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"**Non-discrimination Policy in Employment: Practice of EU Member States**"

Master Thesis

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ABBREVIATIONS

EU - European Union.

CJEU - Court of Justice of the European Union.

TFEU - Treaty on the functioning of the European Union.

ECSC - European Coal and Steel Community.

ECHR - European Convention on Human Rights.

ECtHR - European Court of Human Rights.

Directive 2006/54 - Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

Equal Pay Directive of 1975 - Council Directive 75/117/EEC on the Approximation of the Laws of the Member States relating to the Application of the Principal of Equal Pay for Men and Women [1975] O.J. L45/19.

Equal Treatment Directive of 1976 - Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions [1976] O.J. L39/40.

Framework Directive - Council Directive 2000/78/EC establishing a General Framework for Equal Treatment in Employment and Occupation [2000] O.J. L303/16.

ILO – International Labour Organization.

NGO - Non-governmental Organizations.

Race Directive - Council Directive 2000/43/EC implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin [2000] O.J. L180/22.

TEC - Treaty establishing the European Community.

INTRODUCTION

Statement of the topic. The business consists of people, of the ordinary employees that devote their lives to someone's company. Exactly these employees run the mechanism of work and try to do all the best for the prosperity of the companies. When the employer rejects to hire the potential employee on the discriminatory grounds, the employer loses not only "working power", he/she loses dignity before the people and the country. How can an ordinary employee of the company protect himself/herself against the discrimination? Can the state defend such employees and provide justice in the discrimination cases? Can the state guarantee the effective mechanism of its protective power by the national authorities and by functioning measures?

Of course, the employees can also be discriminated in the sphere of public employment, but in this situation, the public authority will deteriorate the status of the whole state. In addition, in the public sphere, a person who is responsible to hire individuals can be punished for discrimination because it can be his/her personal opinion. Despite this, in the private sector, the discrimination can be not only grounded on personal opinion of the employer but can also be set as the agenda of the whole company. That is why the employees in the business sphere are not properly protected from discrimination in the employment relations.

Furthermore, the EU aims are to protect rights of employees, to provide the security of these rights and to give them an equal possibility to be employed. But the knowledge of the employees about their rights is still limited due to them being afraid to fight with the discrimination where there is no guarantee that state will defend them and will take appropriate measures of the protection against the employers. In addition, various countries within the EU have different rules that can create a likelihood of confusion in the protective mechanism, that can infringe an employee’s possibility to work in every Member State according to one of the core principles of the European Union which allows the freedom of movement of persons (employees).

As a result, with further development of the labour relations, there will be a necessity to restrict more and more probabilities of the discrimination not only on the level of the countries that are included in the European Union but in the primary and secondary legislation of the EU. Therefore, it is important to clarify the scope of the discrimination which is covered by the legislative protection of the individuals regarding their employment relations with the employers. After the defining what is related to discrimination, the research is concentrated on the implementation of the national protective rules that shows the correlation of them with the EU direction in the non-discrimination policy. This research points out the necessity of the employees’ protection through the effective procedures and measures that will be accessible and easily understandable for them through the

amendments the legislation of the EU which will fix the basic protective procedures and measures without the possibility of the EU Member States to change it.

The current research will investigate the jurisdictions of Finland, France, Germany, Poland, Sweden, Slovakia according to their mechanism of the protection of the individuals in the employment relations.

Scientific research problem. The EU primary and secondary legislation define the scope of the issues related to discrimination in employment, but the problem is to what extent these legislative norms provide the directions for the EU Member States and what is still yet to be determined. In addition, do the Member States guarantee the effectiveness of the non-discrimination policy in the European Union where they should protect employees from the discrimination in the employment through the efficient national legislative norms and practices which should break the barriers to the access to the national authorities and the justice itself, and provide sufficient measures in respect of injured individuals?

Novelty and relevance of the master thesis. The proper effect of the non-discrimination policy in the employment of the Member States still raises debates. The Directives[1] that were established at the beginning of the 2000-s should cover the non-discrimination issues regarding employment and give the clarification on the protected grounds, types, procedures of protection and measures against the discrimination. But mostly they have an adverse effect because nowadays the EU Member States have not enough interactive mechanism of the protection of the individuals in the employment relations. Therefore, the importance of the investigation of the practice of the EU Member States in their non-discrimination policy of the employment is that looking through the history of the development of the mechanism of protection, nowadays the countries need to resolve the issue of the lack of availability of justice and its disproportionality in the relevant field. That needs to be done for the sake of compliance with the one of the aims of the EU - combating the discrimination. Unfortunately, the employees are of the more sensitive groups where the protective rules only exist in the legislation of the EU and are not appropriately implemented into practice. This creates misunderstandings and barriers on the way of the defence of the employees against the discrimination.

[1] Council Directive 2000/78/EC establishing a General Framework for Equal Treatment in Employment and Occupation [2000] O.J. L303/16. (Framework Directive); Council Directive 2000/43/EC implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin [2000] O.J. L180/22. (Race Directive); Directive of the European Parliament and of the Council 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] O.J. L204 (Directive 2006/54).

The contribution of the research lies in the field of identification of the current problems of the non-compliance of the EU Members with the directions of the general EU policy regarding the non-discrimination in the sphere of employment. The research tries to fill the gap in the employment legislation of the EU that allows the EU Member States to create procedures and measures regarding the protection against the discrimination at their own discretions that are the main reason of the barriers to justice.

Review of the literature: Barnard C., Bogg A., Costello C., Davies A.C.L., Debreceniova J., Douka V. S., Foster N.G., Halrynjo S., Howard E., Ivanus C. A., Jonker M., Reading P., Seifert A., Thompson F.R.

The **aim** of the master thesis i**s** to analyze the compliance of the EU Member States with the non-discrimination policy of the European Union in the sphere of employment, especially regarding the provision of the appropriate measures and procedures for the protection of employees and approaches for combating the discrimination on the existent protected grounds (sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation)[2], and according to the analysis, to formulate opinions and make suggestions regarding the effectiveness of the non-discrimination policy of the EU in the sphere of employment.

The goal is to be achieved through the following **objectives**:

1) to analyze to which extent the discrimination in employment covers the protection of potential/current/dismissed employees. This will be done by investigating the historical development of the discrimination and revealing the types, grounds, and exceptions to the discrimination of individuals in their employment relations;

2) to define the effectiveness of the enforcement procedures of the state bodies according to the ways of defence of employees (disregarding their status) and of the measures provided in the national legislation of the Member States in order to protect them from the discrimination by the employer.

Practical significance. This research identifies the ways how the EU Member States try to combat the discrimination in employment relations and, what is more crucial, how EU countries try to prevent the unequal treatment by means of the legislative norms of the European Union. The importance of the work is to determine the effectiveness of the procedures and measures due to appropriate enforcement of the rights of the potential/current/dismissed employees regarding the discrimination on the protected grounds within the scope of discrimination.

[2] Consolidated version of the Treaty on the Functioning of the European Union, Article 19. *[accessed 2018-01-08]*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FTXT>.

The first reason why this research can be valuable for the policy makers, is the fact that the identification of the barriers which the employees can meet when he/she wants to protect the rights in the national body/bodies will be conducted and the suggestions of the improvement of the access to them will be provided. Such barriers also show the necessity of changing the legislation regarding the measures. The second reason of the significance is to show how the EU Member States deals with the protection of the employees who were discriminated in the employment under their national legislation and where these legislative norms are in need of improvement for the purpose to fall under the legislative act that provides the non-discrimination policy of the EU. The current research also underlines the necessity of the cooperation between the EU Member States regarding the protection of the persons in the employment sphere as there are various national procedures for the protection of the employees and a certain degree of their convergence within the EU is needed.

The main importance of the current research for various practitioners in the field at hand lies in the acknowledgment of the lack of efficiency in respect of the proper protection of the employees under the EU non-discrimination policy. The research also shows the necessity of a proactive position in defending the employees to be formed. In addition, the observations of the practical methods protection of the employees of various Member States are to be provided.

Furthermore, by using the underlined and defined obstacles to the justice in case of the discrimination in the employment as a starting point, future researchers can propose to create the modern solutions or to continue the development of the solutions that are given at this research. In addition, the future researchers can further elaborate the recommendations that are to be listed in the current work regarding the creation of the general “first aid” body on the EU level and evaluate the efficiency and appropriateness of such.

An overall significance of the research lies in the gathering of the actual information regarding the employment discrimination according to its scope, which is obligatory for the Member States to apply, an information that can be found regarding their procedures and measures that should protect the employees within the 28 countries of the European Union.

The defended statements of this master thesis are:

1. The EU employment Directives provide for the non-efficient provisions regarding combating the discrimination, giving too much discretion to the EU Member States in establishing of the body/bodies that has the competence to fight against the discriminatory issues in the employment relations.

2. The EU Member States are not initiative enough in respect of the conduct of national investigation procedures in employment discrimination cases.

3. The existing measures against the discrimination in employment, that are currently adopted by the EU Member States, are not sufficient enough to provide a redress to the injured employees.

In collecting and processing the necessary information for this research, the following methods will be used:

1. *Data collection method* - to gather the useful and actual information regarding the legislative acts of the European Union and its Member States, the cases, the researches and articles of scholars that are related to the discrimination issues in employment;

2. *Data analyzing method* - to critically analyze the bulk of the legal acts, cases, and the doctrine related to the non-discriminatory policy in the employment of the Member States of the EU;

3. *Comparative method* – to compare the approaches of the EU countries (Finland, France, Germany, Poland, Sweden, Slovakia) regarding the protection of the potential/current/dismissed employees, also match the various publications of the different scholars who analyzed the problematic issues related to the topic;

4. *Historical method* – to analyze the development of legislation regarding the protection of individuals in the employment relations, from the foundation of the European Coal and Steel Community to the current non-discrimination policy of the European Union.

5. *Logic method* - to clarify and understand the legal documents, cases, and other sources by using the logical process of thinking and, as a result, to make logical conclusions from the current problems in the EU;

6. *Linguistic method* - to reveal the ordinary meaning of the concepts laid down in the legal acts.

The structure of the master thesis. It consists of two parts according to tasks of this Master‘s Thesis. The first (general) chapter of the master thesis describes the framework of the discrimination in the employment relations. The first sub-chapter shows the gradation of the development of the protection against the discrimination (from the establishment of the current European Union and the only one protected by the EU legislator ground such as sex to nowadays with the enlargement of the protection to the other grounds, such as racial or ethnic origin, religion or belief, disability, age or sexual orientation. The second sub-chapter qualifies the types of discrimination at work regarding which an employee have the right to defend himself/herself under the non-discrimination policy of the Member State. The third sub-chapter lists the protected grounds according to which every EU Member State has an obligation to provide the protection in its national body/bodies. The fourth sub-chapter names the exceptions that can be seemed like the discrimination in the employment relations,

but, in fact, the EU legislator allows it and recognizes the absence of factual discrimination in such situations.

The second (special) part is devoted to the Member States‘ implementation of the non-discriminatory norms of the EU and the further protection and enforcement of the potential/current/dismissed employees in the appropriate body/bodies according to the national procedures, in the first sub-chapter. The second sub-chapter determines the measures for fighting with the discrimination in employment, considering the efficiency of the variations of them in the EU Member States.

1. PROTECTIVE SYSTEM AGAINST DISCRIMINATION IN THE EMPLOYMENT UNDER THE EUROPEAN UNION LAW

In this chapter will be discussed the importance of the legal protection under European Union (hereinafter EU) legislative system regarding the non-discrimination policy and its reflection in the employment law.

In general, non-discrimination is a fundamental principle of the EU legal order. The Court of Justice of the European Union (hereinafter CJEU) developed the general position on the basis of its practice and described the discrimination like "similar situations that shall not be treated differently unless differentiation is objectively justified"[3]. In addition, under the practice of the above-mentioned court and the European Court of Human Rights (hereinafter ECtHR), the term "discrimination" characterizes the less favorable treatment of a one person compared to the treatment another person enjoys, enjoyed or would enjoy in similar circumstances[4].

In the opinion of the Advocate General to the case 422/06, in the paragraph 36, said that "the 'equal treatment' and 'non-discrimination' are simply two labels for a single Community law principle" which prohibits both treating similar situations differently and treating different situations in the same way unless there are objective reasons for such treatment[5]. Under the case law of the CJEU, "discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations"[6]. Regarding the equal treatment, it is prohibited under the above-mentioned principle with the remark that such treatment can be objectively justified[7].

The non-discrimination policy in employment is the system that ensured the protection to the employees under the EU and national laws where the "standard employment relation" typically envisages a bilateral, full-time and open-ended contractual arrangement with a single employer, with

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[3] Directorate-General for Research. *European Union Anti-Discrimination Policy: From equal opportunities between women and men to combating racism, Working document. Public Liberties Series LIBE 102 EN. [accessed 2018-01-14]*. <http://www.europarl.europa.eu/workingpapers/libe/102/text1_en.htm>.

[4] Viktoria S. Douka, "Prohibition of Discrimination: Law and Law Cases," *Comparative Labor Law & Policy Journal* 30, no. 2 (2009): 199, accessed January 13, 2018, http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/cllpj30&div=21&start_page=199&collection=journals&set_as_cursor=74&men_tab=srchresults#.

[5] Catalina-Adriana Ivanus, "Justification for Indirect Dicrimination in EU," *Perspectives of Business Law Journal 3* (2014): 154, accessed January 27, 2018, http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/perbularna3&div=20&start_page=153&collection=journals&set_as_cursor=33&men_tab=srchresults#

[6] Judgement of 14 February 1995, *Finanzamt Koln-Altstadt v. Schumacker* (C-279/93, ECR 1995 p. 1-225), para.30.

[7] For instance, in the Judgement of 13 December 1984, *Sermide* (106/83, ECR 1984 p.4209), para.28, or the Judgement of 15 April 2008, *Nuova Agricast* (C-390/06, ECR 2008 p.1-2577), para.66.

work undertaken at the employer's premises[8]. Furthermore, the non-discrimination policy is directed to combat the discrimination due to the system of the defense and guarantees that employees, disregarding their status (an employee in the future, a present employee or an employee in the past), are not be treated non-similar to another employee or not be treated differently.

In general, discrimination involves treating people differently on the basis of a personal characteristic that is unrelated to their ability to do the job[9].

Moreover, a "protected ground" of the prohibition of the discrimination is a characteristic based on which an individual cannot control and as such should not be considered relevant to differential treatment or enjoyment of a particular benefit[10]. The protected grounds are sex, race, colour, ethnic, social origin, genetic features, language, religion, belief, political or any other opinion, membership of a national minority, property, birth, disability, age, sexual orientation, nationality. The prohibition of the discrimination based on the above-mentioned grounds can be found in the EU legislative acts and also in the national legislation. It is worth to mention that the primary legislation of the European Union is progressive according to prohibited grounds of the discrimination and does not allow the Member States of the EU to ignore any of them. The Member States of the EU can add other prohibited grounds in their national laws which are aimed to underline the prohibition of the discrimination in their country.

The protected grounds against discrimination in the employment relation cover such kind of an employee: 1. a future employee, who just wants to take the job and can be treated not similarly to other candidates or can be differentiated from others potential employees on the above-mentioned grounds; 2. The current employee, who is employed at this moment and also can be discriminated at work; 3. The past employee, that was dismissed from the employment position on the basis of the discriminatory grounds. In addition, it does not matter in what kind of establishments, private or public, an employee will work, is working or worked, because the non-discrimination policy is applied to both types of them.

Furthermore, the fields that are governed by the prohibition of the discrimination in the employment relations are the following:

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[8]Alan Bogg, Cathryn Costello and A.C.L. Davies, *Research Handbook on EU Labour Law* (UK: Edward Elgar Publishing Limited, 2016), 7, accessed February 12, 2018, https://books.google.lv/books?id=lBSlDQAAQBAJ&printsec=frontcover&dq=labour+law+in+eu&hl=ru&sa=X&ved=0ahUKEwiQiK2XiYjaAhUBYpoKHTBQCQkQ6AEIJzAA#v=onepage&q&f=false

[9] European Bank of Reconstruction and Development. *Nondiscrimination and equal opportunity: guidance for clients. [accessed 2018-01-16]*. <http://www.ebrd.com/downloads/about/sustainability/NonDiscrimination.pdf>.

[10] British Institute of International and Comparative Law. *FAQ: EU Non-Discrimination Law in the* UK, 2017, p.1. *[accessed 2018-01-14]*. <https://www.biicl.org/documents/1660_faq_-_eu_non-discrimination_law_in_the_uk.pdf?showdocument=1>.

- the access to work and generally to employment, including the selection criteria and the terms of employment in all sectors of activity and in all levels of professional hierarchy;
- the terms and conditions of work and employment, including those regarding the terms of service and professional promotion, remuneration and dismissals. [11]

Therefore, it is necessary to see the way of the development of the prohibition of the discrimination in the European Union that began from the Treaty of Rome and now is subject to improvements. From the first protected ground that was the prohibition to discriminate on the basis of sex till the expansion on the other protected grounds, such as racial or ethnic origin, religion or belief, disability, age, sexual orientation. In addition, the court's practice of the EU (means the CJEU) and national Member States play the significant role in the elaboration of the grounds and types of the discrimination. It will be also underlined where a possible discrimination can be objectively justified. The EU non-discrimination policy shows the willingness of the European Union to protect employees from most abusive situations in the employment relations when they want to employ, or are employed now, or were unlawfully dismissed.

1.1. The historical development of the EU non-discrimination policy: from establishing of the European Coal and Steel Community to nowadays

The modern non-discrimination policy of the European Union began to develop from the foundation of the European Coal and Steel Community (hereinafter ECSC) in 1951. The creation of the legislation in the sphere of the Labour Law had the aim to abolish the negative discrimination that is based on the laws. The additional factor serving the same purpose, was the engagement of all European States with the International Conventions that they signed regarding regulation of the issues intended to eliminate discrimination.[12]

The principle of the equality was one of the main principles of the ECSC. The first reflection of this principle was found in the context of gender equality. The Treaty of Rome of 1957 required equal pay between men and women and provided the competence to develop the first Equality

[11] Viktoria S. Douka, "Prohibition of Discrimination: Law and Law Cases," *Comparative Labor Law & Policy Journal* 30, no. 2 (2009): 204, accessed January 13, 2018, http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/cllpj30&div=21&start_page=199&collection=journals&set_as_cursor=74&men_tab=srchresults#.
[12] *Ibid*, p.204.

Directives: the Equal Pay Directive of 1975[13] and the Equal Treatment Directive of 1976[14], which prohibited discrimination on the ground of gender in access to employment, vocational training and promotion, and working conditions.[15]

Traditionally the non-discrimination legislation of the future European Union was directed to prohibit discrimination in the employment that could contribute to the proper functioning of the internal market of the countries that joined the Community at that moment and could enhance the level of protection of the employment rights in it.

The specific power to combat discrimination appeared only in the Treaty of Amsterdam in 1997. The protection was based on such range of the grounds as sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation[16]. The grounds were listed in the Article 13 of the Treaty establishing the European Community (hereinafter TEC). It led both to the adoption of two Directives based on this Article: the Race Directive[17] and the Framework Directive[18]. These Directives were the first legislative measures taken at EU level against discrimination on the ground other than sex, while measures against sex discrimination have been in place in the EU from 1975.[19]

In recent years there have also been two other major developments relating to the sphere of the anti-discrimination law of the EU. Firstly, the powers and functions of the European Union relating to equality and other human rights were recently amended and enhanced by the ratification of the Lisbon Treaty (which entered into force on 1 December 2009) and it was made significant changes to the constitutional framework of the EU[20]. The Charter of Fundamental Rights of the European Union became the primary source for the protection of the persons and became to have the same binding power as the main Treaties of the EU. Secondly, as a result of the Lisbon Treaty and other key decisions by the EU institutions, there is a growing convergence between the EU human rights

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[13] Council Directive 75/117/EEC on the Approximation of the Laws of the Member States relating to the Application of the Principal of Equal Pay for Men and Women [1975] O.J. L45/19.
[14] Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions [1976] O.J. L39/40.
[15] Peter Reading. *Introduction to European Labour Law: Anti-discrimination. [accessed 2018-01-18]*. < https://www.era-comm.eu/anti-discri/e_learning/module1_intro.html>.
[16] *Ibid*.
[17] Council Directive 2000/43/EC implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin [2000] O.J. L180/22 (Race Directive).
[18] Council Directive 2000/78/EC establishing a General Framework for Equal Treatment in Employment and Occupation [2000] O.J. L303/16 (Framework Directive).
[19] Erica Howard, "The Case for a Considered Hierarchy of Discrimination Grounds in EU Law", *Maastricht Journal of European and Comparative Law* 13, no. 4 (2006): 445-446, accessed January 8, 2018, http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/maastje13&div=38&start_page=445&collection=journals&set_as_cursor=0&men_tab=srchresults.
[20] Peter Reading. *Introduction to European Labour Law: Anti-discrimination. [accessed 2018-01-18]*. <https://www.era-comm.eu/anti-discri/e_learning/module1_intro.html>.

frameworks and other intergovernmental human rights frameworks of the Council of Europe and the United Nations[21].

Despite the protection of persons on the European Union level, it also exists the international right of people to be equal. This universal right covers defense under the law, protection against discrimination and is recognized by the Universal Declaration of Human Rights, by the United Nations Conventions on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights respectively on Economics, Social and Cultural Rights and the European Convention on Human Rights and Fundamental Freedoms[22]. In general, The European Union and the Council of Europe have the general goal to fight against discrimination. They have created quite a comprehensive set of rules, in particular, due to their courts that are the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR). The provisions of rules prohibiting the discrimination have developed separately, but are comparable in many aspects. In addition, the 27 Member States of the EU are parties to the European Convention on Human Rights (ECHR).[23]

Regarding the specific protection of the employees on the international level, it is covered by the International Labour Organization (hereinafter ILO) that is the agency of the United Nations. The ILO has the main goal to combine all the countries for the promotion of the rights of employees, establishing standards of work, encouraging employment opportunities and etc.[24] Though the EU is not a member of the ILO and does not oblige to ratify the ILO's Conventions, they have intensive cooperation since the 1950s. This is mainly because Member States of the EU are Members of the ILO and have ratified the core ILO Conventions. Despite the interrelation of the EU Member States and ILO, the rules of EU law are "an integral part of the legal systems of the Member States and which their courts are bound to apply" and dispose of a stronger legal effect on the legal orders of the Member States than international Treaties ratified by a State would produce on the national laws of the signatory parties[25]. So, the legislative power of the EU has more influence on its Member States than

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[21] *Ibid*.

[22] Catalina-Adriana Ivanus, "Justification for Indirect Dicrimination in EU," *Perspectives of Business Law Journal 3* (2014): 153, accessed January 27, 2018, http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/perbularna3&div=20&start_page=153&collection=journals&set_as_cursor=33&men_tab=srchresults#.

[23] "An overview of the case law on the prohibition of discrimination of the ECJ and the ECtHR". *[accessed 2018-01-18]*. http://www.humanrights.is/static/files/Itarefni/an-overview-of-the-case-law-on-the-prohibition-of-discrimination-of-the-ecj-and-the-ecthr-emilie.pdf.

[24] The official site of the International Labour Organization. *[accessed 2018-01-18]*. <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm>.

[25] Achim Seifert, "Still Complex Relationship between the ILO and the EU: The Example of Anti-Discrimination Law", *International Journal of Comparative Labour Law and Industrial Relations* 29, no. 1 (2013): 42. Accessed February 10, 2018,

the international organizations. Disregarding this, the EU cooperates with the international organizations and cooperates with them for the purpose to protect the employment relations due to nowadays issues.

1.2. The scope of the prohibition of the discrimination in employment relations

The employment relationship should be based on the principle of equal opportunity and fair treatment, and an employee should be not discriminated with respect to all aspects of this relation, including recruitment and hiring, compensation (including wages and benefits), working conditions and terms of employment, access to training, promotion, termination of employment or retirement, and discipline.[26]

1.2.1 The legislative basis for the protection of employees

The priority of protection of citizens of the European Union and their residents against discrimination is one of the primary goals for the existing of the EU. The EU tries to defend all people who are working on its territory from abusive possibilities of employers to misuse their employment power in relation to employees that based on the discriminatory grounds.

The prohibition of discrimination can be found on the whole European Union level that means that the primary legislation of the EU protects the people disregarding their nationality (with exceptions to it) and location on the territory of the EU countries. The defending norms of the primary legislation are in:

1) the *Treaty on the Functioning of the European Union*[27], Articles: 8, 18, 19, 154, 157;

2) the *Treaty on European Union*[28], Articles: 2, 3;

3) the *Charter of Fundamental Rights of the European Union*[29], Articles: 21 and 23;

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http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.kluwer/cllir0029&div=8&start_page=39&collection=kluwer&set_as_cursor=1&men_tab=srchresults.

[26] European Bank of Reconstruction and Development. *Nondiscrimination and equal opportunity: guidance for clients. [accessed 2018-01-16].* <http://www.ebrd.com/downloads/about/sustainability/NonDiscrimination.pdf>.

[27] Consolidated version of the Treaty on the Functioning of the European Union. *[accessed 2018-01-08].* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FTXT>.

[28] Treaty on European Union. *[accessed 2018-01-08].* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>.

[29] Charter of Fundamental Rights of the European Union, Official Journal of the European Union, C 326/391, 2012. *[accessed 2018-01-08].* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT.

All the above mentioned protective provisions in the legislative acts have also covered the ban to discriminate persons in the employment relation. None of the members of the European Union can exclude any of the prohibited grounds from their national legislation, the Member States have the only option to extend the defending grounds that protect employees against discrimination on their state level.

The Treaty on the Functioning of the European Union (TFEU) in the Article 19 allows the EU institutions to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". This is one of the main treaties of the EU that defines the list of the protected grounds. On the basis of these grounds built the national legislation of the EU Member States that prohibits the discrimination in every sphere of a contact of a person with a government, private or public organization, another person, and also includes the prohibition of discrimination of an employee's interaction in employment relations. The Member States cannot ignore the protection against discrimination based on the above-mentioned grounds. In other words, the Member States of the EU cannot derogate from obligatory provisions of the TFEU.

The Article 18 of the TFEU has underlined the prohibition of any discrimination on the ground of nationality. This provision distinctly delimits the nationality ground from others that are mentioned in the Article 19. One of the main reasons is that the EU citizens have the "double" citizenship: the citizenship of the European Union and the citizenship of their national country. Although this provision is consisted in the primary source, as the TFEU, and gives, from the first sight, the comprehensive protection from discrimination on the basis of the nationality, it covers only nationals of the EU (that means employees with the EU nationality). This protected ground is the protective mechanism for one of the core freedoms of the European Union – free movement of persons. According to the Article 45 of the Treaty on the Functioning of the European Union, this free movement for workers shall be secured through every Member State of the EU. In addition, the discrimination which is based on the nationality of the employee should be prohibited in the employment, remuneration and other conditions of work and employment. Thus the Article 45 says about the exception of the above-mentioned ground, it underlines that limitations can be justified if they are built regarding a public policy, public security or public health. Another main issue that the sphere of the public service[30] is exempted from the prohibition of the discrimination on the nationality. It should be done for the protection of the internal governance of the country and protects the citizens of it. Therefore, it should not be discrimination in fact under the Article 45 of the TFEU.

[30] Consolidated version of the Treaty on the Functioning of the European Union, Art. 45 para.4. *[accessed 2018-01-08]*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FTXT>.

Certainly, the first ground that was under the defense of the European Union – it is the equality between men and women. Nowadays it is reflected in the Article 8 of the TFEU and constitutes the aim of elimination the inequality between them in all Member States that are combined into the European Union. In addition, according to the Article 154 of the TFEU, the promotion of the equality between men and women should cover the employment that also includes the labour market opportunities and the treatment at work. The separate article in the Treaty on the Functioning of the European Union also involves the principle of equal pay for male and female workers, for equal work or work of equal value for them[31]. Although the Article 19 includes the prohibition of the discrimination on the basis of sex, this above-mentioned Articles underlines the ban of unequal treatment between these two genders, especially in their employment relations.

Another primary source of the EU is the Treaty on European Union (TEU). The preamble of it declares that this legislative act was created under the development of the universal values of the inviolable and inalienable rights of the human person and under the maintaining of the democracy, equality and the rule of law[32]. In the Articles 2 and 3 emphasized the necessity of the equality between men and women as the cornerstone element of the EU, the same as in the TFEU. In addition, the above-mentioned values should be common for all Members of the European Union, where the principle of non-discrimination should prevail[33]. Also, the TFEU contains one of the main tasks of the EU – protection, and combat against discrimination[34].

One more important primary source in the non-discrimination policy of the European Union is the Charter of Fundamental Rights of the EU. It binds the European Union institutions, and also the Member States of the EU, to pay attention to the prohibited grounds when they are interpreting and applying the EU law[35]. Furthermore, the Charter of Fundamental Rights contains the prohibition of discrimination on various grounds and makes the distinction between the prohibition on grounds of sex that can be found in the Article 21 and the gender equality provided in Article 23.[36]

According to the Article 21 of the Charter of Fundamental Rights of the EU, the prohibited grounds for discrimination are sex, race, colour, ethnic, social origin, genetic features, language,

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[31] *Ibid*, Art. 157.
[32] Treaty on European Union. *[accessed 2018-01-08]*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>.
[33] *Ibid*, Art. 2.
[34] *Ibid*, Art. 3 para.3.
[35] British Institute of International and Comparative Law. *FAQ: EU Non-Discrimination Law in the* UK, 2017, p.1. *[accessed 2018-01-14]*. <https://www.biicl.org/documents/1660_faq_-_eu_non-discrimination_law_in_the_uk.pdf?showdocument=1>.
[36] Catalina-Adriana Ivanus, "Justification for Indirect Dicrimination in EU," *Perspectives of Business Law Journal 3* (2014): 153, accessed January 27, 2018, http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/perbularna3&div=20&start_page=153&collection=journals&set_as_cursor=33&men_tab=srchresults#

religion, belief, political or any other opinion, membership of national minority, property, birth, disability, age and sexual orientation. The separate abstract underlines the prohibition on the basis of the nationality[37]. In addition, the Charter of Fundamental Rights underlines the equality between women and men that must be ensured in all areas, including the employment, work, and pay[38].

The purpose to have this Charter of Fundamental Rights is to combine all the rights of a person that are proclaimed for the purpose of the protection of a person, including defending against discrimination on the above-mentioned reasons. The Charter of Fundamental Rights of the European Union has been updating in the light of changes in society, social progress, scientific and technological developments. It also displays all the rights that were mentioned and protected by the case law of the Court of Justice of the EU, other rights and freedoms that are preserved by the European Convention on Human Rights and the rights and principles resulting from the common constitutional traditions of EU countries and other international instruments[39].

As a result, the Charter of Fundamental Rights emphasizes the rights of a person if they are not covered by the constitutional act of one of the Member States of the EU. Furthermore, it devotes more intention for complying with the protection of the rights when the organs of the EU create a new legislative act and when the national authorities of the Member States want to implement it into their national law.

Regarding the conformity of the Charter of Fundamental Rights with the nowadays possible grounds of the discrimination can be a question but in general, it covers more protected grounds than another primary source - Treaty on the Functioning of the European Union. Nowadays it is the most protective and prospective act of the primary legislation. The Charter of Fundamental Rights began to have the same binding value as the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union when the Lisbon Treaty was entered into force in 2009.

After the primary legislation, such as the Treaty on the Functioning of the European Union, Treaty on European Union, Charter of Fundamental Rights of the European Union, the next powerful law is the secondary legislation. Regarding the non-discrimination policy in employment, the secondary legislation includes the variety of the directives that prohibits discrimination, contains more detailed provisions which disallow to discriminate employees in their employment relations.

It is worth to mention that the European Union Member States are under obligation to implement the EU law in their national legislation and to apply it correctly. Every EU Member States

[37] Charter of Fundamental Rights of the European Union, Art. 21, Official Journal of the European Union, C 326/391, 2012. *[accessed 2018-01-08]*. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT.
[38] *Ibid*, Art. 24.
[39] "Why do we need the Charter?" *[accessed 2018-01-10]*. https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/why-do-we-need-charter_en

should include the general principle of the equal treatment or protected grounds of discrimination in their Constitution and/or national antidiscrimination legislation[40]. So, the provisions of the Treaties, Directives and other obligatory sources should be maintained by the national law.

Concerning the sphere of employment, the main directives are:

– Racial Equality Directive 2000/43 (Race Directive)[41] which covers the prohibition on the basis of race and ethnic origin;

– Employment Equality Directive 2000/78 (Framework Directive)[42] which covers the prohibition on the basis of religion, disability, age and sexual orientation;

– Directive 2006/54 (recast)[43] covers the prohibition on the basis of sex discrimination in employment.

The Race Directive and Framework Directive are applicable to all persons. This means that national anti-discrimination laws should apply to all persons on a Member State's territory, irrespective of whether they are EU or third-country nationals. On the whole, protection against discrimination in the Member States on any of the grounds included in the directives is not conditional on nationality, citizenship or residence status. Even so, some countries have included nationality in their list of protected grounds.[44]

For instance, the Framework Directive talks about this above-mentioned statement that if the discrimination is based on religion or belief, disability, age or sexual orientation it should be prohibited on the territory of the EU and cover every person, even the third-country nationals. Despite this, the Framework Directive will not spread its provisions on the treatment of persons regarding their nationality[45]. As a result, in the sphere of employment and occupation, all persons will have the protection against discrimination and will be provided the equal treatment on all above-mentioned grounds, except nationality.

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[40] British Institute of International and Comparative Law. *FAQ: EU Non-Discrimination Law in the* UK, 2017, p.1. *[accessed 2018-01-14]*. <https://www.biicl.org/documents/1660_faq_-_eu_non-discrimination_law_in_the_uk.pdf?showdocument=1>.

[41] Council Directive 2000/43/EC implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin [2000] O.J. L180/22.

[42] Council Directive 2000/78/EC establishing a General Framework for Equal Treatment in Employment and Occupation [2000] O.J. L303/16.

[43] Directive of the European Parliament and of the Council 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] O.J. L204.

[44] European Commission. *A comparative analysis of non-discrimination law in Europe*. Brussel, 2017, p.58.

[45] Council Directive 2000/78/EC establishing a General Framework for Equal Treatment in Employment and Occupation [2000] O.J. L303/16.

The same provision of non-relation to discrimination on the basis of the nationality has the Race Directive. Therefore, the defense under the protected grounds, such as racial and ethnic origin, will cover all persons in the EU Member States.

In addition, the Framework Directive makes an accent on one of the main aims of the European Union – combat discrimination. It is also based on the principle of equal treatment.[46] In general, the Framework Directive is the most comprehensive one that covers all the grounds listed in the Article 19 of the Treaty on the functioning of the European Union, except sex and racial or ethnic origin.

The Directive 2006/54 is based on the first protected ground – sex. It provides the equal opportunities and equal treatment of men and women and narrows the application of non-discrimination policy regarding gender only to the sphere of employment and occupation.

It is worth to mention that all three Directives (Framework, Race and 2006/54) embrace only spheres of an employment and occupation in private and public sectors (including public bodies). The protection against the discrimination in employment relations according to these Directives shall cover:

1. conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
2. access to all types and to all levels of vocational guidance, vocational training, advanced vocational training, and retraining, including practical work experience;
3. employment and working conditions, including dismissals and pay.

1.2.2. The types of discrimination that are prohibited in the European Union

In general, the EU legislation, especially directed to employment sphere, establishes direct and indirect discrimination, harassment, sexual harassment, instruction to discriminate and any less favorable treatment of a woman related to pregnancy or maternity leave as forms of discrimination.

Originally only one form of the discrimination existed, it was likely to direct discrimination, because at the beginning discrimination was the only unequal treatment of comparable situation explicitly based on a prohibited criterion. Thus, after the judicial practice of the Court, the

[46] *Ibid*, Article 1.

discrimination was divided into direct and indirect. Also, that distinction was made in the EU Directives, but they did not give the definitions to them.[47]

The first time when the Court refers to indirect discrimination was *Milchverwertung-Sudmilch AG v. Salvatore Ugliola* case[48]. In another case of *Giovanni Maria Sotgiu v. Deutsche Bundespost*, the CJUE states that the rules regarding equality of treatment forbid not only overt discrimination but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result[49].

As a result, the Court strictly divided the discrimination notion into direct and indirect discrimination. In CJEU case-law direct discrimination exists when the provisions, criterion or practice explicitly refers, for instance, to sex as the ground of discrimination. Indirect discrimination, on the other hand, occurs when a disadvantageous provision, criterion or practice is unrelated to sex. After the Court practice, the indirect discrimination was subsequently recognized in the legislation. Therefore, in the Directive 97/80 on the burden of proof in cases about sex discrimination was the first EU legal instrument that gives a legal definition of indirect discrimination[50].

The main difference between the first notion of the indirect discrimination that was written in the above-mentioned Directive 97/80 and the current legislation (Directive 2006/54/EC) is that the first consist the exclusion in the form of the justifications. So, the Directive 97/80 says that the justification can be made only by objective factors unrelated to sex, and the Directive 2006/54/EC says that the justification should be made by a legitimate aim.

In other words, the difference of an indirect discrimination in treatment should be apparently neutral, and not obviously as in the case of direct discrimination.

Furthermore, the central problem in the employment discrimination is distinguishing the victim of discrimination from the person who simply suffered an adverse employment action[51] that is why it is important to establish the types of the discrimination and states the exceptions in them.

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[47] Catalina-Adriana Ivanus, "Justification for Indirect Dicrimination in EU," *Perspectives of Business Law Journal 3* (2014): 154, accessed January 27, 2018, http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/perbularna3&div=20&start_page=153&collection=journals&set_as_cursor=33&men_tab=srchresults#

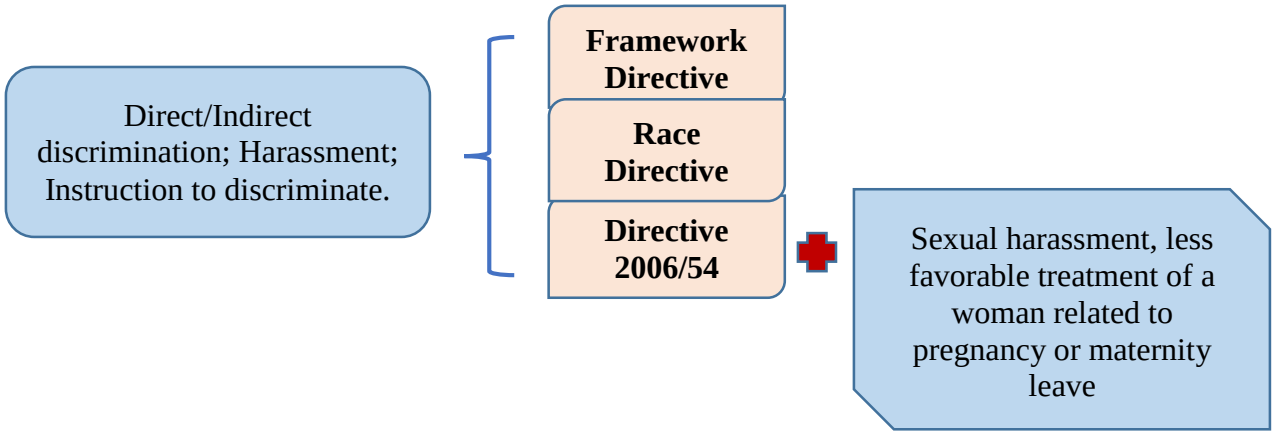
[48] Judgement of 15 October 1969, *Wurttembergische Milchverwertung Sudmilch AG v. Ugliola* (15/69, ECR 1969 p.363), para.6.

[49] Catalina-Adriana Ivanus, "Justification for Indirect Dicrimination in EU," *Perspectives of Business Law Journal 3* (2014): 155, accessed January 27, 2018, http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/perbularna3&div=20&start_page=153&collection=journals&set_as_cursor=33&men_tab=srchresults#

[50] *Ibid*.

[51] Richard Thompson Ford, "Bias in the Air: Rethinking Employment Discrimination Law," *Stanford Law Review* 66, no. 6 (2014): 1384, accessed January 23, 2018, http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/stflr66&div=40&start_page=1381&collection=journals&set_as_cursor=13&men_tab=srchresults#

Nowadays there are such types of discrimination:



The notion of a direct discrimination includes 3 provisions where an employee disregarding the status is:

- treated less favorably than another person is, has been or would be;
- the other person is in a comparable situation;
- the treatment is on grounds of racial or ethnic origin (in relation to the Race Directive[52]), religion or belief, sexual orientation, or disability (in relation to the Framework Directive[53]), sex (in relation to the Directive 2006/54[54]).

Therefore, direct or "overt" discrimination involves a person being treated less favorably than another. So for example in *Macarthys case*[55], where the woman received less pay than the man doing the same job. In addition, in order to claim direct discrimination, the applicant needs to identify a comparator – actual or hypothetical – another person (employee) who has been treated more favorable. In the Romer case is underlined that: "first, it is required not that the situation to be identical, but only that they be comparable and, second, the assessment of that comparability must be carried out not in a global and abstract manner"[56]. As a result, the crucial element of a direct discrimination is determining whether the persons are in a comparable situation, because there may not always be an

[52] Council Directive 2000/43/EC implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin [2000] O.J. L180/22.
[53] Council Directive 2000/78/EC establishing a General Framework for Equal Treatment in Employment and Occupation [2000] O.J. L303/16.
[54] Directive of the European Parliament and of the Council 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] O.J. L204.
[55] Case 129/79 *Macarthys v. Smith* [1980] ECR 1275.
[56] Case C-147-08 *Romer v. Freie und Hansestadt Hamburf* [2011] ECR 1-000, para. 42.

actual comparator, in which case a hypothetical comparator may be sufficient to establish direct discrimination.[57]

It should be mentioned that the motive or intention to discriminate is not a necessary element of direct discrimination[58]: it is enough that the adverse treatment is based upon, or caused by, a prohibited classification of grounds (sex, race and etc.)[59].

In addition, in relation to the prohibited ground which is based on age, a different test applies to determine the direct discrimination, because in this case the direct discrimination can be justified[60]. This provision is in the Article 6 of the Framework Directive. Therefore, in some situation in the employment relations, such differential treatment on a ground of sex will not constitute a discrimination if the next condition is fulfilled: difference of treatment is within the context of national law and is objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market, and vocational training objectives, and also the means of achieving that aim are appropriate and necessary[61]. Such justification can be applied to the following differences of treatment on the grounds of age:

> a) the setting of special conditions on access to employment and vocational training, employment, and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
>
> (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
>
> (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.[62]

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[57] *EU Anti-discrimination law.* Module 2: Types of discrimination that are prohibited. *[accessed 2018-01-10]*. https://www.era-comm.eu/anti-discri/e_learning/module2_1.html.

[58] Case 69/80 *Worringham v. Lloyds Bank* [1981] ECR 767.

[59] Catherine Barnard, *EU Employment Law*, Fourth Edition (Oxford: Oxford University Press, 2012), p.278, accessed February 22, 2018, https://books.google.lv/books?id=dkkKKvocLCgC&printsec=frontcover&dq=labour+law+in+eu&hl=ru&sa=X&ved=0ahUKEwipzoXPxJvaAhWuxaYKHZ7eBksQ6AEISjAF#v=onepage&q=labour%20law%20in%20eu&f=false.

[60] *Ibid*.

[61] Directive of the European Parliament and of the Council 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Art.6. [2006] O.J. L204.

[62] *Ibid*, Article 6.

This above-mentioned justification that is based on the ground of age is interesting because by general rule the justification is permitted only in the indirect discrimination but not in the direct one. So, it shows the intention of the EU law to defense and underlines the group of employees that in case of age differentiation need more protection. Such situations in an employment process should not be treated as a discrimination if it has a legitimate aim.

After the above-mentioned the reasonable question appears: can a direct discrimination be justified in other cases, for instance, on the ground of sex? Prof. Barnard, whose scope of interests leads in the sphere of the labour and discrimination law of the European Union, links us to the Directive 2006/54 and to the Race and Framework Directives in respect of all grounds, the answer is *no*, with the exception that is given to the ground based on age[63]. Direct discrimination can be saved only by reference to the derogations expressly provided for by the legislation.

Prof. Barnard states that the absence of any such derogations in the Article 157 TFEU has generated difficulties that can be shown by the *Roberts Case*[64] in 1993. In this case, the employer paid a former male employee a bridging pension (the pension in case of an early retirement on the grounds of ill health and which is intended to compensate, in particular, for loss of income resulting from the fact that an employee is before the age of getting the State pension on the ground of the retirement age[65]) between the ages of 60 and 65 but did not pay the same to a former female employee who received the equivalent pension from the state authority, as she had a lower state pension age. The woman, therefore, received less pay from her employer than a man. It should be underlined that at first glance she suffered direct discrimination on the ground of sex which is prohibited by the primary legislation of the EU (at that time it named the European Community) but there were no derogations available for the employer because of the absence of the justification of the direct discrimination. In this case, the Commission of the European Communities (now it names European Commission) directed to follow the Continental view that the direct discrimination could be objectively justified[66] "since the very concept of discrimination, whether direct or indirect, involves a difference in treatment

[63] Case C-262/88 *Barber* [1990] ECR 1-1889, para.32, and Case C-177/88 *Dekker v. Stichting Wormingscentrum voor Junge Volwassen Plus* [1990] ECR 1-39441, para.12; Case C-356/09 *Kleist* [2010] ECR 1-000, paras.41-3.
[64] Case C-132/92 *Roberts* [1993] ECR 1-5579.
[65] Nigel G. Foster, *Blackstone's EC Legislation 2006-2007*, 17th Edition. (Oxford: Oxford University Press, 2006), p.292, accessed February 22, 2018, https://books.google.lv/books?id=g8mzrN30u48C&pg=PA292&lpg=PA292&dq=roberts+case+direct+discrimination+1993&source=bl&ots=_11g2cf7r4&sig=wC5N_7rnaPcpLTjpzaEBUKAtm4c&hl=ru&sa=X&ved=0ahUKEwjnifKL-ZvaAhXFKJoKHf0nDkwQ6AEIOTAD#v=onepage&q=roberts%20case%20direct%20discrimination%201993&f=false
[66] Catherine Barnard, *EU Employment Law*, Fourth Edition (Oxford: Oxford University Press, 2012), p.287, accessed February 22, 2018, https://books.google.lv/books?id=dkkKKvocLCgC&printsec=frontcover&dq=labour+law+in+eu&hl=ru&sa=X&ved=0ahUKEwipzoXPxJvaAhWuxaYKHZ7eBksQ6AEISjAF#v=onepage&q=labour%20law%20in%20eu&f=false.

which is unjustified"[67]. In the judgement of the Court under *Roberts Case* it is noticed, that such different payment of the bridging pension to woman is not contrary to the primary legislation of the EC, because the difference in the payment was equal to the amount of the State pension to which she was entitled as from her legislative age of retirement at 60 in respect of the periods of service completed with that employer.[68]

So, debating on the existence of the objective justification in case of direct discrimination, Prof. Barnard refers to the notion of the discrimination that means detrimental treatment which is grounded on sex (reference is based on the above-mentioned *Roberts* Case), it consists of two elements – harm (adverse treatment) and causation (the grounding of that treatment in a prohibited classification). It can indicate that the existence of objective justification in a direct discrimination creates the misunderstanding due to the structural elements of discrimination. Thus the concept of justification is used in relation to indirect discrimination. In addition to this, in the discrimination relating to gender, the Court in the *Jorgensen* case determined that[69]:

Thus, once it is established that a measure adversely affects a much higher percentage of women than men or vice versa, that measure will be presumed to constitute indirect discrimination on grounds of sex and it will be for the employer or the person who drafted the measure to prove contrary[70].

As the result, the Court should investigate each case individually for checking a possibility of a discrimination and determining a direct or indirect discrimination. In addition, the notion of the "objective justification" can exist only in cases where it will be established the indirect discrimination. Furthermore, for the prohibited ground of the discrimination, such as gender, the Court rules that it should be used the principle of the indirect discrimination if the measure taken by an employer has more adversely affects to one of the genders.

Regarding the notion of indirect discrimination, the discrimination should be consisted of:

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[67] Case C-132/92 *Roberts* [1993] ECR 1-5579, para.15.

[68] Nigel G. Foster, *Blackstone's EC Legislation 2006-2007*, 17th Edition. (Oxford: Oxford University Press, 2006), p.292, accessed February 22, 2018, https://books.google.lv/books?id=g8mzrN30u48C&pg=PA292&lpg=PA292&dq=roberts+case+direct+discrimination+1993&source=bl&ots=_11g2cf7r4&sig=wC5N_7rnaPcpLTjpzaEBUKAtm4c&hl=ru&sa=X&ved=0ahUKEwjnifKL-ZvaAhXFKJoKHf0nDkwQ6AEIOTAD#v=onepage&q=roberts%20case%20direct%20discrimination%201993&f=false

[69] Catherine Barnard, *EU Employment Law*, Fourth Edition (Oxford: Oxford University Press, 2012), p.288, accessed February 22, 2018, https://books.google.lv/books?id=dkkKKvocLCgC&printsec=frontcover&dq=labour+law+in+eu&hl=ru&sa=X&ved=0ahUKEwipzoXPxJvaAhWuxaYKHZ7eBksQ6AEISjAF#v=onepage&q=labour%20law%20in%20eu&f=false.

[70] Case C-226/98 *Jorgensen v. Foreningen* [2000] ECR 1-2447, para.30.

- an apparently neutral provision, criterion or practice is applied to persons of a protected group (identified by sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation);
- the provision, criterion or practice would put that group at a particular disadvantage compared with other persons;
- the provision, criterion or practice is not objectively justified.[71]

In accordance with the Employment Directives regarding the prohibition of a discrimination, the conception of objective justification includes that the legitimate aim of such discrimination and the means of achieving of such aim should be appropriate and necessary.

Talking again in the context of sex discrimination, indirect discrimination arises when the application of a gender-neutral criterion or practice, in fact, disadvantages a much higher percentage of women than men unless that difference can be justified by objective factors unrelated to any discrimination on the ground of sex[72].

Another one type of discrimination that is under the prohibition is harassment. It includes two main elements in its definition:

- unwanted conduct related to any of the protected grounds of sex; race, religion or belief; sexual orientation, disability or age;
- the conduct has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment and violating the dignity of a person.

According to the Directive 2006/54, the "sexual harassment" is where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs[73], with the purpose or effect the same like in the notion of the harassment.

1.2.3. The grounds on which it is prohibited to discriminate in employment on the EU level

[71] *EU Anti-discrimination law.* Module 2: Types of discrimination that are prohibited. *[accessed 2018-01-10]*. https://www.era-comm.eu/anti-discri/e_learning/module2_1.html.

[72] Catherine Barnard, *EU Employment Law*, Fourth Edition (Oxford: Oxford University Press, 2012), p.278, accessed February 22, 2018, https://books.google.lv/books?id=dkkKKvocLCgC&printsec=frontcover&dq=labour+law+in+eu&hl=ru&sa=X&ved=0ahUKEwipzoXPxJvaAhWuxaYKHZ7eBksQ6AEISjAF#v=onepage&q=labour%20law%20in%20eu&f=false.

[73] Directive of the European Parliament and of the Council 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Art.2. [2006] O.J. L204.

The list of the protected grounds can be found in the primary sources such as the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union.

The comprehensive list of the prohibited grounds in the Charter of Fundamental Rights is not additionally explained in the secondary legislation. So, the main purpose of the Charter of Fundamental Rights is to emphasize the rights of a person in the EU and which is addressed to the institutions, bodies, offices, and agencies of the EU and to the Member States of the EU in case of implementing Union law[74]. Therefore, the wide list of non-discriminatory grounds 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[75], will not be applied by the Member States of the EU as the obligatory grounds and they do not need to implement them into the national legislation.

As a result, the obligatory grounds that prohibit the discrimination in the employment relationship are listed in the Article 19 of the TFEU. They are sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Dr. Howard who is qualified in equality and discrimination law (her areas of research in discrimination are racial, religious and belief), human rights and European law, talks about the hierarchy of the grounds that prohibit discrimination which are located in Article 19 of the Treaty on the Functioning of the European Union (it was Article 13 of the Treaty establishing the European Community). It can be said that this EU legislation puts on the first place the discriminatory grounds such as sex, closely followed by racial and ethnic origin, with religion or belief, disability and age below this and sexual orientation at the bottom. She states that the hierarchy of the prohibited grounds of the discrimination is not the outcome of a political pragmatism, it is more a deliberate consideration of the different grounds. She proposes to make a more considered decision about which grounds need stronger protection because on her suggestion the hierarchy is not necessarily wrong.[76]

The hierarchy of the non-discriminatory grounds began to exist from adopting the Article 13 TEC where were listed the prohibited discriminatory grounds. Especially, it became noticeable, when the Race and the Framework Directives were adopted in 2000. As it was mentioned in the sub-chapter regarding the history of the non-discrimination policy that before these two Directives, the additional protection against discrimination was given only to the ground which is based on sex. The main reason

[74] Charter of Fundamental Rights of the European Union, Official Journal of the European Union, C 326/391, 2012. Art. 51. *[accessed 2018-01-08]*. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT.
[75] *Ibid*, Article 21.
[76] Erica Howard, "The Case for a Considered Hierarchy of Discrimination Grounds in EU Law", *Maastricht Journal of European and Comparative Law* 13, no. 4 (2006): 445, accessed January 8, 2018, http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/maastje13&div=38&start_page=445&collection=journals&set_as_cursor=0&men_tab=srchresults.

of such is that it is not only the protected ground, it is also one of the leading principles of the European Union (to promote equality between men and women).

The Race and the Framework Directives have been criticized for creating the hierarchy because of some of the grounds from the Article 19 receiving stronger protection than other grounds. The Race Directive is said to put discrimination on the grounds of racial or ethnic origin almost at the top of the hierarchy for three reasons: 1) it has a much wider material scope; 2) it allows for very limited exceptions, and 3) it contains enforcement provisions which make it easier for the victim to bring a claim of discrimination.[77]

In addition, the racial or ethnic origin is not defined in the Race Directive but should be interpreted broadly and may include related concepts of national origins, descent, colour, and language[78].

As the Race and Framework Directives exist from 2000, the Directive 2006/54 is the last version of the legislative act regarding the prohibition of the discrimination in the employment relations. Now, both the Race Directive[79] and Directive 2006/54[80] have the provision to the Member States regarding the creation of the special body/bodies which the specific tasks in the area of the protected grounds, but it is not a duty for them.

Therefore, it is noticeable that the non-discrimination policy based on the grounds of race and sex have broader protection than other grounds that are provided in the primary legislative acts.

That is why the hierarchy of the prohibited grounds can lead to problems for some reasons, for instance, the different level of protection. Dr. Howard proposed to draw a distinct line between the different grounds, but she mentions that sometimes it is difficult to do, because of their interrelation. This is especially true for the racial or ethnic origin and religion or belief. In addition, the different level of protection can present a problem in case of multiple discrimination: where a person is discriminated against two or more grounds. But this does not mean that all the grounds should be treated in the same way.[81]

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[77] *Ibid*, 445-446.
[78] *EU Anti-discrimination law.* Module 2: Types of discrimination that are prohibited. *[accessed 2018-01-10]*. https://www.era-comm.eu/anti-discri/e_learning/module2_1.html.
[79] Council Directive 2000/43/EC implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin, Article 13 [2000] O.J. L180/22.
[80] Directive of the European Parliament and of the Council 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Article 20 [2006] O.J. L204.
[81] Erica Howard, "The Case for a Considered Hierarchy of Discrimination Grounds in EU Law", *Maastricht Journal of European and Comparative Law* 13, no. 4 (2006): 450, accessed January 8, 2018, http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/maastje13&div=38&start_page=445&collection=journals&set_as_cursor=0&men_tab=srchresults.

The hierarchy of the protected grounds against the discrimination can be seemed because for one of the protected grounds can be devoted special legislative act that adds value to its protection. Despite this the European Commission in the Explanatory Memorandum to the Proposal for the Framework Directive (in 1999) proclaimed the absence of the hierarchy among the discriminatory grounds because it is important, first of all, to protect a person in case of multiple discrimination. However, as Dr. Howard noticed, this opinion is not mirrored in the Proposals or the Directives, that can forward to the possible hierarchy of the protected grounds on which are prohibited to discriminate[82].

The next overview will be devoted to the special issues of the grounds on which are prohibited to discriminate a person in the employment relations.

In addition, earlier women fell under more abusive treatment in the employment relations than men. Therefore, on the basis of sex, women could meet the institutional negative discrimination, that is based on the laws, in the employment which was in the form of:

- denying access to certain occupations;
- denying promotion to higher ranks;
- lesser wages compared to men;
- younger age of retirement.[83]

So, the prohibition to discriminate on gender is now one of the cornerstones of European law. The Court of Justice of the European Union in 1978 recognized equality between men and women as a fundamental constitutional principle of European Law: "… respect for fundamental personal human rights is one of the general principles of the Community law[84]". Thus, the Court determined that equal treatment between women and men is a fundamental human right but also a general principle of EU law[85]. Furthermore, nowadays, the Treaty on European Union states that "the principle of equality between women and men is one of the values of the Union"[86] and "promoting gender equality is an objective of the EU"[87].

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[82] *Ibid*, p.451.

[83] Viktoria S. Douka, "Prohibition of Discrimination: Law and Law Cases," *Comparative Labor Law & Policy Journal* 30, no. 2 (2009): 200, accessed January 13, 2018, http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/cllpj30&div=21&start_page=199&collection=journals&set_as_cursor=74&men_tab=srchresults#.

[84] Judgement of 15 June 1978, *Defrenne v. SABENA* (C-149/77, ECR 1978 p. 1365), para.26.

[85] Catalina-Adriana Ivanus, "Justification for Indirect Dicrimination in EU," *Perspectives of Business Law Journal 3* (2014): 153, accessed January 27, 2018, http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/perbularna3&div=20&start_page=153&collection=journals&set_as_cursor=33&men_tab=srchresults#.

[86] Treaty on European Union, Article 2. *[accessed 2018-01-08]*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>.

[87] *Ibid*, Article 3 para.3.

In addition, the notion of sex has been broadly interpreted to include not only the biological differences between men and women but also the notion of the gender identity, protecting to those who have undergone gender reassignment surgery[88].

It should be mentioned that since the possibility to change the gender, in the practice of the EU Member States the elements of the discrimination on the basis of sex can be traced. In this case, all unclear provisions or determinations where is the discrimination can be clarified through the case law of the EU. For instance, in the Richards case, the applicant had changed his gender from male to female through surgery. She claimed her pension when she turned 60 like women are entitled to in the United Kingdom. The State refused to grant her pension because the State did not want to treat her as a woman. The ECJ found that she had been discriminated against and should have been considered as a woman by the reason that the UK allows gender change.

Another protected grounds such as religion or belief have no definitions in the Framework Directive. However, the case law of the European Court of Human Rights has developed principles as to what measures religions and beliefs would be protected. It was made in relation to Article 9 about the right of the freedom of religion under the European Convention on Human Rights (the EU Member States are the Parties to it). As a result, the notion "religion" includes the more commonly recognized religions such as Buddhism, Christianity, Hinduism, Islam, Judaism. A religion does not need to be mainstream or well known to gain protection as a religion. However, it must have a clear structure and belief system. And "belief" means any religious or philosophical belief and includes a lack of belief such as Humanism or Atheism.[89] So, if an employee wants to prove that he/she is discriminated on the ground of religion or belief and it is not known to public, however it has structure and system, an employee can have a chance for protection in this case, but at the same time he/she should additionally demonstrate the evidence of the existing of such religion or belief.

The application of the Framework Directive covers also the prohibition to discriminate on the basis of the disability, but this Directive does not give the definition of it. In the *Chacon Navas* case defines the concept of disability that the definition of a disability must be given an "autonomous and uniform interpretation". In addition, the Court refers to "a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person

[88] "An overview of the case law on the prohibition of discrimination of the ECJ and the ECtHR", 5. *[accessed 2018-01-18]*. http://www.humanrights.is/static/files/Itarefni/an-overview-of-the-case-law-on-the-prohibition-of-discrimination-of-the-ecj-and-the-ecthr-emilie.pdf.

[89] *EU Anti-discrimination law.* Module 2: Types of discrimination that are prohibited. *[accessed 2018-01-10]*. https://www.era-comm.eu/anti-discri/e_learning/module2_1.html.

concerned in professional life". The limitation must also last "for a long time". [90] In the practice of the EU, the notion of disability is the medical model and not the social one[91].

One more protected ground under the EU legislation is age. Under the practice of the CJEU, this prohibited ground of discrimination is more popular among others in case of claiming the protection. The cases divided into three categories:

- concerning the lawfulness of national or sector-specific retirement ages;
- cases concerning the maximum age at which a person can enter a profession or field of work;
- cases concerning age discrimination against younger workers.[92]

As regarding the nationality that is one of the protected ground against discrimination, it is mentioned in the Article 18 of the TFEU and about which was already discussed in the sub-chapter devoted to the legislative norms of the EU. It should be added that the discrimination on the ground of nationality can be closely related to discrimination based on race and ethnic origin, and can moreover refer to the difference of status between nationals and foreigners, especially when they come from outside the European Union. The discrimination based on nationality under EU law is covered by the Directive on free movement of a person[93], which is limited in scope to EU citizen and their family members[94]. As a result, the prohibition of discrimination on the basis nationality in employment relations protects only nationals of the EU and this prohibition does not cover the non-EU nationals in their relations with employers while working on the territory of the European Union. Therefore, while non-discrimination on the ground of nationality is an important aspect of the internal market and EU citizenship, it does not protect third-country nationals in the same way[95].

1.2.4. The exceptions to the non-discrimination rule

[90] Case C-13/05 *Chacon Navas* [2006] ECR I-06467.
[91] *EU Anti-discrimination law.* Module 2: Types of discrimination that are prohibited. *[accessed 2018-01-10]*. https://www.era-comm.eu/anti-discri/e_learning/module2_1.html.
[92] *Ibid*.
[93] Directive of the European Parliament and of the Council 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] O.J. L 158/77.
[94] "An overview of the case law on the prohibition of discrimination of the ECJ and the ECtHR", 12-13. *[accessed 2018-01-18]*. http://www.humanrights.is/static/files/Itarefni/an-overview-of-the-case-law-on-the-prohibition-of-discrimination-of-the-ecj-and-the-ecthr-emilie.pdf.
[95] Alan Bogg, Cathryn Costello and A.C.L. Davies, *Research Handbook on EU Labour Law* (UK: Edward Elgar Publishing Limited, 2016), p.12, accessed February 12, 2018, https://books.google.lv/books?id=lBSlDQAAQBAJ&printsec=frontcover&dq=labour+law+in+eu&hl=ru&sa=X&ved=0ahUKEwiQiK2XiYjaAhUBYpoKHTBQCQkQ6AEIJzAA#v=onepage&q&f=false

There are main general exceptions that are related to the non-discrimination policy which can be found in the Race, Framework and 2006/54 Directives: genuine occupational requirements and positive action measures.

In relation to both direct and indirect discrimination, an exception to the genuine occupation requirements relates to a protected characteristic. There will be no unlawful discrimination if:

- by reason of the nature of the particular occupational activities or context in which they are carried out;
- the characteristic (race, religion or belief, sexual orientation, disability or age) is a genuine and determining occupational requirement;
- provided the objective is legitimate and the requirement is proportionate.[96]

Therefore, the specific justification in case of direct discrimination is admissible where the EU Directives allow "genuine and determining occupational requirements". In addition, the Framework Directive accepts that religious organizations can impose the conditions on their employees based on their religious beliefs and that employment policies also allow differential treatment on grounds of age if the measure is necessary and proportionate[97].

For instance, the prohibition of discrimination on the basis religion or beliefs in the Framework Directive establishes the exceptions "where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organization's ethos". Based on the above-mentioned legislative norm, religious organizations are allowed to require the fulfillment of certain conditions to their employees, for instance, the refusal to hire female priests if it contradicts their beliefs.[98]

As regarding the positive action provisions in the Race and Framework Directives, the aim is to permit measures that prevent or compensate for the disadvantage that can be suffered by the protected groups in employment. Through the positive action, the EU tries to promote greater equality due to policies, programmes or other measures. Under the case law of the European Union, a positive action should be lawful and admissible if:

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[96] *EU Anti-discrimination law.* Module 2: Types of discrimination that are prohibited. *[accessed 2018-01-10]*. https://www.era-comm.eu/anti-discri/e_learning/module2_1.html.

[97] "An overview of the case law on the prohibition of discrimination of the ECJ and the ECtHR", 3. *[accessed 2018-01-18]*. http://www.humanrights.is/static/files/Itarefni/an-overview-of-the-case-law-on-the-prohibition-of-discrimination-of-the-ecj-and-the-ecthr-emilie.pdf.

[98] *Ibid*, p.12.

- it states about a particular disadvantage of a group which can be proved by evidence;
- it is proportionate;
- the period of providing a positive action is equal to the time of lasting of a disadvantage. [99]

It should be mentioned that a positive action cannot be applied if one group receive automatically preferential treatment, it will be unlawful discrimination regarding another group. But it does not concern the disable persons. The employer can treat a disabled job applicant more favorably even if they are not at a disadvantage due to their disability in the particular situation[100].

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The European Union is based on the principles of liberty, democracy, respect for human rights and fundamental freedoms[101]. These principles cover all the 27 Member States of the EU where the rule of law should be respected also. In this case, all the legislative norms that are issued by the EU's organs should be taken into consideration by its Members. As the non-discrimination policy is one of the main directions of the EU, the European Union by the primary legislation defends persons from the discrimination based on the grounds such as sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (in case of the prohibition of the discrimination that is based on nationality, it protects only the citizens of the EU). None of the EU Member States can derogate from the legislative norms of the European Union.

In this chapter were analyzed the historical development of the non-discrimination policy of the EU. It begins with the equal treatment of men and women and now encompass more protected grounds that prohibit discriminations. As it was mentioned, the obligatory protected grounds of nowadays are listed in the Article 19 of the Treaty on the functioning of the European Union and listed above.

The EU non-discrimination policy in employment tries to give protection to whom who needs it. Therefore, this chapter also underlined secondary legislation that provides defense to specific protected grounds in work relations, such as the Race Directive (concerns racial and ethnic origin as

[99] *EU Anti-discrimination law.* Module 2: Types of discrimination that are prohibited. *[accessed 2018-01-10]*. https://www.era-comm.eu/anti-discri/e_learning/module2_1.html.
[100] *Ibid*.
[101] Treaty on European Union, Art.6. *[accessed 2018-01-08]*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>.

protected grounds), the Framework Directive (concerns religion or belief, disability age and sexual orientation as protected grounds) and Directive 2006/54 (concerns sex as a protected ground).

Furthermore, the subchapters also disclose the types of the situations that can be treated as discrimination, list the possible justification and exceptions of the discrimination in employment relations. In addition, through the case law, it is given the definitions of the grounds of disability, religion, and belief, because of the absence of them in the Directives.

As a result, the non-discrimination policy of the European Union in employment law consists of the general principles of protection of persons. The EU gives its Member States right to develop the notions of the protected grounds and kinds of their defense that can lead to problems because of the absence of general regulations. In addition, due to different treatment of the non-discrimination norms by the EU Members States, countries can give a non-similar level of protection to the employees.

2. THE EFFECTIVENESS OF THE PROTECTION OF EMPLOYEES AGAINST DISCRIMINATION IN THE EU MEMBER STATES

The issue of the non-discrimination in employment is important regarding the protection of the employee in his/her relation with the employer. The protection policy of a state wants to defend its citizens and workers from a possible discrimination in employment relations. A state issues the laws or acts for the defense of their citizens and then try to improve the protection policy through the practice (for instance, court decisions are one of the most proper ways to protect an employee from a discrimination in an employment). The consolidation of the Member States of the European Union enhances the security of the employees disregarding their current status (a future employee, a current employee or an employee in the past) or their current location (whatever of 28 Member States of the European Union).

In addition, Professor of Law at Stanford Law School who is interested in the employment discrimination, especially in prohibition of the discrimination on the ground of race, argues that modern employment discrimination jurisprudence is based on the statements that key concepts such as "discrimination", "intent", "causation" and other prohibited grounds of discrimination refer to discrete and objectively verifiable phenomena or facts. Instead these, he asserts that the central concepts in antidiscrimination law do not describe objective phenomena of fact at all. The central concepts of non-discrimination in the employment law are based on the social conflicts between employer prerogatives and equality goals. He states that in general, the employment law does not prohibit the discrimination, instead of this the employment legislation just imposes a duty of care on employers to avoid decisions that undermine social equality[102].

The legislation of the EU Member States gives only the general protection to employees against the discrimination and that is why the employees need to enforce their rights in the country/EU's bodies or courts to overlap the shortcomings in state or EU laws.

Therefore, the functioning of the anti-discrimination mechanism should be effective for the protection of the persons located on the territory of the EU. Unfortunately, the weakness of the existing EU equal opportunities legislation is the inability to produce genuine improvements in the Member States domestic legislation. Also, the legislation has in many cases not provided individuals with the

[102] Richard Thompson Ford, "Bias in the Air: Rethinking Employment Discrimination Law," *Stanford Law Review* 66, no. 6 (2014): 1381, accessed January 23, 2018, http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/stflr66&div=40&start_page=1381&collection=journals&set_as_cursor=13&men_tab=srchresults#.

practical protection against discrimination.[103] As the Commission stated in 1996: "although the legal framework is fairly comprehensive, equality is still not accessible to everyone in the European Union[104]". And the question is not in the additional legislation, the question is in the effective utilization of this legislation by the EU Member States[105].

For example, at the time of existing the only one protected ground – gender (sex), the Commission stated in its first annual report on equal opportunities that "there remain a number of outstanding problems in the application of Community law: time limits, the effectiveness of legal remedies and sanctions, and access to justice are some of the problematic areas facing women and men seeking to enforce their rights[106]. It was stated in 1997. In this year appeared the power to combat discrimination on more grounds than just sex, such as racial or ethnic origin, religion or belief, disability, age and sexual orientation. But still, even now the access to justice remains difficult. The problems can be identified at every stage of the litigation process: barriers in evidence-gathering, insufficient protection against victimization, a lack of legal and financial assistance for victims of discrimination, a poor understanding of equality concepts amongst the judiciary, inadequate and inappropriate remedies[107].

Every day there are new situations of discrimination based on the different grounds, the EU and the Member States try to improve their legislation under the needs of employees in their defence. But the last EU legislative acts regarding the prohibition of the employment discrimination were created almost 12 years ago (Directive 2006/54 concerning protected ground – sex). So, now the EU Member States have the freedom in the improvement of the non-discriminatory policy by themselves.

In addition, sometimes an employee cannot know about the possibility to defend his/her rights and the structure of state's legislative acts can be difficult for a person who in ordinary life has no relation with laws. Therefore, it is important to increase employees' knowledge about the protection of the inalienable rights through the articles in the Member States' newspapers/sites and, of course, through the consultations/informative brochures on the workplaces. For instance, the European Bank

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[103] Directorate-General for Research. *European Union Anti-Discrimination Policy: From equal opportunities between women and men to combating racism, Working document. Public Liberties Series LIBE 102 EN. [accessed 2018-01-14]*. <http://www.europarl.europa.eu/workingpapers/libe/102/text1_en.htm>.

[104] European Commission (1996) " *Proposal for a Council Directive on the burden of proof in cases of discrimination based on sex"* COM (96) 340, 17.7.97; p. 3.

[105] Directorate-General for Research. *European Union Anti-Discrimination Policy: From equal opportunities between women and men to combating racism, Working document. Public Liberties Series LIBE 102 EN. [accessed 2018-01-14]*. <http://www.europarl.europa.eu/workingpapers/libe/102/text1_en.htm>.

[106] European Commission (1997) "Annual Report from the Commission: Equal Opportunities for Women and Men in the European Union 1996" COM (96) 650, 12.2.97; pp. 6-7.

[107] Directorate-General for Research. *European Union Anti-Discrimination Policy: From equal opportunities between women and men to combating racism, Working document. Public Liberties Series LIBE 102 EN. [accessed 2018-01-14]*. <http://www.europarl.europa.eu/workingpapers/libe/102/text1_en.htm>.

for Reconstruction and Development[108] made the statements regarding the situations where the discrimination can occur. They are:

> ***1)*** *"Recruitment, training, promotion, termination, redundancy.*
> Job announcements, application forms or interviews should not refer to an applicant's gender, marital status, age, race, disability or other personal characteristics that is irrelevant to the job.
> The procedure and criteria applied during retrenchment phases should be objective and transparent and should not disadvantage one group over another.
>
> ***2)*** *Wages and conditions of work.*
> Workers should be treated equally in relation to working conditions (e.g. working hours, security of tenure, leave, safety and health measures, social security and other benefits) and pay (including additional payments such as overtime, bonuses, allowances and other benefits).
> Women must receive equal pay for work of equal value. This means that rates of remuneration (including the basic wage and any additional cash or non-cash benefits) must be established without any discrimination based on sex.
>
> ***3)*** *Health assessments*
> Job applicants or workers should not be asked about or to undertake health or pregnancy tests (except as strictly required by health and safety laws) or be asked directly or indirectly about HIV/AIDS status.
>
> ***4)*** *Work adaptation."*

As a result, the main problems of nowadays in case of protecting the employees against discrimination are: the inappropriate level of involving of the state in the discrimination cases, non-easy ways of claiming the discrimination, unknowing of persons about the possible ways of protection, fears of employees to claim against employers, unwilling to bear the legal costs and non-appropriate measures (penalties) in the cases about discrimination in employment relations.

This chapter will encompass the ways of protection of the rights of employees in their fights with the discrimination. Also, it will be discovered the enforcement of the employee's rights in the countries such as Finland, France, Germany, Poland, Sweden, Slovakia.

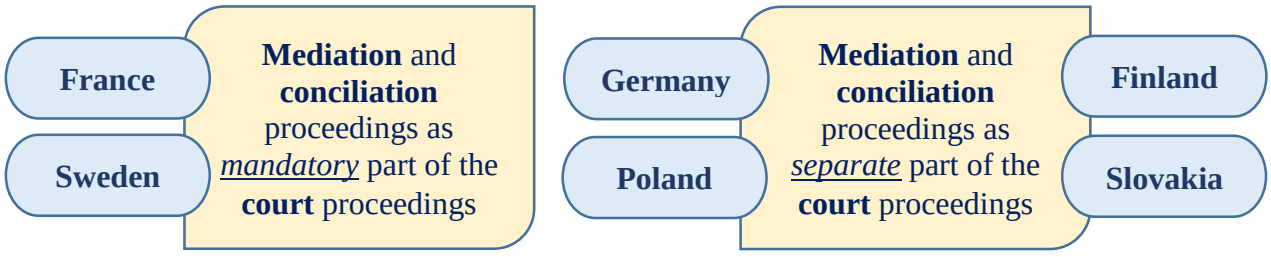
[108] European Bank for Reconstruction and Development. *Nondiscrimination and equal opportunity: guidance for clients. [accessed 2018-01-16]* <http://www.ebrd.com/downloads/about/sustainability/NonDiscrimination.pdf>.

2.1. The procedures for the defence of the employees that are applied in case of discrimination in the employment relations

Access to justice for victims of discrimination as well as the existence of effective, proportionate and dissuasive remedies are essential to ensure the effective enforcement of the non-discrimination obligations imposed on the EU Member States[109].

That is why all three Directives regarding the employment (the Race, Framework and 2006/54 Directives) provide the remedies which entitle employees to bring claims and enforce their rights in case of discrimination in the employment relations. In addition, these Directives oblige the European Union Member States to ensure the existence of appropriate procedures for application of the non-discrimination law. Such provisions have the equal meaning in the Directives regarding the employment and are named in the same way "defence of rights". The wording of these articles (Art. 9 of the Framework Directive, Art. 7 of the Race Directive and Art. 17 of the Directive 2006/54) is: "Member States shall ensure that judicial *and/or* administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under these Directives are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended". So, the Articles state about 3 types of procedures: "judicial, administrative and conciliation", which should be ensured for the protection of potential/current/dismissed employees. Also, these provisions give the choice to the Member State of the EU what of these 3 kinds to establish in its country. And, as it was mentioned in the general part of this work, the protection can be guaranteed for the employee disregarding his/her status: future, current, past employee.

In general, the resolving of the discrimination disputes covers not only judicial procedures. For instance, the procedures of protection[110] of the employees' rights can be:



[109] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017.
[110] *Ibid*, p.84.

Sweden

Trade Union is representing one of its members, **negotiation** must take place with the employer before a case is brought to the **Labour Court**, with the view of reaching a settlement agreement.

Moreover, these above-mentioned Articles provide that the associations, organizations or other legal entities which have a legitimate interest in ensuring the compliance with the norms of the EU regarding the protection the employees in their employment, can enforce the protection of the employees on their behalf and with their approval.[111]

In some countries, such as France, Germany, Slovakia and Sweden, the national legislation provides that the associations and/or trade union or other organizations can be engaged by the injured person in the discrimination cases. It contrasts with Poland, where such legal entities do not have explicit authorization by the specific provisions regarding the discrimination. Generally, it can be found in civil, administrative and labour law.[112]

In addition, if the associations or organizations want to be representative bodies on behalf or in support of victims, they should fulfill the certain requirements of the legislator, such as a certain number of years of existence and/or explicit mention of the fight against discrimination in their statutes. In France, for example, the national law[113] specifies the ability of all representative trade unions and non-governmental organizations (NGOs) that exist more than five years to act either on behalf or in support of victims of discrimination, before any jurisdiction. In addition, the French equality body the Defender of Rights can present observations in any case before any jurisdiction. In Germany[114], under the antidiscrimination associations are entitled to support claimants in the court proceedings, provided that they fulfill certain criteria, such as having at least 75 members and operating permanently and not on an *ad hoc* basis to support one claim.[115]

But, for example, in the procedural law of Sweden, it is stated that there are no the requirements to the length of activity or to the number of cases which the trade unions should have because the trade unions always have a legal right of the representation of the victim where one of their members is involved. And in Slovakia, the equality bodies (the Slovak National Centre for

[111] Art.7 Race Directive, Art. 9 Framework Directive, Art.17 Directive 2006/54.
[112] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.89.
[113] Article R779-9 of the Code of Administrative Justice of France; Article 3 the Code of Civil Procedure of France; Article 2, Code of Penal Procedure of France; Articles L1134-2 and L1134-3 of the Labour Code of France; Article 8, paras 1 and 2, Law in the public sector of France No 83-634 of 13 July 1983
[114] General Equal Treatment Act of Germany.
[115] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.89.

Human Rights) or any NGOs or trade unions (from 2016) that can help in the protection of the victims in the discriminatory case, can intervene as a third party in court proceedings. [116]

The Directives regarding the prohibition of the discrimination in employment state that also the associations or organizations can act "on behalf of" of the injured potential/current/dismissed employee. The interaction of the associations or organizations "on behalf of" the employee disregarding his/her status can be found in France, Poland, Slovakia, and Sweden. But there are the limitations for the associations or organizations for such actions. For instance, in Slovakia[117], representation of victims by NGOs and by the national equality body (the Slovak National Centre for Human Rights) is allowed before the ordinary courts. In addition, the representation by NGOs (from 2016) becomes possible before the Supreme Court, but Constitutional Court proceedings remain excluded. In Finland, the right to bring a case before the courts is reserved to the victim only. However, before the Non-Discrimination and Equality Tribunal, the Non-discrimination Ombudsman or an organisation with an interest in advancing equality may bring a case, as long as the victim gives his/her consent. The Government proposal[118] clarifies that an organisation with an interest in advancing equality can be, for example, a human rights association. In Sweden, NGOs have the right to bring actions representing an individual person provided that their statutes predict the possibility of taking into account their members' interests, depending on their own activities and the circumstances of the case and on condition that consent is given.[119]

Furthermore, the Race Directive and the Directive 2006/54 mention that the EU Member should designate a body or bodies "for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin[120]" and "for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex[121]". The competence of the above-mentioned bodies includes:

- the independent assistance to victims of discrimination in pursuing their complaints about discrimination,
- conducting independent surveys concerning discrimination,

[116] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.90.
[117] Civil Dispute Act of Slovakia, No 160/2015, Section 429(2)(c).
[118] Government proposal on the Non-Discrimination Act (Finland), 19/2014, p. 87.
[119] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.90-91.
[120] Council Directive 2000/43/EC implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin, Art.13. [2000] O.J. L180/22.
[121] Directive of the European Parliament and of the Council 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Art.20. [2006] O.J. L204.

- publishing independent reports and making recommendations on any issue relating to such discrimination.[122]

For example, France (the Defender of Rights) and Germany have created an absolutely new body for complying with the requirements of the promotion of equal treatment to all injured individuals in case of the discrimination in the employment. In addition, the Defender of Rights in France concludes an investigation by adopting a decision that may propose recommendations, suggest mediation or decide to present observations to the courts[123]. The other Member States have given the necessary function to the existent bodies. For instance, in Slovakia, the function of promoting the rights is given to existing National Centre for Human Rights. In addition, some Member States can merge the responsible bodies for the fulfilling of the above-mentioned function. For example, in Sweden[124], the Swedish Equality Ombudsman was created through the merger of four pre-existing ombudsmen institutions working with different grounds of discrimination: sex, ethnic origin, and religion; disability and sexual orientation.[125]

Therefore, national equality bodies, responsible for the enforcement of non-discrimination law, represent one of the areas where the human rights violation become visible. Also, the Member States are generally considered to have a common social structure while undergoing similar social-economic developments. And, in addition, the countries of the EU are all obliged to meet the requirements of the binding EU anti-discrimination legislation. It shows that they may face comparable problems in judicial practice.[126]

Regarding the judicial procedures, an employee affected by the discrimination in the work relations should take the initiative and submit a complaint to the respective court, and sustain the initiative during the proceedings as well. In general, these courts are civil, administrative or labour[127]. The problem is that the employees who faced the discrimination do not always want to seek the protection of their rights in the court. For instance, they may not know about the ways of protection or just do not want to spend their money for court's charges, or they do not have enough evidences,

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[122] Art.13 Race Directive, Art.20 Directive 2006/54.
[123] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.116.
[124] Equality Ombudsman Act of Sweden, No 2008:568.
[125] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.108.
[126] Merel Jonker; Sigtona Halrynjo, "Multidimensional Discrimination in Judicial Practice," *Netherlands Quarterly of Human Rights* 32, no. 4 (2014): 410, 412, accessed March 18, 2018, http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/nethqur47&div=34&start_page=408&collection=journals&set_as_cursor=93&men_tab=srchresults.
[127] Janka Debreceniova, "*Ex officio* investigations into violations of the principle of equal treatment: the role of labour inspectorates and other bodies", *European Anti-discrimination Law Review* 17 (2013), p. 26, accessed April 18, 2018, http://www.migpolgroup.com/wp-content/uploads/2013/11/Review-17-EN.pdf

or just not believe in justice. Under national survey of Slovakia in 2012 only a tiny percentage of persons (who have been discriminated) had sought a legal remedy and more than 92% had not taken any steps to seek a remedy. The reasons why such a high number of people, who were discriminated, did not take any legal steps included:

- lack of trust in the institutions that could successfully resolve discrimination (13.1% of all responses);
- lack of evidence (11.8% of responses);
- thoughts about unimportance of resolving their cases (11.6%);
- lack of information as to where and who to turn to for legal assistance (more than 10%).[128]

Also Ms Debrecéniová, the lawyer that is the country expert for Slovakia in the European Network of Legal Experts in the Non-discrimination Field, lists also the reasons that she met in her practice, they can be:

- fear of having to bear the legal costs if the case is lost;
- lack of financial means to cover their own costs (such as legal representation and court fees which may not be reimbursed even if litigation is successful);
- fear of being marked as a "troublemaker" after filling a legal complaint;
- fear of losing a job;
- fear of victimisation;
- fear of confrontation with a person in power;
- the length of proceedings.[129]

For instance, the cost for *ex officio* procedures in all the Member States are taken by the responsible body which is financed from the country budget. But when the individuals want to initiate the proceedings after being discriminated, they should pay all legal costs by themselves.[130]

In addition, the hurdle for an employee can be the absence of the knowledge to what court should he/she apply, because complaints regarding the public sector are commonly dealt with separately from the private sector. Therefore, in France, the administrative courts hear complaints

[128] Janka Debreceniova, "*Ex officio* investigations into violations of the principle of equal treatment: the role of labour inspectorates and other bodies", *European Anti-discrimination Law Review* 17 (2013), p. 26, accessed April 18, 2018, http://www.migpolgroup.com/wp-content/uploads/2013/11/Review-17-EN.pdf
[129] *Ibid*.
[130] *Ibid*., p.35.

from civil servants and contractual employees in the public sector and from citizens bringing actions against the state.[131]

It is worth to mention about one more barrier for an employee to protect his/her rights against the discrimination by the employer is that the body/bodies, which are responsible for the discrimination issues in employment, can refer the cases to another body/bodies under the *ex officio* procedures. These bodies, in general, are a prosecutor or a court.[132] In this situation an injured party will be not find justice in the frame of one responsible body and it can be the reason for the additional length of time in the resolving of the discrimination case.

Another obstacle that creates the difficulties to employees is the complexity of discrimination law. Skilled, experienced assistance for victims can help cover the above-mentioned barrier, but such aid remains limited in availability (in contrast to the professional advice and representation usually available to respondents that are employers). The lack of sufficient means to sue the employer can be closely related to the absence of adequate representation. This interrelation is showed by the mandatory provisions of the state to have obligatory legal representation.[133] Of course, from the point of view that, in general, the employees do not have the specific knowledge in the field of the employment law and for their protection, in the court proceeding it is necessary to have the qualified help. But for combating the discrimination in the employment relations on the various grounds of the EU law and the national law, the Member States of the EU should provide the legal help free of charge, also in for court proceedings.

For example, in Slovakia, the access to free legal aid is limited and dependent on complex procedures. Also, if the employee wants to sue the employer due to his/her adverse treatment, the employee should pay the fee for the proceeding of the case regarding the discrimination in the courts of Slovakia.[134]

One more barrier is the short time limits for bringing a case. Under the Race (Article 7(a)), Framework (Article 9(3)) Directives and the Directive 2006/54 (Article 17(3)) about the prohibition of the discrimination that is based on gender, the Member States of the EU can establish the time limits what it deems appropriate to them.[135]

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[131] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.86.
[132] Janka Debreceniova, "*Ex officio* investigations into violations of the principle of equal treatment: the role of labour inspectorates and other bodies", *European Anti-discrimination Law Review* 17 (2013), p.35, accessed April 18, 2018, http://www.migpolgroup.com/wp-content/uploads/2013/11/Review-17-EN.pdf
[133] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.87.
[134] *Ibid.*
[135] *Ibid.*

Under Germany's General Equal Treatment Act there is a time limit of two months for claiming material or non-material damages in labour or civil law, beginning either with the obtainment of the rejection on a job application by the applicant or with the knowledge of the disadvantageous behaviour. In Sweden[136], the time limits for bringing a case in the employment matters seem to be based on the assumption that the victim is represented by a trade union. Also, if the claim aims to have a dismissal declared void, the time limit for filing is a matter of weeks from the act of dismissal or – in certain cases – one month after the termination of the employment. In France, the complexity of the different time limits is in their applicability for different types of actions, in particular in the field of employment, create an additional barrier.[137]

Ms Debrecéniová states that it is essential that States, when seeking to combat discrimination, do not need to wait for the affected individuals, the Member States of EU should take the lead by identifying and sanctioning discrimination themselves – by introducing adequate institutional and procedural mechanisms for identifying and remedying discrimination on their own initiative. The absence of such mechanisms makes the employees sensitive and unprotected against the discrimination by the employers.[138] Also it has negative influence on discrimination cases in the future where the employers will be not punished for previous adverse treatment of employees on the grounds of sex, such as racial or ethnic origin, religion or belief, disability, age and sexual orientation that are prohibited by the EU law or any other grounds that are protected by the national legislation.[139]

As it was mentioned in the Race (in the Art.7), the Framework (in the Art.9) Directives and the Directive 2006/54 (in the Art.17), it does not explicitly state the kind of procedure that is need to establish in the Member States for the enforcement of the protection of the rights against the discrimination (that is the obligation under Directives). These procedures should be available to all persons who considered themselves wronged by failure to apply the principle of equal treatment to them[140]. All the procedures still require an unconditional initiative from the employees affected by the discrimination and the main obstacles for them are practical barriers in accessing of justice. Therefore,

[136] Discrimination Act of Sweden, Chapter 6, Sections 4 and 5.
[137] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.87-88.
[138] Janka Debreceniova, "*Ex officio* investigations into violations of the principle of equal treatment: the role of labour inspectorates and other bodies", *European Anti-discrimination Law Review* 17 (2013), p.27, accessed April 18, 2018, http://www.migpolgroup.com/wp-content/uploads/2013/11/Review-17-EN.pdf
[139] *Ibid*.
[140] Art. 7 Race Directive, Art.9 Framework Directive, Art. 17 Directive 2006/54.

the EU Member States are not "putting into effect" [141] the principle of equal treatment, as the Directives require.[142]

Ms Debrecéniová underlines that the Member States cannot exercise their responsibilities to eliminate or reduce discrimination if they do not take the burden of dealing with the discrimination that currently are on the employees and do not take the initiative by themselves on a systematic level.[143]

Therefore, the body/bodies should include in their functioning the conciliation, judicial *and/or* administrative procedures for the enforcement of the rights of the injured individuals in the employment relations. Every person who is or was discriminated on the protected grounds can apply to the body/bodies of his/her country where the employment relations are/were. These persons are potential employee/current employee/dismissed employee. The Member States of the European Union should provide an effective mechanism of the defence for their citizens and persons who are permitted to work in the concrete Member State. Such mechanism of the protection of employees is the body/bodies that has/have the powers to guarantee the defence of individuals in employment relations.

Some of the existing bodies will be listed below to underline the general kinds of them and to show the necessity of the function of the *ex officio* investigation of the discrimination in the cases regarding employment (the reason for the investigation is the promoting of the interactive participation of the country of the EU through non-judicial proceeding for the protection against the discrimination with minimum interaction of the injured potential/current/dismissed employee).

So, the bodies that are responsible for the defence of the persons against the discrimination in the employment relations are: labour inspectorates, equality bodies, the ombudspersons, courts (civil, administrative or labour) and others. All of these bodies can propose different procedures (administrative/judicial/conciliation) to the persons who were adverse treated (discriminated) by the employers.

For instance, Sweden has the special equality body that is responsible for fighting the discrimination and protecting the equal rights and opportunities for everyone disregarding their gender, and it is called the *Equality Ombudsman* (that was created in 2009). The *Equality Ombudsman* reviews situations concerning gender equality in the workplace. It is also responsible for ensuring that

[141] Art. 1 Race Directive, Art. 1 Framework Directive.
[142] Janka Debreceniova, "*Ex officio* investigations into violations of the principle of equal treatment: the role of labour inspectorates and other bodies", *European Anti-discrimination Law Review* 17 (2013), p. 27, accessed April 18, 2018, http://www.migpolgroup.com/wp-content/uploads/2013/11/Review-17-EN.pdf
[143] *Ibid*.

the law regarding parental leave is followed and that parents who go on leave are not adversely affected at work. The *Equality Ombudsman* primarily oversees compliance with the Discrimination Act of Sweden. This law prohibits discrimination related to gender, transgender identity or expression, sexual orientation, ethnicity, religion or other belief, disability or age.[144]

In Finland, the *Non-Discrimination and Equality Tribunal* can confirm a settlement between the parties or prohibit the continuation of conduct that is contrary to the prohibition of the discrimination or victimization. The tribunal may also order to the employer to fulfill his/her obligations by imposing a conditional fine. The advantages of the tribunal proceedings are: settlement is free of charge and does not require the use of a legal counsel. The other body is the *Non-discrimination Ombudsman* that can issue statements on any discrimination case submitted to him/her, lead the conciliation proceedings, where necessary forward the complaint to the appropriate authorities, if it is agreed by the complainant, and provide legal assistance.[145]

Also the responsible bodies for the discrimination issues in employment that conduct *ex officio* procedures regarding the violations of the principle of equal treatment, should inform the public about the cases through the media or their reports.[146] This information for the public is necessary for rising of the general knowledge of persons about possible ways of protection in case of the discrimination in employment relations and also it can show that the Member States can grant them the protection under the non-discrimination policy of the European Union.

Such information should be opened to the public only after the end of the discrimination cases or during the proceeding a case if the responsible bodies agreed on it with the victim or need to find witnesses of such discrimination. Also, it will be useful to publish a general overview of the discrimination cases (in the national language and in English) in every Member States that will be based on the protected grounds of the EU (Art. 19 of the TFEU) and also on the prohibited grounds in the national legislation. In the cases, where the person disregarding the status became the victim of the discrimination and is worrying about his/her future employment relation and the reaction of the public after the case in the place of his/her permanent residence, it is better to publish such overview in an anonymous way.

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[144] "GENDER EQUALITY IN SWEDEN". *[accessed 2018-04-09]*. https://sweden.se/society/gender-equality-in-sweden/.

[145] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.85.

[146] Janka Debreceniova, "*Ex officio* investigations into violations of the principle of equal treatment: the role of labour inspectorates and other bodies", *European Anti-discrimination Law Review* 17 (2013), p.35, accessed April 18, 2018, http://www.migpolgroup.com/wp-content/uploads/2013/11/Review-17-EN.pdf

In addition, the more the cases are reported in the media, the more knowledgeable victims will become about their rights and options for upholding these rights in their fight with the discrimination in the employment. There is a tendency for the media to report on high-profile cases involving racial or ethnic and religious discrimination rather than age or disability cases. The media are likely to report even less in countries where cases are not made public.[147]

Under three Directives concerning employment[148], the 28 Member States of the EU should ensure the appropriate measure in their national legislation or in practice that are necessary to protect employee against dismissal or other adverse treatment by the employer when this employee decided to protect his/her rights against the discrimination and bring a complaint in a court/national body. It is called victimization when an employer takes action against an employee, in retaliation for involvement in bringing, or supporting, a complaint of discrimination[149]. That is one of the reasons why the employees affecting by the discrimination in the work relations want that the publishing of the information about current cases should be anonymous. In addition, the fear to be victimized can be the obstacle in wishing to find a justice in the case of discrimination at work.

The employment Directives do not grant the protection against victimization in the discrimination cases only to the claimant (injured potential/current/dismissed employee), they potentially extend this protection to anyone who could receive adverse treatment "as a reaction to a complaint or to proceedings". Despite the above-mentioned, such protection to other persons can be limited by the Member States. For example, in Poland, the protection against victimization has covered the claimants and those who "support" them. In France, the specific protection against victimization applicable to the direct or indirect discrimination covered by the Directives, extending protection to anyone "having testified in good faith" according to discriminatory behaviour or having reported it.[150]

As it was mentioned, for protection against the discrimination in the employment relation, an employee should apply to a court or other competent authority, it depends on the national rules, and prove facts from which it can be presumed that there has been direct or indirect discrimination. The burden of proof in the case of discrimination is laid on an employer. An employer should prove that there has been no breach of the principle of equal treatment of an employee (an applicant) regarding

[147] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.88.
[148] Art. 9 Race Directive, Art.11 Framework Directive, Art. 24 Directive 2006/54.
[149] "WHAT IS VICTIMISATION?". *[accessed 2018-03-09]*. https://worksmart.org.uk/work-rights/discrimination/harassment-and-bullying/what-victimisation.
[150] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.100.

the protected ground.[151] This unconditional requirement of shifting the burden of proof can be applied to the judicial procedures only (it is shown by the practice of the EU Member States). Also, the number of *ex officio* procedures where a shift in the burden of proof applies prevails over the number of procedures where the burden of proof the violations rests upon the investigating body (or, in practice, upon the complainant). In other words, in most cases about the discrimination, the burden of proof is under the respondent, the employers. Therefore, a shift in the burden of proof applies to *ex officio* procedures conducted by all types of bodies (i.e. labour inspectorates, equality bodies, ombudspersons and other bodies).[152]

In addition, the burden of proof on the employee can be one more obstacle to justice in the discrimination cases, therefore, the above-mentioned provisions lay down that individuals who feel they have faced discrimination must only establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination. And then the burden of proof will shift to the respondent, who must prove that there has been no breach of the principle of equal treatment. Firstly, the shift of the burden of proof was developed under the gender legislation that can be found in the Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex. Nowadays, the three employment Directives in the sphere of the discrimination cover the shift of the burden of proof, but this does not affect criminal cases, and the Member States can decide not to apply it to cases in which courts have an investigative role.[153]

Thus, for example, in France, the burden of proof is not shifted in the administrative procedures which are inquisitorial in nature. But, at the same time, the Council of State (the supreme administrative court) held that, although it is the responsibility of the claimant (injured individual) in discrimination cases to submit the facts that could lead the judge to presume a violation of the principle of non-discrimination, the judge must actively ensure that the respondent (employer) should provide evidence that all elements which could justify the decision are based on objectivity and devoid of discriminatory objectives. In Slovakia[154], the Act on Labour Inspection does not contain any explicit and clear provisions on the burden of proof in relation to identifying breaches of the principle of equal treatment.

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[151] Art. 8 Race Directive, Art.10 Framework Directive, Art. 19 Directive 2006/54.
[152] Janka Debreceniova, "*Ex officio* investigations into violations of the principle of equal treatment: the role of labour inspectorates and other bodies", *European Anti-discrimination Law Review* 17 (2013), p.35, accessed April 18, 2018, http://www.migpolgroup.com/wp-content/uploads/2013/11/Review-17-EN.pdf.
[153] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.98.
[154] Act on Labour Inspection of Slovakia, No 125/2006; Act on Illegal Work and Illegal Employment of Slovakia, No 82/2005.

In Sweden[155], there was a case about the shift of the burden of proof in case of contradicting evidence of equal value. "The claimant was a Muslim dental student who was required to work with bare underarms due to state regulations on hygiene issues. Due to her religious beliefs, she asked to wear disposable underarm protection instead of showing her bare arms to strangers. When this request was denied, the claimant brought the claim to the Equality Ombudsman, which brought the case to court. Before the court, the Swedish State defended the hygiene regulations by calling an expert witness who argued that the necessary hygiene standards could be compromised if the specific protection requested was used. The Equality Ombudsman, however, called a British expert who gave the explanation that the kind of underarm protection requested was used in the UK, arguing that nothing indicated that such protection would lead to increased risks of infection. The court decided that both experts to be equally scientific and credible, stating that it was not possible for it (the court) to believe one expert more than the other. The court then noted that the education provider (as alleged discriminator) bears the burden of proof with regard to the justification of possible indirect discrimination. Under such circumstances, it was found that the education provider had failed to prove that there was no breach of the principle of equal treatment. The claimant was awarded approximately 550 EUR as compensation for indirect discrimination on the ground of religion".[156] Therefore, this Swedish case shows that even if the evidence are equal and under the state normative act, it exists the requirement of the observance of some hygiene rules, but it also admissible not to infringe this rules under the practice of another country, it is admissible to deviate from the national rule, and the existence of the national rules should be the justification of the direct discrimination.

The meaning of the phrase, "facts from which it may be presumed that there has been direct or indirect discrimination", that was also underlined in the above-mentioned case, was one of several questions on the burden of proof put before the Court of Justice of the European Union in the *Firma Feryn*[157] case and the *Asociaţia Accept* [158]case. In the last case the CJEU held that "a defendant (employer) cannot deny the existence of facts from which it may be concluded that it has a discriminatory recruitment policy merely by asserting that statements suggestive of the existence of a homophobic recruitment policy come from a person who, while claiming and appearing to play an

[155] Judgment of 16 November 2016, Stockholm Municipal Court (Sweden), *Equality Ombudsman v the Swedish State through Karolinska Institutet*, [2016] T 3905-15.
[156] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.99.
[157] CJEU, Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v NV Firma Feryn*, judgment of 1 July 2008, [2008] ECLI:EU:C:2008:397.
[158] CJEU, Case C-81/12, *Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării*, judgment of 25 April 2013, [2013] ECLI:EU:C:2013:275.

important role in the management of that employer, is not legally capable of binding it in recruitment matters".[159] In this *Asociaţia Accept* case was underlined the question regarding the qualifying respondent for the reason of the correctness of establishing the type of the discrimination (the direct or indirect discrimination). The case was about the recruitment policy of the football club where the manager made the statements regarding the non-employment of the football player who has the untraditional orientation. It was important to establish if these words were the opinion of the manager or the common policy of the football club, and, therefore, who was the responsible respondent that needed to bear the burden of proof. The CJEU stated that "a defendant employer cannot deny the existence of facts from which it may be inferred that it has a discriminatory recruitment policy merely by asserting that statements suggestive of the existence of a homophobic recruitment policy come from a person who, while claiming and appearing to play an important role in the management of that employer, is not legally capable of binding it in recruitment matters" [160], these above-mentioned statement says that the football club (that factually is the employer) cannot assert the absence of the discrimination in its employment policy, if this discriminatory policy comes from the management body who has influence on the football club, even when this body has no influence on hiring of exact person. So, the football club should bear the burden of proof affirming the absence of discrimination after the fact of the words of its manager where it can be presumed the discrimination in the recruitment policy of the whole club.

Another case that was established by the Slovakian Constitutional Court[161], provides guidance on the burden of proof in discrimination cases concerning the peculiarities of anti-discrimination proceedings, which are demanding the evidence assessment. It noted that the claimant (the injured employee disregarding his/her status) is required to give to the court facts which give rise to a reasonable assumption (i.e. not an unquestionable finding) that the principle of equal treatment has been breached. When such facts are given, the burden of proof is transferred to the defendant (employer). The court stated that the shift of the burden of proof depends on the assessment of the available evidence by the deciding court, which has to consider all facts that emerged in the proceedings. In addition, it is not obligatory to the injured individual to prove discriminatory motivation (incentive) of the defendant (employer).[162]

[159] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.99.
[160] CJEU, Case C-81/12, *Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării*, judgment of 25 April 2013, [2013], paragraph 49, ECLI:EU:C:2013:275.
[161] Case of 1 December 2015, Constitutional Court of the Slovak Republic, [2015] No III. US 90/2015-40.
[162] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.99.

To sum up the above-mentioned, it can be said that there are administrative/judicial or conciliation procedures that are fulfilled by the various national bodies. They have different names and different functions that can lead to the possibility of occurrence of confusion of choosing the right organ for the defending of the rights of the employees. It can be the problem for the employee that came to one country for working from his/her national state by using one of the core principles of the European Union – freedom of movement of the persons, that in our case are employees. Due to the limited knowledge of the employees about the possible ways of protection himself/herself in the situation of the discrimination in the period of hiring, or working, or dismissal, it is difficult to find fast the necessary ways of protection. Therefore, the system of bodies and the ways of protection can be complicated for employees. It should be better to establish in each Member States the body of the "first aid" to individuals that met the discrimination in employment relations. This body will help free of charge for the purpose do not create the obstacle to the justice and will explain about the rights of the potential/current/dismissed employees in case of the discrimination by the employer and will give the direction of further action to employee disregarding his/her status.

In addition, the structure of bodies in the Member States is rather complicated, because one similar function can be devoted to different bodies. For example, in Finland, there is another institution in addition to the equality body, exercising tribunal-like functions, namely the National Non-Discrimination and Equality Tribunal. In general, this Tribunal has another function that the equality body as stipulated by the Race Directive and the Directive 2006/54, because the Tribunal covers the grounds of the Framework Directive and the national legislation.

In general, the EU Member States try to improve their protective system which can defense employees against the discrimination on different grounds in the employment relations. The other question is ineffectiveness of the *ex officio* procedures of the above-mentioned bodies in this research. Therefore, the practical lawyer in the sphere of employment, Ms Debrecéniová, in her research "*Ex officio* investigations into violations of the principle of equal treatment: the role of labour inspectorates and other bodies", underlines the ineffectiveness of the *ex officio* procedures that are available in the Member States are in:

- the lack of investigatory powers;
- the inability of the responsible bodies to issue binding decisions;

- the inappropriateness of the types of decisions that the respective bodies can issue.[163]

For example, labour inspectorates were criticized by the national experts for non-conducting the investigations into the cases of discrimination and also for non-considering that violations of the principle of equal treatment may fall under the material scope of labour inspection. In addition, as it was mentioned before, the one responsible body can refer the discrimination case to another body, so the labour expectorates were also criticized for referring such cases to equality bodies and ombudspersons instead of conducting proper investigations. Another reason of criticizing is that the victims (employees) were unsatisfied by the financial penalties imposed by labour inspectorates – if these are imposed at all (which is rather rare), the amounts are often symbolic only.[164]

Furthermore, other problems that were reported by the national experts regarding the equality bodies and ombudspersons due to the *ex officio* procedures conducted by them in the field of employment-related discrimination are:

- the lack of investigatory and remedial powers;
- the lack of human and financial resources.[165]

In general, the main problem regarding all types of procedures is the problem of proving the discrimination especially, where it is not applied the shift of the burden of the proof to the employer.[166]

In addition, there is no explicit legal requirement for the Member States of the European Union to conduct *ex officio* investigations into violations of the principle of equal treatment as defined in the Race, Framework Directives or Directive 2006/54. But investigations can be an important part of actions that can help to combat discrimination. In the Member States of EU, the bodies who are entrusted to make *ex officio* investigations regarding the violations of labour standards are labour inspectorates.[167]

Under the survey of Ms Debrecéniová "*Ex officio* investigations into violations of the principle of equal treatment: the role of labour inspectorates and other bodies", the strongest investigatory powers among the countries of the EU are given to labour inspectorates where the power of the

[163] Janka Debreceniova, "*Ex officio* investigations into violations of the principle of equal treatment: the role of labour inspectorates and other bodies", *European Anti-discrimination Law Review* 17 (2013), p.35, accessed April 18, 2018, http://www.migpolgroup.com/wp-content/uploads/2013/11/Review-17-EN.pdf.
[164] *Ibid.*, p.37.
[165] *Ibid.*
[166] *Ibid.*
[167] Janka Debreceniova, "Ex officio investigations into violations of the principle of equal treatment: the role of labour inspectorates and other bodies", *European Anti-discrimination Law Review* 17 (2013), p. 25, accessed April 18, 2018, http://www.migpolgroup.com/wp-content/uploads/2013/11/Review-17-EN.pdf

equality bodies and the ombudspersons may vary in many cases, because sometimes bodies lack the important procedural powers – the possibility to interview persons who were discriminated or are witnesses of such discrimination.[168]

The labour inspectorates are related to the non-judicial proceeding that can be an effective forum for discrimination cases. For instance, in Finland, the responsible body for the enforcement of the employment law is labour inspectorate. But regarding the compliance of the anti-discrimination legislation by the employer supervised by the Occupational Health and Safety Authority. The same labour inspectorates are in France and Poland. In general, labour inspectorates have different tasks. Sometimes they do not carry out any assignments connected to non-discrimination on an everyday basis or do not carry them at all.[169]

As was mentioned above, *ex officio* investigations are the necessity in the protection of the employees. The first reason for this is that in most cases such investigation does not need the initiative actions from the employee. The second reason is that such investigations can raise the general level of protection of the employees from the discrimination in the work relations. Assuming that an *ex officio* investigation does not need the initiative step we can understand it as the responsible body/bodies should make selective examinations and collect anonymous responses of the employees, or the employees disregarding their status can just inform the responsible body/bodies about the situations with the discriminations in their employment relations, or the responsible body/bodies can monitor the system of the general official organ (which can help persons to find a work) on looking for suspicious situations of the denials in hiring or the dismissals. Therefore, it can be necessary to implement the mandatory function of *ex officio* investigations on the EU level in the employment Directives for the rising of the protection of the employees in the discrimination cases (the Race and the Framework Directives, and the Directive 2006/54).

Germany and Sweden do not have the procedure of the *ex officio* investigations in case of the violations of the principle of equal treatment in the field of employment according to the three Directives (Race, Framework and 2006/54). But, for example, this procedure of the *ex officio* investigations is devoted to more than one body in Finland, France, and Poland. The *ex officio* investigations cover private and public spheres of employment. Such powers to investigate are entrusted explicitly or implicitly to labour inspectorates. For instance, ex officio investigations are

[168] Janka Debreceniova, "*Ex officio* investigations into violations of the principle of equal treatment: the role of labour inspectorates and other bodies", *European Anti-discrimination Law Review* 17 (2013), p.34, accessed April 18, 2018, http://www.migpolgroup.com/wp-content/uploads/2013/11/Review-17-EN.pdf

[169] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.84.

made by labour inspectorates in Finland, France, Poland, and Slovakia. But in Slovakia, labour inspectorates are the only bodies authorized to conduct ex officio investigations into violations of the principle of equal treatment in employment. In Germany and Sweden, labour inspectorates can only have limited tasks, such as check the enforcement of labour standards in the field of health and safety, working environment, working hours and etc. Also, the other body/bodies exist which can help to protect employees from abusive treatment on the protected grounds. For example, the equality bodies are entrusted with *ex officio* investigatory powers into violations of the principle of equal treatment in the field of employment. Such equality bodies are in France. In Finland and Poland, the ombudspersons are empowered for these investigation procedures. It should be mentioned that in Finland, only the Ombudsman for Equality makes investigations of the discriminations in employment, based mainly on the protected ground – gender.[170]

The EU Member States and their inhabitants will receive benefits from taking advantage of having a system which can protect their individuals against discrimination in the employment relations and, after some systemic improvements, will serve as an effective tool for combating discrimination. For example, because the labour inspectorates have the potential as the protective body in fighting the discrimination, mainly if they would make *ex officio* investigation in the discrimination cases, but now their power to defend the employees are largely unused or underused. Although the labour inspectorates in the Member States of the EU make up a system with a relatively good infrastructure in terms of their broad investigatory powers over many aspects of employment, territorial coverage and the availability of human resources, the right to equality is still perceived by them as an 'unnecessary add-on' instead of a fundamental value that must be taken seriously and mainstreamed.[171]

Therefore, for the effective mechanism of the protection, the Member States should increase their initiative in the defence of the ordinary employees through the implementing of the necessary functions to their bodies, such as *ex officio* investigation, and to establish the body that will give the general information regarding the actions and rights, and the organs which are responsible for the protecting the individuals in the labour relations.

[170] Janka Debreceniova, "*Ex officio* investigations into violations of the principle of equal treatment: the role of labour inspectorates and other bodies", *European Anti-discrimination Law Review* 17 (2013), p.33-34, accessed April 18, 2018, http://www.migpolgroup.com/wp-content/uploads/2013/11/Review-17-EN.pdf
[171] *Ibid.*, p.37.

2.2. The measures (remedies) for combating the employment discrimination

According to the Article 15 of the Race Directive and the Article 17 of the Framework Directive, the Member States of the European Union are obliged to create the rules on sanctions applicable to infringements of the national provisions adopted pursuant to these Directives and shall take all measures necessary to ensure that they are applied. If the sanction is the payment to the employee that is suffered by the discrimination in the employment, it must be effective, proportionate and dissuasive. In addition, the Directive 2006/54 in the Article 25 that prohibits the discrimination on the basis of sex, has the same provision, like the Race (Art.15) and the Framework (Art.17) Directives, but the word "sanction" is changed to the word "penalty".

Ms Debrecéniová states that it is not enough to introduce sanctions in theory that can be suitable for the requirements of the articles above (effective, proportionate and dissuasive) because it is important to introduce institutional and procedural frameworks under which these requirements may be applied in practice[172].

The barriers to litigation are shown through the relatively low volume of the cases regarding the discrimination in the employment relations that one of the obstacles regarding the access to the justice is the lack of effective remedies for the victims of discrimination in employment.

In addition, such challenges and barriers can exist in the sphere of applying sanctions:

- There is no ideal sanction for every individual case;
- Concerns about revenge/victimization;
- Complexity, length and cost of proceedings, lack of help with proceedings;
- Inadequate knowledge of rights and legal remedies, lack of legal certainty;
- Limited level of compensation awarded;
- Decisions by equal treatment bodies are insufficiently binding;
- No way of establishing or restoring a discrimination-free situation;
- Lack of experience and sensitivity on the part of judges;
- Difficulty in establishing discrimination and its effects;

[172] Janka Debreceniova, "*Ex officio* investigations into violations of the principle of equal treatment: the role of labour inspectorates and other bodies", *European Anti-discrimination Law Review* 17 (2013), p.28, accessed April 18, 2018, http://www.migpolgroup.com/wp-content/uploads/2013/11/Review-17-EN.pdf

- Lack of practical enforcement mechanisms.[173]

The employment Directives (the Race and the Framework Directives, and the Directive 2006/54) do not list the possible kinds of the penalties that should be applied to the employer that discriminated the potential/current/dismissed employee. They just stress the requirement to the measures.

Such requirements to measures that state of the necessity to be effective, proportionate and dissuasive was first developed in the Court of Justice of the European Union case law on the sex discrimination. Nowadays, the Directive 2006/54 is parallel to the Race and the Framework Directives, so the above-mentioned case law should be relevant for these last-mentioned Directives too. In addition, the meaning of the concept must be determined in each case in the light of individual circumstances.[174]

In addition, only the Directive 2006/54 is specified about accurate kind of the penalties such as compensation and reparation in the cases of discrimination on the ground of the gender (although however, all three employment Directive contain such sanction (penalty) as a payment). Therefore, the special provision in the Article 18, states about the necessity of the provision in the national legislation regarding the compensation or reparation. These above-mentioned measures should be real and effective and should cover the loss and damage to the employee who suffered from the discrimination. Such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration[175]. Such explicit provision as compensation and reparation are not consisted in the other two employment Directives (the Race and the Framework Directives).

Therefore, any infringements made by the employer should be punished by the state due to the next reasons:

- to combat the discrimination in the employment;
- to make warnings to the future wrongdoers;
- to protect the potential/current/dismissed employee;

[173] Katrin Wladasch, "Remedies and sanctions in discrimination cases", 2017. [accessed 2018-04-18]. http://www.era-comm.eu/oldoku/Adiskri/04_Remedies/117DV35_Wladasch_EN.pdf.
[174] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.84.
[175] Directive of the European Parliament and of the Council 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Atr.18. [2006] O.J. L204.

- to ensure the redress to the individual after adverse treatment of the employer;
- to provide the compensation to the employee after the discrimination situation.

In general, the kinds of the remedies can be different and vary depending on the type of law (e.g. civil, criminal, or administrative remedies), the punitive or non-punitive character of the remedies, their orientation such as backward-looking or forward-looking (the latter meaning measures that seek to adjust future behaviour), and obligatory character or just recommendation. Also, they can be pecuniary (material) and non-pecuniary. The remedies may be available through various, possibly complementary, enforcement processes (administrative or judicial processes). In addition, the remedies can belong to different theories of remedies (e.g. remedial, compensatory, punitive and preventative justice). The broad range of the comprehensive remedies says that they want to cover the cases regarding the relief and redress for the victims of discrimination, victimization, compliance with the law. As a result, the kinds of measures are: warning, compensation (for past and for future loss, for injury to feelings), damages for personal injury and damages to punish the discriminator. [176]

In addition, the cases in the European Union states the requirement to the remedies. So, it is important that the sanctions in discrimination cases must:

- be proportionate to the damage suffered (*von Colson*, C-14/83[177]);
- not be purely symbolic (*ACCEPT*, C-81/12[178]);
- not be made dependent on proof of fault (*Decker*, C-177/88[179]);
- have a real dissuasive effect (*Decker*, C-177/88[180]);
- not set any upper limits (*Marshall*, C-271/91[181]);
- be independent of the existence of an actually affected individual (*Feryn*, C-54/07[182]);

[176] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.104.
[177] Judgment of 10 April 1984, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* (C-14/83).
[178] CJEU, Case C-81/12, *Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării*, judgment of 25 April 2013, [2013] ECLI:EU:C:2013:275.
[179] Case C-177/88 *Dekker v. Stichting Wormingscentrum voor Junge Volwassen Plus* [1990] ECR 1-39441.
[180] *Ibid*.
[181] Judgment of 2 August 1993, *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority* (C-271/91).
[182] CJEU, Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v NV Firma Feryn*, judgment of 1 July 2008, [2008] ECLI:EU:C:2008:397.

- can in principle also comprise an element of punitive damages over and above the damage suffered (*María Auxiliadora Arjona Camacho v Securitas Seguridad España*, C-407/14[183]).[184]

It is interesting that for certain cases, the Court of Justice of the European Union made specific indications regarding the EU legal requirements in relation to remedies. For example, in the case of discriminatory dismissal, the remedy (or remedies) granted must in all cases include either reinstatement or compensation. Furthermore, where compensation is chosen as a remedy it must fully cover the damage. In this situation, the upper limits are not acceptable, except for situations where the damage was not caused by discrimination alone. As a result, the Member States such as Finland, France, Germany, Poland, Slovakia, and Sweden have no limits either in relation to pecuniary or non-pecuniary damages in the national legislation.[185] Although, in Slovakia, there is the exception to the cases of discrimination regarding the salary compensation, this remedy has the upper limitations[186]. And the minimum level of compensation can be found in Poland, which is linked to the minimum wage[187].

Moreover, in some national legislations can be established special sanctions in cases of discrimination that mostly can be applied to the employer in the business sphere, but unfortunately they meet rarely:

- Publication of the decision (in the press or in the undertaking);
- Temporary closure of the undertaking;
- Temporary suspension of the right to pursue an occupation or activity requiring a licence from the public authorities;
- Reduction in subsidies;
- Seizure of certain assets;
- Order to cease trading (under penalty of a daily fine for delay);
- Exclusion from public contracts.[188]

[183] Judgment of the Court (Fourth Chamber) of 17 December 2015, *María Auxiliadora Arjona Camacho v Securitas Seguridad España* (C-407/14).
[184] Katrin Wladasch, "Remedies and sanctions in discrimination cases", 2017. [accessed 2018-04-18]. http://www.era-comm.eu/oldoku/Adiskri/04_Remedies/117DV35_Wladasch_EN.pdf.
[185] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.105-106.
[186] Labour Code of Slovakia.
[187] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.106.
[188] Jean-François Neven, "Remedies and sanctions in discrimination cases", 2018, para.3.5. [accessed 2018-04-18]. http://www.era-comm.eu/oldoku/Adiskri/04_Remedies/118DV18_NEVEN_EN.pdf.

In addition, the main aim of this research is to analyze the appropriateness and effectiveness of the measures regarding the discrimination in the employment. So, under the case *Asociaţia Accept*[189], the CJEU examined and provided the guidance on the effectiveness, proportionality, and dissuasiveness of sanctions available in discrimination cases. As it was mentioned, the manager of the football club made the statement criticizing the recruitment by this club of homosexual players. Even he was not responsible for the employment issues in the club, but he had an influence on it, so, as a result, the football club was obliged to prove that the statement of its manager, was not its general discriminatory policy in the recruitment. Also, the CJEU stated that to this situation can be applied the Framework Directive, which involves statements concerning the conditions regarding access to employment, including recruitment conditions. In addition, the CJEU examined the sanctions that were in the national legislation. As the situation (the statement by the manager) was more than 6 months ago, the only sanction to the football club could be just a warning. In this regard, the CJEU found that the directive prohibits such a regulation unless the specific remedy can be considered to be effective, proportionate and dissuasive. The CJEU underlined that symbolic sanctions are not compatible with the directive. Thus, although monetary sanctions are not the only sanctions compatible with the directive, non-pecuniary sanctions should be accompanied by a sufficient degree of publicity. In addition, the CJEU said that each remedy available in national legislation should individually fulfill the criteria of the directive. It is interesting that the responsible courts of the state where this football club is located (Romania), did not follow the ruling of the CJEU. They did not agree that the "warning (as a sanction) is not incompatible with Art. 17 of Framework Directive: and should be considered as a purely symbolic sanction". The courts[190] asserted that "in applying this sanction the national body which is responsible for the protection against the discrimination in employment, has assessed multiple elements, among which the context in which the statement was said, the effects, the outcome and the person of the violator played an important role. Not lastly, the publicity generated by the decision to sanction the author of the statement regarding discrimination who excessively exercised his freedom of expression played a dissuasive part in the society".[191] The situation about the case *Asociaţia Accept* says that the CJEU tried to create the rules of the appropriateness of the sanctions (remedies). Because on the opinion of the CJEU the warning after the discriminatory statement regarding the recruitment to the football club, is not enough. Of course,

[189] CJEU, Case C-81/12, *Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării*, judgment of 25 April 2013, [2013], paragraph 49, ECLI:EU:C:2013:275.
[190] Decision of 29 May 2015, High Court of Cassation and Justice of Romania, *Inalta Curte de Casație și Justiție*, [2015] decision 224 in file 12562/2/2010.
[191] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.103-104.

there was no injured party at all, because the case regarding the discrimination was raised by the interested associations that protected the rights of persons with untraditional sexual orientation after the discriminatory statements of the manager that were made to the public. But, in general, the CJEU tried to make a direction to the effectiveness of the sanctions, especially for future situations. The word "tried" is applied, because with the decision of CJEU, the national courts did not agree and said the remedy ("warning") is suitable in this situation and that the person (the manager of the football club) just used his rights of freedom of expressions.

In addition, the bodies with *ex officio* investigatory powers (for instance, labour inspectorates in Poland or Slovakia) are empowered to issue legally binding decisions, except Finland and France. The types of the decision can be different. For example, in Slovakia, the labour inspectorates can impose fines. The employers can receive the fines for the discrimination and their amount can vary among the EU Member States. It can be from 25 EUR to 185.515 EUR under the statistic of the 2013 year. These sums are for the violations of the principle of equal treatment and are lower than the fines for the violations of labour legislation generally. But, in general, the fines by the labour inspectorates are a rare thing. As regarding Poland, the State Labour Inspectorate may impose fines and initiate court proceedings in relation to other fields than discrimination. However, in cases concerning discrimination, it does not have the power to impose fines and can only initiate court proceedings.[192]

Moreover, the responsible body/bodies can issue the non-obligator decisions. Therefore, many of the bodies conducting *ex officio* investigations can also recommend measures to those who are in violation of the principle of equal treatment[193].

In the general practice of the Member States of the EU, the compensation can be found also in the cases regarding the discrimination on the grounds other than sex. So, EU countries have the *ex officio* procedure as compensation. The compensation to individuals damaged by discrimination exists only in a small number of cases and basically involves only the possibility to compensate the material loss (such as loss of income in Poland), and not the injury of feelings.[194]

As an example, in Poland, under the Labour Code[195], can be found such procedure as "compensation complaint". It is available where the victims of discrimination in the employment are entitled to initiate judicial proceedings and ask for compensation. The Labour Court determines the

[192] Janka Debreceniova, "*Ex officio* investigations into violations of the principle of equal treatment: the role of labour inspectorates and other bodies", *European Anti-discrimination Law Review* 17 (2013), p.34, accessed April 18, 2018, http://www.migpolgroup.com/wp-content/uploads/2013/11/Review-17-EN.pdf
[193] *Ibid., p.35.*
[194] *Ibid.*
[195] Labour Code of Poland, Art. 18 (3d).

amount of the compensation, taking into consideration the type and gravity of the discrimination. This specific remedy as compensation in case of discrimination in the work relations was intended to avoid the need to use more general legal remedies such as general compensation[196], although the use of general remedies is not excluded. In addition, the 2010 Act on Equal Treatment also states about a compensation complaint that is available to any person (natural or legal) who claims an infringement to the principle of equal treatment, in any field of application of the act.[197]

But there can be some cases where the proper responsible body in a situation of the discrimination in the employment can award the non-pecuniary remedies. For instance, in Slovakia, in 2017 was adopted the first national court decision in favour of a Roma claimant in a case of racial discrimination in access to employment. The decision is important for some reasons: first, the case was analyzed again by the court after 5 years, when in 2012 the complaint, the Roma woman, was rejected to have the court proceeding as manifestly ill-founded. Second, she was granted the non-pecuniary damages. The essence of the case: the claimant (the Roma woman) sued the employer (the body which provides the state policy) after non-selecting her on the position of the social worker, because she was suitable candidate for this work for the reasons of having the necessary experience and complying the additionally listed "advantages" (to speak Roma language and to be of the Roma origin). Additionally to this, the persons selected for the positions were less qualified than the claimant and did not fulfill the criteria listed as "advantages".[198]

So, after the rejections of the District and Regional Courts to review her case about the discrimination in the employment relations, the injured applicant for the job directed her case to the Constitutional Court. This Court said in 2015 that the regional court had violated the claimant's rights to a fair trial and to an effective remedy. It quashed the decision and ordered the national general courts to deal with the case again. In 2017, the District Court issued a new decision in what it stated that definitely, it was the discrimination by the employer. The respondent (employer) had discriminated against the claimant on the ground of her Roma ethnic origin. The Court concluded that the claimant had met her burden of proof and established a prima facie case of discrimination. The employer did not submit any evidence to dispute the presumption of discrimination and did not provide any reasonable arguments why the advantages listed by the employer were not included into the selection process set by the respondent. Finally, the respondent did not provide any reasonable

[196] Civil Code of Poland, Art.415.
[197] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.86.
[198] Decision of 23 March 2017, District Court in Spišská Nová Ves (Slovakia), *V.P. against Town of Spišská Nová Ves*, [2017] No. 8 C 268/2016 – 523.

explanation on the selection of the other applicants who were less qualified and had less training and relevant experience than the claimant.[199]

As a result, the Court concluded that discrimination as such interferes with the victim's human dignity, and also pointed out a preventive function of the financial compensation towards future potential discriminatory treatment. In other words, it says that it was the discrimination on the ground of the racial or ethnic origin in the employment relations (on the phase of the job applications). The Court ordered the respondent (the employer) to send a written apology to the claimant, to pay non-pecuniary damages in the amount of EUR 2,500 and to pay 50 % of her legal costs (that are only the half of what the job applicant claimed).[200]

So, this case about the discrimination of the job applicant on the basis that the person is the Roma origin (the protected ground – the racial and ethnic origin) shows that the Constitutional Court of Slovakia eliminated the discrimination under the above-mentioned ground. Such case can give a chance that all old cases will be reviewed by the claimant (employee) initiative because the individuals disregarding their status (just job applicant (potential employees), current employees or dismissed employees) can rely on the justice in their country. But the negative moment is that the legal cost should be covered only partially under this case, that can be the reason for non-applying to a judicial body, because it can be costly (especially, when the Roman woman applied to independent instances in her country, the Constitutional Court, after all, possible courts where she wanted to find the protection against the discrimination).

The above-mentioned situations regarding the awarding of the remedies show that most of these measures are non-effective. The discrimination in the employment continues to be, the employers do not stop to discriminate the potential/current/dismissed employees and the Member States do not award effective sanctions in order to combat the discrimination.

The ineffectiveness of the remedies is illustrated through the limitations in the national legislation of the EU Member States. Thus, in France, judges still generally resist to award substantial amounts when calculating material loss, and amounts awarded remain rather low. In Sweden, damages for violations of non-discrimination law generally range between EUR 1 700 and EUR 13 000, depending on the circumstances. In Poland, Equal Treatment Act only refers to "compensation" (which in Polish law implies that only material damage is covered).[201]

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[199] European Commission. *European equality law review*. Brussel, 2017, p.122. *[accessed 2018-04-20]*. https://www.equalitylaw.eu/downloads/4484-european-equality-law-review-2-2017-pdf-1-818-kb.
[200] *Ibid*.
[201] European Commission. *A comparative analysis of non-discrimination law in Europe*, 2017, p.107.

The European Commission in its report in 2014 stated: "…there are still potential grounds for concern as regards the availability of remedies in practice and whether sanctions that are imposed in concrete cases comply fully with the requirements of the Directives. The national courts appear to have a tendency to apply the lower scale of sanctions provided for by law and in terms of the level and amount of compensation awarded".[202] Therefore, even the European Union cannot guarantee the sufficient measures to the injured individuals in the employment relations giving the wide discretion to its Member States. It can be done only through the obligatory provisions to the countries in the EU legislation.

From the perspective of European equal treatment organizations, the most effective remedies can be:

- Administrative penalties if they are punitive in nature;
- Publication of decisions;
- Compensation at a level that has a dissuasive effect;
- Requirements/recommendations to dismantle discriminatory structures/procedures;
- Restoration of a discrimination-free situation;
- Requirement to perform unpaid work;
- Requirement to introduce anti-discrimination policies – where these are likely to lead to actual change;
- Warnings – where these have the potential to damage image.[203]

To sum up, the remedies in the Member States do not fulfil the requirement of the Directives to be effective and proportionate. The measures in cases regarding the discrimination of the employee are insufficient. First, because they can be of non-obligatory character (for example, recommendations) or just not appropriate in the case of discrimination in the employment where the injured potential/current/dismissed employee do not have a redress. Second, because the state can have legislative rules with the not sufficient remedies and do not want to correct them, even after the remark of the CJEU, like in the case *Asociaţia Accept*. In my opinion, the best variant that will punish the wrongdoer (the employer) is to award the obligatory compensation fixing the obligatory minimum

[202] Jean-François Neven, "Remedies and sanctions in discrimination cases", 2018. (concerning the Commission Report of 17 January 2014 (regarding Directives 2000/43 and 2000/78), 2 final, p. 8) [accessed 2018-04-18]. http://www.era-comm.eu/oldoku/Adiskri/04_Remedies/118DV18_NEVEN_EN.pdf.
[203] Katrin Wladasch, "Remedies and sanctions in discrimination cases", 2017. [accessed 2018-04-18]. http://www.era-comm.eu/oldoku/Adiskri/04_Remedies/117DV35_Wladasch_EN.pdf.

fair amount. The employer will not stop to discriminate the individuals in the employment relations if the Member States will have a soft attitude to the perpetrator. In addition, it appropriate to have the provision in the national legislation regarding the non-pecuniary damages, especially in the situations where the injured persons were trying to have the redress in some instances (like in the case with the Roma woman in Slovakia[204]).

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Therefore, there are a lot of hurdles before the effective, proportionate and dissuasive functioning of the employment Directives (The Race and Framework Directives and the Directive 2006/54). Due to these obstacles, the Member States of the EU do not eliminate the infringement in the employment relation that can be treated as non-combating discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation, listed in the Art.19 of the Treaty on the Functioning of the European Union. In addition, these problems in the functioning of the responsible body/bodies and, complicated procedures and ineffective measures (in other words: sanctions, penalties, compensation or reparation) show that the EU Member States do not provide the working legal mechanism under the non-discrimination policy of the European Union.

Even the employment Directives were established in 2000-s, there are a lot of obstacles in the way of the injured employee (disregarding his/her status) to justice. The fee to the judicial barriers, short time limits, variety of bodies that are responsible for the discrimination cases, insufficient remedies – are still the actual problem of the Member States of the European Union.

[204] Decision of 23 March 2017, District Court in Spišská Nová Ves (Slovakia), *V.P. against Town of Spišská Nová Ves*, [2017] No. 8 C 268/2016 – 523.

CONCLUSIONS AND RECOMMENDATIONS

After the examination of the legislative norms of the European Union and of the EU Member States, and the survey of the articles and literature regarding this Master's Thesis, it can be concluded that the aim of the current research was achieved, the objectives were reached and the defended statements formulated in the introduction were confirmed:

1. The EU employment Directives, more specifically, the articles concerning the defence of the rights of employees give the Member States the discretion to ensure the type of the procedure (judicial and/or administrative with conciliation where it is appropriate) for the enforcement of rights of the injured employees where the EU Member States create variety of bodies with different legislative power that leads to occurrence of confusion as to which body the injured employee should apply. This situation where each Member State has its special body with different functions poses an additional obstacle to easy access to the employees to the protection.
2. For combating the discrimination in employment in the EU Member States, often the national bodies lack the initiative in the investigation and leave all the interactive actions on employees with their limited accesses to most of the functions that are allowed to the state bodies.
3. The measures that are proposed by the national legislation, do not provide the sufficient redress to the injured potential/current/dismissed employees. The state can limit the amount of compensation to an employee or the court or responsible body can appoint the non-appropriate amount or award of a non-compensatory type where such measures do not affirm that the employer will not continue to be discriminated on the prohibited grounds due to the fact of insufficient punishment for the wrongdoer.

Suggested amendments to the effective employment Directives (the Race Directive, the Framework Directive and the Directive 2006/54):

1. According to the first conclusion that there is a discretion to the Member State of the EU to choose the procedure that can provide the enforcement of the rights of the injured individual in the various bodies, in order to ensure the easy access to justice for the employee, to eliminate the barrier of limited knowledge regarding the ways of protection in case of employment discrimination, and to make the provision regarding the protection of the employees more efficient, it is proposed to add the following provision to the Article

7 of the Race Directive, to the Article 9 of the Framework Directive and to the Article 17 of the Directive 2006/54:

"*Member States shall establish the competent body that will provide the general information about the ways of protection, additional information regarding the enforcement of the rights of the employees, further direction of actions to appropriate competent authority to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship, in which the discrimination is alleged to have occurred, has ended. The legal help should be provided free of charge and should cover the information without prejudice to the grounds that are prohibited by the EU primary legislation*".

2. In order to increase the initiative of the Members States in investigating of the discrimination in cases related to employment and strengthen the compliance of the EU Member States with the aim of the European Union to combat the discrimination, to add the provision on the function regarding the competence of the proper bodies to the paragraph 2 Article 13 in the Race Directive, to the paragraph 2 Article 20:

"*– conducting independent investigations under the application of the injured person or at their own discretion for checking the existence of the unequal treatment by the employer*",

and include the additional paragraph to the Article 9 of the Framework Directive:

"*Member States shall ensure that the competences of a body or bodies that are responsible for the enforcement of obligations under this Directive include: – conducting independent investigations under the application of the injured person or on their own discretion for checking the existence of the unequal treatment by the employer*".

3. For the promotion of the sufficient redress for the injured individuals in the employment, to fix the measure of the obligatory compensation in the material equivalent in the Article 15 of the Race Directive, in the Article 17 of the Framework Directive and the Article 18 of the Directive 2006/54:

"*The sanctions* (compensation – in case of Directive 2006/54), *which shall comprise the payment of compensation to the victim, must be effective, proportionate, dissuasive and have the material equivalent to the minimum 2 salaries that the victim could have had as another employee doing the same work*".

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Diak K., Non-discrimination Policy in Employment: Practice of EU Member States, Master's thesis. Supervisor Dr. Vilius Mačiulaitis. – Vilnius: Mykolas Romeris University, Faculty of Law, 2018.

ANNOTATION

This Master's thesis gives the analysis under the legislative norms of the EU and of the Member States regarding the protection of individuals against the discrimination in their employment relations. In addition, it covers the scope of the discrimination that is prohibited regarding the potential/current/dismissed employees, and examines what are the types and grounds of the discrimination with the historical overview of their development and with the underlining the exceptions in which case the discrimination is allowed.

Furthermore, this research revises the effectiveness of the enforcement of the rights of the employees (disregarding their status) in the national bodies with the using of the administrative/judicial/conciliation procedures. Also, it states about the necessity of the improvement in the providing the general information to the injured employees regarding the access to the justice. As regarding measures, there is the variety of them, but mostly they do not ensure the appropriate redress to the injured individuals in the employment relations, according to this the research states about the usefulness of obligation of such kind of the punishment to the wrongdoer that should be in the obligatory compensation in the discrimination cases in the employment relations.

Keywords: discrimination, protected grounds, employment.

NON-DISCRIMINATION POLICY IN EMPLOYMENT: PRACTICE OF EU MEMBER STATES

SUMMARY

Kateryna Diak

The Master's thesis is dedicated to the non-discrimination policy of the European Union in the employment relations. It discloses the interrelation of the EU protective norms with the legislation of its Member States. Despite the comprehensive legislative protection of the employees against discrimination in their work relations, it still exists the problem of the abusive attitude from the side of the employers.

This master thesis research problem is: the non-efficient enforcement of the rights of the employees under the legislative national norms of the EU Member States that correlate with the non-discrimination policy of the European Union.

The first general chapter of the master thesis is devoted to historical changes in the legislation of the European Union where it shows the development of the increasing amount of the protected grounds against the discrimination in employment. Also, the general part discloses the scope of the discrimination in the employment regarding which the employees can enforce his/her rights in the state's body/bodies for the protection of them. This scope includes the types and protected grounds of discrimination due to the legislative norms of the EU that are obligatory to each Member State of the EU (that are sex, as racial or ethnic origin, religion or belief, disability, age or sexual orientation). The second chapter has as the main objective to find out the shortcomings in the non-discrimination policies of the EU Member States in general with the demonstration of the variety of different kinds of the protection that will help to detect the effectiveness of such policies in the employment relations. The first subchapter analyzes the existence of the procedures and appropriate bodies for defending the rights of the potential/current/dismissed employees in the situation where they were discriminated by the employer. Also, it lists the obstacles for enforcement of the rights of the employees and the defficiency of the power of the enforcement authority. The second subchapter makes the research of the measures that exist in the EU Member States and determine their non-sufficiency of them regarding the protection of the individuals in the employment relations.

The defended statements of this master's thesis are: the EU employment Directives provide the non-efficient provisions regarding combating the discrimination, the EU Member States are not

initiative enough in respect of the conduct of national investigation procedures in employment discrimination cases, the existing measures against the discrimination in employmen are not sufficient enough to provide a redress to the injured employees. All these defended statements were confirmed in conclusions and recommendations regarding changes to the employment Directives (the Race and the Framework Directives and the Directive 2006/54) were made. The recommendations include the creation of the general body within the Member States that should give basic information and further directions to the injured potential/current/dismissed employee, the formation of the obligatory *ex officio* investigation in the discrimination cases and the creature of obligatory compensation in the aterial form.

ANNEX No. 1

Form approved on 20 November 2012 by the decision No. 1SN 10 of the Senate of Mykolas Romeris University

HONESTY DECLARATION

15/05/2018
Vilnius

I, **Kateryna Diak**, student of **Mykolas Romeris University** (hereinafter referred to University), Faculty of law, European and International Business Law,

confirm that the Master's Thesis titled **"Non-discrimination Policy in Employment: Practice of EU Member States"**

1. Is carried out independently and honestly;
2. Was not presented and defended in another educational institution in Lithuania or abroad;
3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.

Kateryna Diak

(*Signature*) (*Name, Surname*)

Master's thesis finished 2018-04-30, Kateryna Diak.
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