscript{519} In fact, “[w]hen the Ombud’s perceived role becomes more one of a spokesperson for disadvantaged groups and less one of a guardian of individual rights to non-discrimination, the agency also risks being perceived mainly as an ‘unobjective activist’”.\textsuperscript{520} The LDN has exclusively judicial-type functions. According to Skjeie, this expresses a division of labour in which the LDO acts as a “protagonist”, whereas the LDN secures the “‘legitimacy’ of the joint institution”\textsuperscript{521}, strongly focusing on neutrality and independence. An interesting consequence of this division is that as the LDO becomes more active as an advisor, mediator and research body, the LDN receives additional guarantees regarding its independence.\textsuperscript{522}

The Austrian Ombudspersons have no formal decision competence. They offer advice, can investigate allegations of discrimination, encourage friendly settlements and may

\textsuperscript{516} See Ammer et al., \textit{op.cit.} note 50, 44 et seq.
\textsuperscript{517} § 3 Norwegian Discrimination Act, note 381
\textsuperscript{518} See Ot.prp.nr.34 (2004-2005), note 400, 35
\textsuperscript{520} Skjeie in Schiek/Chege, \textit{op.cit.} note 229, 307
\textsuperscript{521} Ibid., 298
\textsuperscript{522} Ibid., 298
apply to the Equal Treatment Commission. In addition, they publish reports, pronounce themselves on draft laws and publish guidelines on topics related to discrimination. Even though some of the competences (e.g. the collection of evidence) are typically attributed to tribunal-type bodies, they can be considered to be predominantly promotional-type bodies. The Equal Treatment Commission, on the other hand, is a tribunal-type body with the competence to issue non-binding decisions.

The Serbian one-stop-shop solution differs from the Austrian and Norwegian system. The CPE is competent to conduct the soft-law tasks executed by the Austrian Ombudspersons and the Norwegian LDO as well as to apply to the courts and issue binding decisions.

In the following, the concrete powers of the national specialised bodies will be discussed. Special attention will be given to the challenges arising when promotional- and tribunal-type functions are combined in one institution. Sections 2-4 concern promotional-type tasks and the relation between specialised bodies and ordinary courts. Sections 5-9 deal with quasi-judicial functions.

For the sake of clarity, the functions outlined in relation to the GPRs and Directive 2000/43/EC (above 2.C.3.) will be further sub-divided in this section in order to pay due attention to structural differences between the national specialised bodies under consideration. The section relating to “provision of assistance” will deal with all the functions ECRI considers to come under this term (the provision of legal advice; the representation and intervention in legal proceedings). ECRI deals with applications to courts in the body’s own name together with representation functions. As Austria, Norway and Serbia differentiate between these functions, a separate section is introduced. On a more general note, the relations with courts need to be examined. The quasi-judicial functions are generally dealt with in the same manner as in 2.C.3. above, with the exception that non-binding and binding decisions form different sections. This is necessary as the States under examination differentiate between these functions, whereas ECRI deals with the two types of competences in one single paragraph.

2. Provision of assistance in pursuing complaints
(a) Assistance regarding complaints options and general information

Assistance is understood here as actions without normative content by the specialised body. The specialised body does not prescribe how a person should act, but merely provides advice on options for actions. Advice may concern the person’s rights and remedies both within the system of specialised bodies and before other authorities.

The Austrian Ombudspersons, the LDO and the CPE shall advise and support persons who feel discriminated against as well as other interested persons. Assistance is understood to cover practical information regarding complaints options and the legal bases for the prohibition of discrimination. The Ombudspersons, LDO and CPE offer legal guidance. The LDO is also obliged to give information on topics bearing some connection with its fields of competence, for instance acts covered by criminal law.

If the specialised body is incompetent to deal with the question, different reactions are stipulated in the national laws. In Norway and Serbia, the LDO and CPE are obliged to refer the request to the competent authority. The Austrian Ombudspersons have no such obligation, but in practice advise the person on the authority to turn to.

(b) Representation of victims in administrative or court proceedings

In Austria and Norway, individuals can bring complaints based on the respective anti-discrimination laws to civil and labour courts, according to the courts’ general competence. In Serbia, complaints are submitted to the civil courts. The array of victim-oriented tasks attributed to the specialised bodies may include the capacity to represent victims in administrative or ordinary court proceedings. In ECRI’s view, this

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525 § 2 Ordinance on the LDO and the LDN, note 419

526 § 3 (6) Norwegian LDO Act, note 398, Article 33 (2) Serbian Law on the Prohibition of Discrimination, note 399
competence would encourage victims to bring complaints and increase their chances of success in formal proceedings (see above 2.C.3.b.). In a European perspective, quite a number of specialised bodies have this competence (e.g. Sweden, UK).  

The Austrian, Norwegian and Serbian specialised bodies do not have this power. The Austrian Ombudspersons may only represent victims of discrimination before the Senate of the Equal Treatment Commission. Contrary to the LDO’s predecessor institution, the LDO is not competent to represent a party. ECRI took note of the reason for the discontinuation of the capacity to represent victims or bring complaint in the LDO’s own name, namely the fact that the LDO now should be competent to neutrally deal with complaints itself. As a consequence, individuals must take their complaints to court assisted by a lawyer. Discrimination cases do not receive priority for attribution of free legal aid, which hampers victims’ access to justice. In its report on Norway, ECRI therefore pointed to its GPR N° 7 recommending that specialised bodies be capable to offer legal assistance including the capacity to represent victims before the court. In addition, ECRI underlined that GPR N° 7 requires that the law provide for free legal aid, including court-appointed lawyers.

(c) Intervention

If a specialised body is competent to intervene in court or administrative proceedings, it acts in its own name in support of a party. It is not itself party to the proceeding, and cannot take over the party’s procedural or cost risk. There are only few examples in which specialised bodies are given the capacity to intervene in proceedings (e.g. Ireland, UK, to a limited extent Belgium). It appears that this capacity suits common law countries better than civil law countries. The Austrian Ombudspersons and the Serbian CPE do not have this capacity. The Norwegian LDO may intervene in ordinary

528 § 12 (1) Austrian Act on the Equal Treatment Commission, note 369
529 § 2 Ordinance on the LDO and the LDN, note 419
530 See § 11 Law on Free Legal Aid, Lov om fri rettshjelp LOV 1980-06-13 nr. 35
531 CRI(2009)4 Norway, note 161, para. 29
532 See Equinet, “Enforcement”, note 527, 39 et seq.
court proceedings to the benefit of a party.\textsuperscript{533} In cases reviewing a LDN decision, intervention is excluded to avoid legal proceedings between the two specialised bodies.\textsuperscript{534} The LDO is also competent to act as \textit{amicus curiae} to the court by submitting an opinion in writing.\textsuperscript{535}

All three States comply with the minimum requirement in Directive 2000/43/EC and ECRI GPR N° 2 (see above 2.C.3.a, 2.C.3.b). However, none of the States provides legal representation through the specialised body as requested by GPRs N° 2, 7 and 14, and only Norway allows for \textit{amicus curiae} interventions.

3. Applications to administrative bodies or courts in the specialised body’s own name

In a European perspective, some specialised bodies are able to initiate legal proceedings (e.g. Belgium, Croatia, Finland). Few specialised bodies may choose to either bring complaints in their own name or to represent a victim (e.g. Ireland, Sweden, UK).\textsuperscript{536} Some of the bodies are competent to select the cases they bring to court (strategic litigation, e.g. Sweden, UK).\textsuperscript{537}

The right to initiate proceedings in the specialised body’s own name can have different functions. It contributes to the protection of the objective law and to combating structural discrimination (\textit{actio popularis}). In this section, specialised bodies’ capacity to apply to administrative bodies or courts in their own name in cases with identifiable victims will be examined.

The Norwegian LDO is not competent to bring complaints in its own name. While the Serbian CPE has a general power to bring complaints to ordinary courts\textsuperscript{538}, the Aus-

\begin{itemize}
\item \textsuperscript{533} § 15-7 (1) b Law on civil disputes, Lov om mekling og rettergang i sivile tvister, LOV 2005-06-17 nr. 90
\item \textsuperscript{534} See Ministry of Justice and the Police, Official interpretation of § 15-7 Law on civil disputes, 200507667 ES KOT
\item \textsuperscript{535} § 15-8 (1) b Law on civil disputes, note 533
\item \textsuperscript{536} See CRIF(2012)46 Fourth report on Sweden, 25 September 2012, para. 65; Benecke, \textit{op.cit.} note 401, 62; Ammer et al., \textit{op.cit.} note 50, 83 et seq.
\item \textsuperscript{537} See Ammer et al., \textit{op.cit.} note 50, 86
\item \textsuperscript{538} Article 46 (1) Serbian Law on the Prohibition of Discrimination, note 399
\end{itemize}
trian Ombudsperson has a limited competence in relation to court and administrative proceedings.

The CPE can bring class actions in cases affecting groups.\textsuperscript{539} A “special litigation proceeding for protection of collective rights and interests of the citizens”\textsuperscript{540} is contained in Article 496 of the new Law on civil procedure. Here, the final judgment establishing discrimination against a group of persons can serve as a basis for subsequent individual complaints of members of the group.\textsuperscript{541} The CPE’s complaint enhances legal security for individual victims and increases their chances of success in legal proceedings. In addition, the CPE can bring cases affecting one particular person.\textsuperscript{542} In this case, the CPE needs the victim’s consent.\textsuperscript{543} Given the fact that the CPE does not initiate investigations ex officio, it brings cases to court only following a complaint.

The CPE engages in strategic litigation.\textsuperscript{544} She/he may bring a complaint if a judgment is deemed to increase protection against discrimination; to improve court practice; or to increase public awareness and encourage victims to bring cases.\textsuperscript{545} In practice, the CPE selects cases according to chances of success, importance of the case, or need for clarification of underlying legal provisions.

In civil proceedings, the CPE may demand a ban on the discriminatory activity, a declaratory judgment, an order to redress the consequences of discriminatory treatment, and the publication of such judgments.\textsuperscript{546} The CPE can also request execution of the judgment obtained.\textsuperscript{547} However, given that the CPE does not represent the victim and the judgment has effect \textit{inter partes}, she/he cannot demand compensation.\textsuperscript{548}

The Austrian Ombudspersons are generally not empowered to bring complaints to civil or labour courts. One exception relates to cases brought following a non-binding decision by the Equal Treatment Commission in an individual case. Conditions for the

\textsuperscript{539} Article 46 (2) \textit{leg.cit.}, note 399
\textsuperscript{540} CPE, Annual Report 2011, note 491, 21
\textsuperscript{541} \textit{Ibid.}
\textsuperscript{542} Article 46 (1) Serbian Law on the Prohibition of Discrimination, note 399
\textsuperscript{543} Article 46 (2) \textit{leg.cit.}, note 399
\textsuperscript{544} See CPE, Annual Report 2011, note 491, 70
\textsuperscript{545} Article 34 (1) Rules of Procedure of the CPE, note 511
\textsuperscript{546} Article 43, 46 (1) Serbian Law on the Prohibition of Discrimination, note 399
\textsuperscript{547} See CPE, Annual Report 2011, note 491, 70 et seq.
\textsuperscript{548} Article 46 (1) Serbian Law on the Prohibition of Discrimination, note 399
application for a declaratory judgment are the following: First, the Ombudsperson must her/himself have initiated the procedure before the Commission. Second, it is necessary that the Commission’s decision diverges from the Ombudsperson’s legal opinion, or that the respondent does not comply with the Commission’s decision.\textsuperscript{549} Such class actions are intended to reduce the procedural risk for the potential complainant.\textsuperscript{550} Applications are subject to the victim’s consent\textsuperscript{551} and are rare.\textsuperscript{552} The fact that the Ombudspersons may not act themselves, but must rely on the Attorney General\textsuperscript{553}, further complicates judicial proceedings. The victims and respondents may not submit an application for a declaratory judgment. This can be explained by the fact that they can initiate ordinary court proceedings.\textsuperscript{554} The limitation of cases in which the Ombudspersons may file an action for a declaratory judgment has been criticised. It excludes actions in cases where the victim has complained to the Commission without prior consultation of the Ombudspersons. This disadvantages such complainants.\textsuperscript{555} The Equal Treatment Act also provides for administrative criminal proceedings regarding minor violations of the principle of equal treatment. The Equal Treatment Ombudspersons may initiate these proceedings against employment agencies and employers in case of publication of discriminatory job advertisements.\textsuperscript{556} In administrative criminal proceedings brought by an Equal Treatment Ombudsperson, she/he is party to the proceedings.\textsuperscript{557} She/he may also submit an appeal against individual administrative decisions in such proceedings.\textsuperscript{558} The Ombudspersons have the same

\textsuperscript{550} Austrian Supreme Court of Justice, 19 November 2003, 9ObA12/03k in relation to the old Austrian Equal Treatment Act
\textsuperscript{551} § 12 (5) Austrian Act on the Equal Treatment Commission, note 369
\textsuperscript{552} See Office of the Equal Treatment Ombudspersons, Bericht II, note 498, 133 et seqq.
\textsuperscript{553} § 3 (1) Act on the Attorney General, Finanzprokuraturgesetz, Federal Law Gazette BGBl. I Nr. 110/2008, last amended by BGBl. I Nr. 101/2011
\textsuperscript{554} See Hopf et al., \textit{GIBG, op.cit.} note 410, 765 et seqq., 793
\textsuperscript{555} See Opinion 32/SN-407/ME XXIV. GP, Stellungnahme der Anwaltschaft für Gleichbehandlung zum Entwurf eines Bundesgesetzes, mit dem das Gleichbehandlungsgesetz und das Gesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft geändert werden, 14; Office of the Equal Treatment Ombudspersons, Bericht II, note 498, 142
\textsuperscript{556} § 24 (1), (2), (3) Austrian Equal Treatment Act, note 368
\textsuperscript{557} § 24 (4) first sentence \textit{leg.cit.}, note 368
\textsuperscript{558} § 24 (4) last sentence \textit{leg.cit.}, note 368
competence regarding discriminatory housing advertisements.\textsuperscript{559} In addition, Ombudspersons may bring cases to the Equal Treatment Commission in their own name.\textsuperscript{560} The lack of a full-fledged capacity to bring complaints and/or represent victims in administrative or court proceedings has been criticised as hampering the Ombudspersons’ effectiveness. Contrary to Norway, the restriction of the Ombudspersons’ complaints-related competences cannot be explained by a fear of mingling victim-oriented and tribunal functions, since the Ombudspersons are competent to apply to courts and administrative bodies under limited circumstances. However, they are kept out of the main avenue for redress in discrimination cases, namely ordinary civil and labour proceedings. ECRI recommended therefore that the Ombudspersons be given the capacity to “apply to the courts whenever they deem necessary” (interim follow-up recommendation).\textsuperscript{561}

The competence to select relevant cases and conduct strategic litigation to improve courts’ practice has received positive resonance. Laws providing for this capacity are presented as best practice examples.\textsuperscript{562} This function is also part of the catalogue contained in ECRI’s GPRs (see above 2.C.3.b). Of the three States under review, the Serbian legislation clearly vests the CPE with the strongest powers to apply to courts and triage cases according to their significance. The Austrian Ombudspersons have powers which are broadly considered to be insufficient, and Norway opted for a model which excludes the capacity to file lawsuits.

4. The specialised bodies as quasi-courts: Relations between specialised bodies and ordinary courts

Most European States provide alternative or parallel remedies before the specialised bodies and the ordinary courts in discrimination cases.\textsuperscript{563}

It has been shown that all three countries confer on their civil courts (Austria and Norway on their labour courts too) the capacity to deal with complaints based on the

\textsuperscript{559} § 37 (2) leg.cit., note 368
\textsuperscript{560} § 12 (1) Austrian Act on the Equal Treatment Commission, note 369
\textsuperscript{561} CRI(2010)2 Austria, note 192, para. 41
\textsuperscript{562} See Moon in Schiek et al., \textit{op.cit.} note 51, 894 et seqq., Equinet, “Enforcement”, note 527, 16
\textsuperscript{563} See Benecke, \textit{op.cit.} note 401, 58
anti-discrimination laws (see above 3.G.2.b.). Apart from that, all specialised bodies conduct impartial review of individual cases. It is therefore necessary to examine whether the proceedings before the specialised bodies acting as quasi-courts are alternative or complementary to court proceedings.

The situation is relatively similar in Norway and Serbia. Individuals may complain to the LDO and the CPE before applying to ordinary courts. However, this is not a pre-condition for ordinary court proceedings. The LDO and the CPE are obliged to reject complaints in cases where ordinary court proceedings have been initiated or there already is a court judgment.\(^{564}\) As the LDN, as the appeal instance to the LDO, and the CPE may issue binding decisions, such a rule is necessary to comply with the principle of *ne bis in idem*. In the case of Norway, this is also justified by the fact that the ordinary court is competent to review the LDN’s binding decision. Hence, if the LDO and LDN proceedings could take place after a binding judgment has been passed and the LDN’s ruling was in turn reviewed by an ordinary court, there would not only be the risk of a conflict between an administrative decision and a court judgment, but even between two court judgments. Proceedings before the Austrian Equal Treatment Commission may run in parallel, or even posterior to, court proceedings. This entails the risk of conflicting solutions. However, this is not considered to be problematic.

The majority considers the Commission not to be a public authority. Its substantial decisions are not binding on the persons acting before the Commission, but have the mere quality of expert opinions.\(^{565}\)

Another important question is whether decisions by the specialised bodies may be reviewed by ordinary courts, and which effect they have on ordinary courts. The CPE’s decisions are final and may not be reviewed by courts. The LDN’s decisions may be appealed at the civil or labour courts, which review the facts as well as the legal aspects of the case.\(^{566}\) The Austrian Equal Treatment Commission’s decisions are not binding on courts. Therefore, if the court deals with decisions, it does not review binding administrative acts issued by a public authority. Thus, this is no case of a successive competence.\(^{567}\) However, the legislator intended to give the Commission

\(^{564}\) § 3 (5) Norwegian LDO Act, note 398

\(^{565}\) See Hattenberger, *op.cit.* note 411, 555

\(^{566}\) § 12 Norwegian LDO Act, note 398

\(^{567}\) See Hattenberger, *op.cit.* note 411, 639 et seq.
a certain weight in ensuing ordinary court proceedings. Courts must take into consideration expert opinions and results of examinations of individual cases and state reasons for diverging from the Commission’s findings.\textsuperscript{568} Courts are expected to benefit from the Commission’s expertise. The relevance of Commission proceedings for courts is confirmed by the fact that individual case proceedings before the Commission suspend the expiration of the time limits to bring cases to labour or civil courts.\textsuperscript{569} There is a preference for soft-law settlements to avoid overburdening the courts and contribute to long-term solutions. Given the possibility of temporal overlap of proceedings before courts and the Equal Treatment Commission, Hopf et al consider that the organs should show self-restraint to avoid diverging results.\textsuperscript{570}

As regards Serbia, while the ordinary courts cannot review the CPE’s decision, the law does not prevent them from adjudicating a complaint based on the Law on the Prohibition of Discrimination after the CPE has issued a binding decision. Neither the Law on the Prohibition of Discrimination nor the Civil Procedure Act obliges the ordinary courts to consider to the CPE’s decision. This entails a serious risk of conflicting binding decisions.

In conclusion, while the relations between specialised bodies and the courts are well defined in Norwegian law, they are less clear in Austria and Serbia. This may be explained by the conception of the Austrian specialised bodies as soft-law mechanisms, which renders an unambiguous delimitation of powers less pressing. However, the vagueness of the rules and the parallelism of judgments and opinions entail confusion and problems which would be worth examining more closely. In cases of diverging results, a respondent who has won a discrimination lawsuit can not obtain a change in the anterior Commission’s findings. The Commission’s findings are published in an anonymized form; therefore, the respondent is not considered to have a legal interest in changing the findings. In contrast, in Serbia, the possible collision between judgments and CPE decisions poses a serious threat to legal security. Courts have more far-reaching decision-making powers regarding compensation, and a far-reaching capacity to enforce judgments.\textsuperscript{571} As they are able to act posterior to a binding decision

\textsuperscript{568} § 61 Austrian Equal Treatment Act, note 368  
\textsuperscript{569} §§ 29 (2), 35 (5) GIBG  
\textsuperscript{570} Hopf et al., \textit{GlBG}, \textit{op.cit.} note 410, 744; see also Hattenberger, \textit{op.cit.} note 411, 542  
\textsuperscript{571} Law on Enforcement Procedure, Official Gazette of the Republic of Serbia No. 125/04
by the CPE, but not vice versa, the law establishes a hierarchy which is likely to undermine the CPE’s authority.  

5. *Hearing complaints*

This function encompasses the reception of formal complaints referring to individual cases. Contrary to requests for information or support by victims or interested persons, such complaints aim at a consideration by the specialised body itself, resulting in investigations, conciliation, or a decision. A range of European States have introduced specialised bodies with such tribunal-type competences. However, in several States, tasks to consider complaint exclude representative functions (e.g. the Netherlands, where the specialised body may not assist or represent victims).

All three States have designated a body which is competent to receive complaints: The Austrian Equal Treatment Commission, the Norwegian LDO, and the Serbian CPE. The Austrian Ombudspersons do not formally deal with individual complaints. However, given that proceedings before the Ombudspersons include investigations and conciliation and may result in a formal complaint to the Equal Treatment Commission, the Ombudspersons’ fact-finding and settlement activities should also be taken into account in the following sections. Upon reception of an application the Ombudspersons *may* (emphasis added) conduct investigations (see below 3.G.6). If an investigation results in the finding that a violation of the principle of equal treatment is probable, the Ombudspersons may request the Commission to deal with the case.

Complaints to the Equal Treatment Commission, the LDO and the CPE may be submitted in writing or (for the CPE only in exceptional cases) orally.  

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572 See on the problem of parallel CPE and court proceedings and the risk of contradictions CDL(2007)121rev Commission pour la démocratie par le droit, Observations sur le projet de loi sur la prohibition de la discrimination (sic) de la République de Serbie par Mme Lydie Err (Membre, Luxembourg), 2007, 7
573 See Banulescu-Bogdan/Givens, *op.cit.*, note 194, 7
575 §§ 5 (3), 6 (3) Austrian Act on the Equal Treatment Commission, note 369
suffers from formal errors, the specialised bodies assist the complainant in rectifying the complaint.\footnote{\textsection 6 Austrian Act on the Equal Treatment Commission, note 369, 13 (3) AVG, note 412, See CPE, Annual Report 2011, note 491, 47}

Triaging of complaints follows different conditions. The CPE may refuse to act on a complaint if court proceedings have been initiated or an enforceable decision has been passed (note that the CPE is also authorised to decide to initiate court proceedings her-/himself, see above 3.G.3.); if it is evident that no discrimination has occurred; if the same matter has already been decided; or if the time elapsed since the violation of rights makes it impossible to achieve the purpose of the complaint proceedings.\footnote{Article 36 (2) Serbian Law on the Prohibition of Discrimination, note 399} The Equal Treatment Commission rejects complaints if the complainant does not correct formal errors\footnote{\textsection 16 (1) Austrian Act on the Equal Treatment Commission, note 369, 13 (3) AVG, note 412} or if they do not contain a precise request.\footnote{\textsection 16 (1) Austrian Act on the Equal Treatment Commission, note 369, 13 (6) AVG, note 412} The LDO refuses to deal with a complaint if it is insignificant, and rejects a complaint if the LDO is incompetent or if court proceedings have been initiated.\footnote{\textsection 3 (1), (4) Norwegian LDO Act, note 398; See Likestillings- og diskrimineringsombudet, „Gangen i en klagesak“, at <http://www.ldo.no/no/Dine-rettigheter/Gangen-i-en-klagesak2/>}

All three States comply with ECRI GPR No° 2 (see above 2.C.3.c) by introducing functions related to the consideration of individual complaints. In the following, it will be examined which precise actions by the specialised bodies such complaints-proceeding functions encompass.

6. Investigating cases

Investigation in this context only means investigation into concrete situations, preceded by a complaint or request, and not abstract investigations aiming at detecting structural discrimination. If this competence is designed in a way to enable interaction and participation of all persons involved, it can also be forward-looking and have a transformational character.\footnote{See Fredman, \textit{Law}, \textit{op.cit.} note 23, 295} In a European perspective, specialised bodies with the power to issue binding decisions have far-reaching investigatory powers. In these cases, investigatory powers are considered to be incidental to quasi-judicial functions. Many
of the bodies which are competent to issue only non-binding decisions cannot compel the parties or third persons to submit evidence (e.g. Slovenia). The Danish specialised body issues binding decisions, but does not have satisfactory powers to collect evidence.

Austria, Norway and Serbia have empowered their specialised bodies to conduct investigations. In fact, in Austria and Norway, the first, as well as the “second” instance bodies have investigatory powers.

All bodies are able to review evidence provided by the complainant; question the complainant and the respondent as well as witnesses. The LDO and CPE also use external experts. The Austrian Ombudsperson II can interview the members of the works council, and the Ombudsperson III can interview other “informants”. There is no limitation as to the circle of informants.

In addition, the Ombudsperson II, but not the Ombudsperson III, may request information from the statutory social insurance organisations. It appears that there is a qualitative difference of the investigatory powers at the disposal of the Ombudspersons II and III. Ombudsperson III has no competence to request information from social security, and may not be instructed to perform on-site inspections. This difference is hard to justify given the fact that victims of discrimination in the fields of social protection and education are in a similarly weak position to obtain and present evidence. The Ombudspersons, the LDO and the CPE are authorised to conduct on-site inspections. The CPE also reviews international practice and may use statistics and other data.

583 See Equinet, “Enforcement”, note 527, 17 et seq.
584 See CRI(2012)25 Denmark, note 205, para. 44
586 § 11 Ordinance on the LDO and the LDN, note 419; see CPE, Annual Report 2011, note 491, 22
587 § 5 (2) Austrian Act on the Equal Treatment Commission, note 369
588 “Auskunftsperson”, § 6 (2) leg.cit., note 369
589 § 5 (2a) leg.cit., note 369
590 See on this topic Amnesty International, “Stellungnahme”, note 376, 6
592 Article 31 (1) Rules of Procedure of the CPE, note 511
The Austrian Equal Treatment Commission can also call upon the Ombudspersons to investigate cases.\(^{593}\) In proceedings before the Equal Treatment Commission, like in those before the LDO and LDN, the rules of evidence from the respective administrative procedure laws apply.\(^{594}\) Therefore, all evidence may be used. In addition, the LDN may request that courts collect evidence, in which case the evidentiary rules relating to civil procedures apply.\(^{595}\) The CPE, too, is obliged to establish all relevant facts of the case.\(^{596}\)

There are different rules regarding failure to submit requested information. In Austria, statutory social security organisations are obliged to transmit data on individuals’ contributory basis. Moreover, employers or “informants” are required to provide the requested information. However, failure to submit the requested information cannot be sanctioned, which weakens the effectiveness of investigations.\(^{597}\) In Serbia, the respondent is not obliged to submit the required information (arg. “may”, Article 37 (2) Law on the Prohibition of Discrimination). In Norway, public authorities are obliged to furnish requested information, and are in this respect released from their obligation of confidentiality.\(^{598}\) For individuals, the same rules apply as for witnesses before court.\(^{599}\) If a person intentionally or negligently fails to submit required information, a criminal procedure is initiated.\(^{600}\)

All three States provide for investigatory powers. ECRI has not pronounced itself on the competence of the specialised bodies to collect evidence, indicating that the provisions and practices in place in the three States are satisfactory. However, it can be questioned whether the Austrian and Serbian laws provide for “appropriate” investigatory powers in the sense of GPR N° 2 (see above 2.C.3.d). The Austrian specialised bodies rely strongly on voluntary cooperation and conciliation. Therefore, lack of ca-

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593 §§ 5 (4), 6 (4) Austrian Act on the Equal Treatment Commission, note 369; See Nikolay-Leitner/Konstatzky in Krell et al., op.cit. note 549, 537
594 §§ 16 Austrian Act on the Equal Treatment Commission, note 369, 45, 46 AVG, note 412, § 15 Norwegian LDO Act, note 398, § 17 Administration Act, Lov om behandlingsmåten i forvaltningssaker, LOV-1967-02 nr. 10
595 § 11 (4) Norwegian LDO Act, note 398
596 Article 12 Rules of Procedure of the CPE, note 511
597 See Hopf et al., GlBG, op.cit. note 410, 765 et seqq., 781; Equinet, “Enforcement”, note 527, 18
598 § 11 (1) Norwegian LDO Act, note 398
599 See Ot.prp.nr.34 (2004-2005), note 400, 83 et seq.
600 § 13 (1) Norwegian LDO Act, note 398
Another question relates to the burden of proof. Under which circumstances do the specialised bodies assume that there has been discrimination? All three States have taken into account the requirements of the European standards regarding the shared burden of proof. The Austrian formulation has received strong criticism. The Norwegian and the Serbian wording establish a real shift in the burden of proof\textsuperscript{601}, thus obliging the respondent to prove that no violation of the principle of equal treatment has taken place. The Austrian law only requires that the respondent makes credible that it is more likely that she/he acted with a motive which is not prohibited by the Equal Treatment Act.\textsuperscript{602} The wording of the Act is not in conformity with the Directives and GPR No 7.\textsuperscript{603} The Austrian Supreme Court of Justice believes that it is sufficient to interpret the provision in accordance with the Directives.\textsuperscript{604} This is doubted by others who are of the opinion that the Austrian legislation is in breach of EU law.\textsuperscript{605} In this case, the direct effect of the Directives via the principle of non-discrimination as developed in the \textit{Kücükdeveci} judgment would not extend to procedural provisions. It does not apply to questions of burden of proof (see above 2.B).

7. \textit{Promotion of friendly settlements}

Most European States offer some kind of conciliation procedure (e.g. Sweden, Estonia, Belgium).\textsuperscript{606} Only few of them provide “formal means of alternative dispute resolution”\textsuperscript{607} (e.g. Belgium, UK). In States with both a promotional-type and a judicial-type

\begin{itemize}
\item \textsuperscript{601} § 10 Norwegian Discrimination Act, note 381; Article 45 (2) Serbian Law on the Prohibition of Discrimination, note 399
\item \textsuperscript{602} §§ 26 (12), 38 (3) Equal Treatment Act, note 368
\item \textsuperscript{604} See Austrian Supreme Court of Justice, 9 July 2008, 9ObA177/07f
\item \textsuperscript{605} See Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern, “Vorschläge zur Weiterentwicklung des GlBG und GBK/GAW-G”, 5, at <http://www.klagsverband.at/recht/glbg-entwicklung.pdf>; Office of the Equal Treatment Ombudspersons, Bericht II, note 498, 139 et seq.
\item \textsuperscript{606} See Equinet, “Enforcement”, note 527, 21; Benecke, \textit{op.cit.} note 401, 62
\item \textsuperscript{607} Ammer et al., \textit{op.cit.} note 50, 81
\end{itemize}
specialised body, this task is usually attributed to both bodies, with only the tribunal-type body able to facilitate binding agreements between the parties.\textsuperscript{608}

However, the solutions in the three States differ. The Austrian Ombudspersons support “informal negotiations”\textsuperscript{609} between the victim of discrimination and the discriminator. They also provide support to find amicable settlements and encourage the payment of voluntary compensation.\textsuperscript{610} Promotion of an amicable settlement is the “characteristic” element of the individual case procedure before the Equal Treatment Commission.\textsuperscript{611} The main aim is to avoid Commission decisions through compromises and informal amicable solutions. The Ombudspersons’ potential to resolve individual cases is considered high given the fact that solutions are consensual rather than imposed.\textsuperscript{612} Going further than facilitation, the Norwegian LDO and the Serbian CPE propose mediation.\textsuperscript{613} In Norway, the LDO itself conducts the mediation, whereas mediation in CPE proceedings is conducted by certified mediators.\textsuperscript{614} There are attempts in Serbia to detach the mediation proceeding from the CPE. Hence, mediation takes place at the CPE’s office or any other place agreed upon.\textsuperscript{615} If the conflict parties refuse mediation or fail to reach an agreement, the complaints proceeding continues before the LDO or CPE respectively.\textsuperscript{616}

Conciliation is a function contained in ECRI GPR N° 2. The Directives also suggest the introduction of conciliation procedures through administrative bodies or courts (see above 2.C.3.e). By enabling their specialised bodies to facilitate or mediate solutions, the three States comply with the European standards.

\textsuperscript{608}Ibid., 87
\textsuperscript{609}“informelle Verhandlungen”, Nikolay-Leitner/Konstatzky in Krell et al., op.cit. note 549, 535
\textsuperscript{611}See Hattenberger, op.cit. note 411, 582, 604
\textsuperscript{612}See Hopf et al., GIBG, op.cit. note 410, 763
\textsuperscript{613}§ 3 para. 3 Norwegian LDO Act, note 398, Article 38 Serbian Law on the Prohibition of Discrimination, note 399
\textsuperscript{614}Articles 27 et seqq. Rules of Procedure of the CPE, note 511; see CPE, Annual Report 2011, note 491, 21
\textsuperscript{615}Article 30 (3) Rules of Procedure of the CPE, note 511
\textsuperscript{616}See Ot.prp.nr.34 (2004-2005), note 400, 64, Article 30 (3) Rules of Procedure of the CPE, note 511
8. Non-binding decisions

The competence to issue non-binding decisions is relatively common in Europe (e.g. Denmark, France, Hungary). Typically, decisions take the form of warnings, recommendations or opinions.\(^\text{617}\)

Non-binding decisions are the result of a process of deliberation. They seek to establish whether a situation is in breach of anti-discrimination laws. Yet, they have no normative content and do not seek to create, abrogate or establish rights. They are factual, and have an argumentative or persuasive function rather than a prescriptive one.\(^\text{618}\)

Non-binding decisions are the main form of action at the disposal of the Norwegian first-instance mechanism, the LDO, and of the Austrian “second-instance” mechanism, the Equal Treatment Commission. The Serbian CPE, like the Norwegian LDN, only issues binding decisions (see section 3.G.9.).

If the Equal Treatment Commission or the LDO conclude that there has been violation of the anti-discrimination laws, their non-binding decision takes the following forms: The Equal Treatment Commission transmits a written suggestion on how to achieve equal treatment and an order to put an end to the discrimination to the perpetrator, imposing a time-limit of two months.\(^\text{619}\) The LDO’s decisions take the form of written findings that there has been violation of the Law on discrimination (uttalelse).\(^\text{620}\) In this case, it may also suggest measures to bring the situation in conformity with the anti-discrimination laws. These non-binding suggestions have essentially the same scope as the LDN’s binding individual acts.\(^\text{621}\)

The two States have found different mechanisms to ensure compliance with the specialised bodies’ decisions: Suggestions and orders by the Equal Treatment Commission are made public, though in an anonymized form.\(^\text{622}\) Through the anonymization

\(^{617}\) See Benecke, *op.cit.* note 401, 62; Ammer et al., *op.cit.* note 50, 82

\(^{618}\) On these thoughts see Graver, *op.cit.* note 446, 397

\(^{619}\) § 12 (3) Austrian Act on the Equal Treatment Commission, note 369

\(^{620}\) §3 (3) Norwegian LDO Act, note 398; see Skjeie in Schiek/Chege, *op.cit.* note 229, 297

\(^{621}\) § 5 Ordinance on the LDO and the LDN, note 419

\(^{622}\) § 12 (7) Austrian Act on the Equal Treatment Commission, note 369
the publication loses its sanction potential.\textsuperscript{623} The Commission has the capacity to
increase the pressure put on discriminators by obliging the discriminator to submit
follow-up reports, and publishing opinions on non-compliance upon receipt of every
report.\textsuperscript{624} However, in practice such follow-up has not taken place.\textsuperscript{625} The LDO
actively seeks to ensure that the parties respect the recommendation.\textsuperscript{626} However, the
LDO “does not conduct systematic analyses whether her/his decisions are being re-
spected and implemented”\textsuperscript{627}.

Moreover, both States provide for the possibility to apply to another body in case of
non-compliance. If the Norwegian LDO has found a breach and the respondent does
not abide by the opinion, or if a friendly settlement cannot be found, the LDO may
submit the case to the Equal Treatment and Discrimination Tribunal (LDN).\textsuperscript{628} Within
three weeks, parties may submit an application for review of the LDO’s opinion\textsuperscript{629},
and the LDO itself can put a case before the LDN for a binding decision. In addition,
the LDN can request that the LDO submits a case for a binding decision.\textsuperscript{630} In their
application to the LDN (which has to be submitted to the LDO), the parties may bring
forward new facts. The LDO first reviews the case, and can pass a new recommen-
dation or submits the case to the LDN.\textsuperscript{631}

The Austrian Equal Treatment Commission’s suggestions and orders are not oppos-
able.\textsuperscript{632} However, failure to comply with orders within the time-limit can lead to addi-
tional proceedings. The representatives of labour and employers’ organisations may
apply to the labour or civil courts to reach a declaratory judgment on whether there
has been violation of the principle of equal treatment.\textsuperscript{633} Additionally, the Equal
Treatment Ombudspersons may apply to the courts if the Commission deals with the

\textsuperscript{623} See Hattenberger, \textit{op.cit.} note 411, 553
\textsuperscript{624} § 13 Austrian Act on the Equal Treatment Commission, note 369
\textsuperscript{625} See Office of the Equal Treatment Ombudspersons, “Gemeinsamer Bericht 2008-2009”, 159, at
\url{http://www.gleichbehandlungsanwaltschaft.at/DocView.axd?CobId=42115}
\textsuperscript{626} § 3 para. 3 Norwegian LDO Act, note 398; see NOU 2011:18, note 409, 136
\textsuperscript{627} “[…]ingen systematiske undersøkelser av om hennes uttalelser respekteres og følges opp”, Hel-
lum/McClimans, \textit{op.cit.} note 519, 64
\textsuperscript{628} § 3 para. 3 Norwegian LDO Act, note 398
\textsuperscript{629} See Likestillingso og diskrimineringsombudet, “Om å klage en sak inn for Likestillingso og diskri-
mineringsnemnda”, in:<http://www.ldo.no/no/Dine-rettigheter/Likestillingso--og-
diskrimineringsnemnda/Om-adgangen-til-a-klage-en-sak-\textendash-inn-for-Likestillingso--og-
diskrimineringsnemnda/>
\textsuperscript{630} § 6 (2) Norwegian LDO Act, note 398
\textsuperscript{631} See LDO, “Klage”, note 629
\textsuperscript{632} See Hopf et al., \textit{GlBG, op.cit.} note 410, 765 et seqq., 792
\textsuperscript{633} § 12 (4) Austrian Act on the Equal Treatment Commission, note 369
case upon request by the Ombudspersons and the respondent does not comply with orders or the Commission reaches a different conclusion than the Ombudspersons (see above 3.G.3.).

Given the non-binding nature of the Commission’s opinions, questions of compensation, reinstatement and sanctions are left to administrative criminal proceedings and civil and labour courts. Few cases are brought to the ordinary courts, and courts are deemed to be hesitant to award compensation in discrimination cases.

9. **Binding decisions**

Some European States have mandated their respective specialised body to issue binding decisions (e.g. Bulgaria, Croatia, Cyprus, Finland, Hungary, Romania). While several of these bodies are authorised to impose fines in cases of non-compliance, very few bodies can attribute compensation (e.g. Estonia).

Of the three States under review, only the Norwegian and Serbian laws empower specialised bodies to make binding administrative decisions. The Norwegian LDN acts only after the LDO has passed its finding. If no mediation agreement has been reached and the CPE has not initiated court proceedings, complaints proceedings before the CPE result in binding decisions. Hence, binding decisions are of a subsidiary character.

The CPE and the LDN review both facts and legal questions of a case. The LDN decisions are defined as “acts by a public authority acting with imperium which are […] determining for rights or obligations of private persons”.

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634 § 12 (5) leg.cit., note 369  
635 § 5 (5), 6 (5) leg.cit., note 369  
636 See European Union Agency for Fundamental Rights, “Access”, op.cit. note 37, 46  
638 “en avgjørelse som treffes under utøving av offentlig myndighet og som generelt eller konkret er bestemmende for rettigheter eller plikter til private personer.” Graver, op.cit. note 446, 396; see § 2 (1) Administration Act, note 594
Their binding administrative decisions have different contents. Both the LDN and the CPE can issue a declaratory decision in cases of breach of the laws coming under their respective remit. 639 The LDN orders measures to put an end to a discriminatory situation and to prevent new violations of the laws. 640 Likewise, the CPE issues a “binding recommendation” (i.e. an order) on measures to redress the violation. 641 The respondent is obliged to act upon the recommendation within 30 days, and to submit information on implementation to the CPE. 642

There are great differences regarding the LDN’s and CPE’s capacity to sanction non-compliance. The LDN may set a time-limit for compliance. 643 If a time-limit has been set, the LDN may impose an administrative fine (mulkt) upon expiration of the time-limit. 644 Before the fine is imposed, the parties must be heard. 645 According to § 18 Act on the LDO, this injunctive remedy is imposed in daily rates until reinstatement. The Act on the LDO contains no upper or lower limit for the fine; however, the criteria of proportionality and effectiveness need to be taken into account. 646 The orders mentioned above in combination with the fines are considered to be effective and dissuasive sanctions in the sense of Article 15 Directive 2000/43/EC and Article 17 Directive 2000/78/EC. 647 Given their primary aim of forcing compliance with the anti-discrimination laws, the fines are not considered penalties in the sense of Article 6 ECHR. 648 The obligation to pay such fines may be enforced by the LDN’s secretariat. 649

639 §§ 7 (1) Norwegian LDO Act, note 398, Article 39 (1) Serbian Law on the Prohibition of Discrimination, note 399
641 Article 39 (1), (2) Serbian Law on the Prohibition of Discrimination, note 399
642 Article 39 (3) Serbian Law on the Prohibition of Discrimination, note 399; see also CPE, Annual Report 2011, note 491, 47 et seq.
643 § 7 (2) Norwegian LDO Act, note 398
645 § 18 Ordinance on the LDO and the LDN, note 419
646 See Hedlund in Hellum/Ketscher, op.cit. note 644, 346
647 See Ot.prp.nr.34 (2004-2005), note 400, 70; Hedlund/Djupvik Semner, op.cit. note 438, 491
648 See Hedlund in Hellum/Ketscher, op.cit. note 644, 344; Ot.prp.nr.34 (2004-2005), note 400, 70
649 § 7-2 (d) Enforcement Act, Tvangsfullbyrdelsesloven, LOV 1992-06-26 nr. 86; § 9 Ordinance on the LDO and the LDN, note 419;
The CPE, in case of non-compliance with the recommendation and the reporting obligation, cautions the respondent in a final decision.\textsuperscript{650} After the lapse of another 30 days, the CPE is obliged to inform the public about the case.\textsuperscript{651} Thus, naming and shaming is the strongest sanction at the disposal of the CPE. It strongly relies on its institutional authority and public pressure to achieve compliance with its findings.\textsuperscript{652} The Venice Commission considers this sanction to be too weak, and recommended to use it only as an “additional measure to other penal or administrative ones.”\textsuperscript{653}

However, there are also limits to the LDN’s power. It cannot lift or change a general administrative act, nor can it order how the act would need to be changed to be in conformity with the laws under the LDN’s jurisdiction.\textsuperscript{654} The LDN has no power to lift individual administrative acts\textsuperscript{655}, but it can publish a non-binding reasoned opinion.\textsuperscript{656} This is justified by the need for increased legal security and hence ordinary court decisions on such issues\textsuperscript{657}, but in practice limits the LDN’s effectiveness in a broad range of cases involving acts by public authorities.\textsuperscript{658} It cannot order a potential employer to hire a victim of discrimination.\textsuperscript{659}

It cannot impose compensation for pecuniary or non-pecuniary damages.\textsuperscript{660} This may cause under-reporting\textsuperscript{661} and have adverse consequences. The high costs of ordinary court proceedings discourage victims of discrimination to file an action for compensation even if the LDN established that there had been discrimination.\textsuperscript{662} Therefore, ECRI recommended that the LDN be made competent to award compensation.\textsuperscript{663}

\begin{itemize}
\item \textsuperscript{650} Article 40 (1), (3) Serbian Law on the Prohibition of Discrimination, note 399, §§ 196 et seqq. Law on Administrative Procedure, Official Gazette of the Federal Republic of Yugoslavia, No. 33/97, 31/01
\item \textsuperscript{651} Article 40 (2) Serbian Law on the Prohibition of Discrimination, note 399
\item \textsuperscript{652} See Commissioner for Protection of Equality, “Practicum for Protection against Discrimination”, Belgrade, 2012, 74, at \url{http://www.ravnopravnost.gov.rs/files/Practicum_For_Protection_Against_Discrimination.pdf}
\item \textsuperscript{653} CDL-AD(2008)001, note 407, 10
\item \textsuperscript{654} See NOU 2011:18, note 409, 156
\item \textsuperscript{655} § 9 Norwegian LDO Act, note 398; See Hedlund in Hellum/Ketscher, \textit{op.cit.} note 644, 343; LDO, “Klage”, note 629
\item \textsuperscript{656} § 7 (1) Norwegian LDO Act, note 398; see Hedlund in Hellum/Ketscher, \textit{op.cit.} note 644, 343; Hedlund/Djupvik Semner, \textit{op.cit.} note 438, 496
\item \textsuperscript{657} See Ot.prp.nr.34 (2004-2005), note 400, 75
\item \textsuperscript{658} See Helga Aune, "Helsedepartementet, Regjering og Storting bryter likestillingsloven!", in \textit{Kritisk juss} 2004 (30) 2, 144-155, at 152 et seq.
\item \textsuperscript{659} See Hedlund in Hellum/Ketscher, \textit{op.cit.} note 644, 343
\item \textsuperscript{660} See Ammer et al., \textit{op.cit.} note 50, 96
\item \textsuperscript{661} See CR(2009)4 Norway, note 161, para. 39
\item \textsuperscript{662} See Norwegian official report, NOU 2009:14 Et helhetlig diskrimineringsvern
\item \textsuperscript{663} CR(2009)4 Norway, note 161, para. 41
\end{itemize}
In case of failure to respect the LDN’s order, a criminal court proceeding may be initiated and additional monetary penalties (bot) can be imposed.\footnote{664} Such a penalty requires at least negligent behaviour by the respondent. The decision is legally binding.\footnote{665}

In cases of urgency (e.g. danger of irrecoverable damage), also the LDO is authorised to make binding rulings (hastevedtak).\footnote{666} This is only possible in cases where the respondent does not abide by the LDO’s initial sentence. In practice, such decisions concern only cases where the violation is obvious.\footnote{667} The competence to pass urgency rulings is derived from the LDN’s competence to pass binding decisions.\footnote{668} Parties must be heard before the decision is issued and can appeal against the decision to the LDN.\footnote{669}

The decisions by the Serbian CPE are final and cannot be appealed. Appeals against decisions by the LDN have to be brought to ordinary courts\footnote{670}. In terms of separation of powers, this does not pose a problem in Norwegian law. The courts’ competence to review legality of administrative acts has no basis in the written constitution, but is considered to be a constitutional principle.\footnote{671} In cases where ordinary courts review binding acts emanating from quasi-judicial administrative organs, the ordinary courts “act as some kind of appeal instance.”\footnote{672} Norway has a relatively small number of court cases regarding discrimination. This is due to the LDO’s and LDN’s growing competence and activism, with the downside that judgements are unsystematic.\footnote{673}

ECRI’s GPR N° 7 explicitly states that the competence to pass binding decisions should be given to “another body” than the one entrusted with victim-oriented functions (see above 2.C.3.f, 2.C.3.). In this sense, the Norwegian LDN satisfies ECRI’s

\footnotesize{\begin{itemize}
\item \textsuperscript{664} § 12 Norwegian LDO Act, note 398
\item \textsuperscript{665} See Hedlund in Hellum/Ketscher, \textit{op.cit.} note 644, 353 et seq.; Ot.prp.nr.34 (2004-2005), note 400, 73
\item \textsuperscript{666} § 4 Norwegian LDO Act, note 398
\item \textsuperscript{667} See Likestillings- og diskrimineringsombudet, ”Uttalelser”, at <http://www.ldo.no/no/Dine-rettigheter/Gangen-i-en-klagesak2/Uttalelser/>
\item \textsuperscript{668} See Ot.prp.nr.34 (2004-2005), note 400, 77
\item \textsuperscript{669} § 4 (3) Norwegian LDO Act, note 398, § 16 Administration Act, note 594; see Hedlund/Djupvik Semmer, \textit{op.cit.} note 438, 454 et seqq.
\item \textsuperscript{670} § 12 (1) Norwegian LDO Act, note 398; See Skjeie in Schiek/Chege, \textit{op.cit.} note 229, 297
\item \textsuperscript{671} See Graver, \textit{op.cit.} note 446, 99 et seq.
\item \textsuperscript{672} ”fungerer som en slags klageinstans.” Graver, \textit{op.cit.} note 446, 103
\item \textsuperscript{673} Anne Hellum, Diskriminerings- og likestillingsrett, lecture held at University of Oslo, 4 September 2012; Advokatfirmaet Frøland & Co DA, “Utredning. Rettspraksis om disktimineringslovgivning”, 2008, 29
\end{itemize}}
recommendation. The CPE, as well as the LDO, combine a broad set of functions, including advice to victims and conciliation. The LDO has an internal separation of advisory and complaints tasks. While such a separation is insufficient to satisfy GPR N° 7, it is considered sufficient by Jacobsen to ensure impartiality. The CPE lacks internal separation of council and quasi-judicial functions. Rather, the Department for complaint proceedings triages cases. If it considers a case to be suitable for strategic litigation and has the victim’s consent, the Department brings the case to court, which precludes its competence to conduct a complaints review itself (see above 3.G.4.) In practice, if it has decided to conduct a complaints proceeding itself, it does not bring the case to the court. There is however no legal obligation for this practice. The unclear delimitation of tasks fuels doubts as to the CPE’s impartiality. Thus, legislation relating to binding decisions of the CPE appears not to be in conformity with ECRI GPR N° 7.

In conclusion, the three States have adopted quite different responses to the European standards. All of the States comply with a baseline where specialised bodies are able to provide guidance and information, hear complaints and encourage friendly settlements. They go beyond the minimum requirements to varying degrees. Austria clearly focuses on soft law proceedings. It vests its specialised bodies with fewer and less authoritative powers than Norway and Serbia. This may have implications for the specialised bodies’ effectiveness and credibility. Norway opted for a predominantly tribunal-type system, thus leaving aside competences which ECRI considers to be fundamental, namely representation of victims and applications to courts. This is problematic given the high obstacles for discrimination victims to have access to legal aid. Serbia chose to enable its specialised body to provide a wide array of tasks, thus formally satisfying most European standards. The downside of the accumulation of competences in one single-apex body is the mingling of victim-oriented and quasi-judicial functions and the danger of perception of impartiality.

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675 See Jacobsen, op.cit. note 182, 332
676 See CPE, Annual Report 2011, note 491, 19
677 Interview with Kosana Beker, note 408
Competences attributed to the specialised bodies by the States under review

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<td>LDO</td>
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H. GOING BEYOND THE TEXT: EFFECTIVE IMPLEMENTATION

Specialised bodies are intended to make a real difference in peoples’ lives. If they are toothless institutions, their contribution to fighting racism and racial discrimination is minimal; if they are not perceived as effective and impartial, victims will refrain from reporting discrimination cases. After having analysed the legislation in place in the three States, a short outlook to the factual situation of these institutions should provide a better impression of the effectiveness and impact of specialised bodies. The correct transposition of Directives does not mean that EU law is correctly applied in all instances. In fact, there is a significant gap between transposition rates and adequate and effective factual implementation of EU and public international law.678

It is very difficult to measure the effectiveness of specialised bodies, as one can only speculate what the situation in relation to racial discrimination would be like if these institutions had not been introduced.679

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679 See Holtmaat, *op.cit.* note 3, 6
I. Accessibility

"Awareness of the equality bodies is generally low, and that among minority groups is even lower than for the whole population." This leads to a discrepancy between the real and perceived level of discrimination and the action taken to counter it or to seek redress.

In its 4th monitoring cycle, ECRI issued 13 recommendations (two interim follow-up recommendations) to raise awareness of the specialised body’s existence or role, indicating a strong need for tackling under-reporting. One of these recommendations relates to Serbia. Specialised bodies themselves recognise accessibility to be one of the main challenges for the future.

The three States under review intended to create low-threshold mechanisms, which should be easily accessible and offer cheap proceedings. However, regional outreach activities remain a challenge, with the great majority of complainants from the capital cities.

Austria is an illustrative example. Around 67% of requests regarding gender discrimination were submitted in three Länder (Vienna, Upper Austria and Styria). Upper Austria and Styria have regional attorneys dealing with gender discrimination. In relation to other grounds, there are no regional attorneys. Regarding discrimination in employment on other grounds than gender, 45% of requests were submitted in Vienna;


682 CRI(2011)21 Serbia, note 482, paras. 30, 36.

683 See Equinet, “Challenges”, note 437, 8.


42% of requests regarding discrimination on the ground of ethnic belonging concerned Vienna.  

2. **Resources**

In particular at times of economic crisis, which tend to exacerbate discriminatory attitudes and actions, specialised bodies have an important role to play. Drastic budget cuts have had a great impact on many specialised bodies’ capacity to deal with individual cases.  

ECRI points to the fact that specialised bodies are called upon to “play a crucial role” in times of economic difficulty. In addition, public awareness of specialised bodies is on the rise, leading to a higher number of complaints. Therefore, even stagnating staff levels lead to an increased backlog of cases.

In its 4th monitoring cycle, which started shortly after the beginning of the economic crisis, ECRI issued a total of 37 recommendations regarding financial and human resources. Out of these, eight are interim follow-up recommendations, indicating on the one hand the urgency of the topic, and on the other the position of governments that increasing specialised bodies budgets would be a relatively easy requirement to fulfil within two years.

ECRI issued recommendations in this respect to all three States under review (interim follow-up recommendations to Austria and Serbia; ordinary recommendation for Norway). ECRI linked the lack of resources of the specialised bodies in the three States with lack of effectiveness.

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686 Office of the Equal Treatment Ombudspersons, Bericht II, note 498, 25, 28
687 See CRIR(2012)23 Annual Report 2011, note 79, 8; CommDH(2011)2, note 211, 14; Equinet, “Challenges”, note 437, 7
688 CRIR(2011)36 Annual Report 2010, note 227, 8
689 See Banulescu-Bogdan/Givens, *op.cit.*, note 194, 12
691 CRIR(2010)2 Austria, note 192, para. 41
692 CRIR(2011)21 Serbia, note 482, paras. 29, 36, 43
693 CRIR(2009)4 Norway, note 161, para. 43
For 2012, the approved budget for the CPE amounts to 89, 5m RSD (approx. 753,000€)\textsuperscript{694}. In 2011, the LDO had a budget of 55 950 000 NOK (approx. 7,5 mill. €).\textsuperscript{695} The resources are considered insufficient given the LDO’s broad mandate.\textsuperscript{696} The Austrian Ombudspersons have no budgetary autonomy. Staff costs, rents and material costs are covered by the budget of the Federal Chancellery. In addition, the Ombudspersons dispose of approx. 400 000 € for outreach activities.\textsuperscript{697}

After initial difficulties in securing sufficient funding for the Commissioner and adequate premises in Belgrade, the Commissioner took up her functions in 2010.\textsuperscript{698} Per 31 December 2011, the CPE’s office consisted of 18 employees, with another 11 posts to be filled in 2012. The Norwegian LDO has 67 employees. The Ombudspersons II and III in total have 5,75 full-time lawyers.\textsuperscript{699} The level of resources is considered insufficient.\textsuperscript{700} There are no plans to increase resources if the Ombudspersons’ mandate is extended in the framework of a levelling up as proposed by the government (see above 3.E.).\textsuperscript{701}

3. Dealing with complaints

All European specialised bodies take the view that they have had a positive impact regarding policy, social structures and individual behaviour. Despite the economic crisis, some have noted an increase in complaints levels and an improved internal capacity to process complaints.\textsuperscript{702}

A terminological clarification is necessary before comparing the actual figures. The CPE uses the term “complaint” also for requests for information and advice, whereas

\textsuperscript{694} See Official Gazette 101/10; CPE, Annual Report 2011, note 491, 103
\textsuperscript{695} See CRI(2009)4 Norway, note 161, para. 40
\textsuperscript{697} See Ammer et al., op.cit. note 50, 47
\textsuperscript{698} See OSCE Mission to Serbia, note 523, 164
\textsuperscript{700} See OSCE Mission to Serbia, note 523, 164
\textsuperscript{701} Office of the Equal Treatment Ombudspersons, Bericht II, note 498, 142
\textsuperscript{702} See Equinet, “Challenges”, note 437, 11 et seq.
the Austrian and Norwegian bodies differentiate between request for advice and complaint.

In European States, numbers of complaints vary greatly. Specialised bodies of some States with a comparable size to Austria, Norway and Serbia (4-10 million inhabitants) received fewer than 100 complaints per year (Slovakia, Denmark). The Swedish and Finnish bodies received between 100 and 1000 complaints, while the Hungarian, Bulgarian and Irish bodies received more than 1000 complaints per year.\textsuperscript{703}

In total, the CPE received 335 complaints in 2011.\textsuperscript{704} In 2011, the LDO received 1476 requests for information and advice,\textsuperscript{705} while the Office of the Ombudspersons received 4444 requests for information and advice.\textsuperscript{706} In the period 2007-2010, the LDO received 589 individual complaints.\textsuperscript{707} In 2010-2011, the Equal Treatment Commission received 228 complaints. Thus, on average, the LDO received 147 complaints, while the Equal Treatment Commission received 114 complaints per year. The percentage of complaints relating to the discrimination grounds covered by this diploma thesis is relatively low: 24\% in Serbia\textsuperscript{708}, 41\% in Norway\textsuperscript{709}, and 27\% in Austria.\textsuperscript{710}

For the period 2008-2009, the LDO found that there had been discrimination in only 20\% of complaints based on ethnicity, compared to a rate of 50\% in gender-related complaints.\textsuperscript{711} In contrast, the Austrian Equal Treatment Commission’s Senate II found discrimination in 29\% of cases relating to ethnic belonging, 43\% of cases relating to religion and belief. Senate III, dealing with discrimination on the ground of ethnic belonging in fields outside employment, found discrimination in 69\% of cas-

\textsuperscript{703} See Banulescu-Bogdan/Givens, \textit{op.cit.}, note 194, 8
\textsuperscript{704} See CPE, Annual Report 2011, note 491, 11
\textsuperscript{705} LDO, “Veiledningssaker etter diskrimineringsgrunnlag”, at <http://www.ldo.no/no/Tema/Statistikk-analyse/Veiledningssaker-etter-diskrimineringsgrunnlag/>
\textsuperscript{706} See Office of the Equal Treatment Ombudspersons, Bericht II, note 498, 11
\textsuperscript{707} See NOU 2011:18, note 409, 23
\textsuperscript{708} See CPE, Annual Report 2011, note 491, 51 et seq.
\textsuperscript{709} See NOU 2011:18, note 409, 23
\textsuperscript{711} See NOU 2011:18, note 409, 126 et seqq.
Disaggregated data according to discrimination grounds are not available for Serbia. In total, the CPE found that there had been discrimination in 14% of cases.\textsuperscript{713} It would be interesting to examine the concrete reasons for the divergences in numbers of complaints. The Fundamental Rights Agency’s EU-MIDIS study dating back to 2009, there is no current Europe-wide research into racial discrimination and knowledge of rights and remedies. One indication is given by ECRI in relation to Serbia, namely that the awareness of the CPE is still low (see above 3.H.2.).\textsuperscript{714} The EU-MIDIS study indicated that reasons for under-reporting of discrimination cases were due to lack of knowledge of remedies, lack of trust in public bodies, and fear of negative consequences.\textsuperscript{715} Further studies would be needed, in particular as regards non-EU Member States.

The divergences in numbers of cases and findings of discrimination reveal deficiencies of institutions which are still in the making, and a lack of awareness of the content of anti-discrimination legislation by the target groups. It is not possible to conclude with bodies’ effectiveness, in particular given the lack of systematic follow-up (see 3.G.8.). The fact that the Austrian specialised bodies receive the most requests for information must be seen in the light of the Ombudspersons’ limited competences and the relatively low number of court cases.\textsuperscript{716}

\textbf{CONCLUSION}

Specialised bodies to combat racism and racial discrimination have come into existence in almost all European States in the past 15 years. Following increased awareness of issues of racism and racial discrimination, European standards for the whole of the continent were developed to introduce a common baseline for protection against discrimination in material and institutional terms. Acknowledging the need for effective remedies for victims of discrimination, the European Union and the Council

\begin{flushleft}
\textsuperscript{712} See Federal Chancellery, Bericht I, note 710, 159 et seqq.
\textsuperscript{713} See CPE, Annual Report 2011, note 491, 69
\textsuperscript{714} CRI(2011)21 Serbia, note 482, paras. 30, 36
\textsuperscript{715} European Union Agency for Fundamental Rights, “EU-MIDIS”, note 680, 54 et seqq.
\textsuperscript{716} See European Union Agency for Fundamental Rights, “Access”, op.cit. note 37, 46
\end{flushleft}
of Europe’s European Commission against Racism and Intolerance developed standards relating to specialised bodies’ competence to deal with individual cases.

The relation between the EU’s and ECRI’s standards has been examined. Directives 2000/43/EC and 2000/78/EC as well as the gender Directives constitute minimum standards in the field of anti-discrimination. Directive 2000/43/EC contains vague requirements relating to equality bodies. They are broadly accepted on the continent and binding on EU Member States. Developed by independent experts, ECRI’s non-binding GPRs go beyond the Directive’s minimum compromise. They set benchmarks for best practice in anti-discrimination legislation and legislation on specialised bodies to combat racism and racial discrimination.

The only provision in Directive 2000/43/EC on the capacity of specialised bodies to deal with individual cases relates to “assistance to victims in pursuing their complaints”. ECRI’s GPRs can be used to concretise this vague provision. It has been shown that the wording of the Directive undoubtedly covers the victim-oriented functions provided for in ECRI’s GPRs, in particular legal advice to and representation of victims. Moreover, the question whether Directive 2000/43/EC encompasses quasi-judicial functions as detailed by ECRI, must be answered in the affirmative. In order to ensure impartiality of specialised bodies acting as quasi-courts, ECRI recommends conferring the two types of power on two separate bodies. ECRI’s standards are more concrete in relation to specialised bodies’ structure and independence. All in all, the European standards taken together provide for a strong set of (partly binding) guidelines for specialised bodies.

The GPRs and the Directives have a similar, though not identical, understanding of discrimination. They differ as regards discrimination grounds. ECRI has a broad understanding of its mandate, which encompasses racism, racial discrimination, xenophobia, antisemitism and intolerance. It requires specialised bodies to be able to tackle discrimination on more grounds than those contained in Directive 2000/43/EC (racial or ethnic origin) and 2000/78/EC (religion and belief, amongst others).

The last part of the diploma thesis focused on the implementation of the European standards in European States, with Austria, Norway and Serbia serving as illustrative examples. The specialised bodies of all three States examined in this diploma thesis reflect the influence of the innovative European standards. Even though only Austria
is bound by the Directives, all three States referred to the Directives as well as to ECRI, underlining the persuasive value of the latter’s standards. In all three States, the anti-discrimination legislation and legislation on specialised bodies are mainly in compliance with the Directives. National law goes beyond the Directives to varying degrees and thereby partly implements ECRI’s standards. None of the States can be said to fully implement the GPRs.

The complexity of the Austrian equal treatment laws and the different levels of protection assigned to different discrimination grounds received criticism. In Norway and Austria, lack of independence of specialised bodies remains a concern. As regards the capacity to deal with individual cases, all three States have introduced innovative features and proceedings which can serve as a model for other States. The Austrian specialised bodies essentially provide soft law proceedings. Even though they have few competences in a comparative perspective, they receive most requests for advice, indicating a real need for this institution. Both the Norwegian and the Serbian laws mandate specialised bodies to make binding decisions and ensure compliance. With the intention to improve case-law and raise awareness, the Serbian specialised body brings strategic litigation claims to courts. It has been shown that in Norway and Serbia, specialised bodies have both victim-oriented and quasi-judicial functions. This runs contrary to ECRI’s recommendation in this respect and is considered to jeopardize the perception of the bodies’ impartiality when considering complaints. It undermines their standing as a distinct avenue for redress and as a real alternative to ordinary court proceedings.

Even the best law would be worthless if it did not have any impact on people’s lives. It is not possible to measure the impact of specialised bodies on the realisation of equality. However, the fact that they take part in public discourse, promote equality and provide a forum for exchange and conflict resolution contributes to fostering a climate of openness. As in many European States, the specialised bodies in Austria, Norway and Serbia undergo constant change and adaptation to new challenges. In times of crisis, their value cannot be overestimated.
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