
Expanding the List of Protected Grounds within Anti-Discrimination Law in the EU

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Executive summary

Article 19 of the Treaty on the Functioning of the European Union enshrines a list of protected grounds limited to sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation. At national level, some European states have adopted lists of protected grounds which go (far) beyond this list. However, many people discriminated against are still left out of the protection of anti-discrimination law in Europe. The fact that a list of protected grounds is limited and excludes some characteristics entails an important gap in the protection of some vulnerable people in society when they are victims of discrimination.

Expanding the list of grounds in anti-discrimination law in Europe is key to ensure the effectiveness and coherence of this body of law and to remedy some of its shortcomings and contradictions.

in anti-discrimination law enhances the effectiveness of the anti-discrimination legal framework and its implementation.

The question of expanding anti-discrimination law protections to these “other grounds” therefore becomes a pressing political, social, and legal issue. Against this background, on the basis of a literature and case law review and of a survey and interviews with equality bodies and stakeholders, this report, commissioned by Equinet, answers the question of whether and how the expansion of the list of protected grounds

Expanding the list of grounds in anti-discrimination law in Europe, whether it is at the EU, Council of Europe, or national level, is key to ensure the effectiveness and coherence of this body of law and to remedy some of its shortcomings and contradictions. Many advantages of recognising additional grounds were identified by survey participants and interviewees.

Firstly, expanding the list of grounds allows to name social groups in need for protection, sending a symbolic message. Secondly, if grounds are not named, there is a risk that they will not be covered by judicial interpretation and by policy and decision-making. Thirdly, structural discrimination against some specific groups has been largely documented, calling for the inclusion of explicit grounds related to these groups. Explicitly recognised grounds provide a legal basis for and catalyse data collection and research. Fourthly, explicitly recognising a ground implies that there is no need for equality bodies and courts to develop protracted arguments to protect individuals with reference to other less obvious or proxy grounds. Finally, some equality bodies have a mandate only for grounds that are explicitly covered, which means that recognising new grounds enhances their ability to take action. While some reluctance to explicitly adding new grounds exists as well, these objections are much more limited than the advantages raised.

Other grounds

The relationship between discrimination and socio-economic disadvantage is a complex one. There is sometimes a confusion between socio-economic rights, on the one hand, and socio-economic discrimination, on the other hand, and the distinction between them is not always clear: it is sometimes believed that the very existence of socio-economic rights makes it

unnecessary to enshrine a prohibition of discrimination on grounds of socio-economic status, or that socio-economic rights should take priority over fighting against socio-economic discrimination. However, poverty or socio-economic precariousness is not only a consequence, but also a cause of discrimination, and anti-discrimination legislation prohibiting socio-economic discrimination should be seen as complementary to anti-poverty policies and measures, in a mutually reinforcing relationship.

The ground of socio-economic disadvantage does not seem to have fully made its way into the anti-discrimination landscape of most European countries, either because it is not enshrined as a protected characteristic or because it is not fully implemented. There is a wide consensus among participants and interviewees on the importance of taking all necessary steps to ensure the implementation of an effective prohibition against socio-economic discrimination.

Several points were raised by equality bodies and stakeholders in this regard. Firstly, discrimination on grounds of socio-economic status is a reality and recognising it is one important solution to break the cycle of perpetuating poverty and socio-economic disadvantage. Secondly, when socio-economic status is not enshrined as a protected ground there is no other proxy ground to ensure protection. Thirdly, discrimination affects persons with low incomes relatively more often, and socio-economic discrimination is in many instances part of multiple or intersectional discrimination. Fourthly, there is a need to include a prohibition of socio-economic discrimination early in policy and decision-making processes regarding socio-economic issues. Finally, positive action should be part of the fight against discrimination on grounds of socio-economic status.

Regarding health status, most equality bodies agreed that this ground should be part of anti-discrimination legislation and that it would improve the overall effectiveness of this body of law. There is a certain overlap both in theory and in practice between the grounds of health status and disability. However, health status should be recognised as a ground on its own, since the disability ground does not cover all instances of health issues on the basis of which discrimination is likely to occur. The recognition of this ground should extend to actual or perceived health status, as well as past, present, and future health status.

The grounds of gender identity, gender expression, and sex characteristics show strongly diverging degrees of protection in domestic anti-discrimination legislations across European countries. While these grounds have found recognition both at the international and European levels, they are not explicitly recognised, or only partially recognised, in some countries, some of which have deployed strategies to protect persons discriminated against based on these grounds through sex/gender and through sexual orientation. However, this may lead to contradictions. Gender identity, gender expression, and sex characteristics should be explicitly recognised in anti-discrimination law to increase the visibility of these groups, avoid mischaracterisation, and ensure a comprehensive legal protection.

Several other grounds were also mentioned by equality bodies and stakeholders besides socio-economic status, health status, and gender identity, gender expression, and sex characteristics, notably genetic heritage, physical appearance, additional or complementary grounds related to racial or ethnic origin, and non-EU nationality. These grounds should be further explored and developed to ensure a more encompassing and coherent protection under European anti-discrimination law.

The difficult case of the open-ended clause

Proposed definition of a ground recognised under the open-ended clause: an objectively identifiable characteristic, whether real or perceived, shared by others which serves as a basis for social prejudice and stigma ingrained in social, political, or institutional practices

An open-ended clause is a clause stating that grounds beyond those explicitly mentioned in it may also be invoked. Many European states do not recognise an open-ended clause or limit its scope. The opportunity of enshrining an open-ended clause in anti-discrimination law has been the most polarising question among survey participants and interviewees. A majority of survey participants found that an open-ended clause should be recognised besides the protection of explicit grounds, even though recognising new grounds should be a priority, while a minority considered that a closed list of grounds would be

preferable. Several equality bodies whose mandate encompasses an open-ended clause reported that this clause has value, is useful in practice, and does not raise any particular difficulties or entail an overwhelming additional workload.

Many of the objections regarding open-ended clauses could actually be addressed by defining it further. We propose the following definition of a ground recognised under the open-ended clause: an objectively identifiable characteristic, whether real or perceived, shared by others which serves as a basis for social prejudice and stigma ingrained in social, political, or institutional practices.

To combat all instances of discrimination, discriminatory situations must be considered in a comprehensive manner, which includes multiple (additive and cumulative) and intersecting discrimination. Additive/cumulative discrimination means that discrimination takes place on the basis of several grounds operating separately (either at the same time—additive—or on separate occasions over time—cumulative), whereas intersectional discrimination arises when grounds cannot be separated because there is a synergy between them. EU law should explicitly prohibit additive/cumulative discrimination as well as intersectional discrimination. However, in light of the unanimity requirement at EU level, there is a broad consensus among most equality bodies surveyed on the fact that additive/cumulative and intersectional discrimination should be also recognised explicitly at national level where this is not yet the case.

The Role of Equality Bodies

Equality bodies have a central role to play in the expansion of grounds in European anti-discrimination law. While it is difficult to propose one-size-fits-all solutions given the diversity of mandates and national contexts, equality bodies play a decisive role in at least two important respects: on the one hand, in pushing for the introduction of new grounds and, on the other hand, in anchoring and developing newly introduced “other” grounds in the domestic legal system. To be able to properly carry out their functions and face issues related to internal

prioritisation and the risk of political backlash, equality bodies need strong safeguards as regards their independence and appropriate resources, both financial and logistical.

Finally, we put forward several recommendations to national and EU legislators and policy-makers as well as equality bodies, on the basis of our research findings and the arguments developed throughout this report. Some of these recommendations (in an abridged version) are the following:

National legislators and policy-makers should expand the list of protected grounds in all fields covered by anti-discrimination legislation to at least socio-economic status, health status, and gender identity, gender expression, and sex characteristics.

National legislators and policy-makers could consider providing a definition of each ground which remains relatively open (presented as encompassing “at least” certain situations but not exclusively those), avoiding the multiplication of grounds when these cover the same substantive characteristics or statuses, and harmonising the list of protected grounds in existing anti-discrimination norms to avoid material fragmentation. National legislators and policy-makers should enshrine an open-ended clause of grounds which is strictly defined and which allows to tackle additional discriminatory situations, and, where not yet recognised, intersectional discrimination.

National legislators and policy-makers should explicitly prohibit additive/cumulative and intersectional discrimination in all fields covered by anti-discrimination legislation, and provide a clear definition of these forms of discrimination.

National legislators and policy-makers should extend the mandate of equality bodies to novel grounds and, if it is not yet the case, to all grounds enshrined in domestic law, including open-ended clauses where available.

National legislators and policy-makers should ensure the complete independence, broadest possible mandate, and all necessary powers and resources for equality bodies to ensure their effective functioning.

Equality bodies should recognise that different grounds of discrimination may call for a different pedagogy and for different tools to foster recognition and implementation, and adapt their strategy and functioning according to such differences.

Equality bodies could consider using a series of key arguments outlined in different chapters of this report where changes in national law and policy regarding the recognition of new grounds and of an open-ended clause are advisable.

Equality bodies should encourage practitioners to systematically invoke discrimination on grounds of socio-economic status, health status, and gender identity, gender expression, and sex characteristics on the basis of domestic law when they constitute protected grounds and on the basis of Article 21(1) of the Charter of Fundamental Rights of the European Union in cases where Member States are implementing EU law.

Equality bodies should focus on the national level as their main focus of engagement and persuasion, given the difficulties related to decision-making at the EU level and the fact that national contexts are very diverse.

Equality bodies could consider redefining certain grounds where they are already recognised albeit in a partial or incomplete manner, by developing an expansive interpretation in their decisions, opinions, and external communications, including by actively considering the role of prejudice and bias and of general negative perceptions in society.

Equality bodies could consider, where possible, qualifying or requalifying certain situations to find discrimination on novel grounds even when such grounds have not been explicitly invoked by a complainant, and actively making use of open-ended clauses where available.

Equality bodies should launch extensive outreach, information, and awareness-raising campaigns regarding novel grounds of discrimination, multiple and intersectional discrimination, and open-ended clauses.

Equality bodies could consider engaging with the political level by pointing to areas where new or amended legislation would be necessary, building on international and European human rights law and liaising with social partners, NGOs, and civil society, and through participation in coordination platforms and working groups of both a political and a policy-based nature.

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List of abbreviations

CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
LGBTQI+	Lesbian, Gay, Bisexual, Transgender, Queer, Intersex +
OECD	Organisation for Economic Co-operation and Development
RESC	Revised European Social Charter
SES	Socio-economic status
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations

Introduction¹

Article 19 of the Treaty on the Functioning of the European Union (TFEU) and the EU anti-discrimination law directives adopted on this basis appear to play an increasingly important role in combating the exclusion and discrimination against people who are at the margins of society and in shaping domestic anti-discrimination laws. However, the scope of protection of this article is limited to a few protected grounds, namely sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation, while other grounds (especially socio-economic status, health status, and gender identity, gender expression, and sex characteristics, the main foci of the present research) are left out of its scope.

The question of expanding anti-discrimination law protections to these “other grounds” therefore becomes a pressing political, social, and legal issue

The fact that a list of protected grounds is limited and excludes some characteristics entails an important gap in the protection of some vulnerable people in society when they are victims of discrimination, whether it comes to their political, civil, cultural, or socio-economic rights. Indeed, many people discriminated

against are left out of the protection of anti-discrimination law in Europe.

For instance, people living in a disadvantaged socio-economic situation are subjected to stereotyping, prejudice, stigma, and discrimination because of their socio-economic situation, whether it is because of their lack of education, their neighbourhood, their diploma from a school mainly attended by low-income students, the way they look and dress, their economic vulnerability, their lack of school materials, their reliance on social benefits, etc.² However, the plight of socio-economically disadvantaged people remains mostly invisible, raising more than ever the question of prohibiting discrimination against them.

Along the same lines, discrimination on grounds of health status has been sharply brought to the forefront of equality and non-discrimination issues in the past two years because of the Covid-19 pandemic. Moreover, Lesbian, Gay, Bisexual, Transgender, Queer, Intersex + (LGBTQI+) persons continue to be under systemic threat in some countries, where the public opinion remains very hostile to persons with minority sexual orientations and persons with non-conforming gender identities, gender expressions, or sex characteristics.

The question of expanding anti-discrimination law protections to these “other grounds” therefore becomes a pressing political, social, and legal issue. Against this background, on the basis of a literature and case law review and of a survey and interviews with equality bodies and stakeholders, this report answers the question of whether and how the expansion of the

¹ The authors would like to thank the Equinet Secretariat, in particular Milla Vidina and Tamas Kadar, for their trust and valuable suggestions; Emma Schulte for her help with referencing; and everyone who took the time to answer our survey and our interview requests and to share with us their expertise and experience.

² See, for a comprehensive overview, UN Special Rapporteur on extreme poverty and human rights, Olivier De Schutter, “The persistence of poverty: how real equality can break the vicious cycles”, A/76/177 (19 July 2021). <https://undocs.org/A/76/177>.

list of protected grounds in anti-discrimination law enhances the effectiveness and coherence of the anti-discrimination legal framework and its implementation.

After an overview of the protected grounds in national specific anti-discrimination legislations in Europe (I), we explain the methodology that we followed to elaborate this report (II). We then turn to general considerations regarding the expansion of the list of grounds, and consider the grounds of socio-economic status; health status; and gender identity, gender expression, and sex characteristics; as well as a few selected other grounds (III). We also analyse the opportunity of an open-ended clause (IV) and of the prohibition against additive/cumulative and intersectional discrimination (V). Finally, we examine the role of equality bodies in this context (VI). The report ends with a list of recommendations to national and EU legislators and policy-makers and to equality bodies (VII).

I. Tour d’horizon of protected grounds in national laws

Protected grounds in EU anti-discrimination law are limited to the six grounds enounced in Article 19 of the Treaty on the Functioning of the European Union (TFEU), namely sex,³ racial or ethnic origin, religion or belief, disability, age, and sexual orientation. Several anti-discrimination law directives have been adopted⁴ on this basis and a proposal for a so-called “horizontal directive” is still pending before the Council.⁵ Many domestic anti-discrimination legislations protect more grounds than the ones enshrined in Article 19 TFEU, though, making the scope of protection of anti-discrimination law much wider at domestic level.

In order to grasp the scale of the questions surrounding the opportunity of adding new grounds, it is necessary to give first an overview of what grounds are protected at domestic level in European states, including EU non-Member States. Specifically, in light of the grounds on which this report focuses, we provide a brief overview of the following protected grounds around Europe: socio-economic status, health status, and gender identity, gender expression, and sex characteristics. Finally, we examine whether the open-ended clause is widespread and touch upon two additional grounds: genetic heritage and physical appearance.

This brief *tour d’horizon* is limited to *what country enshrines what grounds at national level*—all further explanations and issues related to these grounds, including the protection provided at international and European level and the interrelationship between these levels and national systems, will be developed throughout the report. This *tour d’horizon* is based on the main national specific anti-discrimination legislations in Europe which are reported in the 2020 comparative analysis report by the European Network of legal experts in gender equality and non-discrimination,⁶ as well as the information that the equality bodies reported in the survey and/or interviews. It comprises 39 states in total.

³ As for the ground of sex, see also Article 157 TFEU.

⁴ See for instance: Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ L* 303 2 December 2000, pp. 16–22; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin *OJ L* 180 19 July 2000, pp. 22–26; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services *OJ L* 373, 21 December 2004.

⁵ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181}.

⁶ I. Chopin and C. Germaine, *A comparative analysis of non-discrimination law in Europe 2020. The 27 EU Member States, Albania, North Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia Turkey and the United-Kingdom compared* (European network of legal experts in gender equality and non-discrimination, 2021), pp. 121-133. <https://op.europa.eu/en/publication-detail/-/publication/a88ed4a7-7879-11ea-a07e-01aa75ed71a1>. It must be noted that some countries have one main anti-discrimination instrument and/or a few ground-specific anti-discrimination instruments such as gender/sex and disability (like in Georgia, Bulgaria, North Macedonia, Turkey and Hungary). Conversely, other countries count *several* anti-discrimination legal instruments protecting different grounds depending on the instrument at stake. These instruments are defined based on the scope of application *ratione materiae* (like in France and Latvia) or on the federal nature of the state and the

Firstly, eighteen European countries enshrine grounds related to socio-economic status broadly speaking in their anti-discrimination legislation, through various concepts, some of which sometimes add to one another: social status, property, economic vulnerability, social origin, social standing, economic situation, profession, part-time employment, etc.⁷ Other countries recognise related grounds in a limited manner as regards their scope, such as in Ireland, where only the ground of housing assistance is enshrined. The protection on the basis of this ground is also sometimes limited to one specific field, such as in Denmark, where discrimination on grounds of social origin is prohibited only in the labour market.⁸ Fourteen countries do not enshrine any ground related to socio-economic status,⁹ and a few of them have an open-ended clause in their main anti-discrimination legislation under which discrimination based on a characteristic related to socio-economic situation could potentially fall.¹⁰

Secondly, only eleven states out of 39 explicitly recognise the ground of health status.¹¹ A few additional ones recognise it but in a limited manner, either because the scope of this ground is restricted (the ground is limited to chronic illness, for instance, or to present and future, but not past, health status)¹² or because it is likely to be applied in a limited field.¹³ As we explain

division of competences between the federated entities (like in Belgium and Austria), which sometimes makes anti-discrimination law more difficult to systematise and practice.

⁷ Namely: Albania (economic, education or social situation), Belgium (social origin and wealth/Income/property), Bulgaria (social status), France (economic vulnerability), Greece (social status), Hungary (social origin, financial status, part-time nature of employment), Lithuania (social status), Montenegro (social origin), North Macedonia (social origin, social status, property), Romania (social status), Serbia (financial position), Slovakia (social origin, property), Slovenia (social standing, economic situation, education), Turkey (wealth), Georgia (property of social status; social origin), Kosovo* (social status, wealth), Croatia (property, social status, social origin) and Moldova (social origin and wealth: although the main anti-discrimination act does not recognise such a ground, the Moldovan Constitution does, as well as other specific anti-discrimination acts).

⁸ See also Norway (where only the ground of part-time/temporary work is enshrined), Latvia (where the grounds of social origin and property are protected in Labour law and Social Security law and the grounds of social status, occupation and place of residence are protected in the field of education), Portugal (where discrimination on grounds of economic situation, instruction, origin or social condition is prohibited in Labour law only) and Estonia (where the grounds of property and social status are explicitly covered in the private sector for the conciliation procedure). Moreover, in the Czech Republic, the ground of social origin and property is protected in the fields of employment, education, and judicial process. However, the Public Defender of Rights of Czech Republic has no mandate to act on the basis of this ground.

⁹ Namely: Austria, Cyprus, Finland, Germany, Iceland, Italy, Liechtenstein, Luxembourg, Malta, Poland, Spain, Sweden, the UK, Moldova and the Netherlands.

¹⁰ For instance, Finland and Moldova.

¹¹ Namely: Albania, Finland, France, Hungary, Serbia, Slovakia (unfavorable state of health), Turkey, Georgia, Kosovo*, Croatia and North Macedonia.

¹² See for instance: Greece (chronic illness), Belgium (actual or future state of health), Portugal (Law 46/2006 which prohibits and punishes discrimination based on disability and on a pre-existing risk to health in addition to the grounds of reduced work capacity and chronic disease which are protected in Labour Law) and Romania (non-contagious chronic disease, HIV positive status)

¹³ For instance, in Iceland, discrimination on grounds of reduced capacity to work or health condition is prohibited only in the field of social security, in Latvia, the ground of health condition is protected in the fields of education and social security only and in the Czech Republic, the ground of health is protected in the fields of education and employment only (but the Czech Public Defender has no mandate for this ground). Finally, Moldovan anti-discrimination law prohibits discrimination on grounds of HIV-positive status in the field of employment and on the ground of health status in the field of social inclusion of persons with disabilities (see Article 8 of the Labor Code of the Republic of Moldova nr. 154/2003

below, this does not mean that discrimination on grounds of health status is not prohibited in states which do not recognise it explicitly.¹⁴ Indeed, several of them use the ground of disability as a proxy to protect people against discrimination on grounds of their health status. Moreover, the open-ended clause is also likely to play a protective role when this ground is not explicitly enshrined.

Thirdly, regarding gender identity, gender expression, and sex characteristics, 21 states explicitly prohibit discrimination on the basis of at least one of these three grounds (most of the time “gender identity”).¹⁵ Besides this, some states, such as the UK, only recognise the ground of “gender reassignment”. Finally, not many states explicitly prohibit discrimination on the basis of all three of these grounds.¹⁶ However, in some countries, the ground of sex/gender has played the role of proxy to protect people victims of discrimination based on gender identity, gender expression, and sex characteristics, like in Germany.¹⁷

Fourthly, the open-ended clause states that grounds beyond those explicitly mentioned in it may also be invoked. It is usually formulated through the mention of “other personal characteristics”, “any other situation, attribute or condition of a person or group”, “discrimination based on any ground”, “other status”, etc. A majority among the 39 states we looked at does not enshrine an open-ended clause.¹⁸ Among the states which have an open-ended clause,¹⁹ a few of them also recognise the ground of “(presumed) personal characteristic”, “personal status”, or “belonging to a disadvantaged group”, which are very wide grounds coming close to an open-ended clause.²⁰ A few additional states recognise an open-ended clause which is limited to the public sector and public authorities.²¹

Fifthly, the question of explicitly recognising other grounds than the grounds of socio-economic status, health status, gender identity, gender expression, and sex characteristics has also been dealt with in the present report. Specifically, the ground of genetic heritage (or

https://www.legis.md/cautare/getResults?doc_id=126038&lang=ro; Article 8 par. (3) of the Law nr. 60/2012 on social inclusion of persons with disabilities

https://www.legis.md/cautare/getResults?doc_id=126285&lang=ro). However, neither the Moldovan Constitution, nor the general anti-discrimination act protect such a ground).

¹⁴ Namely: Austria, Bulgaria, Cyprus, Denmark, Estonia, Germany, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Montenegro, Norway, Poland, Slovenia, Spain, Sweden, the UK and Moldova.

¹⁵ Albania (gender identity only), Belgium, France, Greece (gender identity or gender characteristics), Hungary (sexual identity), Iceland, Malta, Montenegro (gender identity, intersex characteristics), Serbia, Slovenia, Sweden, Georgia (Gender identity and expression), Kosovo* (gender identity only), Czech Republic (the term ‘gender identification’ is used, but according to the Public Defender of Rights of Czech Republic, this means gender identity), Finland, Luxembourg, the Netherlands, Norway, Portugal, Croatia and North Macedonia.

¹⁶ Austria, Cyprus, Denmark, Estonia, Germany, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Poland, Romania, Slovakia, Spain, Turkey, Bulgaria, Moldova and the UK.

¹⁷ In 2017, the Federal Constitutional Court of Germany clarified that the prohibition of sex discrimination covers gender identity: BVerfG, Beschluss des Ersten Senats vom 10. Oktober 2017 1 BvR 2019/16 – Rn. (1 – 69), DE:BVerfG:2017:rs20171010.1bvr201916.

¹⁸ Austria, Cyprus, Czech Republic, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Norway, Poland, Portugal, Spain, Sweden, Turkey, Croatia and the UK.

¹⁹ Albania, Bulgaria, Estonia, Finland, Hungary, Latvia, Montenegro, North Macedonia, Romania, Serbia, Slovakia, Slovenia, Georgia, Moldova, Kosovo* and Georgia.

²⁰ Albania, Bulgaria, Hungary, North Macedonia, Romania, Serbia, Slovakia, Slovenia, Georgia, Moldova, Kosovo* and Georgia.

²¹ See for instance Estonia.

related grounds) has been recognised in eight countries only,²² while the great majority does not explicitly include it,²³ although it is not excluded that discrimination on this basis could be recognised through an open-ended clause. This ground was chosen in light of the importance of this issue in societal debate, especially in relation to developments in genetic research and manipulation technology, and the potential challenges these might create in the near future. Moreover, only three states recognise the ground of physical appearance or physical characteristics.²⁴ This ground was chosen as it was spontaneously evoked by several interviewees, either in relation to socio-economic status and other grounds or as a standalone ground.²⁵

Finally, it is worth noting that, in some exceptional cases, equality bodies have a mandate to act on the basis of grounds that are not enshrined as such in their main anti-discrimination legislation. For instance, in Cyprus, the Ombudsman institution is competent to act on the grounds of social descent, birth, wealth, and social class,²⁶ which are enshrined in the Constitution,²⁷ although the main Cypriot anti-discrimination legislation does not protect such grounds, whether explicitly or implicitly under an open-ended clause. In Latvia, the Ombudsman's mandate covers any ground,²⁸ reflecting the Constitution which prohibits discrimination of any kind,²⁹ although the main anti-discrimination law enshrines a closed list of protected grounds which does not encompass the grounds of gender identity, gender expression, and sex characteristics, for instance.

Conversely, although some national constitutions enshrine an equality clause with an open-ended list of grounds, the mandate of the equality body is sometimes restricted to the grounds enounced in the general anti-discrimination legislation and does not extend to the ones enshrined in the Constitution, such as in Belgium,³⁰ or even to some specific anti-discrimination acts such as in the Czech Republic for the grounds of social origin and health conditions.³¹ In some instances, the mandate of equality bodies is extended only to a few

²² Namely: Albania (genetic predispositions), Belgium (Genetic characteristic), Bulgaria (human genome), France, Portugal, Kosovo* (genetic inheritance), Croatia and Serbia (genetic characteristics).

²³ Namely: Austria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Montenegro, the Netherlands, Norway, Poland, Romania, Slovakia, Slovenia, Spain, Sweden, Turkey, UK, Georgia, Moldova and North Macedonia.

²⁴ Namely: Belgium, France and Serbia.

²⁵ This was evoked by the UN Special Rapporteur on extreme poverty and human rights, the FRA, ATD Fourth World, Sophie Latraverse (independent expert for France), Austria, Georgia, and Bulgaria.

²⁶ Cyprus, Combating of Racial and other forms of Discrimination (Commissioner) Law N. 42(I)/2001, Arts. 5 and 7

²⁷ Cyprus, Article 28 (2) of the Cypriot Constitution.

²⁸ Law on Ombudsman, Article 11(2).

²⁹ Article 91 of the Latvian Constitution.

³⁰ Articles 10 and 11 of the Constitution, which prohibit discrimination without any restriction as to grounds and mainly concern legislative norms or administrative acts.

³¹ Constitution, Charter of the Fundamental Rights and the Basic Freedoms, Article 3(1). As for the specific acts, see: article 16, Act No. 262/2006 Coll., Labour code https://www.mpsv.cz/documents/625317/625915/Labour_Code_2012.pdf/a66525f7-oddf-5af7-4bba-33c7d7a8bfdf; article 4, Act No. 435/2004 Coll., act on employment https://www.cizinci.cz/documents/551336/568645/act_no._435_2004_coll._1.1.2018.pdf/240fb9ae-ad66-febf-7b6d-5d22e22d647c; article 2, Act No. 561/2004 Coll. On pre-school, basic, secondary, tertiary, professional and other education (the Education Act)

additional grounds beyond the general anti-discrimination legislation, like in the Netherlands, where the ground of working time is part of the mandate of the Dutch Institute for Human Rights,³² although they are not enshrined in the General Equal Treatment Act, while the Dutch Constitution prohibits discrimination on any grounds. Finally, although some anti-discrimination laws foresee an extensive list of grounds, their effectiveness may be limited because the equality body of the country in question is not operational, such as in North Macedonia in 2020.³³

<https://www.msmt.cz/dokumenty-3/act-no-561-2004-collection-of-law-on-pre-school-basic>; article 18, Act No. 99/1963 Coll. Civil procedure code

<https://www.zakonyprolidi.cz/cs/1963-99?text=ob%C4%8Dansk%C3%BD+soudn%C3%AD+%C5%99%C3%A1d>

³² Netherlands Institute for Human Rights Act, 19 April 2011, Section 34
<https://mensenrechten.nl/nl/publicatie/17477>.

³³ As explained in the 2020 report, the Commission for Protection Against Discrimination of North Macedonia ceased functioning in August 2019 due to the entry into force of the new Law on Prevention and Protection Against Discrimination. In 2020, the new Equality Body had not yet entered into function.

II. Methodology

The methodology for this report involved a review of relevant literature and case law, a survey of Equinet members, individual interviews with stakeholders, individual interviews with selected equality bodies, and the elaboration of a catalogue of cases and examples, as well as three separate sets of recommendations.

Firstly, a review of relevant literature and case law was conducted. The inclusion and exclusion criteria for this review were formulated based on their ability to provide clarity as to whether and how the expansion of the list of grounds and/or the addition of an open-ended clause of grounds in anti-discrimination legislation would enhance the effectiveness of the existing equality legal framework and its national implementation.

Secondly, a survey of Equinet members was launched to collect their input and perspectives. The questionnaire for this survey was designed following a combination of closed and open-ended questions, balancing the interest of obtaining directly comparable results through closed responses and of giving enough room for participants to elaborate and expand on their national contexts through open-ended responses, raising new information and insights where relevant.

In practical terms, the survey was open for responses between 2 June and 30 June 2021. The following 14 countries submitted a response to the survey: Georgia, Malta, Finland (both the Non-Discrimination Ombudsman of Finland and the Ombudsman for Equality answered the survey), Greece, Bulgaria, Poland, Serbia, the Netherlands, Lithuania, Moldova, Austria, Germany, Kosovo*, and the Czech Republic. The full questionnaire can be found as an annex to this report, as well as an overview of which countries among the interviewees and survey participants explicitly prohibit discrimination on the basis of the grounds studied in this report.

Thirdly, semi-structured individual interviews with stakeholders, with an average length of one hour per interview, were conducted and analysed using the questions formulated for the survey of Equinet members as a reference, albeit in a modified version specifically designed for these stakeholders and their respective fields of action and following the structure of this report.

The following 7 organisations and stakeholders were interviewed: the United Nations Special Rapporteur on extreme poverty and human rights (Olivier De Schutter), ATD Fourth World (France), an official of the European Commission's Directorate-General for Justice and Consumers (Dorothea Staes), the Council of Europe (Directorate General of Human Rights and Rule of Law, Department of the European Social Charter), the UK's Trades Union Congress, an independent consultant with a deep expertise in French anti-discrimination law (Sophie Latraverse), and the EU Fundamental Rights Agency (Research & Data Unit).

Fourthly, a selection of equality bodies to be individually interviewed was carried out based on objective criteria formulated considering the literature, reports, and case law review analysis, the survey results analysis, and the following considerations:

- ✓ Equality bodies in Member States where the ground of socio-economic status was recently added to their national legislation or where it was already existing in national law at the time when the equality body was created.
- ✓ Equality bodies in Member States where the ground of health status was recently added to their national legislation or where it was already existing in national law at the time when the equality body was created.
- ✓ Equality bodies in Member States where the grounds of gender identity, gender expression, and sex characteristics were recently added to their national legislation or where they were already existing in national law at the time when the equality body was created.
- ✓ Member States in which all or at least one of the aforementioned grounds have been successfully mobilised to combat discrimination.
- ✓ A geographical balance.
- ✓ A balance between equality bodies which answered the survey (4) and equality bodies which did not respond to it (3).

Fifthly, the individual interviews with equality bodies, with an average duration of one hour and a half per interview, were conducted based on an interview guide closely tied with the purpose, objectives, and structure of this report and developed in line with the selection criteria previously established, as validated by Equinet. The individual interviews followed a semi-structured format, with the aim of collecting a maximum of information from interviewees while framing the questions to a certain extent. Notably, open-ended, dichotomous questions were asked to ensure the connection to the research objectives and the elements needed for the elaboration of the report.

The following 7 equality bodies were interviewed: Poland (Office of the Commissioner for Human Rights), Ireland (Irish Human Rights and Equality Commission), Austria (Ombud for Equal Treatment), Georgia (Public Defender – Ombudsman), Romania (National Council for Combating Discrimination), Belgium (Inter-federal Centre for Equal Opportunities), and Bulgaria (Commission for Protection against Discrimination).³⁴

Sixthly, the catalogue of cases and examples included throughout the report in the format of textboxes was elaborated following relevance criteria, including the originality, potential to be replicated, and expected or actual outcome of each example, with the aim of making this catalogue directly leverageable by equality bodies who are contemplating the promotion or are already promoting the adoption of relevant new grounds in their national legislations.

Finally, three sets of recommendations regarding the use and added value of novel grounds, targeted respectively at EU and national legislators and policy-makers and at equality bodies, were elaborated considering the impact, readiness for implementation, and transformative potential of each recommendation, and they were formulated in a clear, concise, and impactful manner that can be directly mobilised and used by the respective target audiences.

³⁴ It must be noted that, when referring to the survey and interviews with equality bodies in the coming sections of the report, we mention the name of the corresponding countries only and not the full name of the equality bodies, for the sake of clarity and conciseness.

III. Expanding the list of grounds

General overview

Not enough protected grounds in EU law

EU anti-discrimination law is not encompassing enough when it comes to protected grounds. There is a consensus among interviewees on this point. The six grounds enshrined in Article 19 TFEU, namely sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation, are too restrictive and leave certain groups out of the scope of protection of anti-discrimination law.³⁵

Under EU law, equality bodies have no competence to help victims of discrimination which would fall outside the scope of protection of anti-discrimination law as defined by Article 19 TFEU, but inside the scope of application of Article 21 CFREU.

In addition, although the list enumerated in Article 21 of the Charter of Fundamental Rights of the European Union (CFREU) is an open-ended one, the scope of protection is much more modest due to the limited scope of the Charter defined by its Article 51(1).³⁶ Moreover, Article 21 is not part of the EU anti-discrimination legal framework *per se* (i.e. the anti-discrimination law directives which are mainly adopted on the basis of Article 19 TFEU), which comprises definitions, remedies,

enforcement, and bodies for the promotion of equal treatment. As a result, even when Article 21 is likely to apply according to Article 51(1) CFREU, EU law does not require Member States to give a mandate to equality bodies to act on this basis. In other words, under EU law, equality bodies have no competence to help victims of discrimination which would fall outside the scope of protection of anti-discrimination law as defined by Article 19 TFEU, but inside the scope of application of Article 21 CFREU.

A broader legal basis with additional protected grounds would allow EU institutions to act on additional grounds, such as socio-economic status. This would be relevant not only for legal purposes, but also for *soft law* and policy work, which has an important preventive impact.³⁷ Moreover, it would require Member States who are reluctant to extend the protection beyond the six grounds protected in EU law to widen the scope of protection in their own domestic anti-discrimination legislation.³⁸ Indeed, anti-discrimination law has sometimes a bad

³⁵ For instance, Court of Justice of the European Union (Fourth Chamber), Judgment of 7 July 2011, *Stefan Agafitei and Others*, Case C-310/10, EU:C:2011:467, paras. 35-36 [where the Court ruled that discrimination on the ground of professional category or place of work falls outside of the scope of EU law].

³⁶ For instance, Court of Justice of the European Union (Tenth Chamber), Judgment of 6 mars 2014, *Cruciano Siragusa c. Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, case C-206/13, EU:C:2014:126, paras. 19-22.

³⁷ Such as, according to Dorothea Staes (DG JUST of the European Commission), supporting Member States in taking actions on the ground to fight against discrimination, like the Anti-Racism Action Plan.

³⁸ It is the case in Poland.

reputation in public opinion and politics, and there is a need for EU law to drive change in this field and offer more protection.

However, the unanimity rule required to modify Article 19 TFEU makes it very difficult, if not impossible, to protect more grounds under EU anti-discrimination law. Consequently, changing the unanimity rule in Article 19 TFEU to introduce a qualified majority voting rule would be more important than adding new grounds as such in EU anti-discrimination law, since it would “unlock” this article for further modifications down the line.³⁹

Along the same lines, the Commission declared that the use of the *passerelle* clause for Article 19 TFEU would “facilitate the development of equal protection against discrimination, with effective redress mechanisms for all”.⁴⁰ The *passerelle* clause enshrined in Article 48(7) of the Treaty on European Union (TEU) implies that the European Council takes unanimously the decision to move to qualified majority voting in a given area, provided that there is no opposition of national parliaments and that the European Parliament gives its consent by a majority. The same mechanism applies to the switch from a special legislative procedure to an ordinary legislative procedure.

In any case, for now, and given the fact that it is highly unlikely that qualified majority voting will be adopted for Article 19 TFEU (whether through a *passerelle* clause or a modification of the TFEU), the recognition of additional grounds beyond the six grounds enshrined in Article 19 TFEU is more likely to happen at domestic level rather than at EU level.

Convergences and divergences among protected grounds at domestic level

The protected grounds that are explicitly recognised in domestic law vary from one country to another, as explained in the *Tour d’horizon* section. In general, European states have adopted lists of protected grounds which go (far) beyond the list of grounds enshrined in EU law.

There is a tendency among the more recent EU Member States as well as European countries who are not part of the EU to recognise more protected grounds than the original EU Member States,⁴¹ with some exceptions.⁴² In Member States where only a few characteristics are protected and no open-ended clause is enshrined there is a clear need, made explicit in survey responses and/or during our interviews, to extend the list of grounds. However, the approach to such an extension varies: for some countries such as Poland “the broader the list, the better”,

³⁹ It was suggested by Dorothea Staes (DG JUST of the European Commission).

⁴⁰ European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. More efficient decision-making in social policy: Identification of areas for an enhanced move to qualified majority voting”, COM(2019) 186 final (16 April 2019), p. 7-10.

⁴¹ It is the case for Bulgaria, Malta, Hungary, Estonia and Romania as well as Georgia, Kosovo*, Serbia, Moldova and North Macedonia as opposed to Austria, Germany, the Netherlands, Luxembourg, Spain and Italy.

⁴² Like in France and in Belgium, where the list of grounds is very extensive, and in Poland, where the list of protected grounds is very limited.

whereas other countries such as Austria or Germany argue for the addition of one or a few grounds only.⁴³

Participants who did not agree (or neither agreed nor disagreed) with the fact that certain disadvantaged groups are currently left out of the protection of anti-discrimination legislation come from countries where the list of grounds is already (very) extensive.⁴⁴ For instance, Georgian anti-discrimination law encompasses an open-ended clause besides more than 20 protected grounds, and any objectively illustrated personal characteristic may be considered as a protected ground as well.⁴⁵ As explained below, too many grounds can sometimes raise concerns regarding coherence and intelligibility, like in France or Belgium.

Specifically, participants and interviewees underlined the need for recognising the following protected grounds, beyond the six grounds enshrined in Article 19 TFEU:⁴⁶ non-EU nationality;⁴⁷ physical appearance;⁴⁸ political opinion;⁴⁹ socio-economic status;⁵⁰ health;⁵¹ gender identity, gender expression, and sex characteristics;⁵² grounds relating to racial or ethnic origin such as language,⁵³ country of birth,⁵⁴ country of origin,⁵⁵ and skin colour⁵⁶ (since, as explained below, the Court of Justice of the European Union defines ethnic origin very narrowly);⁵⁷ trade union affiliation;⁵⁸ genetic heritage;⁵⁹ belonging to particular

⁴³ Only socio-economic status in the case of Austria; nationality, socio-economic status (which needs discussion) as well as family status, gender identity, family status in the case of Lithuania; sexual orientation, disability, and age as to the horizontally applicable legislation for access to goods and services in the Netherlands. In 2015, as Malta started a consultation process to revise its equality legislation, the National Commission for the Promotion of Equality suggested adding the following grounds: gender, nationality, language, political opinion, health, socio-economic status, and physical appearance.

⁴⁴ Namely, Bulgaria, Georgia, Greece, Serbia, Czech Republic, and France.

⁴⁵ Law of Georgia on Elimination of All Forms of Discrimination.
<https://www.ombudsman.ge/res/docs/2020060916283929212.pdf>.

⁴⁶ The European Social Charter does not explicitly include the grounds of disability and sexual orientation, although these grounds are indirectly protected through other grounds used as proxies (see below) and the CoE's Department of the European Social Charter expressed a need for these grounds to be recognised.

⁴⁷ According to Olivier De Schutter, Germany and Malta, among others.

⁴⁸ According to ATD Fourth World, Poland and Malta, among others.

⁴⁹ According to Malta, among others.

⁵⁰ According to Dorothea Staes (DG JUST of the European Commission), CoE's Department of the European Social Charter, UK's Trade Union Congress, Poland, Germany (to be discussed) and Malta, among others.

⁵¹ According to Dorothea Staes (DG JUST of the European Commission), Poland, Greece and Malta, among others.

⁵² According to Dorothea Staes (DG JUST of the European Commission), CoE's Department of the European Social Charter, Poland, the FRA and Lithuania, among others.

⁵³ According to Czech Republic, Malta and Dorothea Staes (DG JUST of the European Commission).

⁵⁴ According to Dorothea Staes (DG JUST of the European Commission), among others.

⁵⁵ According to Dorothea Staes (DG JUST of the European Commission), among others.

⁵⁶ According to Czech Republic and Dorothea Staes (DG JUST of the European Commission), among others.

⁵⁷ Court of Justice of the European Union (First Chamber), Judgment of 6 April 2017, *Jyske Finans A/S*, case C-668/15, EU:C:2017:278.

⁵⁸ According to the UK's Trades Union Congress, among others.

⁵⁹ According to Poland, among others.

professional groups/occupation;⁶⁰ criminal record;⁶¹ place of residence;⁶² migration status;⁶³ family status;⁶⁴ care-giving (related to the implementation of the EU work-life balance directive);⁶⁵ and parenthood.⁶⁶ Where these grounds are not already protected, participants expressed the need to protect them explicitly (preferably) or through an open-ended clause (but this is less ideal).

These grounds reflect the diversity among domestic anti-discrimination laws. As a matter of fact, national context matters a lot in framing anti-discrimination law and its priorities. Challenges regarding the recognition of protected grounds and their implementation are different from one country to another, and several participants underlined that there are limits at the common goals that we can look at from a common European approach.⁶⁷

For example, the Irish Human Rights and Equality Commission's and the Austrian Ombud for Equal Treatment's main priorities focus on advocating for the prohibition of discrimination on grounds of socio-economic status.⁶⁸ Equality bodies in some Eastern European countries, such as Poland and Georgia, have a more important commitment to the grounds of gender expression, gender identity, and sex characteristics, which can be explained not only by the way anti-discrimination legislation is drafted but also by the political and social context in those countries. Moreover, governments opposing the extension of the EU anti-discrimination framework are also afraid of losing control over the interpretation of their own national anti-discrimination legislation, as it has been the case for Germany regarding the proposal of the so-called "horizontal" Council Directive.⁶⁹

⁶⁰ According to Poland, among others.

⁶¹ According to Belgium, among others. It is worth noting that, in February 2017, the Commission for the evaluation of Belgian anti-discrimination law recommended that the ground of social origin be replaced by the grounds of "social origin or social status" or "social origin or social condition", which are broader and are likely to cover more situations including discriminations based on criminal record. See Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations, Premier rapport d'évaluation (February 2017), pp. 48-49.

https://www.unia.be/files/Documenten/Aanbevelingen-advies/Commission_d%C3%A9valuation_de_la_l%C3%A9gislation_f%C3%A9d%C3%A9rale_relative_%C3%A0_la_lutte_contre_les_discriminations.pdf

⁶² According to Belgium, among others.

⁶³ According to Belgium, among others.

⁶⁴ According to Belgium (this ground has been added in the Walloon law only), Germany and Lithuania, among others.

⁶⁵ According to Germany, among others.

⁶⁶ According to Czech Republic (the parenthood ground is only covered through the ground of sex), among others.

⁶⁷ According to Ireland, Poland, Austria.

⁶⁸ As for the Irish Human Rights and Equality Commission, see Irish Human Rights and Equality Commission, "Observations on the Equality (Miscellaneous Provisions) Bill 2017", (December 2017). <https://www.ihrec.ie/app/uploads/2018/01/Observations-on-Equality-Miscellaneous-Provisions-Bill-2017.pdf>; as well as previous statements set out in Irish Human Rights and Equality Commission, "Ireland and the International Covenant on Economic, Social and Cultural Rights" (2015). https://www.ihrec.ie/app/uploads/download/pdf/icescr_report.pdf; Irish Human Rights and Equality Commission, "Ireland and the Convention on the Elimination of All Forms of Discrimination Against Women" (2017). <https://www.ihrec.ie/app/uploads/2017/02/Ireland-and-theConvention-on-the-Elimination-of-All-Forms-of-Discrimination-Against-Women.pdf>.

⁶⁹ According to Dorothea Staes (DG JUST of the European Commission). See for instance: Nicole Sagener, "NGOs tell Germany to stop blocking anti-discrimination directive", *Euractiv* (24 July 2015) <https://www.euractiv.com/section/justice-home-affairs/news/ngos-tell-germany-to-stop-blocking-anti->

However, it is worth noting that most survey participants agree on the importance of explicitly protecting the grounds of socio-economic status, health, and gender identity, gender expression, and sex characteristics when they are not explicitly protected. In addition, it should be recalled that EU law constitutes a safety net and prevents in some cases that domestic anti-discrimination law and equality bodies be dismantled, like in Romania.⁷⁰

The question of protected grounds is closely linked to the scope *ratione materiae* of anti-discrimination legislation in each country. There is a wide agreement with the fact that substantive rights are more meaningful if linked to non-discrimination requirements. For instance, the United Nations (UN) Special Rapporteur on extreme poverty and human rights explains that “the discrimination faced by disadvantaged individuals and households should be seen for what it is: a form of systemic discrimination that affects a range of areas including health, education, housing and employment”.⁷¹ Survey participants and interviewees also confirmed that employment, healthcare, education, housing, and access to public and private services are the most salient fields where discrimination is likely to occur. With regard to the grounds of gender identity, gender expression, and sex characteristics more specifically, the field of media is also an important one, such as in Poland regarding LGBTQI+ individuals.

Furthermore, several countries have a parallel system for employment and occupation (where protection tends to be higher) and for all other fields (where protection tends to be lower).⁷² Finally, in federal countries where non-discrimination is not an exclusive competence of the federal state, some difficulties appear or are likely to appear due to different lists of grounds in different federated entities, such as in Belgium. In this context, there is a need for a coherent anti-discrimination law system within the country to avoid spatial fragmentation.

discrimination-directive/ More generally, according to the discussions within the Council, certain countries have questioned the need for the Commission’s proposal, which they see as infringing on national competences for certain issues and as conflicting with the principles of subsidiarity and proportionality. Other countries also questioned the inclusion of social protection and education within its scope. See the documents reporting the discussions within the Council and its preparatory bodies between 2016 and 2021, available at: <https://eur-lex.europa.eu/legal-content/en/HIS/?uri=CELEX:52008PC0426>.

⁷⁰ EU Commission, Staff Working Document 2021, Rule of Law Report Country Chapter on the rule of law situation in Romania (Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2021, Rule of Law Report The rule of law situation in the European Union), SWD(2021) 724 final (20 July 2021).

⁷¹ UN Special Rapporteur on extreme poverty and human rights, Olivier De Schutter, “The persistence of poverty: how real equality can break the vicious cycles”, A/76/177 (19 July 2021), paras. 53-54, <https://undocs.org/A/76/177>.

⁷² For instance, in Austria and in Poland (there is a lack of political will to include the exact same list into the law on equal treatment, although the Polish constitution has an open-ended anti-discrimination clause).

Advantages of extending the list of grounds

Many advantages of naming and recognising the existence of additional grounds were identified by participants in our survey and interviews.

Expanding the list of grounds allows to name and identify social groups in need for protection

Firstly, expanding the list of grounds allows to name and identify social groups in need for protection, with the consequence that this recognition sends a symbolic message: it reflects a judgment by society on which groups need to be protected as well as a signal to those who

discriminate, which is important for voluntary compliance.⁷³ Although adding further grounds is not a magical formula,⁷⁴ it is likely to play an important role in visibilising and protecting vulnerable groups which are excluded and disadvantaged.⁷⁵

Secondly, if grounds are not named, they will often not be covered by judicial interpretation and by policy and decision-making.⁷⁶ In this vein, even under an open-ended clause, courts have sometimes been reluctant to find discrimination on grounds which are not explicitly protected, because they lack audacity.⁷⁷ Explicitly recognising new grounds brings legal certainty, precision, and concreteness regarding the scope of anti-discrimination law, as opposed to an open-ended clause.⁷⁸ Along the same lines, several participants have raised doubts about an open-ended clause because its legal uncertainty could be addressed by explicitly adding new grounds.⁷⁹

Thirdly, data collection is key in anti-discrimination law and it reinforces the need for recognising explicit grounds. On the one hand, there are many studies, data, and academic works regarding systemic discrimination against some specific groups, such as people living in poverty, people with a chronic illness, trans people, etc., and calling for the inclusion of protected grounds related to these characteristics.⁸⁰ On the other hand, there is an urgent need for more studies to shed light on the forms of discrimination that these groups experience, especially as regards the fields where it occurs, the mechanisms at play, the root causes, etc.

In this regard, explicitly recognised grounds may be useful as they provide a legal basis for and catalyse data collection and research. This is particularly true at EU level for the European Commission, since explicit grounds allow to easily collect and use data, which constitutes a key factor to combat structural discrimination.⁸¹ Indeed, even in the instance where data exists regarding other grounds, the European Commission cannot use it in its legal work due to its competences being limited to the six grounds of Article 19 TFEU.

Fourthly, explicitly protecting a ground implies that there is no need for equality bodies or courts to develop a protracted justification on why a certain characteristic or situation ought

⁷³ According to Georgia, The Netherlands, Austria, Finland, ATD Fourth World and Olivier De Schutter

⁷⁴ According to ATD Fourth World.

⁷⁵ According to The Netherlands, Moldova and CoE's Department of the European Social Charter.

⁷⁶ According to Poland.

⁷⁷ According to Olivier De Schutter.

⁷⁸ According to CoE's Department of the European Social Charter among others.

⁷⁹ For instance, Lithuania, Greece and Czech Republic (see below).

⁸⁰ See the references in the next sections which deal with these grounds.

⁸¹ According to Dorothea Staes (DG JUST of the European Commission).

to be retained as a prohibited ground of discrimination. In other words, the existence of the protected ground as part of the scope of anti-discrimination law would be impossible to contest or doubt as such.⁸²

Finally, in some cases, even when an open-ended clause is enshrined in the national constitution, some equality bodies have a mandate only for grounds explicitly covered in the main anti-discrimination act(s), as it is the case in Belgium, the Netherlands and the Czech Republic.⁸³ As a result, explicitly recognising grounds also implies extending the mandate of equality bodies, who would not be able to act on this basis otherwise, including with regard to their policy and advocacy work.⁸⁴ Equality bodies in countries which have an extensive list of grounds have reported that it is easier to act upon complaints when such a list is explicit.⁸⁵

Disadvantages of extending the list of grounds

On the other hand, several interviewees expressed some reluctance to adding new grounds, although these objections are much more limited than the advantages raised. Most of these objections are not linked to the expansion of the protection against discrimination *per se*, but rather to the idea that the existing anti-discrimination legal framework should be better exploited and interpreted in order to enhance protection and to avoid a “grounds inflation”.

The countries which are the most reluctant to adding new grounds have a very extensive list of protected grounds already, like France, which counts more than 25 grounds,⁸⁶ or Belgium, which foresees 19 grounds.⁸⁷ They fear that adding new grounds would reduce the effectiveness of anti-discrimination law and dilute the content of its “core” grounds.⁸⁸ A never-ending expansion of grounds brings along some difficulties, such as the overlap and multiplication of similar grounds,⁸⁹ with a risk that anti-discrimination law loses coherence and becomes unintelligible. This difficulty is compounded in some cases, like in France, by the fragmentation of the anti-discrimination legal framework, which is based on several legal instruments enshrining different lists of protected grounds.⁹⁰

⁸² According to Moldova.

⁸³ See above the *Tour d’horizon* section.

⁸⁴ According to Malta, among others.

⁸⁵ It is the case, for instance, in Serbia, Georgia and Romania.

⁸⁶ Law No. 2008-496 of 27 May 2008 relating to the adaptation of National Law to Community Law in matters of discrimination, as last amended in 2017. See also: S. Latraverse, *Country report Non-discrimination Transposition and implementation at national level of Council Directives 2000/43 and 2000/78 France, Reporting period 1 January 2019 – 31 December 2019* (European Commission, 2020). <https://op.europa.eu/en/publication-detail/-/publication/076fe633-fede-11ea-b44f-01aa75ed71a1>.

⁸⁷ Article 3 of the General Anti-Discrimination Act of 10 May 2007.

⁸⁸ Like Belgium, for example.

⁸⁹ For instance, in France, Sophie Latraverse (independent expert) explains that the ground of family name overlaps with the ground of origin, and that the ground of place of residence overlaps with economic vulnerability or origin.

⁹⁰ R. Medhar Inghilterra, “L’inégale multiplication des critères de discrimination : conséquences et modalités d’harmonisation éventuelle” in *Multiplication des critères de discrimination, Enjeux, effets et perspectives, Actes du colloque, 18-19 Janvier 2018* (Défenseur des droits, 2018), p. 77. <https://www.defenseurdesdroits.fr/fr/actes-de-rencontre/2019/01/actes-du-colloque-multiplication-des-criteres-de-discrimination-enjeux>.

It has also been underlined that the “sanctity” of non-discrimination may be less evident if the list of protected grounds gets longer,⁹¹ and that expanding the list of grounds too much would make it difficult to distinguish anti-discrimination law from the main equality principle.⁹² This can be observed in France, where several authors have argued that there is a potential conflict between the general principle of equality and anti-discrimination law, especially before courts, because constitutional and administrative judges are reluctant to rule on the basis of anti-discrimination norms and rely mainly on the general equality principle.⁹³ However, it has been rightly argued that, in fact, anti-discrimination law is a legal complement to the equality principle, and that there is no solid argument which demonstrates an opposition, competition, or conflict between anti-discrimination law and the equality principle.⁹⁴ In this context, it should be recalled that, at EU level, anti-discrimination is usually seen as a particular expression of the principle of equal treatment, as repeatedly stated by the Court of Justice of the European Union (CJEU) regarding Article 21(1) CFREU in relation to Article 20 CFREU, which enshrines this principle of equal treatment as a general principle of EU law.⁹⁵ Moreover, the requirement of proving an invidious difference of treatment based on an identifiable characteristic and the stigma attached to it, implying a negative social meaning,⁹⁶ represents an important element characterising the prohibition of discrimination, independently of the number of grounds enshrined.

Some grounds (such as disability or sex/gender) are routinely used as proxies for non-protected grounds (such as health status or gender identity, gender expression, and sex characteristics)

gender identity, gender expression, and sex characteristics).⁹⁸ The lack of a strict definition of

For some interviewees, it is sometimes strategically better to interpret existing grounds extensively rather than incorporating a new ground, which may have a limited scope of application.⁹⁷ The practice at national and EU level shows that some grounds (such as disability or sex/gender) are routinely used as proxies for non-protected grounds (such as health status or

⁹¹ According to Olivier De Schutter.

⁹² According to Sophie Latraverse (independent expert for France). See also P. Icard, *Pérégrination des critères de non-discrimination dans le prétoire des juges administratifs in Multiplication des critères de discrimination, Enjeux, effets et perspectives, Actes du colloque, 18-19 Janvier 2018* (Défenseur des droits, 2018), pp. 115 and seq. <https://www.defenseurdesdroits.fr/fr/actes-de-rencontre/2019/01/actes-du-colloque-multiplication-des-criteres-de-discrimination-enjeux>.

⁹³ See for instance : S. Hennette-Vauchez & E. Fondimare, “Incompatibility between the ‘French Republican Model’ and Anti-Discrimination Law? Deconstructing a Familiar Trope of Narratives of French Law”, in B. Havelková, B. and M. Möschel, *Anti-Discrimination Law in Civil Law Jurisdictions* (Oxford, OUP, 2019) p. 56-75.

⁹⁴ R. Medard Inghilterra, “La réalisation du droit de la non-discrimination”, *RDLF* (2020, thèse n°9) http://www.revuedlf.com/theses/la-realisation-du-droit-de-la-non-discrimination/#_ftn14.

⁹⁵ See for instance: Court of Justice of the European Union (Fourth Chamber), Judgment of 29 avril 2015, *Geoffrey Léger*, case C-528/13, EU:C:2015:288, para. 48; Court of Justice of the European Union (Grand Chamber), Judgment of 10 May 2011, *Römer*, case C-147/08, EU:C:2011:286, para. 59; Court of Justice of the European Union *Glatzel* (Fifth Chamber), Judgment of 22 May 2014, case, C-356/12, EU:C:2014:350, para. 43.

⁹⁶ I. Solanke, *Discrimination as Stigma. A Theory of Anti-discrimination Law* (Bloomsbury, 2019), p. 17-38.

⁹⁷ According to Sophie Latraverse (independent expert for France) and Belgium for example.

⁹⁸ See for instance Court of Justice of the European Union, Judgment of 30 avril 1996, *P v. S and Cornwall County Council*, Case C-13/94, EU:C:1996:170 [where the Court used the ground of sex as a proxy for gender reassignment]; Court of Justice of the European Union (Fourth Chamber), Judgment

grounds sometimes allows equality bodies and courts to interpret these grounds extensively and, when necessary, expand their application to other related characteristics. This is the case in Austria and Germany, where the ground of sex/gender is used to protect against discrimination on grounds of gender identity, gender expression, and sex characteristics. In this connection, an open definition of grounds may be useful, as it gives some indications on how to interpret the relevant ground while allowing other potential situations to fall under that same ground.

The Law on Equal Treatment of Lithuania states that the ground of social status encompasses “education or qualification acquired by a natural person or his studies at research and education establishments, his property, income, need for state support provided for in legal acts and/or other factors related to the financial/economic situation of the person”.

The concepts of additive/cumulative and intersectional discrimination may also represent a way to avoid the phenomenon of “grounds inflation”, according to some interviewees.⁹⁹ However, this approach has its limits, as the recognition of other characteristics based on proxies is left at the entire discretion of courts, which are sometimes reluctant to do so.¹⁰⁰ Moreover, certain characteristics cannot be addressed by any proxy, such as the ground of socio-economic status, as explained below.

A final objection against adding new grounds is the risk of a populist backlash. One interviewee evoked the possibility of sabotage during the process of expanding the list of grounds by illiberal parties in Parliament (for example, by attempting to include discrimination on grounds of “shoe colour”).¹⁰¹ This is related to the hostile attitude of some sectors of public opinion towards equality and anti-discrimination law.¹⁰² However, the essence of anti-discrimination law lies in a countermajoritarian rationale, and the European Court of Human Rights (ECtHR) has repeatedly asserted that the prejudice of the majority can never justify treatment imposed to the minority.

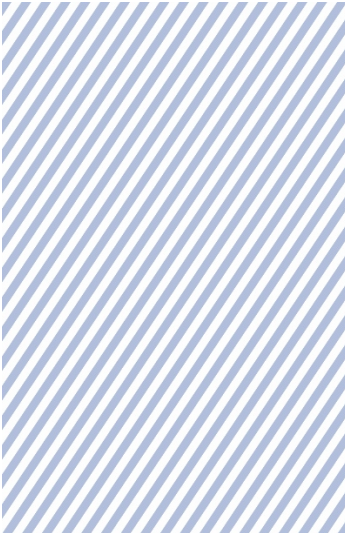
of 18 December 2014, *Fag og Arbejde (FOA) contre Kommunernes Landsforening (KL)*, case C-354/13, EU:C:2014:2463 [where the Court judged that severe or morbid obesity can constitute a disability]; Court of Justice of the European Union, Judgment of 8 November 1990, *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, Case C-177/88, EU:C:1990:383 [where the court used the ground of sex as a proxy for pregnancy].

⁹⁹ For instance, according to Belgium.

¹⁰⁰ See for instance Court of Justice of the European Union, Judgment of 17 February 1998, *Lisa Jacqueline Grant*, Case C-249/96, EU:C:1998:63 [where the Court refused to consider sexual orientation under the umbrella of the ground of sex].

¹⁰¹ This occurred in Belgium.

¹⁰² Like in Poland.



The ECtHR has found that “the position of perpetuating the education of Roma children in a public school attended exclusively by Roma, and the renouncing of effective anti-segregationist measures [...] partially because of the opposition shown by parents of non-Roma students, cannot be considered as objectively justified by a legitimate aim”.¹⁰³ With regard to a blanket ban on begging, the ECtHR has also recalled the statement of the UN Special Rapporteur on extreme poverty and human rights, according to which the motivation of making poverty less visible in a city and to attract investment is not legitimate with regard to human rights.¹⁰⁴

Interim conclusion

To summarise this general overview about the expansion of the list of grounds, and before moving on to specific grounds, it was first observed that EU anti-discrimination law is not encompassing enough when it comes to protected grounds. At the same time, the protected grounds that are explicitly recognised in domestic law vary a lot from one country to another. Challenges regarding the recognition of protected grounds and their implementation are also different in each country, and there may be limits to the common goals that we can achieve from a common European perspective. However, there is a wide agreement that substantive rights are more meaningful if they are linked to non-discrimination requirements.

Many advantages of recognising additional grounds were identified. Firstly, expanding the list of grounds allows to name social groups in need for protection, sending a symbolic message. Secondly, if grounds are not named, they will not be covered by judicial interpretation and by policy and decision-making. Thirdly, there are many studies, data, and academic literature regarding systemic discrimination against some specific groups and calling for the inclusion of explicit grounds related to these groups. Explicitly recognised grounds provide a legal basis for and catalyse data collection and research. Fourthly, explicitly protecting a ground implies that there is no necessity for equality bodies and courts to develop protracted arguments in individual cases. Finally, some equality bodies have a mandate only for grounds that are explicitly covered.

Some reluctance to explicitly adding new grounds exists as well, although these objections are much more limited than the advantages raised. Most of the objections are linked to the idea that the existing anti-discrimination legal framework should be better exploited and interpreted in order to improve the protection offered by anti-discrimination law and to avoid a “grounds inflation”.

¹⁰³ See European Court of Human Rights, First Section, *Lavida and others v. Greece*, Application no. 7973/10 (30 May 2013), para. 72.

¹⁰⁴ See European Court of Human Rights, Third Section, *Lăcătuș v. Switzerland*, Application no. 14065/15 (19 January 2021), para. 113. See S. Ganty, “The Double-Edged ECtHR *Lăcătuș* Judgment on Criminalisation of Begging. Da Mihi Elimo Sinam Propter Amorem Dei”, *European Convention on Human Rights Law Review* (2021): 1–28

The ground of socio-economic status

Overview

It is only relatively recently that the question of the protected ground of socio-economic status (SES) in anti-discrimination law has been brought up in the literature and invoked before courts. The relationship between discrimination and socio-economic disadvantage is a complex one. It is widely agreed that “groups which suffer from discrimination on status grounds [gender, racial or ethnic origin, etc.] are disproportionately represented among people living in poverty”,¹⁰⁵ and it has become clear that “status-based discrimination is frequently closely correlated with socio-economic disadvantage”.¹⁰⁶ Poverty or socio-economic precariousness is, in this sense, a consequence of the discrimination that vulnerable groups and minorities such as Roma, migrants, people of colour, single women, and persons with disabilities have historically had to endure.¹⁰⁷ Because of long-standing discrimination against them, these groups experience structural socio-economic disadvantage which is difficult to overcome.¹⁰⁸

Poverty or socio-economic precariousness is not only a consequence but also a cause of discrimination, creating a vicious cycle

In this context, structural socio-economic disadvantage has traditionally been tackled through the framework of socio-economic policies and rights. However, socio-economically underprivileged people are also subjected to stereotyping, prejudice, stigma, and

discrimination because of their socio-economically precarious situation, whether it is because of their reliance on social or housing assistance, their lack of education, their neighbourhood, their diploma from a school mainly attended by low-income students, the way they look and dress, their economic vulnerability, their lack of school materials, etc.¹⁰⁹ A study conducted by ATD Fourth World in France in 2014 shows that 97% of French people have at least one prejudice against people living in poverty.¹¹⁰ In this regard, poverty or socio-economic precariousness is not only a consequence but also a cause of discrimination, creating a vicious cycle.¹¹¹

¹⁰⁵ S. Fredman, “The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty”, *Stellenbosch Law Review* 22, no. 3 (2011): 566-590.

¹⁰⁶ S. Fredman, “Redistribution and Recognition: Reconciling Inequalities”, *South African Journal on Human Rights* 23 (2007): 214-234.

¹⁰⁷ Although the ground of socio-economic status is not limited to poverty but encompasses more broadly any situation related to socio-economic disadvantage, most of the discrimination happening on this ground is likely to concern people living in poverty.

¹⁰⁸ S. Ganty, “Poverty as Misrecognition: What Role for Antidiscrimination Law in Europe?”, *Human Rights Law Review* 21, no. 4 (2021): 962-1007.

¹⁰⁹ See, for a comprehensive overview, UN Special Rapporteur on extreme poverty and human rights, Olivier De Schutter, “The persistence of poverty: how real equality can break the vicious cycles”, A/76/177 (19 July 2021). <https://undocs.org/A/76/177>.

¹¹⁰ ATD Fourth World, *97 % des Français ont au moins un préjugé sur les pauvres ... mais leur opinion peut évoluer* (2014). <https://www.atd-quartmonde.fr/97-des-francais-ont-au-moins-un-prejugé-sur-les-pauvres-et-la-pauvrete-mais-leur-opinion-peut-evoluer/>.

¹¹¹ S. Ganty, “Poverty as Misrecognition: What Role for Antidiscrimination Law in Europe?”, *Human Rights Law Review* 21, no. 4 (2021): 962-1007.

The UN Special Rapporteur on extreme poverty and human rights explains that “children from poor families [...] face exclusion at school owing to their social origin. For example, 1 in 10 children in European countries belonging to the Organization for Economic Cooperation and Development (OECD) lacks access to basic clothing which can lead those children to face discrimination or be excluded or bullied at school both by their peers and school staff. A participatory action research project on education in Belgium identified that shame experienced by children in poverty was one of the key obstacles to successful schooling”.¹¹²

Besides the well-known dimensions related to deprivation (lack of decent work, insufficient and insecure income, and material and social deprivation), the researchers also identified dimensions which are much less considered in policy discussions, namely the relational dimension (or “relational dynamics”), which includes social maltreatment, institutional maltreatment, and unrecognised contributions, as well as the core experience of poverty, which places “the anguish and agency of people at the centre of the conceptualisation of poverty” and relates to suffering in body, mind, and heart, disempowerment, and struggle and resistance.¹¹³

These dimensions are essential when speaking of discrimination on grounds of SES, since they acknowledge that discrimination and exclusion (which mainly touch upon the relational dimension) are fully part of the phenomenon of poverty and nurture it, with important consequences on deprivation and the way people living in poverty perceive themselves.

Over the last two years, the Covid-19 pandemic has exacerbated inequalities, socio-economic disadvantage, and class divides, not only in terms of flexible working and the consequences of

¹¹² UN Special Rapporteur on extreme poverty and human rights, Olivier De Schutter, “The persistence of poverty: how real equality can break the vicious cycles”, A/76/177 (19 July 2021). <https://undocs.org/A/76/177>. See also : OECD, *Changing the Odds for Vulnerable Children, Building Opportunities and Resilience* (2019). <https://www.oecd.org/publications/changing-the-odds-for-vulnerable-children-a2e8796c-en.htm>; ATD Fourth World, *Changement pour l'égalité, Pour un école où tous réussissent* (2017). <https://atd-quartmonde.be/cms/wp-content/uploads/2018/03/NosAmbitionsPourEcole-BrochureWeb.pdf>.

¹¹³ Ibid.

exposure to the virus and long-term illness, but also regarding death rates and access to healthcare, making the question of socio-economic discrimination even more pressing.¹¹⁴

Although there is an increasing number of studies showing that discrimination on grounds of socio-economic status is widespread and needs to be tackled,¹¹⁵ this ground does not seem to have fully made its way into the anti-discrimination landscape of most European countries, either because it is not enshrined as a protected characteristic or because it is not implemented. As Ignatieff explained already 20 years ago, “while inequalities of gender, race, and sexual orientation have been made visible the last forty years, older inequalities of class and income have dropped out of the registers of indignation”.¹¹⁶

Some scholars such as Fineman have expressed objections against a prohibition of discrimination on grounds of socio-economic status, because “it does not provide a framework for challenging existing allocations of resources and power”.¹¹⁷ Fredman also argues that anti-discrimination law cannot “address status inequalities which require resources to correct them”.¹¹⁸ Although not rejecting as such the ground of socio-economic status, Atrey adopts a “contextual perspective” of anti-discrimination and poverty, considering that it is necessary to think beyond the perspective of poverty as a ground upon which inequality or discrimination are based: poverty needs to be tackled “as inhering in the very ideas or discourses of inequality or discrimination more broadly”.¹¹⁹

To be sure, there is a need to tackle socio-economic disadvantage and inequality through more structural measures and policies, and there is a need to link socio-economic disadvantage to discrimination operating on traditional grounds more broadly. In this context, anti-discrimination legislation prohibiting socio-economic discrimination should be seen as complementary to anti-poverty policies and measures, in a mutually reinforcing relationship,

¹¹⁴ According to the UK's Trades Union Congress. See also for instance: B. Burström, W. Tao, “Social determinants of health and inequalities in COVID-19”, *Eur. J. Public Health* 30, no. 4 (2020): 617–618; J. Patel, “Poverty, inequality and COVID-19: the forgotten vulnerable”, *Public Health* 30 (2020): 110–111; R. Blundell, “COVID-19 and Inequalities”, *Fiscal Studies* 41, no.2 (2020): 311–313; Cl. Bambra et al., “The COVID-19 pandemic and health inequalities”, *J Epidemiol Community Health* (2020): 1–5. See also S. Ganty, “The Veil of the COVID-19 Vaccination Certificates: Ignorance of Poverty, Injustice towards the Poor”, *European Journal of Risk Regulation* 12, no. 2 (2021): 343–354. And S. Ganty, “Socioeconomic Precariousness in Times of Covid-19: A Human Rights Quandary under the ECHR”. *Polish Yearbook of International Law* 40 (2021): 151.

¹¹⁵ S. Atrey, “The Intersectional Case of Poverty in Discrimination law”, *Human Rights Law Review* 18 (2018): 411–440; T. Kadar, *An analysis of the introduction of socio-economic status as a discrimination ground* (Equality and Rights Alliance, 2016). <http://17october.ie/wp-content/uploads/2019/08/Analysis-of-socio-economic-status-as-discrimination-final.pdf>; J.C. Benito Sánchez, ‘Towering Grenfell: Reflections around Socio-economic Disadvantage in Anti-discrimination Law’, *Queen Mary Human Rights Law Review* 5, no. 2 (2019): 1; A. Benn, “The Big Gap in Discrimination Law: Class and the Equality Act 2010”, *Oxford Human Rights Hub Journal* 3, no. 1 (2020): 30; S. Ganty, “Poverty as Misrecognition: What Role for Antidiscrimination Law in Europe?”, *Human Rights Law Review* 21, no. 4 (2021): 962–1007; Equinet, *Equality Bodies contributing to the protection, respect and fulfillment of Economic and Social Rights* (2015). https://equineteurope.org/wp-content/uploads/2019/02/economic_and_social_rights_electronic-3.pdf.

¹¹⁶ M. Ignatieff, *The Rights Revolution* (Anansi Press, 2000), p. 92.

¹¹⁷ M. A. Fineman, “The Vulnerable Subject: Anchoring Equality in the Human Condition”, *Yale Journal of Law and Feminism* 20 no. 1 (2008): 1–23.

¹¹⁸ S. Fredman, “Redistribution and Recognition: Reconciling Inequalities”, *South African Journal on Human Rights* 23 (2007): 221.

¹¹⁹ S. Atrey, “The Intersectional Case of Poverty in Discrimination law”, *Human Rights Law Review* 18 (2018): 414.

as it has already been argued.¹²⁰ Generally, as most of the interviewees evoked, there is a need in anti-discrimination law to tackle attitudes which treat people differently on the basis of their socio-economic situation and which mainly relate to the relational dimension of poverty. In other words, the prohibition of discrimination on grounds of socio-economic status is crucial to break the cycles that perpetuate poverty and socio-economic disadvantage.

Terminology

Grounds related to socio-economic status are widely protected in international, Council of Europe, EU, and national laws. At the United Nations level, Articles 2(1) and 26 of the International Covenant on Civil and Political Rights explicitly protect people against any discrimination (distinction) on grounds of “social origin [...] or other status”. It also enshrines the grounds of property and birth. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights contains a similar clause regarding the rights contained in it.

Social origin is also specified as a protected ground in Article 14 ECHR and Article 1 of Protocol No. 12 to the ECHR, besides the ground of property. As a reminder, Article 1 of Protocol No. 12 stands alone and does not have to be invoked in conjunction with another right guaranteed by the Convention, as opposed to Article 14. Article E of the revised European Social Charter—which does not stand alone either—also prohibits discrimination on grounds of social origin, birth, or other status.

Article 21 CFREU forbids discrimination based on social origin and property, as opposed to Article 19 TFEU and the EU anti-discrimination directives, which do not. However, as explained above, the Charter has a limited scope of application.¹²¹ We have already noted in the *Tour d’horizon* section that a minority of European countries explicitly enshrine grounds related to socio-economic status, including social origin, social status, property, wealth, economic vulnerability, financial status, housing assistance, education, social standing, etc.

However, the different labels related to socio-economic status have been debated in the literature as to whether they are encompassing enough. For instance, at international level, “social origin” is presented as a very vague concept and it is rarely developed. General Comment No. 20 of the UN Committee on Economic, Social and Cultural Rights, entitled “Non-discrimination in economic, social and cultural rights”, explains that “‘social origin’ refers to a person’s inherited social status and refers to ‘property’ status, descent-based discrimination under ‘birth’ and ‘economic and social status’”.¹²²

The Committee seems to attribute quite a broad meaning to “economic and social status”, since it considers that: “individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person’s social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or

¹²⁰ UN Special Rapporteur on extreme poverty and human rights, Olivier De Schutter, “The persistence of poverty: how real equality can break the vicious cycles”, A/76/177 (19 July 2021), paras. 53-54, <https://undocs.org/A/76/177>.

¹²¹ Article 51(1) of the Charter of Fundamental Rights of the European Union.

¹²² United Nations, Committee on Economic, Social and Cultural Rights, “General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights)”, E/C.12/GC/20 (2 July 2009), para 24.

unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places”.¹²³

Nonetheless, it has been argued that the concept of social origin is limited to inherited situations, coming close to the ground of birth. Its scope is very narrow, since it must encompass a “heritage/ancestry dimension” and it is not likely to fully capture the socio-economic status on the basis of which a person is discriminated against whenever this status is not *per se* inherited.¹²⁴

Regarding the ground of property, this is “a broad concept and includes real property (e.g. land ownership or tenure) and personal property (e.g. intellectual property, goods and chattels, and income), or the lack of it”.¹²⁵ Nonetheless, it only refers to one’s material situation, without taking into account other criteria such as professional status or education.

Following this debate, authors such as MacKay and Kim have argued for the acknowledgement of a broader concept like “social condition”, which does not require any inherited characteristics and which is not limited to wealth.¹²⁶ Social condition is about the present situation, and it refers to the condition of inclusion of an individual in a socially identifiable group which suffers from social or economic disadvantage resulting from poverty, low income, illiteracy, poor education, or any other similar circumstance.¹²⁷ Social condition encompasses many features of socio-economic position, and it requires the victim of discrimination to be a member of a socially disadvantaged group,¹²⁸ to prevent wealthy individuals from claiming that they have been discriminated against by social policies which they do not benefit from. Benn considers that “class” is more appropriate and detailed, and defines it as “a status that depends on social, cultural and economic aspects of a person’s life”.¹²⁹

This rather theoretical debate on the best term to address socio-economic discrimination does not appear to arise among survey participants and interviewees: there is a wide consensus on the terms of socio-economic situation/status/disadvantage. For some, “socio-economic disadvantage” would be the preferred term, since it is asymmetrical and not limited to a money-based approach like the grounds of wealth or property.¹³⁰ Moreover, it has been emphasised that the ground of socio-economic disadvantage should also encompass perceived

¹²³ Ibid., para 35.

¹²⁴ W. MacKay and N. Kim, “Adding Social Condition to the Canadian Human Rights Act” (Canadian Human Rights Commission, 2009), p. 37.

https://publications.gc.ca/collections/collection_2012/ccdp-chrc/HR4-14-2009-eng.pdf.

¹²⁵ United Nations, Committee on Economic, Social and Cultural Rights, “General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights)”, E/C.12/GC/20 (2 July 2009), para. 25.

¹²⁶ W. MacKay and N. Kim, “Adding Social Condition to the Canadian Human Rights Act” (Canadian Human Rights Commission, 2009), p. 37.

https://publications.gc.ca/collections/collection_2012/ccdp-chrc/HR4-14-2009-eng.pdf; A. Benn, “The Big Gap in Discrimination Law: Class and the Equality Act 2010”, *Oxford Human Rights Hub Journal* 3, no. 1 (2020): 30.

¹²⁷ W. MacKay and N. Kim, “Adding Social Condition to the Canadian Human Rights Act” (Canadian Human Rights Commission, 2009), p. 127.

https://publications.gc.ca/collections/collection_2012/ccdp-chrc/HR4-14-2009-eng.pdf.

¹²⁸ Ibid., p. 10.

¹²⁹ A. Benn, “The Big Gap in Discrimination Law: Class and the Equality Act 2010”, *Oxford Human Rights Hub Journal* 3, no. 1 (2020): 30.

¹³⁰ According to Olivier De Schutter.

socio-economic disadvantage and not only actual socio-economic disadvantage,¹³¹ and it should be intelligible for equality bodies, courts, and victims of such discrimination alike.¹³² Others explain that terminology is not that important but we should rather aim towards a consensus in society for an intelligible term, or towards a term that fits well in the existing national anti-discrimination legal framework.¹³³

Sometimes, specific instances of socio-economic status recognised as grounds prove themselves to be working well, like the ground of housing assistance introduced in Ireland in 2016,¹³⁴ which is used relatively frequently and successfully partly because it is very narrow and specific.¹³⁵ However, these subsets of grounds are unlikely to achieve an effective overall protection on the ground of socio-economic status. The Irish Human Rights and Equality Commission has been advocating for several years for the recognition of the ground of socio-economic status as such, since, besides the ground of housing assistance, there is no possibility to invoke discrimination on any other ground related to socio-economic status in Ireland.

In Ireland, the Equality (Miscellaneous Provisions) Bill 2021, which is currently pending before the Irish House of Representatives, defines the characteristic of socio-economic disadvantage as “having disadvantaged social status or disadvantaged economic status, or both, that may be indicated by a person’s inclusion, other than on a temporary basis, in a socially or geographically identifiable group that suffers from such disadvantage resulting from one or more of the following poverty, source of income, illiteracy, level of education, address, type of housing or homelessness, employment status, social or regional accent, or from any other similar circumstance.”¹³⁶

General remarks on non-recognition and insufficient implementation

As mentioned above, the ground of socio-economic status is not explicitly recognised in the ECHR or the revised European Social Charter (RESC), although Article 14 ECHR enshrines the ground of property and social origin and Article E of the RESC foresees the ground of social origin too. However, both Article 14 ECHR and Article E RESC (which have to be invoked in conjunction with another right of the Convention or the Charter, respectively) incorporate an

¹³¹ According to Olivier De Schutter

¹³² According to ATD Fourth World.

¹³³ According to ATD Fourth World.

¹³⁴ On 1 January 2016, the Equality (Miscellaneous Provisions) Act 2015 introduced “housing assistance” as a new discriminatory ground.

¹³⁵ In 2020, out of 610 queries brought before the Irish Human Rights and Equality Commission based on the Equal Status Acts 2000- 2018, 19% were based on the grounds of housing assistance. See: Irish Human Rights and Equality Commission, *Annual Report 2020* (2021).

https://www.ihrec.ie/app/uploads/2021/07/IHREC_2020_AR_English_FA_pages.pdf.

¹³⁶ Article 2 of Equality (Miscellaneous Provisions) Bill 2021:

<https://data.oireachtas.ie/ie/oireachtas/bill/2021/6/eng/initiated/b0621d.pdf>.

open-ended clause under which discrimination on grounds of socio-economic status could potentially be invoked.

Nevertheless, the ECtHR has been reluctant to rule on the basis of the ground of SES: when an applicant claims to be a victim of discrimination based on their socio-economic situation under Article 14 ECHR, the ECtHR tends to consider that this “does not raise a separate issue”.¹³⁷ The European Committee of Social Rights (ECSR) has, for its part, found discrimination based on socio-economic status in the framework of several collective complaints.¹³⁸



The case of *Central Union for Child Welfare v. Finland*¹³⁹ concerned an amendment to the Finnish Act on Early Childhood Education and Care which restricted the individual entitlement to early childhood education and care to 20 hours per week where one of the parents was unemployed or on maternity, paternity, or parental leave for a sibling. Examining this provision, the Committee found an instance of discrimination based on parents' socio-economic status with regard to children's right of access to education and care.¹⁴⁰ According to the Committee, the need to cut the annual costs of preschool facilities cannot objectively and reasonably justify the difference of treatment at stake, especially because “unemployment of a parent is already a factor that has a harmful impact on children, and yet restricting access for this group of children to early childhood education and care makes their position even more difficult”.¹⁴¹

At the EU level, neither the ground of socio-economic status nor any related grounds are covered by Article 19 TFEU. Article 21(1) CFREU prohibits discrimination on grounds of social origin and property and is open-ended. However, its scope of application is limited to Article 51(1), i.e. EU institutions and agencies, and Member States only insofar as they are

¹³⁷ See for instance, European Court of Human Rights, Fifth Section, *Wallová and Walla v. Czech Republic*, Application No 23848/04 (26 October 2006), para. 88; European Court of Human Rights, *Loncke v. Belgium*, Application No 20656/03 (25 September 2007), para 59 and more recently European Court of Human Rights, Fourth Section, *N. v. Romania*, Application No 38048/18 (16 November 2021). The Court has ruled discrimination cases under the ground of property, although the cases did not concern people discriminated against because of their socio-economic disadvantage: European Court of Human Rights, *Chabauty v. France*, Application No 57412/08 (4 October 2012); European Court of Human Rights, *Chassagnou and others v France*, Applications No 25088/94, 28331/95, 28443/95 (29 April 1999).

¹³⁸ European Committee of Social Rights, *International Federation for Human Rights (FIDH) and Inclusion Europe v. Belgium*, Collective complaint No. 141/2017 (9 September 2020).

¹³⁹ European Committee of Social Rights, *Central Union for Child Welfare v. Finland*, Collective complaint no. 139/2016 (11 September 2019).

¹⁴⁰ Violation of Article E in conjunction with Article 17§1(a), which requires the establishment or maintenance of sufficient institutions or services suited to the purpose of educating children, and of Article E in conjunction with Article 16, which enshrines the right of the family to social, legal, and economic protection.

¹⁴¹ European Committee of Social Rights, *Central Union for Child Welfare v. Finland*, Collective complaint No. 139/2016 (11 September 2019), para. 71.

implementing EU law, and the CJEU has already found cases involving a discrimination on grounds of property inadmissible on the basis of Article 21(1) for clear lack of jurisdiction.¹⁴² As a consequence, when a situation entailing a discrimination on grounds of socio-economic status falls within the scope of application of Article 51(1) CFREU, Article 21(1) constitutes an alternative to protect victims of such discrimination,¹⁴³ especially since it has a horizontal direct effect.¹⁴⁴

For instance, integration tests required by some Member States such as the Netherlands as a condition for a family reunification visa are likely to raise important issues of discrimination on grounds of socio-economic status, since the costs of the tests and the preparatory courses as well as their difficulty negatively impact migrants who are in an underprivileged socio-economic situation. In *K & A*, which concerned the compatibility of Dutch integration tests with Directive 2003/86/EC on the right to family reunification,¹⁴⁵ although the CJEU touched upon the question of the socio-economic situation of the applicants under the specific individual circumstances requirement,¹⁴⁶ the question of discrimination under Article 21(1) of the Charter was not brought up by the applicant, neither ruled upon by the Court, while the tests could have been challenged on that basis.

Interestingly, in a case where the applicants were challenging the excessive and disproportionate administrative charges that migrants had to pay to obtain long-term resident status,¹⁴⁷ Advocate General Bot indicated that “the principle of non-discrimination seems to me to preclude the establishment of charges the amounts of which have a deterrent effect on third-country nationals who do not have sufficient financial resources”.¹⁴⁸

As a consequence, a good practice would be for practitioners to systematically invoke discrimination on grounds of socio-economic status in cases which fall under the scope of application of EU law, i.e. when Member States are implementing EU law and where socio-economically underprivileged people are negatively impacted by the measure or policy at stake. In this vein, it is worth noting that the CJEU has already ruled in one case where discrimination on grounds of property was claimed, although it leaves a broad discretion to Member States, especially when the alleged discrimination concerns socio-economic rights such as pensions.¹⁴⁹

¹⁴² See for instance Court of Justice of European Union (Ninth Chamber), Ordinance of 15 November 2015, *Corpul Național al Polițiștilor – Biroul Executiv Central*, Case C-369/12, EU:C:2012:725.

¹⁴³ It goes similarly for the ground of genetic features, which is explicitly enshrined in Article 21(1), and physical appearance, which could potentially be considered under the open-ended clause.

¹⁴⁴ Court of Justice of the European Union (Grand Chamber), Judgment of 17 April 2018, *Egenberger*, Case C-414/16, EU:C:2018:257, paras. 87-79.

¹⁴⁵ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (2003) OJ L 251/12.

¹⁴⁶ Court of Justice of the European Union (Second Chamber), Judgment of 9 July 2015, *K & A*, Case C-153/14, EU:C:2015:453, para. 58. See also : S. Ganty, *L'intégration des citoyens européens et des ressortissants de pays tiers en droit de l'Union européenne. Critique d'une intégration choisie*, Larcier, Collect. Droit de l'Union européenne, 2021, p. 765 et seq.

¹⁴⁷ Court of Justice of the European Union (Second Chamber), Judgment of 26 April 2012, *Commission v the Netherlands*, Case C-508/10, EU:C:2012:243.

¹⁴⁸ Opinion of the Advocate General Yves Bot delivered on 19 January 2012, EU:C:2012:25, para 69.

¹⁴⁹ Court of Justice of the European Union (Third Chamber), Judgment of 24 September 2020, *YS v NK AG*, Case C-223/19, EU:C:2020:753, paras. 82-85. See also paras. 61-66 for the question of the margin of appreciation of Member States.

At national level, in some countries such as Austria, Germany, or Ireland the ground of socio-economic status does not constitute a protected characteristic as such and no discrimination can be found on this ground in the absence of an open-ended clause, despite the fact that, as mentioned above, some equality bodies in these countries have actively lobbied for the recognition of such a ground.

Furthermore, where socio-economic status is recognised as a protected characteristic, its use varies enormously from one country to another. In some countries, there is a scarce use of this ground and little case law on it, as is the case in Georgia, where no case of discrimination on the basis of socio-economic status was evoked to the exception of the issue of unpaid internships (see below).¹⁵⁰ Greece prohibits discrimination on grounds of social status in the field of employment, but it is rarely invoked.¹⁵¹ The situation is not different in the Czech Republic, where discrimination on grounds of social origin and property is only prohibited in the field of education, employment, and judicial process, while socio-economic discrimination mainly occurred in the field of housing (including municipal housing), as reported by the Public Defender of Rights.¹⁵² The same phenomenon can be observed in Serbia, where the grounds of financial position and income level are, however, explicitly enshrined in the General Law on Prohibition of Discrimination, which covers all fields.¹⁵³

In a few other countries, this ground has been increasingly invoked and implemented over the last few years. In Bulgaria, in 2020, most of the complaints brought before the Commission for Protection against Discrimination (and especially the panel in charge of the grounds of “education, belief, political affiliation, social status, and property status”) were related to education and social status, although rarely successful for the latter.¹⁵⁴ In France, in 2020, the economic vulnerability ground was the 7th most invoked ground (5,4%), after disability, origin, health, nationality, family status, and age.¹⁵⁵ In Belgium, the ground of wealth is the 4th most frequent ground among cases brought before the Belgian Inter-federal Centre for Equal

¹⁵⁰ Public Defender (Ombudsman) of Georgia, “Special Report of the Public Defender of Georgia On Combating and Preventing Discrimination and the State of Equality” (2020), para. 8.3. <https://ombudsman.ge/res/docs/2021051313265374968.pdf>. See also the Special Report of the Public Defender of Georgia on Combating and Preventing Discrimination and the State of Equality for 2020, 2019 and 2018.

¹⁵¹ See Article 1 (1) of Law 4443/2016 http://www.et.gr/idos-nph/search/pdfViewerForm.html?args=5C7QrtC22wFHp_31M9ESQXdtvSoClrL8noyF6ARJ3CN5MXDoLzQTLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx9hLslJUqeiQ3nbkBCEPywVlvhGvSNl91LE_vq03KD6K8AIw9U2mQRQ.

¹⁵² See Article 16, Act No. 262/2006 Coll., Labour code; Article 4, Act No. 435/2004 Coll., act on employment; Article 2, Act No. 561/2004 Coll., act on pre-school, basic, secondary, tertiary, professional and other education (the education act); article 18, Act No. 99/1963 Coll., act on Civil procedure.

¹⁵³ Serbian Law on the Prohibition of Discrimination. http://ravnopravnost.gov.rs/wp-content/uploads/2012/11/images_files/Zakon_o_zabrani_diskriminacije_i_prevodi.pdf.

¹⁵⁴ Commission for Protection against Discrimination (Bulgaria), “Annual Report for the activities of the Commission for Protection against Discrimination for 2020” (2020).

¹⁵⁵ Défenseur des droits (French Ombudsman), Rapport annuel d’activités (2020). https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddd_rapport-annuel-2020_25-03-2021.pdf.

Opportunities (Unia), after race, disability, and religion¹⁵⁶ (184 complaints were brought on this ground while there were only 76 in 2015).¹⁵⁷

Whether the ground of socio-economic status is effectively implemented also depends on the field taken into account. In Belgium, out of 184 complaints in 2020, 171 related to access to good and services (mainly housing) and only 4 concerned the field of education, where people either do not feel that they are discriminated against or do not see the equality body as a helpful actor in this context.

Reasons for non-recognition or insufficient implementation

Several factors can be mentioned to explain why there is non-recognition or an insufficient implementation of the ground of SES, namely: confusion between socio-economic rights and socio-economic discrimination, individual responsibility, under-reporting, and the issue of proof.

Confusion between socio-economic rights and socio-economic discrimination

Several points can be raised concerning the relationship between socio-economic rights and socio-economic discrimination. Firstly, there is a confusion between socio-economic rights, on the one hand, and socio-economic discrimination, on the other hand, and the distinction between them is not always clear:¹⁵⁸ it is sometimes believed that the very existence of socio-economic rights makes it unnecessary to enshrine a prohibition of discrimination on grounds of SES, or that socio-economic rights should take priority over fighting against socio-economic discrimination.¹⁵⁹ This confusion arises even among some interviewees.¹⁶⁰

Claims based on discrimination on grounds of socio-economic status should be however distinguished from claims based on economic, social, and cultural rights. While the former primarily pursue a recognition aim (but not exclusively) and are related to the aforementioned “relational dimension” of poverty, the latter mainly pursue a redistributive aim linked to material deprivation.¹⁶¹ Those claims are sometimes closely linked, such as in the case of housing, where people receiving social assistance benefits are systematically rejected because

¹⁵⁶ Belgian Interfederal Center for Equal Opportunities (Unia), *Rapport chiffres* (2020). <https://www.unia.be/fr/publications-et-statistiques/publications/rapport-chiffres-2020>. Please note that the ground of sex/gender is not included in these statistics as there is a separate equality body which deals with issues related to equality between women and men.

¹⁵⁷ Ibid.

¹⁵⁸ This was pointed out by ATD Fourth World and Austria.

¹⁵⁹ This was pointed out by ATD Fourth World.

¹⁶⁰ For instance, one interviewee stated with regard to socio-economic discrimination that “an authoritative way of saying everyone should earn the same or have the same way of living is a complex issue” and another one explained that the ground of socio-economic status is linked to social reality in a given country and it might be difficult to find common standards across Europe as countries have very different standards of life. This confusion leads to the real concern that the middle class could use the prohibition of socio-economic discrimination to gain protection or advantages for themselves, thereby acting against the spirit of the legislation, as it was explained by the UK’s Trades Union Congress .

¹⁶¹ S. Fredman, “Redistribution and Recognition: Reconciling Inequalities”, *South African Journal on Human Rights* 23 (2007): 214-234.

they are regarded as poor and unreliable. Several examples can be found within European countries.

The Public Defender of Georgia has reported that: “People who are in a socially disadvantageous position face particular challenges in terms of the realisation of their social and economic rights. Consequently, in addition to state-provided programmes, it is vital for them to get education and be employed. Paradoxically, in the process of taking the necessary steps for career advancement, people face substantial obstacles precisely because of their social status. A clear example of this is the internship system in Georgia. Internships and professional experience are one of the most common job requirements today. However, the Public Defender’s practice shows that the chances of finding a paid internship in public institutions and gaining work experience are quite limited. A large proportion of young people, due to the financial challenges they face, cannot afford to do an unpaid internship, which deprives them of the opportunity to gain professional experience and puts them in an unequal position compared to other young people who have no similar financial problems. Being able to afford an unpaid internship is therefore directly related to financial opportunities, which contribute to the deepening of already existing social inequalities in the future.”¹⁶²

A study carried out by the French Defender of Rights showed that people are refused healthcare by 9% of dentists, 11% of gynaecologists, and 15% of psychiatrists because of their socio-economic situation, especially when they relied on health assistance (which covers the fraction of the costs that is not reimbursed by their health insurance). Moreover, 42% of people relying on such assistance were refused an appointment with dentists, gynaecologists, or psychiatrists.¹⁶³

¹⁶² Public Defender (Ombudsman) of Georgia, “Special Report of the Public Defender of Georgia on Combating and Preventing Discrimination and the State of Equality” (2020), para. 8.3. <https://ombudsman.ge/res/docs/2021051313265374968.pdf>.

¹⁶³ Défenseur des droits (French Ombudsman), *Les refus de soins discriminatoires liés à l’origine et à la vulnérabilité économique : tests dans trois spécialités médicales en France. Études & Résultats* (October 2019). <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/etres-refussoins-num-21.10.19.pdf>. The French Ombudsman found that such a situation is discriminatory on grounds of economic vulnerability and origin (Défenseur des droits, decision n°2020-233, 11 December 2020).

Claims related to socio-economic rights and socio-economic discrimination might not be related to each other, as in cases of discrimination against people in precarious situations regarding their civil and political rights, such as the right to choose one's residence in the context of gentrification policies.¹⁶⁴ People may also be discriminated against in their access to social and economic rights because of other characteristics than SES.¹⁶⁵ Moreover, socio-economic rights are not able to address situations in which socio-economically disadvantaged people are treated differently, directly or indirectly, precisely because of their precarious situation.

Finally, from a procedural perspective, the justiciability of socio-economic rights is relatively low: socio-economic rights are the “poor parents” of human rights, the “Cinderella” of fundamental rights,¹⁶⁶ not only because their formulation focuses primarily on obligations of means—through programmatic statements—rather than obligations of result, but also because of their ineffective implementation, since courts tend to leave a wide margin of appreciation to states in those areas. For example, according to the settled case law of the ECtHR, “because of their direct knowledge of their society and its needs, national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds. The Court will generally respect the legislature’s policy choices unless it is ‘manifestly without reasonable foundation’”.¹⁶⁷ The CJEU adopts a similar position concerning social and employment measures.¹⁶⁸

The level of scrutiny by courts in these matters is therefore lighter than in other areas. In this context, when people are discriminated against on grounds of their socio-economic status in their access to socio-economic rights, anti-discrimination law is likely to be highly protective, not only because it captures the situation of stigma that socio-economic rights do not necessarily encompass but also because the justiciability of discrimination on grounds of socio-economic status is likely to be strong, as the previous examples regarding unpaid internships and refusal of healthcare to people on social benefits show. In this context, the

¹⁶⁴ European Court of Human Rights, Grand Chamber, *Garib v. The Netherlands*; Application No 43494/09, (6 November 2017). V. David and S. Ganty, “Strasbourg fails to protect the rights of people living in or at risk of poverty: the disappointing Grand Chamber judgment in *Garib v the Netherlands*”, *Strasbourg Observers*, (16 November 2017).

<https://strasbourgobservers.com/2017/11/16/strasbourg-fails-to-protect-the-rights-of-people-living-in-or-at-risk-of-poverty-the-disappointing-grand-chamber-judgment-in-garib-v-the-netherlands/>.

¹⁶⁵ European Court of Human Rights, Fourth Section, *Vrountou v. Cyprus*, Application No 33631/06 (13 October 2015).

¹⁶⁶ S. Fredman, *Human Rights Transformed: Positive rights and positive duties* (Oxford University Press, 2008) : 2; I. Leijten, *Core rights and the protection of socio-economic interests by the European Court of Human Rights* (Cambridge University Press, 2018): 26-28. See also: L. Lavrysen, “Strengthening the Protection of Human Rights of Persons Living in Poverty under the ECHR” *Netherlands Quarterly of Human Rights* 33, (2015): 293.

¹⁶⁷ European Court of Human Rights, *Stec and Others v the United Kingdom*, Applications no. 65731/01 and no 65900/01 (12 April 2006); European Court of Human Rights, *J.D. and A. v The United Kingdom*, applications no. 32949/17 and no. 34614/17 (24 October 2019), paras. 77 and 89; European Court of Human Rights (Grand Chamber), *Carson and Others v. the United Kingdom*, Application no. 42184/05 (16 March 2010); European Court of Human Rights, *Bah v. the United Kingdom*, Application no. 56328/07 (27 September 2011), para. 47; European Court of Human Rights, *Hudorovič and others v Slovenia*, applications no. 24816/14 and 25140/14 (10 March 2020) paras 141, 144 and 148.

¹⁶⁸ Court of Justice of the European Union (Grand Chamber), Judgment of 12 October 2010, *Ingeniørforeningen v Denmark*, C-499/08, ECLI:EU:C:2010:600, para 33; Court of Justice of the European Union (Grand Chamber), Judgment of 22 November 2005, *Mangold v Helm* 22 November 2005, C-144/04, ECLI:EU:C:2005:709, para 63.

prohibition of socio-economic discrimination becomes a powerful tool to tackle head on the recognition problems encountered by vulnerable people which socio-economic rights are unable to combat.¹⁶⁹

Individual responsibility

Socio-economic discrimination is sometimes not seen as a priority based on the false belief that socio-economic situation can be changed and is related to individual responsibility. One interviewee reported that the lack of commitment in the fight against discrimination on grounds of socio-economic status could be explained by the fact that the question of whether a socio-economic situation is innate and/or its link to individual responsibility is sometimes debatable. The debate surrounding the recent amendment to the Dutch Constitution to introduce a new explicit ground is also illustrative: discrimination on socio-economic grounds was considered as being of a different nature than disability and sexual orientation, as it is not an inherent or unchangeable characteristic but (allegedly) mutable.¹⁷⁰

Socio-economic disadvantage is sometimes—not to say usually—viewed as a state which is changeable and a matter of individual responsibility. As put by Atrey, “viewed through this individualistic lens, poverty obviously fell beyond the purview of discrimination as concerned with structural disadvantage between groups rather than individual circumstances”.¹⁷¹ This also echoes what Bridges has coined “the moral construction of poverty”, referring to the discourse according to which people are poor because there is something wrong with them and they are themselves responsible for their situation of poverty.¹⁷²

However, there are countless studies showing that people are poor because of structural reasons outside their control and that poverty is passed on from one generation to another.¹⁷³ “Poverty [...] is not the result of laziness, a lack of self-control or deficient planning: it has its sources in structural factors such as high unemployment, stagnating wages and discrimination.”¹⁷⁴

¹⁶⁹ S. Ganty, “Poverty as Misrecognition: What Role for Antidiscrimination Law in Europe?”, *Human Rights Law Review* 21, no. 4 (2021): 962–1007.

¹⁷⁰ Tweede Kamer, *Het Voorstel van wet van de leden Bergkamp, Özütok en Van den Hul houdende verklaring dat er grond bestaat een voorstel in overweging te nemen tot verandering in de Grondwet, strekkende tot toevoeging van handicap en seksuele gerichtheid als non-discriminatiegrond (32411)*, Doc. 86/34 (23 June 2020). https://www.eerstekamer.nl/behandeling/20200623/voortzetting_behandeling/document3/f=/vlaxn4aivpz7.pdf.

¹⁷¹ S. Atrey, “The Intersectional Case of Poverty in Discrimination law”, *Human Rights Law Review* 18 (2018): 421.

¹⁷² K. Bridges, *The Poverty of Privacy Rights* (Stanford University Press, 2017): 38–64.

¹⁷³ See for instance: OECD, *A Broken Social Elevator? How to Promote Social Mobility* (Paris, 2018), p. 14. https://read.oecd-ilibrary.org/social-issues-migration-health/broken-elevator-how-to-promote-social-mobility_9789264301085-en.

¹⁷⁴ See UN Special Rapporteur on extreme poverty and human rights, Olivier De Schutter, “The persistence of poverty: how real equality can break the vicious cycles”, para. 39. A/76/177 (19 July 2021). <https://undocs.org/A/76/177>.

The UN Special Rapporteur for extreme poverty and human rights recalls that “children born poor have significantly more chances of remaining poor in their adult lives because of a number of mechanisms that perpetuate poverty from one generation to the next. In countries in the OECD, it would take around four to five generations for children from the bottom income decile to attain the level of mean earnings. Some 63 per cent of children with highly educated parents achieve tertiary levels of education, while this is the case for only 15 per cent of children whose parents did not complete secondary school, and only 7 per cent of children with highly educated parents have only a primary education, compared with 42 per cent of those whose parents’ highest level of education was lower secondary. Children whose parents are wealthy also have 13 per cent less chance of having a chronic health condition as adults.”¹⁷⁵

Under-reporting

Even when the ground of socio-economic status is explicitly prohibited in anti-discrimination legislation, people discriminated against on this ground will often not report such discrimination. Under-reporting is an important obstacle to the protection offered by anti-discrimination law. This phenomenon has already been largely documented,¹⁷⁶ and it is particularly evident when it comes to socio-economic discrimination.

One important factor with regard to socio-economic discrimination and under-reporting is the lack of self-esteem: people do not want to be labelled, even if they otherwise would fall under a specific ground,¹⁷⁷ especially when it comes to their socio-economic situation because of their feeling of shame.¹⁷⁸ Along these lines, when people are discriminated against on grounds of several characteristics, they prefer to invoke another ground which is less “shameful”.¹⁷⁹

¹⁷⁵ Ibid., para. 1.

¹⁷⁶ See for instance: Bööck et al., *A comparative analysis of gender equality law in Europe 2020. The 27 EU Member States, Albania, Iceland, Liechtenstein, Montenegro, North Macedonia, Norway, Serbia, Turkey and the United Kingdom compared 2020* (European network of legal experts in gender equality and non-discrimination, 2021), pp. 151-171. <https://op.europa.eu/en/publication-detail/-/publication/fc350c8a-b9e0-11eb-8aca-01aa75ed71a1>; European Union Agency for Fundamental Rights, *Equality in the EU: 20 Years on from the Initial Implementation of the Equality Directives*, pp. 50-56. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-opinion-equality-directives-01-2021_en.pdf; EU Commission, Report the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘the Racial Equality Directive’) and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (‘the Employment Equality Directive’), COM(2021)139 final Brussels, 19 Mars 2021, pp. 6-7.

¹⁷⁷ It is the case in Bulgaria.

¹⁷⁸ According to Austria.

¹⁷⁹ According to ATD Fourth World.

It has been shown in the literature that people in precarious situations are often ashamed of their position and feel responsible for it.¹⁸⁰ The stereotypes and prejudice they are victims of reinforce the feelings of being inferior or worthless.¹⁸¹ Therefore, poor people try to avoid being identified with such groups and are unlikely to claim redress for the discrimination they suffer on account of their socio-economic situation. People who are socio-economically disadvantaged also encounter financial and practical obstacles to claim their rights and bring their cases before courts.¹⁸² In other words, “poverty and social exclusion contribute to the under-reporting of discrimination”.¹⁸³

Other factors contributing to the under-reporting of socio-economic discrimination have been mentioned by interviewees, notably: the fear of litigation and of public authorities (some people might fear losing the custody of their children, for instance),¹⁸⁴ people not being used to dealing with the government, a low level of education,¹⁸⁵ as well as the digital divide,¹⁸⁶ which echoes several reports and academic works.¹⁸⁷ Finally, several interviewees explained that equality bodies and their role are not always known by people who face socio-economic disadvantage,¹⁸⁸ which has been empirically demonstrated.¹⁸⁹

¹⁸⁰ J. Ianni, B. Luyts and B. Tardieu, *Discrimination et pauvreté. Livre Blanc: analyse, testings et recommandations* (ATD Fourth World, 2013). https://www.atd-quartmonde.fr/wp-content/uploads/2014/08/DiscriminationPauvrete_LivreBlanc.pdf.

¹⁸¹ Ibid.

¹⁸² Administrative costs involving long periods spent queuing, filling forms, and obligations to report detailed information and provide extensive documentation to the welfare agencies appear to play an important role in non-take-up. Hernanz et al., *Take-up of Welfare Benefits in OECD countries: a review of the evidence* (OECD Social, Employment and Migration Working papers No 17, 2004). <https://www.oecd.org/els/soc/30901173.pdf>; See the example of Austria and France: M. Fuchs et al., “Falling through the social safety net? Analysing non-take-up of minimum income benefit and monetary social assistance in Austria”, *Social Policy and Administration* 54 (2020): 827; S. Chareyron, P. Domingues, “Take-up of Social Assistance Benefits: the Case of the French Homeless”, *Review of Income and Wealth* 64 (2018): 170.

¹⁸³ Equinet, *Addressing Poverty and Discrimination: Two Sides of the One Coin* (2010). www.equineteurope.org/wp-content/uploads/2019/02/poverty_opinion_2010_english.pdf.

¹⁸⁴ According to ATD Fourth World.

¹⁸⁵ According to Austria.

¹⁸⁶ According to Belgium and ATD Fourth World.

¹⁸⁷ J. Van Dijk, “Digital Divide: Impact of Access” in P. Rössler, C. Hoffner and L. Zoonen (eds.), *The International Encyclopedia of Media Effects* (John Wiley & Sons, 2017). It overlaps with a urban/rural divide and a age gap (Eurostat, ‘Digital Economy and Digital Economy Statistics a Regional Level’ (2021)), as well as gender gap (ITU publications, ‘Measuring Digital Development, Facts and Figures’ (2019)). As for an example of how the digital divide is likely to affect poverty, see: I. Mingo, R. Bracciale, “The Matthew Effect in the Italian Digital Context: The Progressive Marginalisation of the “Poor”” *Soc Indic Res* 135 (2018): 629–659.

¹⁸⁸ According to Bulgaria, Georgia, Austria and Belgium.

¹⁸⁹ EU Commission, *Eurobaromètre : Perception de la discrimination dans le société (Belgium)* (2015). https://www.unia.be/files/Documenten/Publicaties_docs/ebs_437_fact_be_fr.pdf.

In order to address the phenomenon of under-reporting within socio-economically underprivileged communities, the Public Defender of Georgia organises outreach actions to raise awareness and to increase the number of applications coming from these communities. They go to remote areas on a regular basis to discuss problematic issues with them, including infrastructure, food, employment, their rights, and the remedies available.

The issue of proof

The issue of proof has also been raised by interviewees: it may be difficult to find a violation on the basis of socio-economic situation in some cases as the legal qualification of such a situation might not always be clear-cut.¹⁹⁰ In this context, evidence of discrimination on other grounds might be easier to bring.¹⁹¹ For instance, in Ireland the ground of housing assistance has been successful because it is clearly defined and specific, but other cases of socio-economic discrimination (if this ground is enshrined someday) might be more difficult to prove, such as access to other services (e.g. refusal of services in a restaurant due to last name or accent).

An important way to tackle the issue of proof is data collection in fields where discrimination on grounds of socio-economic status is likely to occur, such as education, housing, employment, healthcare, and access to services. This is particularly important when indirect discrimination is at stake, i.e. when people are disadvantaged based on their underprivileged socio-economic situation because of an apparently neutral practice. In the past years, some equality bodies, researchers, and organisations, for instance in France and Belgium, have conducted an increasing number of studies shedding light on the scale of discrimination on grounds of socio-economic status in the aforementioned fields.¹⁹²

This research and data constitute very important resources in front of courts in terms of proof, especially in cases of systemic discrimination. Indeed, as recalled by the ECtHR in the context of domestic violence, “a general policy or a *de facto* situation which has disproportionately prejudicial effects on a particular group may constitute discrimination against that group within the meaning of Article 14 ECHR even where it does not specifically target that group

¹⁹⁰ According to Ireland.

¹⁹¹ According to Georgia and Belgium.

¹⁹² See for instance in France and in Belgium: Belgian Interfederal Center for Equal Opportunities (Unia), *Diversity Barometer Housing*. <https://www.unia.be/en/publications-statistics/publications/diversity-barometer-housing>; Défenseur des droits (French Ombudsman), *Les refus de soins discriminatoires liés à l'origine et à la vulnérabilité économique : tests dans trois spécialités médicales en France. Études & Résultats* (October 2019), <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/etres-refussoins-num-21.10.19.pdf>. See also : ATD Quart Monde, *Nos ambitions pour l'école* (Brussels, 2017); Bourabain D, Verhaeghe P-P, Stevens PAJ, “School of choice or schools’ choice? Intersectional correspondence testing on ethnic and class discrimination in the enrolment procedure to Flemish kindergarten”, *Race, Ethnicity & Education* 1, (2020): 1-21

and where no discriminatory intent has been established”.¹⁹³ In that context, data collection is therefore of the utmost importance.



The French Defender of Rights commissioned a research study in 2020 which aims to provide knowledge on discrimination based on economic vulnerability in France, aware of the importance of data collection in this field after observing that, while precariousness is recognised as a factor of injustice, discrimination based on it is difficult to measure and remains poorly documented.¹⁹⁴

Reasons for recognition and implementation

Despite the lack of recognition of the ground of socio-economic status or its insufficient implementation in some countries, there is a wide consensus among interviewees and survey participants on the importance of explicitly prohibiting discrimination based on socio-economic disadvantage, be it actual or perceived, taking the necessary steps to ensure the implementation of a prohibition of socio-economic discrimination.

In fact, besides the difficulties explained in the previous section, no disadvantages or objections were raised as to the explicit recognition of the ground of SES. Besides the general advantages mentioned above regarding the extension of the list of discrimination grounds, some participants and interviewees brought up additional specific reasons to explicitly prohibit discrimination on ground of socio-economic status.

Firstly, discrimination on grounds of socio-economic status is a reality, and recognising it is one important solution among others to break the cycle of perpetuating poverty and socio-economic disadvantage. Specifically, socio-economic rights such as the right to housing, the right to work, and the right to education would be better operationalised and rendered more meaningful if linked to socio-economic discrimination,¹⁹⁵ especially in times of growing inequalities at national level.¹⁹⁶

¹⁹³ European Court of Human Rights (third section), *Tunikova and others v Russia*, Applications nos. 55974/16 and 3 others (14 December 2021), para. 127.

¹⁹⁴ Défenseur des droits (French Ombudsman), 2020 Call for research projects: <https://www.defenseurdesdroits.fr/appele-a-projets-de-recherche-2020-du-defenseur-des-droits>. At the time of writing, this research has to our knowledge not yet been published.

¹⁹⁵ According to Olivier De Schutter, ATD Fourth World, UK's Trades Union Congress, Georgia and Austria.

¹⁹⁶ According to ATD Fourth World. See also B. Milanovic, *Global Inequality: A New Approach for the Age of Globalization* (Harvard University Press, 2016).

According to the UN Special Rapporteur on extreme poverty and human rights, “in order to properly assess the contribution of prohibiting discrimination on grounds of socio-economic disadvantage to breaking the cycles perpetuating poverty, the discrimination faced by disadvantaged individuals and households should be seen for what it is: a form of systemic discrimination that affects a range of areas including health, education, housing and employment.”¹⁹⁷

Indeed, socio-economic discrimination reinforces the suffering, disempowerment, and feelings of less value of socio-economically disadvantaged people,¹⁹⁸ which often leads to non-take-up and non-access to rights, phenomena which are increasingly documented.¹⁹⁹ As a consequence, fighting against socio-economic discrimination is also a way of fighting against non-take-up and to guarantee a better access to rights, especially socio-economic rights. This is all the more important since socio-economic status is not unchangeable *per se* and it is often an issue experienced during a person’s entire life.

The French Defender of Rights has ruled that the practice of special menus which restrict children’s access to “normal” school meals (“lunch shaming”) with the sole aim of forcing parents to pay their debts stigmatises the children targeted by this measure and constitutes an instance of discrimination based on their particular economic vulnerability.²⁰⁰

Secondly, when SES—or any related ground—is not enshrined as a protected ground (even more so when no open-ended clause is recognised either), there is no other proxy to ensure the protection of people discriminated against because of their SES. Indeed, while discrimination on grounds of health status has found protection through the ground of disability in many instances and the grounds of gender identity, gender expression, and sex characteristics have been sometimes protected through sex/gender (see below), there is no “traditional” grounds, especially among the six grounds enshrined in Article 19 TFEU, which can readily be used to fight against socio-economic discrimination.

¹⁹⁷ See UN Special Rapporteur on extreme poverty and human rights, Olivier De Schutter, “The persistence of poverty: how real equality can break the vicious cycles”, para. 54. A/76/177 (19 July 2021). <https://undocs.org/A/76/177>.

¹⁹⁸ According to ATD Fourth World, Georgia and Belgium.

¹⁹⁹ See M. Fuchs et al., “Falling through the social safety net? Analysing non-take-up of minimum income benefit and monetary social assistance in Austria”, *Social Policy and Administration* 54 (2020): 827; H. Kayser and J. Frick, “Take it or leave it: (non-)take-up behavior of social assistance in Germany”, *Journal of Applied Social Sciences* 121 (2000): 27; J. Stube and K. Kronebusch, “Stigma and other determinants of participation in TANF and Medicaid”, *Journal of Policy Analysis and Management* 23 (2004): 509; B. Baumberg, “The stigma of claiming benefits: A quantitative study”, *Journal of Social Policy* 45 (2016): 181; O. Hümbelin, “Non-Take-Up of Social Assistance: Regional Differences and the Role of Social Norms”, *Swiss Journal of Sociology* 45 (2019): 7.

²⁰⁰ Défenseur des droits, Decision n°2018-063, 22 February 2018.

Moreover, an open-ended clause might not be sufficient in this regard for reasons linked to legal uncertainty, lack of precision and concreteness, absence of a message sent to society and politics as regards which vulnerable groups need to be protected, data collection, protection by the judiciary and in policy and decision-making, as well as the competences of equality bodies.²⁰¹ Explicitly prohibiting socio-economic discrimination sends a clear message to society regarding the protection of these vulnerable groups and allows equality bodies to take action at different levels.

For instance, there is structural socio-economic discrimination in the field of housing in Brussels, where it is increasingly difficult to find a place to live in. Many real estate agencies refuse people on social benefits. This constitutes direct discrimination on grounds of property under Belgian law. Besides some cases which have been successfully brought before courts (despite the very low amount of damages allowed by legislation),²⁰² Unia, the Belgian equality body, has also developed extrajudicial ways to fight against this phenomenon. Besides issuing a report on discrimination in housing based on data collection²⁰³ and favouring mediation with real estate agencies (mindful of their reputation, “naming and shaming”), Unia has worked on these issues with the professional organisation of real estate agents as well as with some municipal governments with a very proactive housing policy, like in Ghent.

Thirdly, the protected ground of socio-economic status is important because discrimination affects people with low income relatively more often,²⁰⁴ and socio-economic discrimination is in many instances part of additive/cumulative or intersectional discrimination.²⁰⁵ In many cases, people discriminated against because of their socio-economic situation are simultaneously victims of discrimination on other grounds and there is therefore a strong link with these grounds, including race and ethnic origin, health, and gender identity, gender expression, and sex characteristics (see below).

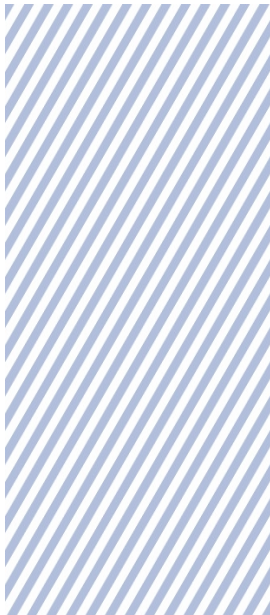
²⁰¹ Some of these factors are explained below.

²⁰² Civ. Namur, 5 May 2015; N. Bernard, « Le propriétaire face au choix de son locataire: sélectionner, oui, discriminer, Non! », *Justice-en-Ligne* (2015). <https://www.justice-en-ligne.be/Le-propretaire-face-au-choix-de>.

²⁰³ Belgian Interfederal Center for Equal Opportunities (Unia), *Diversity Barometer Housing*. <https://www.unia.be/en/publications-statistics/publications/diversity-barometer-housing>.

²⁰⁴ According to Poland, Georgia and Austria.

²⁰⁵ According to the CoE's Department of the European Social Charter, Austria and the UK's Trades Union Congress.



The example of the Roma community is paradigmatic. Ethnic and racial discrimination is undoubtedly the main form of discrimination that Roma and Travellers experience. In some cases, however, it does not stand alone. Discrimination against this minority is also related to their lifestyle and more broadly their socio-economic status.²⁰⁶ Discrimination on grounds of the socio-economic situation of Roma often intersects with their ethnic origin. The failure of states to consider the specifics of the socio-economic position of Roma is common, but rarely addressed by courts. As underlined by the Parliamentary Assembly of the Council of Europe, “Roma form a special minority group, in so far as they *have a double minority status*. They are an *ethnic community* and most of them *belong to the socially disadvantaged groups of society*”.²⁰⁷

The French Ombudsman took several decisions finding discrimination on grounds of multiple criteria, including economic vulnerability. For instance, refusing to enrol children in a school because their parents live in a slum which will soon be cleared constitutes discrimination on grounds of origin, place of residence, and economic vulnerability.²⁰⁸



Moreover, socio-economic status is sometimes used as a substitute for other grounds. For instance, in France, judges are more likely to rule on socio-economic inequality rather than discrimination on the basis of ethnic origin, especially when cases concern the Roma community and migrants.²⁰⁹

Fourthly, not only direct discrimination but also indirect discrimination, where people are disadvantaged because of apparently neutral policies and practices, need to be prohibited on grounds of SES. With regard to indirect discrimination more specifically, there is a need for including a prohibition of socio-economic discrimination early in policy and decision-making processes concerning socio-economic issues, in addition to explicitly prohibiting socio-economic discrimination.²¹⁰

²⁰⁶ For example, *European Agencies for Fundamental Rights, Roma and Traveller in Six Countries*, (2020). https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-roma-travellers-six-countries_en.pdf.

²⁰⁷ Parliamentary Assembly, Recommendation no. 1557 on the legal situation of Roma in Europe (25 April 2002). Our own emphasis.

²⁰⁸ Défenseur des droits (French Ombudsman), Decision n°2021-001, 21 January 2021. See also: Défenseur des droits, Decision n°2017-091, 27 March 2017.

²⁰⁹ This was reported by Sophie Latraverse (independent expert for France).

²¹⁰ According to the UK's Trades Union Congress.



The UK provides a good example of such a practice with the socio-economic duty enshrined in the 2010 Equality Act. According to this socio-economic duty, public authorities, when making decisions of a strategic nature about how to exercise their functions, must have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.²¹¹ This socio-economic duty has not been implemented yet because of the refusal of successive governments to commence it. There are several major exceptions, though. In 2018, the Scottish Parliament enacted the Fairer Scotland Duty, which “places a legal responsibility on particular public bodies in Scotland to actively consider (‘pay due regard’ to) how they can reduce inequalities of outcome caused by socio-economic disadvantage, when making strategic decisions”.²¹² More recently the socio-economic duty came into force in Wales,²¹³ and some local councils, such as the Newcastle Council, currently treat the socio-economic duty as if it were in force.²¹⁴

Fifthly, positive action should be part of the fight against discrimination on grounds of SES.²¹⁵ Meritocracy has sometimes been useful as a pragmatic rhetorical device in the discourse against discrimination, as it focuses on individual talents and efforts and rejects differences based on any other characteristics. However, it has not played such a role for persons living in poverty, quite the opposite: it is encoded in a vision of individual responsibility, overlooking the socio-economic structural reasons behind someone’s situation.²¹⁶ Positive action thus becomes especially important to tackle inequalities of social, economic, and cultural capitals experienced by socio-economically disadvantaged groups, and the fact that socio-

²¹¹ Section 1 of the UK Equality Act 2010 (although the ground of socio-economic status is not a protected characteristic under the Equality Act).

<https://www.legislation.gov.uk/ukpga/2010/15/contents>.

²¹² Scottish Government, *The Fairer Social Duty Interim Guidance for Public Bodies* (March 2018), p. 5.

<https://www.gov.scot/publications/fairer-scotland-duty-interim-guidance-public-bodies/documents>.

²¹³ Welsh Government, *A more Equal Wales, The Socio-economic Duty Equality Act 2010, Statutory guidance* (2021). <https://gov.wales/sites/default/files/publications/2021-03/a-more-equal-wales.pdf>.

²¹⁴ Just Fair, *Tackling Socio-economic Inequalities Locally, Good practices in the implementation of the socio-economic duty by local authorities in England* (June 2018). <https://justfair.org.uk/wp-content/uploads/2018/06/Just-Fair-June2018-Tackling-socio-economic-inequalities-locally.pdf>.

²¹⁵ According to Romania and Olivier De Schutter. See also: See UN Special Rapporteur on extreme poverty and human rights, Olivier De Schutter, “The persistence of poverty: how real equality can break the vicious cycles”, A/76/177 (19 July 2021). <https://undocs.org/A/76/177>.

²¹⁶ See for instance: M Sandel, *The Tyranny of Merit, What’s Become of the Common Good* (Penguin 2021).

economically disadvantaged persons have atypical lives that cannot be fairly judged through the concept of “merit”.²¹⁷

According to the UN Special Rapporteur on extreme poverty and human rights, “economic success is still sometimes seen as reflecting one’s effort and ability, a belief that is especially prevalent in highly unequal countries, [...] higher inequality thus leads those on higher income to perceive the poor as less ‘meritorious’ and more deserving of their socio-economic situation and therefore to justify inequality on the basis of unequal merit. This in turn, leads personal failings to be considered the main cause of poverty: people in poverty are blamed for being poor.”²¹⁸

Along these lines, positive action should be considered to tackle situations where socio-economically disadvantaged people are victims of a system depicting them as “losers”, especially to support the access of disadvantaged individuals to higher education and sectors of employment where they are under-represented: “this could also help to overcome the limited ‘aspirations window’ and the lack of social networks among the factors explaining the perpetuation of poverty”.²¹⁹ The UN Rapporteur on extreme poverty and human rights also underlines that reasonable accommodation constitutes an additional solution “in the sense that people in poverty have atypical lives that should be assessed individually and not on the basis of diplomas”.²²⁰

Interim conclusion

The relationship between discrimination and socio-economic disadvantage is a complex one. Poverty or socio-economic precariousness is not only a consequence but also a cause of discrimination, creating a vicious cycle. Although there is an increasing number of studies showing that discrimination on grounds of socio-economic status is widespread and needs to be tackled, this ground does not seem to have fully made its way into the anti-discrimination landscape of most European countries, either because it is not enshrined as a protected characteristic or because it is not fully implemented.

²¹⁷ In our view, positive action still remains an important tool with regard to the other grounds examined in this report, notably health status and gender identity, gender expression, and sex characteristics, as well as for all other discrimination grounds. However, positive action is not usually considered in a specific manner in relation to socio-economic status, as it is sometimes conflated with socio-economic rights realisation (see the discussion above). Consequently, we have emphasised the role of positive action in this particular context as a novel way of tackling socio-economic status discrimination, beyond its general virtues as an effective instrument to combat structural and systemic discrimination, which we do not wish to detract from.

²¹⁸ See UN Special Rapporteur on extreme poverty and human rights, Olivier De Schutter, “The persistence of poverty: how real equality can break the vicious cycles”, para. 38.A/76/177 (19 July 2021). <https://undocs.org/A/76/177>.

²¹⁹ Ibid., para. 60.

²²⁰ Ibid., para. 59.

There is a wide consensus among participants and interviewees on the terms of socio-economic situation/status/disadvantage to address socio-economic discrimination in anti-discrimination law. In some countries, the ground of socio-economic status does not constitute a protected characteristic as such, and no discrimination can be found on this ground in the absence of an open-ended clause. Furthermore, where socio-economic status is recognised as a protected characteristic, its use varies enormously from one country to another. In a few countries, this ground has been increasingly invoked and implemented over the last few years.

Several factors explain why there is non-recognition or insufficient implementation of the ground of socio-economic status. Firstly, socio-economic rights and socio-economic discrimination are sometimes confused and the distinction between them is not always clearly understood. Claims based on discrimination on grounds of socio-economic status should be however distinguished from claims based on economic, social, and cultural rights. Secondly, socio-economic discrimination is sometimes not seen as a priority, based on the false belief that socio-economic situation can be changed and is related to individual responsibility. However, countless studies show that people are very often poor because of structural reasons outside of their control. Thirdly, even when the ground of socio-economic status is explicitly prohibited in anti-discrimination law, people discriminated against on this ground will often not report such discrimination, since it has been shown that people in precarious situations are often ashamed of their position and feel responsible for it. Fourthly, the issue of proof also plays a role: it may be difficult to find a violation on the basis of socio-economic situation in some cases as the legal qualification of such a situation might not always be clear-cut. An important way to tackle this issue is strengthening data collection in fields where discrimination on grounds of socio-economic status is most likely to occur, such as education, housing, employment, healthcare, and access to services.

Despite the lack of recognition of the ground of socio-economic status or its insufficient implementation in some countries, survey participants and interviewees agreed on the importance of taking the necessary steps to ensure the implementation of a prohibition of socio-economic discrimination. Firstly, discrimination on grounds of socio-economic status is a reality and recognising it is one important solution to break the cycle of perpetuating poverty and socio-economic disadvantage. Secondly, when socio-economic status is not enshrined as a protected ground there is no other proxy ground to ensure protection. Thirdly, discrimination affects people with low income relatively more often, and socio-economic discrimination is in many instances part of multiple or intersectional discrimination. Fourthly, there is a need for including a prohibition of socio-economic discrimination early in policy and decision-making processes regarding socio-economic issues, especially through mandatory equality duties which ensure that the risks of direct and indirect discrimination on grounds of socio-economic status are fully taken into account in the policy-making process. Fifthly, positive action should be part of the fight against discrimination on grounds of socio-economic status and this can only be secured if that ground is explicitly recognised.

The ground of health status

Overview

The ground of health status has been sharply brought to the forefront of equality and non-discrimination issues in the past two years because of the Covid-19 pandemic. This ground, which features relatively frequently in the domestic anti-discrimination legislation of the countries examined,²²¹ was spontaneously linked by most interviewees to the aftermath of the pandemic when asked about its added value. On average, according to our survey, equality bodies agree that this ground should be part of anti-discrimination legislation and that this would improve the overall effectiveness of this body of law.

As a general remark, it can be observed that the protection of public health is sometimes unlawfully used by states as a basis for restricting human rights in the context of a person's health status. Moreover, states must adopt measures to address the widespread stigmatisation of persons based on their health status.

The refusal of a residence permit by Russia to a foreigner on grounds that the applicant was HIV-positive was found by the ECtHR as discriminatory. The pretext used by Russia, namely “concerns about the massive spread of the HIV epidemic” and the threat it posed to public health and to personal, public, and national security, was rejected by the Court as insufficiently substantiated.²²²

In a case against Greece, the ECtHR qualified as discriminatory the dismissal of a HIV-positive employee following protests from his co-workers, since by terminating his employment the employer had further stigmatised the applicant. As the Court put it, “ignorance about how [HIV/AIDS] spreads had bred prejudices which, in turn, had stigmatised or marginalised those infected with the virus”.²²³

There is a clear link to be made between health and socio-economic disadvantage, including when considering the social determinants of health. This notion refers to non-medical factors

²²¹ Belgium, Croatia, Finland, France, Georgia, Serbia, Kosovo*, Moldova, and Romania. This ground is also present in the equality and anti-discrimination legislation of Albania, Hungary, Montenegro, and North Macedonia. Chronic illness is an explicit ground in Greece and the Netherlands.

²²² See European Court of Human Rights, First Section, *Kiyutin v. Russia*, Application no. 2700/10 (10 March 2011).

²²³ See European Court of Human Rights, First Section, *I.B. v. Greece*, Application no. 552/10 (3 October 2013), para. 81.

that influence health outcomes, including the conditions in which people are born, grow, work, live, and age, and the wider set of forces and systems shaping the conditions of daily life.²²⁴

Indeed, poverty has an impact on life expectancy by undermining physical and mental health, among others through low-quality housing, inadequate diet, and fear, anxiety, and depression.²²⁵ Many people living in poverty “cannot access preventive care because they have no access to healthy food, or they live in polluted areas. Both malnutrition and obesity can be prevalent. A lack of health care, including dentistry and eye care, can increase health problems. Poor health caused by multiple privations leaves people physically and emotionally scarred.”²²⁶ Poverty affects both the long-term health prospects of individuals and their economic prospects because of its impacts on children development: children born into disadvantaged families have significantly fewer chances of achieving an adequate standard of living in adult life than children born into wealthier families.²²⁷

Moreover, other protected grounds like racial or ethnic origin, gender, or sexual orientation may interact with health status in additive/cumulative or in intersectional configurations of discrimination expanding to numerous areas of life.²²⁸

Non-recognition or insufficient implementation and overlap with disability

Health status refers, broadly speaking, to a person’s physical or mental health. The ground of health status is not explicitly recognised in the European Convention of Human Rights, neither in the International Covenant on Civil and Political Rights, nor in the International Covenant on Social, Economic and Cultural Rights, nor in Article 21(1) of the EU Charter of Fundamental Rights.

It must be noted, however, that the UN adopts a wide definition of disability under the Convention on the Rights of Persons with Disabilities, which is likely to encompass some situations falling under health status strictly speaking. According to Article 1 of the Convention, “persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.

²²⁴ World Health Organization, *Social determinants of health* (2021). <https://www.who.int/health-topics/social-determinants-of-health>.

²²⁵ See L. Cassio, Z. Blasko and A. Szczepanikova, *Poverty and Mindsets: How Poverty and Exclusion over Generations Affect Aspirations, Hope and Decisions, and how to Address it* (European Commission Joint Research Service, 2021). <https://op.europa.eu/en/publication-detail/-/publication/3122f644-edcf-11eb-a71c-01aa75ed71a1>; United Nations, Human Rights Council, “Final draft of the guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona”, A/HRC/21/39 (18 July 2012).

²²⁶ ATD Fourth World and University of Oxford, *The Hidden Dimensions of Poverty: International Participatory Research* (2019), p. 10. <https://www.atd-quartmonde.org/wp-content/uploads/2019/12/Hidden-Dimensions-of-Poverty-20-11-2019.pdf>.

²²⁷ UN Special Rapporteur on extreme poverty and human rights, Olivier De Schutter, “The persistence of poverty: how real equality can break the vicious cycles”, A/76/177 (19 July 2021), paras. 5-12. <https://undocs.org/A/76/177>.

²²⁸ See European Committee of Social Rights, *International Planned Parenthood Federation – European Network (IPPF EN) v. Italy*, para. 190. See also Equinet Taskforce on Women in Poverty, *Women in Poverty: Breaking the Cycle. A Discussion Paper* (Equinet, 2020). <https://equineteurope.org/publications/women-in-poverty-breaking-the-cycle/>.

As a consequence, in many instances, health status is likely to be considered as a disability, as explained below. Moreover, the UN Committee on Economic, Social and Cultural Rights has found that “states parties should ensure that a person’s actual or perceived health status is not a barrier to realizing the rights under the Covenant”.²²⁹

While discrimination in accessing healthcare based on other grounds (e.g., gender and conscientious objection regarding the provision of abortion services)²³⁰ has been fairly explored in the literature and case law, as well as in the practice of most equality bodies, discrimination in other fields specifically linked to health status has been explored to a lesser extent and is still in need of further theoretical and practical development. The field where this ground has been most often invoked is access to insurance, with certain health conditions or factors being used by insurance companies to deny coverage or to raise individual premiums, for instance because of HIV-positive status or neurological problems.²³¹ However, the Covid-19 pandemic has led to an uptake in the number of cases related to discrimination based on health status in the field of employment, access to goods and services, and even civil rights.²³²

There is a certain overlap both in theory and in practice between the grounds of health status and disability as regards the delimitation between each of these separate grounds. At the European Social Charter level, it is noteworthy that the ground of health is enshrined in Article E, whereas disability is not. By contrast, disability but not health is explicitly mentioned as a prohibited ground of discrimination in the EU treaties and anti-discrimination directives, as well as in the CFREU.

²²⁹ United Nations, Committee on Economic, Social and Cultural Rights, “General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights)”, E/C.12/GC/20 (2 July 2009), para. 33.

²³⁰ European Committee of Social Rights, *International Planned Parenthood Federation – European Network (IPPF EN) v. Italy*, Collective complaint no. 87/2012 (10 September 2013), paras. 190–194.

²³¹ Unia, “For the first time, the Court rules against an insurer who had turned down an HIV-infected woman” (2017). <https://www.unia.be/en/articles/for-the-first-time-the-court-rules-against-an-insurer-who-had-turned-down-an-hiv-infected-woman>; Unia, “Une assurance hospitalisation pour un enfant atteint de troubles neurologiques” (2018). <https://www.unia.be/fr/jurisprudence-alternatives/solutions-negociees/une-assurance-hospitalisation-pour-un-enfant-atteint-de-troubles-neurologiques>. Academic literature has also examined this phenomenon, particularly in the context of Big Data: see A. Blasimme, E. Vayena and I. van Hoyweghen, “Big Data, precision medicine and private insurance: A delicate balancing act” *Big Data & Society* 6(1) (2019): 1; F. Thouvenin, F. Suter, D. George and R.H. Weber, “Big Data in the Insurance Industry: Leeway and Limits for Individualising Insurance Contracts” *Journal of Intellectual Property, Information Technology and E-Commerce Law* 10(2) (2019): 2.

²³² See European Union Agency for Fundamental Rights, *Coronavirus Pandemic in the EU – Fundamental Rights Implications* (European Union, 2020). https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-november_en.pdf; Equinet, *The Role of Equality Bodies During the COVID-19 Pandemic* (2021). https://equineteurope.org/wp-content/uploads/2021/04/equinet_covid19-factsheet-A4_DEF.pdf; Equinet, *Equality in the Time of Covid-19: Learning from Equality Body Initiatives* (2021). https://equineteurope.org/wp-content/uploads/2021/02/Equality_Covid19_NEBS-2.pdf; Equinet, *Solidarity Must Prevail – Stigmatisation and Discrimination of Health Workers has No Place in our Society* (2020). <https://equineteurope.org/solidarity-must-prevail-stigmatisation-and-discrimination-of-health-workers-has-no-place-in-our-society/>; Belgian Inter-federal Centre for Equal Opportunities (Unia), *COVID-19 : Les droits humains mis à l’épreuve (deuxième rapport)* (2021); Public Defender (Ombudsman) of Georgia, “Public Defender’s Amicus Curiae Brief relating to Alleged Discrimination on Grounds of Health Condition” (2020). <https://ombudsman.ge/eng/sasamartlos-megobris-mosazrebebi/sakhalkho-damtsvelis-sasamartlos-megobris-mosazreba-janmrtelobis-mdgomareobis-nishnit-savaraudo-diskriminatsiis-faktze>.

This overlap can also be seen at domestic level, with some countries like Georgia noting that, despite both grounds being protected, complaints usually refer to disability rather than health status. In Serbia, where health condition has become one of the five most common grounds mentioned by citizens in their complaints in recent years, both health status and disability have been invoked by the Commissioner for the Protection of Equality in some cases. In the Czech Republic, a dismissal because of HIV-positive status was reviewed by the Supreme Court as a case of disability rather than a case of health condition.²³³

One of the main elements evoked by interviewees and in the literature alike when trying to distinguish the material scope of these two grounds relates to the Court of Justice of the European Union's interpretation of disability as covering chronic illness. In *Ring and Skouboe Werge*, the CJEU held that “if a curable or incurable illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one, such an illness can be covered by the concept of ‘disability’.”²³⁴

The Court thus distinguished between short-term illnesses, which are not to be regarded as disabilities, and long-term impairments which can be caused by sickness and which, when subject to various barriers and exogenous factors, can be regarded as disabilities.²³⁵ It is for national courts to determine whether the above conditions are met in each case. In *FOA*, the CJEU confirmed that EU law must be interpreted as not laying down a general principle of non-discrimination on grounds of obesity as such as regards employment and occupation.²³⁶

Reasons for recognition and implementation

In most countries, and following the CJEU's interpretation, long-term chronic illness (including AIDS, cancer, etc.) is therefore interpreted as coming under the ground of disability.²³⁷ However, this protection might not apply in certain cases where health problems fall outside of the narrow notion of long-term chronic illness and where the ground of health status is not explicitly recognised in addition to disability,²³⁸ or where the ground of health status covers only present and future health status but not past health status.²³⁹

Another relevant point is the explicit inclusion in certain countries of chronic illness as a prohibited ground, which may cover certain situations currently not covered by the CJEU's interpretation of disability, since the chronic illness ground does not generally require a hindrance to the full and effective participation of the person affected in professional life,

²³³ See Czech Supreme Court, Judgment of 15 August 2018, ECLI:CZ:NS:2018:21.CDO.2550.2018.1.

²³⁴ Court of Justice of the European Union (Second Chamber), Judgment of 11 April 2013, *Ring and Skouboe Werge*, Joined Cases C-335/11 and C-337/11, EU:C:2013:222, para. 41.

²³⁵ See S. Favalli and D. Ferri, “Tracing the Boundaries between Disability and Sickness in the European Union: Squaring the Circle?”, *European Journal of Health Law* 23 (2016): 5–35.

²³⁶ Court of Justice of the European Union (Fourth Chamber), Judgment of 18 December 2014, *FOA*, Joined C-354/13, EU:C:2014:2463, para. 40.

²³⁷ It is the case at least in Belgium, Bulgaria, France, Georgia, Ireland, Romania and the United Kingdom.

²³⁸ It is the case in Austria.

²³⁹ It is the case in Belgium.

unlike the disability ground.²⁴⁰ However, this does not substitute a full protection against discrimination on the basis of health status, which should also extend to perceived health status and to past, present, and future health status, thus covering all instances of health status discrimination likely to arise.

Regarding the delimitation between health status and disability, the UN Committee on the Rights of Persons with Disabilities has clarified that “the difference between illness and disability is a difference of degree and not a difference of kind. A health impairment which initially is conceived of as illness can develop into an impairment in the context of disability because of its duration or its chronicity.”²⁴¹ This interpretation should be used as a reference when trying to qualify a situation as falling under one or the other ground.

From a pragmatic point of view, however, it may be worth it to try to qualify a situation as disability if applicable, given that disability protection is much more developed in most countries than health status protection. Indeed, according to most of the equality bodies and stakeholders surveyed and interviewed, disability is preferred to health status and used as much as possible because of three main reasons: the possibility to leverage reasonable accommodation, the more extensive protection stemming directly from the UN Convention on the Rights of Persons with Disabilities, and a strong existing framework of NGOs and civil society organisations working on the rights of persons with disabilities.²⁴² In the practice of most equality bodies, disability is often tried first, and only if the person does not qualify for the disability ground the health status ground (or the chronic illness ground) is used where available.²⁴³

²⁴⁰ It is the case, for instance, in Greece, where chronic illness is defined as including illnesses that have developed either through a medical condition or due to an accident which presents at least one of the following elements: indefinite duration and no known treatment, rebound effect or possibility of recurrence, permanency, long-term supervision, medical visits and diagnostic examinations, or a need for rehabilitation or special education to recover (Law 4443/2016, Article 1(1) and (2)).

²⁴¹ United Nations, Committee on the Rights of Persons with Disabilities, “Communication No. 10/2013”, *S.C. v. Brazil*, CRPD/C/12/D/10/2013 (28 October 2014), para. 6.3. See also S. Favalli and D. Ferri, “Tracing the Boundaries between Disability and Sickness in the European Union: Squaring the Circle?”, *European Journal of Health Law* 23 (2016).

²⁴² According to Georgia and Belgium.

²⁴³ See Public Defender (Ombudsman) of Georgia, “Public Defender Appeals to Insurance Company relating to Discrimination on Grounds of Obesity” (2021).
<https://ombudsman.ge/eng/191127024245skhva-nishani/sakhalkho-damtsvelma-charbtsonianobis-nishnit-diskriminatsiis-gamo-sadazghvevo-kompanias-mimarta>.

A case from Georgia concerns incitement to discrimination in an environment where stereotypes and stigma are encouraged and this plays a role in future discrimination cases. The case involved the removal of certain phrases in approved biology high school textbooks reflecting strong negative views towards persons with substance addiction and people with HIV/AIDS: the former were framed as dangerous people for society and false information was provided regarding how HIV/AIDS spreads and the fight against it. The Public Defender (Ombudsman) argued that it is unacceptable that the textbooks have such content, which gives wrong information to children and encourages the marginalisation of certain groups, fostering the development of stereotypical thinking from a young age.²⁴⁴

A case from Greece concerns two recruitment advertisements for a fixed-term contract in the public sector, which required candidates to “have no chronic or underlying diseases and [to] not belong to groups that are vulnerable to the coronavirus Covid-19”. This excluded persons who have very frequent and common chronic illnesses (such as diabetes, asthma, hypertension, etc.) as candidates for municipal employment, as well as potentially other vulnerable groups, without any justification or any provision for genuine and determining occupational requirements. This is therefore a clear instance of direct discrimination based on health status.²⁴⁵

An upcoming challenge is vaccination status and (future) state of health in the context of Covid-19. Notably, multiple concerns arise as to whether and to what extent we can limit the fundamental rights of people who are not vaccinated with the objective of protecting public health.

For instance, vaccination certificates are likely to have important exclusionary consequences for socio-economically disadvantaged people and other disadvantaged groups who are already disproportionately affected by the pandemic. They may further compound their

²⁴⁴ See Public Defender (Ombudsman) of Georgia, “General Proposal on Preventing and Combating Discrimination” (2016). <https://ombudsman.ge/eng/skhva-nishani/general-proposal-on-preventing-and-combating-discrimination>.

²⁴⁵ See A. Theodoridis, “Discriminatory recruitment advertisement for staff in the Municipality of Heraklion, excluding persons with chronic or underlying diseases who belong to groups that are vulnerable to COVID-19” (European Network of Legal Experts in Gender Equality and Non-Discrimination, 2021). <https://www.equalitylaw.eu/downloads/5340-greece-discriminatory-recruitment-advertisement-for-staff-in-the-municipality-of-heraklion-excluding-persons-with-chronic-or-underlying-diseases-who-belong-to-groups-that-are-vulnerable-to-covid-19-98-kb>.

underprivileged status, as they are less likely to be vaccinated and to be able to obtain a vaccination certificate due to the lack of accessibility, administrative hurdles, hesitancy, mistrust, or other reasons.²⁴⁶ The lack of a vaccination certificate has a severe impact on the realisation of political and civil rights as well as economic and social rights, as it is required in some countries to access workplaces, public buildings, and for travel between countries, the alternative being paid tests whose validity lasts for a few days at a time.²⁴⁷ The long-term effects of Covid-19 and their impact on fields like employment and occupation were also mentioned by some interviewees, including the difficulty to return to the workplace and to work remotely in some professions.²⁴⁸

Interim conclusion

Most equality bodies agreed that this ground should be part of anti-discrimination legislation and that it would improve the overall effectiveness of this body of law. There is a certain overlap both in theory and in practice between the grounds of health status and disability. However, health status should be recognised as a ground on its own, since the disability ground does not cover all instances of health issues on the basis of which discrimination is likely to occur, notably non-long-term chronic illnesses or long-term chronic illnesses that do not entail a hindrance to the full and effective participation of the person concerned in professional life. The recognition of this ground should extend to actual or perceived health status, as well as past, present, and future health status.

The grounds of gender identity, gender expression, and sex characteristics

Overview

The grounds of gender identity, gender expression, and sex characteristics currently also feature at the forefront of the fight against discrimination across Europe. Many legal developments have taken place regarding these grounds in the past few years at the EU level, notably the development of a bespoke LGBTIQ Equality Strategy.²⁴⁹

However, despite some advancements in the protection against discrimination on these grounds, the European Union Agency for Fundamental Rights' (FRA) 2020 LGBTI survey showed high levels of discrimination and harassment towards LGBTI persons across the EU,

²⁴⁶ See S. Ganty, "The Veil of the COVID-19 Vaccination Certificates: Ignorance of Poverty, Injustice towards the Poor", *European Journal of Risk Regulation* 12, no. 2 (2021): 343–354. See also S. Ganty, "Socioeconomic Precariousness in Times of Covid-19: A Human Rights Quandary under the ECHR". *Polish Yearbook of International Law* 40 (2021): 151.

²⁴⁷ At the time of writing, this is the case in Italy and Luxembourg for workplaces, in Belgium for public buildings, and generally between EU Member States for travel.

²⁴⁸ According to Belgium, Romania, and the UK's Trades Union Congress.

²⁴⁹ See notably, European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Union of Equality: LGBTIQ Equality Strategy 2020-2025", COM(2020) 698 final (12 November 2020).

and a notable decrease in social acceptance. Hate speech against LGBTI persons in public discourse was also flagged as a particularly worrying phenomenon.²⁵⁰

Overall, more LGBT respondents in 2019 (43%) than in 2012 (37%) felt discriminated against in the twelve months prior to the survey in all areas of life enquired about (at work; when looking for housing; accessing healthcare and social services; in educational settings; when in a shop, café, restaurant, bar, or nightclub; and when showing an identity card or other official document that indicates the person's sex). The difference was significantly more pronounced for trans respondents (60% in 2019 compared with 43% in 2012).²⁵¹

It must be further noted that discrimination on grounds of gender identity, gender expression, and sex characteristics is often linked to other discrimination grounds. For instance, the same 2020 LGBTI survey found that 40% of respondents pointed to ethnic origin or immigrant background as an additional ground for discrimination, besides being LGBTI.²⁵² There is also a strong connection with socio-economic status: while about a third of respondents indicated that their households have difficulties to make ends meet, this was most often the case for intersex (52%) and trans (46%) respondents.²⁵³ This reveals a need to address these situations from an intersectional perspective, taking into account these multiple axes of discrimination.

Non-recognition or insufficient implementation and protection through sex/gender

The grounds of gender identity, gender expression, and sex characteristics show strongly diverging degrees of protection in domestic anti-discrimination legislations across European countries. While they are strongly enshrined in some countries and routinely used to secure protection for LGBTQI+ persons, they are conspicuously absent from anti-discrimination law in other countries, where, at best, alternative grounds are used to protect these persons in practice. This roundabout protection sometimes takes place as a pragmatic strategy given the general lack of recognition of the specificities of gender identity, gender expression, and sex characteristics as compared to more traditional grounds like sex/gender or sexual orientation.

As a general remark, we have observed in our survey and interviews, as well as in the literature, reports, and case law review, concurring remarks that LGBTQI+ persons continue to be under systemic threat in some Central and Eastern European countries, where the public opinion remains very hostile to persons with minority sexual orientations and persons with non-conforming gender identities, gender expressions, or sex characteristics.²⁵⁴ This results in lower levels of legal protection or in lower levels of implementation where countries do nevertheless have a robust anti-discrimination legal framework covering these grounds.

²⁵⁰ European Union Agency for Fundamental Rights, *EU-LGBTI II: A long way to go for LGBTI equality* (2020), p. 10. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf.

²⁵¹ Ibid.

²⁵² European Union Agency for Fundamental Rights, *EU-LGBTI II: A long way to go for LGBTI equality*, p. 21. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf.

²⁵³ Ibid., p. 63.

²⁵⁴ According to Georgia, Poland and Romania.

To a lesser extent, we have also observed a worrisome trend in some Western European countries, where the grounds of gender identity and gender expression have come under attack under the pretext that they undermine certain longstanding protections granted to cisgender and gender-conforming women under the ground of sex/gender.²⁵⁵

As for the definition of these three grounds, we refer to the Yogyakarta Principles Plus 10.²⁵⁶ According to their Preamble:

- **gender identity** refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical, or other means) and other expressions of gender, including dress, speech, and mannerisms).
- **gender expression** is each person's presentation of the person's gender through physical appearance—including dress, hairstyles, accessories, cosmetics—and mannerisms, speech, behavioural patterns, names, and personal references, and noting further that gender expression may or may not conform to a person's gender identity.
- **sex characteristics** are each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.

This protection has found recognition both at the international and European levels. At the UN level, the High Commissioner for Human Rights has called upon states to ensure that anti-discrimination legislation includes gender identity among prohibited grounds and protects intersex persons from discrimination.²⁵⁷ UN Committees have also found sex/gender discrimination in cases related to discrimination based on gender identity, gender expression, and sex characteristics.²⁵⁸

At the Council of Europe level, the Committee of Ministers has encouraged states parties to take measures to ensure that legal provisions in national law prohibiting or preventing discrimination also protect against discrimination on multiple grounds, including gender

²⁵⁵ Like in the UK, Ireland and Spain. See A. Sharpe, "Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?", *The Modern Law Review* 83(3) (2020): 539–557.

²⁵⁶ International Commission of Jurists, *The Yogyakarta Principles Plus 10 - Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (2017). https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf; See also M. van den Brink and P. Dunne, *Trans and intersex equality rights in Europe – a comparative analysis*, coords. S. Burri and A. Timmer (European Network of Legal Experts in Gender Equality and Non-Discrimination, 2018).

²⁵⁷ Human Rights Council, "Discrimination and violence against individuals based on their sexual orientation and gender identity. Report of the Office of the United Nations High Commissioner for Human Rights", A/HRC/29/23 (4 May 2015).

²⁵⁸ See for instance, UN Human Rights Committee, *G. v. Australia*, Communication No. 2172/2012 (17 March 2017). For an overview of the cases before the UN committees: International Lesbian, Gay, Bisexual, Trans and Intersex Association: K. Kirichenko, *United Nations Treaty Bodies' jurisprudence on sexual orientation, gender identity, gender expression and sex characteristics: Policy Paper* (ILGA World, October 2019). https://ilga.org/downloads/Treaty_Bodies_Strategic_Litigation_toolkit_policy_paper_en.pdf.

identity.²⁵⁹ The Parliamentary Assembly has, for its part, highlighted that anti-discrimination legislation must effectively apply to and protect intersex people, notably by inserting sex characteristics as a specific prohibited ground in all anti-discrimination norms.²⁶⁰ The ECtHR also recalled in its 2015 judgment in *Identoba* that the prohibition of discrimination under Article 14 of the Convention duly covers questions related to gender identity.²⁶¹

In a 2021 Chamber judgment, *AM v. Russia*, the ECtHR explicitly found a violation of the prohibition of discrimination because of a person's gender identity in relation to parental rights, as she was treated differently from other parents whose gender identity matched their gender assigned at birth. For the Court, "the inescapable conclusion is that her gender identity was consistently at the centre of the deliberations concerning her and was omnipresent at every stage of the judicial proceedings (...). The domestic courts based their decisions on the alleged possible negative effect of the applicant's gender transition on her children."²⁶²

The ground of gender expression is less frequently mentioned in these sources in an explicit manner, often because it is considered as encompassed by the ground of gender identity. For example, the notion of gender expression is included in the definition of gender identity in the Yogyakarta Principles and, as such, "all references to gender identity should be understood to be inclusive of gender expression as a ground for protection".²⁶³ These two grounds should nevertheless be separately recognised in anti-discrimination legislation, to ensure more visibility and clarity as to the different dimensions arising from each of them, since, citing also from the Yogyakarta Principles Plus 10 definition above, "gender expression may or may not conform to a person's gender identity".

Under EU law and following the Court of Justice of the European Union's case law, gender identity is protected to a limited extent under the ground of sex/gender, insofar as it covers

²⁵⁹ Committee of Ministers, "Recommendation of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity" CM/Rec(2010)5 (31 March 2010). See also Steering Committee for Human Rights, "CDDH Report on the implementation of Recommendation CM/Rec(2010)5 of the Committee of Ministers to member States on measures to combat discrimination on grounds of sexual orientation or gender identity", *Combating discrimination on grounds of sexual orientation and gender identity in Council of Europe Member States* (Council of Europe, 2019).

²⁶⁰ Parliamentary Assembly, "Promoting the human rights of and eliminating discrimination against intersex people" Resolution 2191 (2017) (12 October 2017). See also Parliamentary Assembly Committee on Equality and Non-Discrimination, F.B. Chikha, "Combating rising hate against LGBTI people in Europe", Doc. 15121, Ref. 4524 (19 September 2020).

²⁶¹ European Court of Human Rights, Fourth Section, *Identoba and Others v. Georgia*, Application no. 73235/12 (12 May 2015), para. 96.

²⁶² See European Court of Human Rights, Third Section, *A.M. and Others v. Russia*, Application no. 47220/19 (6 July 2021), paras. 75–78.

²⁶³ International Commission of Jurists, *The Yogyakarta Principles Plus 10 - Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*, Preamble. https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf.

individuals who intend to undergo or have undergone gender-affirming surgery. In *P v S and Cornwall County Council*, the CJEU thus found sex discrimination when a trans woman who underwent a process of medical transition was removed from her employment.²⁶⁴ However, beyond this, it is not clear whether trans persons or persons with a non-normative gender identity or gender expression are generally covered by EU anti-discrimination law whenever gender-reaffirming surgery has not taken place. It also remains unclear whether intersex people are implicitly covered under these provisions.²⁶⁵

Our survey and interviews confirm that these grounds (gender identity, gender expression, sex characteristics) are not explicitly recognised, or only partially recognised, in several European countries, some of which have deployed strategies to protect persons discriminated against based on these grounds through sex/gender and through sexual orientation,²⁶⁶ or through other forms of discrimination like sexual harassment.²⁶⁷

Where countries have incorporated these grounds, we see that some recognise gender identity, a fewer number of them protect gender expression, and very few explicitly protect sex characteristics.²⁶⁸ Other countries, like the Czech Republic, have resorted to other formulations like “sexual identification”.²⁶⁹ On average, the surveyed countries agree that these grounds should be incorporated and that it would improve the effectiveness of anti-discrimination law.

Reasons for recognition and implementation

In some of the countries explored, gender identity, gender expression, and sex characteristics are routinely protected through the ground of sex/gender.²⁷⁰ The protection offered by the sex/gender ground is more extensive in some countries (such as Austria and Germany through the “*Geschlecht*” ground, that covers sex, gender and gender identity, gender expression, and sex characteristics discrimination), while it is more limited in other countries following the CJEU’s interpretation linked to gender-affirming surgery. Even in the former case, having bespoke grounds related to these three notions (gender identity, gender expression, sex characteristics) would enhance protection by reaffirming the uniqueness of this type of discrimination and increasing its visibility.

In this connection, some interviewees expressed the idea that, although it is important to fight for the explicit inclusion of these grounds, this is politically very difficult given some national contexts.²⁷¹ In such countries, they claimed it is better from a pragmatic point of view to focus

²⁶⁴ Court of Justice of the European Union, Judgment of 30 April 1996, *P v S and Cornwall County*, C-13/94, EU:C:1996:170, para. 41.

²⁶⁵ See further M. van den Brink and P. Dunne, *Trans and intersex equality rights in Europe – a comparative analysis* (2016). https://ec.europa.eu/info/sites/default/files/trans_and_intersex_equality_rights.pdf. See also Court of Justice of the European Union, Judgment of 26 June 2018, *MB (Change of gender and retirement pension)*, C-451/16, EU:C:2018:492.

²⁶⁶ It is the case in Ireland, Poland and Romania.

²⁶⁷ As evoked by Bulgaria.

²⁶⁸ See above, section on the *Tour d’horizon*.

²⁶⁹ Czech Republic, Act No. 198/2009, Coll. Anti-Discrimination Act, art. (section) 2, para. 4. https://www.ochrance.cz/uploads-import/DISKRIMINACE/pravni_predpisy/Anti-discrimination-Act.pdf.

²⁷⁰ It is the case for instance in Poland, Romania and Bulgaria.

²⁷¹ According to Georgia, Poland and Romania.

on an expansive interpretation and application of the ground of sex/gender, so that even when the grounds of gender identity, gender expression, and sex characteristics are not explicitly enshrined these disadvantaged groups can effectively be protected.

In other terms, they claimed that it is better to be protected by a ground that is not entirely accurate or correct than not to be protected at all, with the caveat that this is a strategic choice to protect people leveraging the existing legislation. One interviewee also noted that protecting gender identity and gender expression under sex/gender or under sexual orientation is in line with EU law and ECHR law,²⁷² where those grounds are not explicitly mentioned either.²⁷³

However, this argument must be nuanced as both Article 14 ECHR and Article 21(1) CFREU foresee an open-ended list of grounds. Furthermore, this approach may lead to negative consequences. For instance, it may require the court to anchor a claimant to the gender they were assigned at birth rather than their actual gender. Moreover, while in certain situations a trans person may confront inequality because of a variance between their gender and the gender they were assigned at birth, in other scenarios they will rather face discrimination because of their self-identification or their self-expression, which is not fully captured by the ground of sex/gender.²⁷⁴

Regarding intersex persons, they are often treated differently from persons whose sex characteristics fully fit the medical definition of the sexes. This means that they are forced to undergo “normalising” medical treatments, often at a young age, even though the variations in their sex characteristics are the result of a natural and biological process for which there is no reason to medically intervene, except in situations of medical emergency.²⁷⁵

Finally, most countries surveyed and interviewed where these grounds are not explicitly recognised deemed that if gender identity, gender expression, and sex characteristics were to be included in EU law, these grounds would be accepted more easily by national legal actors and the society at large.²⁷⁶ Several concrete cases can be also pointed out.²⁷⁷

²⁷² According to Bulgaria.

²⁷³ See, for example, Parliamentary Assembly, “Promoting the human rights of and eliminating discrimination against intersex people”, para. 7.4.: “with regard to combating discrimination against intersex people, ensure that anti-discrimination legislation effectively applies to and protects intersex people, either by inserting sex characteristics as a specific prohibited ground in all anti-discrimination legislation, and/or by raising awareness among lawyers, police, prosecutors, judges and all other relevant professionals, as well as intersex people, of the possibility of dealing with discrimination against them under the prohibited ground of sex, or as an “other” (unspecified) ground where the list of prohibited grounds in relevant national anti-discrimination provisions is non-exhaustive.”

²⁷⁴ See M. van den Brink and P. Dunne, *Trans and intersex equality rights in Europe – a comparative analysis* (2016), p. 47.

https://ec.europa.eu/info/sites/default/files/trans_and_intersex_equality_rights.pdf.

²⁷⁵ Equality Law Clinic of the Université Libre de Bruxelles and Human Rights Centre of Ghent University, “Observations écrites en qualité de tiers-intervenants dans l’Affaire M. c. France” (2021), p. 5. https://hrc.ugent.be/wp-content/uploads/2021/02/Tierce-intervention-M-c.-France-24-février_FINAL.pdf. Two important cases regarding discrimination against intersex people are currently pending before the ECtHR in this regard: *Semenya c. Suisse* (application no. 10934/21) and *M. c. France* (application no. 42821/18).

²⁷⁶ According to Poland and Romania.

²⁷⁷ See also Equinet’s Working Group on Gender Equality, *Equality Bodies Working on the Rights and Discriminations Faced by Trans and Intersex Persons. An Equinet Discussion Paper* (Equinet, 2020). https://equineteurope.org/wp-content/uploads/2020/11/equinet_brief-trans-intersex_A4_O4_web-1.pdf.

In Georgia, since there is no legal recognition of gender change, higher education establishments and universities imposed the same requirement to trans women as for cisgender men regarding completion of military service for enrolment.²⁷⁸ Another Georgian case concerned the improper treatment of a transgender prisoner, who was placed in a specific separate penitentiary institution without provision for medical services, which meant a lack of access to an endocrinologist, hormonal treatment, and appropriate medication.²⁷⁹ The Public Defender (Ombudsman) successfully intervened in both cases.

In a French case that is currently pending before the ECtHR, the applicant was born intersex and assigned male at birth, but they contend that they are neither male nor female but simply intersex. Their application relates to the fact that currently in France it is not allowed for them to change the mention in their birth certificate and official documents to “neutral” or “intersex”, instead of “male” or female”.²⁸⁰ In a third-party intervention, it was argued that this lack of legal recognition constituted a violation of non-discrimination, since “only sex/gender non-conforming persons have to go through several, sometimes inaccessible, administrative and medical hoops for their lived gender identity to be legally registered”.²⁸¹ The vast majority of trans and gender-diverse persons do not have access to gender recognition by states, which generates stigma and prejudice “that tacitly permits, encourages and rewards with impunity the acts of violence and discrimination against them, and leads to a situation of de facto criminalization”.²⁸²

²⁷⁸ See Public Defender (Ombudsman) of Georgia, “General Proposal on Prevention of Discrimination on Grounds of Gender Identity at Higher Educational Level” (2021).

<https://ombudsman.ge/eng/seksualuri-orientatsia-genderuli-identoba/zogadi-tsinadadeba-umaghlesi-ganatlebis-etapze-genderuli-identobis-nishnit-diskriminatsiis-tavidan-asatsileblad>.

²⁷⁹ See Public Defender (Ombudsman) of Georgia, “Public Defender Addresses Penitentiary Service regarding Proper Treatment of Transgender Prisoner” (2020).

<https://ombudsman.ge/eng/191127024203seksualuri-orientatsia-genderuli-identoba/sakhalkho-damtsvelma-transgenderi-patimris-satanado-mkurnalobastan-dakavshirebit-penitentsiur-samsakhurs-mimarta>.

²⁸⁰ European Court of Human Rights, *Y v. France*, Application no. 76888/17 (2017).

²⁸¹ Human Rights Centre of Ghent University in collaboration with the Equality Law Clinic of the Université Libre de Bruxelles, “Third party intervention in the case of Y. v. France” (2020).

https://hrc.ugent.be/wp-content/uploads/2020/11/Third-Party-Intervention-Y-v-France_HRC-AND-ELC.pdf.

²⁸² United Nations, General Assembly, “Protection against violence and discrimination based on sexual orientation and gender identity. Report of the Independent Expert on protection against

Interim conclusion

In summary, the grounds of gender identity, gender expression, and sex characteristics show strongly diverging degrees of protection in domestic anti-discrimination legislations across European countries. While these grounds have found recognition both at the international and European levels, they are not explicitly recognised, or only partially recognised, in some countries, some of which have deployed strategies to protect persons discriminated against based on these grounds through sex/gender and through sexual orientation. However, this may lead to contradictions, depending on how expansively and liberally courts choose to interpret those two concepts. Gender identity, gender expression, and sex characteristics should be explicitly recognised in anti-discrimination law to increase the visibility of these groups, avoid mischaracterisation, and ensure a comprehensive protection against discrimination.

Other grounds

Genetic heritage, physical appearance, additional or complementary grounds related to racial or ethnic origin, and non-EU nationality have been evoked by participants

As mentioned above, several other “other grounds” have been evoked by participants in our survey and interviews, besides socio-economic status, health status, and gender identity, gender expression, and sex characteristics, especially genetic heritage, physical appearance, additional or complementary grounds related to racial or ethnic origin, and non-EU nationality.

Genetic heritage can be generally understood as referring to real or perceived genetic conditions, predispositions, or risk factors related to health and disease traits or to ancestry. It is already recognised as such in several countries, be it directly in the general anti-discrimination legislation,²⁸³ in a specific law,²⁸⁴ or indirectly recognised within the grounds of disability and health.²⁸⁵ Article 21(1) CFREU, for its part, explicitly enshrines the ground of “genetic features”.

This ground is often perceived by respondents as a very novel one, whose content and contours are not yet clear, and which elicits a certain reticence to mobilise it even when it is already recognised. Despite very few cases having been brought to date under this ground, it is expected to play a more prominent role in the future, by virtue of developments in genetic research and manipulation technology.²⁸⁶ Discrimination based on generic heritage may become especially important in the framework of access to insurance, notably in cases where coverage is denied or where premiums are raised based on genetic traits linked to some predisposition to a certain illness.²⁸⁷

violence and discrimination based on sexual orientation and gender identity” A/73/152 (12 July 2018), para. 25.

²⁸³ It is the case in Bulgaria, Georgia, Kosovo*, and Serbia, as well as Albania, Belgium, Croatia and France.

²⁸⁴ It is the case in Austria or Germany.

²⁸⁵ It is the case in Romania.

²⁸⁶ According to Romania.

²⁸⁷ According to Ireland and Belgium.

In this regard, genetic heritage is closely linked to future health status and perceived health status in the sense previously described in this report, with the caveat that a genetic predisposition might not necessarily mean that an illness will eventually manifest. Genetic heritage may also be linked to other established discrimination grounds, notably ethnic origin, since certain genetic risk factors are associated with ancestry and ethnicity.²⁸⁸ When drawing these links, however, a particular degree of attention must be paid to not exacerbate racial inequalities and to not incorporate exogenous factors such as bias, racial discrimination, culture, socio-economic status, access to care, or environmental factors into these associations.²⁸⁹

A second ground to be mentioned in this regard is **physical appearance**, when it is not related to health or disability or to other grounds like ethnic origin, religion or belief, or socio-economic status (as could be the case, for instance, if a Black person wears an Afro hairstyle, if a Muslim woman wears a headscarf, or if a person in a situation of homelessness does not have access to sanitary facilities).

The ground of physical appearance is measured against the backdrop of societal representations of beauty, fitness, and “properness”. These representations are in turn shaped themselves by bias and stigma. We can think in this context of a person who has visible tattoos, persons who are considered overweight or underweight, etc. Here, having a standalone ground would prove useful to combat these instances of discrimination while fighting against those societal representations and for a more inclusive society.²⁹⁰

Specifically at the EU level, two further elements can be raised. Firstly, the CJEU’s narrow interpretation of the ground of racial or ethnic origin may presently undermine its effectiveness. Having **additional or complementary grounds related to racial or ethnic origin** would afford a better protection against this type of discrimination.

The *Jyske Finans* case concerned a person born in Bosnia and Herzegovina who had since acquired Danish nationality, and who was however required an additional proof of identity when applying for a loan since he had been born in a non-EU country. In its decision, the CJEU found that no direct discrimination had occurred since a person’s place of birth cannot alone justify a general presumption that that person is a member of a given ethnic group. It observed that ethnic origin cannot be determined based on a single criterion such as place of birth, but that it must rather be based on a set of elements, such as common nationality, religious faith, language, and cultural and traditional origins and backgrounds.²⁹¹

This narrow interpretation, coupled with the difficulties to collect and use data related to these elements, shows the need to open up more possibilities in EU anti-discrimination law to render effective the prohibition against discrimination based on racial or ethnic origin. This would require the possibility to collect data related to those elements and to treat them as

²⁸⁸ Genetics Home Reference, “Why are some genetic conditions more common in particular ethnic groups?” (Medline Plus). <https://medlineplus.gov/genetics/understanding/inheritance/ethnicgroup/>.

²⁸⁹ L.N. Borrell et al., “Race and Genetic Ancestry in Medicine — A Time for Reckoning with Racism”, *The New England Journal of Medicine* 384 (2021): 474–480.

²⁹⁰ According to the FRA.

²⁹¹ Court of Justice of the European Union, Judgment of 6 April 2017, *Jyske Finans*, C-668/15, EU:C:2017:278, paras. 16–24. See also Court of Justice of the European Union, Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, para. 46.

essentially linked to a claim of racial or ethnic discrimination, allowing claimants to bring a series of concurring elements from which such discrimination may be presumed.

Whereas this could be done without an explicit inclusion of such grounds, adding them to the TFEU would have the advantage that EU institutions would then be afforded larger possibilities for legal action, including the development of more protective legislation and the opening of infringement procedures individually on these elements, thus strengthening the avenues to combat this type of discrimination.²⁹²

An additional ground to strengthen at the EU level is **non-EU nationality**, especially in connection with other grounds such as gender, sexual orientation, civil status, racial or ethnic origin, and religion or belief

Secondly, an additional ground to strengthen at the EU level is **non-EU nationality**, especially in connection with other grounds such as gender, sexual orientation, civil status, racial or ethnic origin, and religion or belief.²⁹³ The provisions of the TFEU which prohibit discrimination on grounds of nationality cover only nationals of EU Member States, and the Racial Equality Directive specifically excludes nationality-based

discrimination from its scope,²⁹⁴ unless they are family members of a mobile EU citizen²⁹⁵ and despite some scholars having convincingly argued for a more encompassing interpretation of that provision.²⁹⁶ Moreover, the General Court has made it clear that Article 21(2) CFREU, which prohibits discrimination on grounds of nationality, must be construed as having the same scope as the first paragraph of Article 18 TFEU, and therefore as excluding third-country nationals.²⁹⁷

Third-country nationals are protected in some respects under EU law, notably and with varying degrees of protection through equality of treatment clauses if they are seasonal workers, long-term residents, Turkish workers, researchers, if they benefit from international protection, or if they are highly qualified workers, among others.²⁹⁸ However, full protection against nationality-based discrimination towards third-country nationals is still absent from EU law from a general perspective, which is problematic.

²⁹² According to Dorothea Staes.

²⁹³ According to Belgium, Poland and Olivier De Schutter. See also Equinet, *Freedom of Movement in the EU: Equality Bodies Tackling Discrimination of Union Workers* (2021). <https://equineteurope.org/wp-content/uploads/2021/06/Freedom-of-Movement-in-the-EU-Equality-Bodies-1.pdf>.

²⁹⁴ See Article 3(2) of the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

²⁹⁵ See more specifically, Article 24(1) of the Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

²⁹⁶ See for instance: Ch. Hublet, “The Scope of Article 12 of the Treaties of the European Communities vis-à-vis Third Country nationals: Evolution at last?”, 15(6) *European Law Journal* (2009): 757.

²⁹⁷ General Court (Fourth Chamber), Judgment of 20 November 2017, *Udo Voigt v. European Parliament*, Case T-618/15. The question remains open as to whether the open-ended clause of Article 21(1) CFREU comprises the ground of nationality for third-country nationals.

²⁹⁸ See Olivier De Schutter, *Links between migration and discrimination* (European Network of Legal Experts in Gender Equality and Non-Discrimination, 2016).

<https://www.statewatch.org/media/documents/news/2017/jan/ep-study-migration-discrimination.pdf>. See also: S. Ganty, *L'intégration des citoyens européens et des ressortissants de pays tiers en droit de l'Union européenne. Critique d'une intégration choisie*, Larcier, Collect. Droit de l'Union européenne (2021).

Conclusion

Expanding the list of grounds in European anti-discrimination law, both at EU and national level, is key to extend this protection to certain groups which are currently outside the scope of the anti-discrimination legal framework, and to ensure a comprehensive application of this body of law that remedies some of its shortcomings and contradictions.

We observed that EU anti-discrimination law is not encompassing enough when it comes to protected grounds. At the same time, the protected grounds that are explicitly recognised in domestic law vary a lot from one country to another. Many advantages of recognising additional grounds were identified: while some reluctance to explicitly adding new grounds exists as well, these objections are much more limited than the advantages raised.

Firstly, the relationship between discrimination and socio-economic disadvantage is a complex one. Poverty or socio-economic precariousness is not only a consequence, but also a cause of discrimination. This ground does not seem to have fully made its way into the anti-discrimination landscape of most European countries, either because it is not enshrined as a protected characteristic or because it is not fully implemented. There is a wide consensus among participants and interviewees on the importance of taking all necessary steps to ensure the implementation of an effective prohibition against socio-economic discrimination.

Regarding health status, most equality bodies agreed that this ground should be part of anti-discrimination legislation and that it would improve the overall effectiveness of this body of law. There is a certain overlap both in theory and in practice between the grounds of health status and disability. However, health status should be recognised as a ground on its own, since the disability ground does not cover all instances of health issues on the basis of which discrimination is likely to occur. The recognition of this ground should extend to actual or perceived health status, as well as past, present, and future health status.

The grounds of gender identity, gender expression, and sex characteristics show strongly diverging degrees of protection in domestic anti-discrimination legislations across European countries. While these grounds have found recognition both at the international and European levels, they are not explicitly recognised, or only partially recognised, in some countries. Gender identity, gender expression, and sex characteristics should be explicitly recognised in anti-discrimination law to increase the visibility of these groups, avoid mischaracterisation, and ensure a comprehensive protection.

Finally, several other “other grounds” have been mentioned by equality bodies and stakeholders besides socio-economic status, health status, and gender identity, gender expression, and sex characteristics, especially genetic heritage, physical appearance, additional or complementary grounds related to racial or ethnic origin, and non-EU nationality. These grounds should be further explored and developed to ensure a more encompassing and coherent protection under European anti-discrimination law.

IV. The difficult case of the open-ended clause

Overview

An “open-ended clause” is a clause stating that grounds beyond those explicitly mentioned in it may also be invoked. The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights as well as the RESC all enshrine an open-ended clause. For example, in its interpretative statement on Article 30 of the RESC (the right to protection against poverty and social exclusion), the ECSR insists on “the important impact of the non-discrimination clause (Article E), which obviously includes non-discrimination on grounds of poverty”,²⁹⁹ in addition to the explicitly enshrined ground of social origin.

The ECtHR has also made it clear in many instances that the list set out in Article 14 ECHR “is illustrative and not exhaustive, as is shown by the words ‘any ground such as’ (in French ‘*notamment*’) [...] and the inclusion in the list of the phrase ‘any other status’ (in French ‘*toute autre situation*’)”.³⁰⁰ However, the difference of treatment should still be based on an “identifiable” characteristic or “status”.³⁰¹ The interpretation of the “open-ended character” of this provision has not always been straightforward in the case law of the ECtHR, though,³⁰² but rather inconsistent, incoherent, and sometimes quite confusing.³⁰³ However, the Court has already recognised many grounds not explicitly enshrined in Article 14 ECHR.³⁰⁴

²⁹⁹ European Committee of Social Rights, Conclusions 2013 – Statement of interpretation – Article 30, 2013_163_06/Ob/EN.

³⁰⁰ European Court of Human Rights (plenary), *Engel and others v. the Netherlands*, Applications nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (23 November 1976), para. 72; European Court of Human Rights (Grand Chamber), *Carson and Others v. the United Kingdom*, Application no. 42184/05 (16 March 2010), para. 70.

³⁰¹ European Court of Human Rights (Fourth Section), *Hode and Abdi v. the United Kingdom*, no. 22341/09 (6 November 2012), para. 44.

³⁰² M. Cousins, “The European Convention on Human Rights, Non-Discrimination and Social Security: Great Scope, Little Depth?”, *Journal of Social Security Law* 16 (2009): 123. See notably European Court of Human Rights (Grand Chamber), *Carson and Others v. the United Kingdom*, Application no. 42184/05 (16 March 2010); European Court of Human Rights (Plenary), *Case relating to certain aspects of the laws on the use of languages in education in Belgium v Belgium*, Applications nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64 (23 July 1968), para. 10.

³⁰³ J. Gerards, “The Discrimination Grounds of Article 14 of the European Convention on Human Rights”, *Human Rights Law Review* 13 (2013): 99. See also O. M. Arnardóttir, “The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights”, *Human Rights Law Review* 14 (2014): 647.

³⁰⁴ See for example: European Court of Human Rights, *Fretté v. France*, Application no. 36515/97 (26 February 2002) (as for the ground of sexual orientation); European Court of Human Rights, *Bah v. the United Kingdom*, Application no. 56328/07 (27 September 2011) and European Court of Human Rights (Second Section), *Anakomba Yula v. Belgium*, Application no. 45413/07 (10 March 2009) (as for the type of residence permit); European Court of Human Rights, *Petrov v. Bulgarie*, Application no. 15197/02 (22 May 2008) (as for the marital status); European Court of Human Rights, *Stummer v. Austria*, Application no. 37452/02 (7 July 2011) (as for the condition of prisoner).

Because Article 21(1) CFREU contains an open-ended list of grounds, it provides a tool to protect against discrimination which occurs on grounds which are not enshrined in Article 19 TFEU and the EU anti-discrimination law directives in situations where Member States are nevertheless implementing EU law

Regarding EU law, the academic literature agrees that Article 21(1) CFREU is an open-ended provision,³⁰⁵ and the CJEU has confirmed this in several discrimination cases on grounds which are not enshrined in Article 21(1).³⁰⁶ Moreover, it is now clear that this article has a horizontal direct effect, meaning that individuals can invoke this provision before domestic courts.³⁰⁷ However, it is important to recall that the scope of Article 21(1) is limited to Article 51(1), i.e. EU institutions and agencies, and Member States only insofar as they are implementing EU law. In

short, because Article 21(1) CFREU contains an open-ended list of grounds, it provides a tool to protect against discrimination which occurs on grounds which are not enshrined in Article 19 TFEU and the EU anti-discrimination law directives in situations where Member States are nevertheless implementing EU law. There are therefore some limited opportunities for claims of discrimination based on grounds not enshrined in Article 19 TFEU.

The landscape is much more diverse at domestic level, since many European states do not recognise an open-ended clause or establish limits to its *rationae personae* or *rationae materiae* scope, as mentioned above. The opportunity of enshrining an open-ended clause in anti-discrimination law has been the most polarising question among survey participants and interviewees, which reflects the divergence of domestic anti-discrimination legal frameworks on this question. Some participants fully endorse the open-ended clause,³⁰⁸ while others are opposed to it.³⁰⁹ Others expressed some hesitation about it without strongly objecting against it.³¹⁰

A majority of survey participants found that an open-ended clause should be recognised besides the protection of explicit novel grounds, even though recognising new grounds should be a priority,³¹¹ while a minority considered that a closed list of grounds would be preferable.³¹² It must be noted that most of the equality bodies which expressed positive views about an open-ended list of protected grounds have already such a clause enshrined in their anti-discrimination legislation (except for Austria and Poland, who were strongly in favour although they do not have it), as opposed to those who expressed concerns about it.

³⁰⁵ See for instance P. Craig and G. de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2015), p. 895.

³⁰⁶ See for instance : Court of Justice of the European Union (Second Chamber), Judgment of 22 January 2022, *Almudena Baldonado Martín v Ayuntamiento de Madrid*, Case C-177/18, EU:C:2020:26.

³⁰⁷ Court of Justice of the European Union (Grand Chamber), Judgment of 17 April 2018, *Egenberger*, Case C-414/16, EU:C:2018:257, paras. 87-79.

³⁰⁸ Namely: Finland, Georgia, Bulgaria, Poland, Serbia, Moldova, Kosovo*, CoE's Department of the European Social Charter and Romania.

³⁰⁹ Namely: Czech Republic, Germany, Lithuania, The Netherlands, Greece, Malta and Sophie Latraverse (independent expert for France).

³¹⁰ Namely: Olivier De Schutter, ATD Fourth World, UK's Trades Union Congress, Ireland, Austria and Belgium.

³¹¹ According to Austria, Poland, Georgia, Finland, Bulgaria, Serbia, Moldova, Kosovo* and Olivier De Schutter also confirmed this.

³¹² According to Czech Republic, Germany, Lithuania, The Netherlands, Greece and Malta.

The advantages and disadvantages of an open-ended clause

The debate around an open-ended list of protected characteristics in anti-discrimination law crystallised around six questions, each of which is addressed at greater length below: a flexible/evolutive approach *versus* legal uncertainty, the competences of equality bodies *versus* the possibility of abuse, the legal reasoning to bring before court, the possibility to invoke additive/cumulative discrimination, the hierarchy between grounds, and political tensions and the risk of backlash.

Firstly, an open-ended clause would address the concern that the law cannot sufficiently follow the quick changes of social reality and, as a result, explicit new grounds would not be included sufficiently fast in many cases since lawmakers do not work so swiftly and have other political interests.

An open-ended list of protected characteristics allows courts to follow societal evolutions more closely and to take an evolutive and dynamic approach, including by addressing future problems that we cannot think of at this moment.³¹³ When anti-discrimination legislation is too restrictive, its ability to protect vulnerable people is reduced, whereas an open-ended clause can provide protection even if the situation is outside of a narrow explicit ground. In this regard, an open-ended list provides some flexibility.³¹⁴

In this context, some countries report having an open-ended clause as a positive and valuable possibility, even though they usually have resort to the long explicit list of grounds and seldom use the open-ended clause as such.³¹⁵ An open-ended clause focuses attention to the impact of policies and practices on diverse individuals and groups, allowing to raise certain hidden situations to the surface. Nonetheless, it can sometimes be hard to envisage how an open-ended clause could be effective in practice and litigated successfully.³¹⁶

One of the main counterarguments relates to the legal uncertainty and unpredictability of such a clause,³¹⁷ especially for horizontal discrimination, for which legal certainty is key.³¹⁸ Along the same lines, some doubts have been voiced as to whether an open-ended list could be enshrined in Article 19 TFEU—beyond the unanimity issue—, since the legal bases related to EU competences have to be very precise and an open-ended clause would be too uncertain legally speaking.³¹⁹

One interviewee suggested that such a clause could be good for test cases in high courts or at the international level, but not in the day-to-day reality of courts.³²⁰ It has similarly been brought up that a distinction should be made between the norms applicable to the state (vertical discrimination) and the norms applicable between individuals/organisations (horizontal discrimination, in the sense of covering the spheres of societal and economic

³¹³ According to CoE's Department of the European Social Charter, Poland, Finland, Moldova, Austria, Olivier De Schutter, Romania, the FRA and Lithuania.

³¹⁴ According to Poland.

³¹⁵ It is the case in Bulgaria and Georgia.

³¹⁶ According to Ireland.

³¹⁷ According to Greece, Lithuania, Czech Republic, Moldova and Romania.

³¹⁸ According to the Netherlands.

³¹⁹ As opposed to Article 21(1), which does not constitute a basis for EU competence as raised by Dorothea Staes (DG JUST of the European Commission).

³²⁰ This was suggested by Ireland.

activity): for some, an open-ended clause should be foreseen for the former but not for the latter, as is the case in the Netherlands.³²¹

Secondly, an open-ended list of protected grounds removes occasional doubts about whether potentially unfair treatment falls within the remit of equality bodies when they have a mandate to deal with such a clause.³²² Nonetheless, an open-ended list of grounds is also likely to create some legal difficulties for equality bodies in deciding whether a certain characteristic constitutes a protected ground.³²³ There is also a fear that an open-ended list would increase the number of requests and cases, making equality bodies unable to adequately deal with this additional workload due to limited resources.³²⁴

The risk of misusing or abusing this clause has also been mentioned by several participants.³²⁵ Specifically, there is a fear that this clause may lead to many ill-founded complaints, making it difficult for equality bodies to manage and prioritise.³²⁶ Indeed, anti-discrimination protections are not always fully understood by the public: people sometimes feel that something is not right but this does not necessarily entail an instance of discrimination. For instance, in Moldova, police officers complained that they were discriminated against on grounds of “professional group” because they earned a lower salary than prosecutors.

On the other hand, the Public Defender of Georgia explained that indeed some ill-founded complaints have been brought on the basis of the open-ended clause (in particular concerning favouritism, personal dislike, etc.), but that they handle such cases without any serious difficulty and this does not outweigh the positive impact and importance of having the mandate to examine any possible cases of discrimination as a result of a non-exhaustive list. Moreover, equality bodies often have some leeway to decide their own priorities and deal with the cases which have a higher social impact beyond the individual situations brought to them.³²⁷

Thirdly, an open-ended list of protected grounds shifts the evaluation of discrimination cases from a more legalistic perspective to actually considering issues of legitimacy and proportionality, which is for some a positive development.³²⁸ For others, on the contrary, an open-ended list requires a strong and rigorous legal reasoning every time a new situation or characteristic is retained as a ground, which is ultimately burdensome.³²⁹

Fourthly, an open-ended clause makes it easier to argue and invoke additive/cumulative discrimination when one or all of the grounds at stake are not explicitly enshrined.³³⁰ Indeed, as explained below, even when additive/cumulative discrimination is not explicitly recognised, general anti-discrimination clauses do not normally exclude the possibility to invoke several

³²¹ An open-ended list (Article 1 of the Dutch Constitution, Article 14 ECHR) applies to public bodies, while individuals are only bound by a closed list. There is no *prima facie* limit to the state’s responsibility.

³²² According to Malta.

³²³ This was reported by Georgia.

³²⁴ This was reported by Malta.

³²⁵ Namely: Malta, Georgia and Moldova.

³²⁶ This was reported by Georgia and Belgium.

³²⁷ This social impact reference was made by the Belgian Inter-federal Centre for Equal Opportunities (Unia). They decided not to deal with the case of a person with a disability asking for financial support to adapt his car, which was a Porsche, claiming reasonable accommodation.

³²⁸ According to Finland.

³²⁹ According to Moldova.

³³⁰ According to Romania.

grounds which operate separately and, in this context, the open-ended clause might be useful when one or all of the grounds at stake are not explicitly recognised.

The value of the open-ended clause is potentially greater when intersectional discrimination is not explicitly prohibited in anti-discrimination law

The value of the open-ended clause is potentially greater when intersectional discrimination is not explicitly prohibited in anti-discrimination law. Indeed, intersectional discrimination constitutes a unique form of discrimination because there is a synergy between the grounds at stake, and if it is not recognised as such in the law it could be

argued that the open-ended clause also encompasses this unique form of discrimination which derives from several grounds operating synergetically. The case law of the ECtHR pleads for such an interpretation. Indeed, although the Court has never coined the term “intersectional” as such, it has found instances of intersectional discrimination under Article 14 ECHR.³³¹ In other words, the open-ended clause potentially allows to take into account situations where grounds cannot be disentangled from one another.³³²

Fifthly, according to some survey participants and interviewees, an open-ended clause would mean that there is no longer a hierarchy between different grounds of discrimination, which would be a positive development.³³³ This is a double-edged sword according to others, since there is a risk of diluting the purpose and effectiveness of anti-discrimination law, as the core criteria of racial or ethnic origin, gender, etc., might lose their specificity³³⁴ and as the protection of social groups that are most at risk of discrimination might be weakened.³³⁵

There is indeed no consensus around the need for a hierarchy between grounds. It has been underlined that there is already a *de facto* hierarchy in most countries concerning the scope of protection³³⁶ and the implementation³³⁷ of various grounds (with gender, ethnicity, and disability at the top of this hierarchy). In this respect, some participants considered that there is a need for “levelling up”³³⁸ because, beyond any legal consequences, this *de facto* hierarchy sends a symbolic message that certain groups deserve to be protected more than others.³³⁹

Along the same lines, there is no agreement as to whether different levels of scrutiny should be applied depending on the grounds at stake, in the image of the “suspect grounds” doctrine developed by the ECtHR.³⁴⁰ On the one hand, since grounds are not isolated but rather often

³³¹ See for instance, European Court of Human Rights, *B.S. v Spain*, Application no. 47159/08 (24 July 2012).

³³² According to Romania.

³³³ For instance, Kosovo*.

³³⁴ For instance, the Netherlands, Sophie Latraverse (independent expert for France) and Belgium.

³³⁵ According to Malta.

³³⁶ For instance, this was underlined by Olivier De Schutter and Poland.

³³⁷ For instance, this was underlined by Ireland, Austria and Georgia.

³³⁸ According to Austria.

³³⁹ According to Olivier De Schutter.

³⁴⁰ The ECtHR considers that a difference of treatment on the basis of suspect grounds should be justified by “very weighty reasons”. For instance, it has judged that “the nature of the status upon which differential treatment is based weighs heavily in determining the scope of the margin of appreciation to be accorded to Contracting States (...) immigration status is not an inherent or immutable personal characteristic such as sex or race, but is subject to an element of choice (...). Given the element of choice involved in immigration status, therefore, while differential treatment based on this ground must still be objectively and reasonably justifiable, the justification required will not be as

connected to one another, it is difficult to find that some deserve more protection than others.³⁴¹ On the other hand, some grounds may require a stricter judicial control taking into account the political and social situation of the country (e.g. LGBTQI+-related hostility in some Eastern European countries like Poland, or religion and belief in Belgium).³⁴²

Sixthly, the open-ended list of protected characteristics offers sometimes an alternative route when there are political tensions surrounding some specific grounds. For instance, an open-ended list was recently adopted in the field of criminal responsibility in Romania without explicitly defining any ground, because there were political tensions around the grounds of gender and sexual orientation (this provision was later declared unconstitutional).³⁴³

There is another face to this coin, however: an open-ended clause can also be restrictively interpreted (especially if not many explicit grounds are recognised besides it), which greatly reduces the protection offered by anti-discrimination law. In this context, it is important to have a stricter definition of the situations likely to be covered by an open-ended list of protected grounds.³⁴⁴ In the same vein, another risk was mentioned regarding the prohibition of hate speech, which can become difficult to manage under an open-ended clause in light of freedom of expression: an excessive risk of censorship exists, as anything could be argued to constitute hate speech.³⁴⁵

Finally, it should be noted that several equality bodies whose mandate encompasses the open-ended clause have reported that this clause has value, is useful in practice, and does not raise any particular difficulties or entail an overwhelming additional workload.³⁴⁶ For instance, in Bulgaria, the open-ended clause has not been used often: complaints mainly resorted to the 19 grounds foreseen in legislation, which are encompassing enough. However, the open-ended clause provides protection when a discriminatory situation falls outside of a narrow explicit ground. More generally, the FRA noted that an open-ended clause is present in many other systems and countries, and that this does not seem to cause any particular problems.

Overcoming the objections to the open-ended clause by defining it

Many of the objections regarding the open-ended clause could actually be addressed by defining it. This would provide some criteria that would help to determine what constitutes a

weighty as in the case of a distinction based, for example, on nationality” (European Court of Human Rights, *Bah v. the United Kingdom*, Application no. 56328/07 (27 September 2011), para. 47).

³⁴¹ According to Dorothea Staes (DG JUST of the European Commission), CoE’s Department of the European Social Charter and the UK’s Trades Union Congress.

³⁴² According to Poland and Belgium.

³⁴³ Although the Romanian National Council for Combating Discrimination advocated rather for a long and precise list of grounds. This clause was challenged before the Constitutional Court by the Presidential Office because it could lead to abuses, as it was not predictable enough. The Constitutional Court has recently found this provision to be unconstitutional. See Romanian Constitutional Court, Decision no. 561 of 15 September 2021. https://www.ccr.ro/wp-content/uploads/2021/10/Decizie_561_2021.pdf. The general anti-discrimination law in Romania contains an open-ended clause plus several explicit grounds, and remains unchanged. Moldova also raised the same issue regarding both the addition of new grounds and an open-ended clause, noting the example of groups that oppose the legal recognition of the grounds of sexual orientation and gender identity based on Orthodox Christian values.

³⁴⁴ According to Romania and Sophie Latraverse (independent expert for France).

³⁴⁵ As mentioned by Belgium.

³⁴⁶ For instance, it is the case in Georgia, Serbia and Bulgaria.

protected ground or not under this clause. This necessity has been underlined by several participants. How would such a definition look like, then? We provide here three examples of definitions before proposing one which, in our view, would be encompassing and clear enough.

The first example can be found in South Africa, where the legislator defines prohibited grounds as “(a) [listed criteria]; or (b) any other ground where discrimination based on that other ground- causes or perpetuates systemic disadvantage; undermines human dignity; or adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)”.³⁴⁷

Secondly, the former Hungarian Equal Treatment Authority issued a note in 2010 where it defined the characteristics likely to be identified on the basis of an open-ended clause, namely a situation that is objectively verifiable, suitable for homogeneous group formation, generalisation, and which is based on social prejudice.³⁴⁸ According to this body, “the essence of the legal protection against discrimination in the case of other situations is that the complainant with a protected characteristic suffers primarily not because of his own conduct, but because he belongs to a certain group”.³⁴⁹

Finally, the Canadian Supreme Court has recognised the existence of so-called “analogous criteria” on the basis of Article 15 of the Canadian Charter of Rights and Freedoms.³⁵⁰ According to the “analogous criteria” doctrine, the following elements should be taken into account when determining new grounds: a group which has suffered a historical disadvantage or which constitutes a “discreet and isolated minority”; a characteristic immutable or modifiable only at an unacceptable price from the point of view of personal identity; and a similarity to one of the criteria listed (or the fact that this characteristic is already recognised by provincial legislators and doctrine as a potentially discriminatory ground).³⁵¹

These definitions provide interesting elements. However, they are either too broad, such as the one provided in South Africa, or, as discussed below, propose unsuitable criteria which are too restrictive, such as “belonging to one group”, the immutable character (or unacceptable change), and the analogy requirement.

On this basis, the following definition of a ground recognised under the open-ended clause could be more suitable at domestic level: an 1) objectively identifiable characteristic 2) whether real or perceived 3) shared by others 4) which serves as a basis for social prejudice and stigma, 5) ingrained in social, political, or institutional practices.

³⁴⁷ Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, chap. 1, art. 1. http://www.saflii.org/za/legis/consol_act/poeapouda2000637.pdf.

³⁴⁸ L. Farkas et al., *Az Egyenlő Bánásmód Tanácsadó Testület 288/2/2010. (IV.9.) TT. sz. Állásfoglalása* (2020). https://www.ajbh.hu/documents/10180/3908613/TTaf_201004.pdf/201920d6-8822-428b-9976-29c7b89dcdbb.

³⁴⁹ Ibid.

³⁵⁰ *Andrews v. Law Society of British Columbia*, [1989] 1 RCS 143, p. 145.

³⁵¹ R. Medhar Inghilterra, “L’inégale multiplication des critères de discrimination : conséquences et modalités d’harmonisation éventuelle” in *Multiplication des critères de discrimination, Enjeux, effets et perspectives, Actes du colloque, 18-19 Janvier 2018*, p. 81 (see the case law the author quotes including: *Andrews v. Law Society of British Columbia*, [1989] 1 RCS 143; *R. v. Turpin*, [1989] 1 RCS 1296 ; *Egan v. Canada*, [1995] 2 RCS 513).

- 1) An objectively identifiable characteristic: the characteristic should be identifiable in order to avoid the cases of personal dislike or favouritism, for instance.
- 2) The characteristic might be real, but it can also simply be perceived or “based on an assumption about another person, which may or may not be factually correct”,³⁵² such as someone who is discriminated against because they are perceived as poor based on the way they dress, while they do not actually experience a situation of poverty.
- 3) The characteristics should be shared by other people. A narrow reference to a group must be avoided, as people are sometimes discriminated against without a particular group being identifiable. For instance, the limitations of a group-based approach can be noticed in the migratory context, where we observe a “multiplication of difference” due to the proliferation of legal statuses carrying various “packages of rights”.³⁵³ Even persons who hold the “same” status may have different experiences depending on the state, region, city, and moment they find themselves in.
- 4) The social prejudice and stigma are the core tenet of this definition, since they put the emphasis of the disadvantage(s) attached to the characteristic, enabling a social process of disempowerment.³⁵⁴
- 5) The role of social, political, or institutional practices: This last dimension captures the lived experience of people to which this characteristic is attached, and replaces a premeditated set of “identity” factors with an investigation of the social processes behind. Moreover, it rejects the innate or immutable requirement, which should not be a condition to qualify a ground as such, as many characteristics are void from innate or immutable qualities. This is also in line with ECtHR case law, which has confirmed that discrimination can occur on the basis of grounds which are not an inherent or immutable personal characteristic.³⁵⁵

Conclusion

An open-ended clause is a clause stating that grounds beyond those explicitly mentioned in it may also be invoked. Many European states do not recognise an open-ended clause or limit its scope. The opportunity of enshrining an open-ended clause in anti-discrimination law has been the most polarising question among survey participants and interviewees, which reflects the divergence of domestic anti-discrimination legal frameworks to this question. A majority of survey participants found that an open-ended clause should be recognised besides the

³⁵² I. Chopin and C. Germaine, *A comparative analysis of non-discrimination law in Europe 2020. The 27 EU Member States, Albania, North Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia, Turkey and the United-Kingdom compared*, p. 33. <https://op.europa.eu/en/publication-detail/-/publication/a88ed4a7-7879-11ea-a07e-01aa75ed71a1>.

³⁵³ K. Nash, “Between citizenship and human rights”, *Sociology* 43, no. 6 (2009): 1080. See also, Moritz Baumgärtel, ‘Facing the Challenge of Migratory Vulnerability in the European Court of Human Rights’, *Netherlands Quarterly of Human Rights* 38, no. 1 (2020): 12-29.

³⁵⁴ I. Solanke, *Discrimination as Stigma. A Theory of Anti-discrimination Law* (Bloomsbury, 2019): 10.

³⁵⁵ European Court of Human Rights (Grand Chamber), *Biao v. Denmark*, Application no. 38590/10, (24 May 2016).

protection of explicit novel grounds, even though recognising new grounds should be a priority, while a minority considered that a closed list of grounds would be preferable.

The debate around an open-ended list of protected characteristics in anti-discrimination law crystallised around six questions: a flexible/evolutive approach *versus* legal uncertainty, the competences of equality bodies *versus* the possibility of abuse, the legal reasoning to bring before court, the possibility to invoke additive/cumulative discrimination, the hierarchy between grounds, and political tensions and the risk of backlash. Several equality bodies whose mandate encompasses the open-ended clause reported that this clause has value, is useful in practice, and does not raise any particular difficulties or entail an overwhelming additional workload.

Many of the objections regarding the open-ended clause could actually be addressed by defining it further. We propose the following definition of a ground recognised under the open-ended clause: an objectively identifiable characteristic shared by others which serves as a basis for social prejudice and stigma, whether real or perceived, ingrained in social, political, or institutional practices.

V. Additive/cumulative and intersectional discrimination

The question of adding new grounds to anti-discrimination law is also closely linked to the issue of additive/cumulative and intersectional discrimination, where discrimination is based on several protected grounds which add/cumulate or intersect with each other. In other words, to combat all instances of discrimination, discriminatory situations must be considered comprehensively.

Additive/cumulative discrimination (so-called “multiple discrimination”) means that discrimination takes place on the basis of several grounds operating separately in one specific case. In additive discrimination, the grounds add on top of one another at the same time, while in cumulative discrimination the grounds operate on separate occasions over time.³⁵⁶ For instance, a Black woman who has received the lowest ranking in an application procedure has been a victim of additive discrimination when not only women but also Black applicants have been ranked lower in the selection process, although they had higher qualifications than men, on the one hand, and white applicants, on the other hand. In this case, the Black woman was a victim of additive discrimination, where the grounds of race and gender operated at the same time but separately.³⁵⁷ An employee who is discriminated against on grounds of race and disability on separate occasions over a period of a few months is a victim of cumulative discrimination.³⁵⁸ In other words, in cases of additive/cumulative discrimination, the individual “belongs to two different groups, both of which are affected by [discriminatory] practices”.³⁵⁹

In contrast, intersectional discrimination refers to “the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone”.³⁶⁰ It arises “where the grounds cannot be separated because there is a *synergy* between them”.³⁶¹ In the case *B.S. v Spain*,³⁶² the ECtHR found that the applicant,

³⁵⁶ I. Solanke, “The anti-stigma principle-centralising intersectionality in the theory of anti-discrimination law” in *Multiplication des critères de discrimination, Enjeux, effets et perspectives, Actes du colloque, 18-19 Janvier 2018* (Défenseur des droits, 2018), p. 146 <https://www.defenseurdesdroits.fr/fr/actes-de-rencontre/2019/01/actes-du-colloque-multiplication-des-criteres-de-discrimination-enjeux>.

³⁵⁷ S. Hannett, “Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination”, *Oxford Journal of Legal Studies* 23 (2003): 68.

³⁵⁸ Ibid.

³⁵⁹ Ibid. S. Hannett, “Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination”, *Oxford Journal of Legal Studies* 23 (2003): 68.

³⁶⁰ Ibid., 68. Kimberley Crenshaw coined the term of “intersectionality”: K. Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-discrimination Doctrine, Feminist Theory and Antiracist Politics”, *University of Chicago Legal Forum* (1989): 1.

³⁶¹ I. Solanke, “The anti-stigma principle-centralising intersectionality in the theory of anti-discrimination law” in *Multiplication des critères de discrimination, Enjeux, effets et perspectives, Actes du colloque, 18-19 Janvier 2018* (Défenseur des droits, 2018), p. 146. See also K. Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-discrimination Doctrine, Feminist Theory and Antiracist Politics”, *University of Chicago Legal Forum* (1989): 1; and, S. Hannett, “Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination”, *Oxford Journal of Legal Studies* 23 (2003): 65.

³⁶² European Court of Human Rights, *B.S. v Spain*, Application no. 47159/08 (24 July 2012).

who was a female Nigerian national and legal resident of Spain carrying out outdoor sex work, who was repeatedly stopped by the police for alleged identification purposes and was verbally and physically abused, was a victim of discrimination based on her position as *an African woman working as a prostitute*. Although the Court did not use the term intersectionality but vulnerability *in casu*, this case constitutes a clear illustration of intersectional discrimination where different grounds (socio-economic status, race, and gender) operate synergetically.

This distinction has legal consequences, as the legal recognition of additive/cumulative discrimination does not pose any important issues while the legal recognition of intersectional discrimination does. Indeed, additive/cumulative discrimination is usually recognised in anti-discrimination law—even though, most of the time, not explicitly—, since applicants can argue discrimination on each ground taken separately.³⁶³ For instance, nothing prevents applicants from claiming that discrimination has occurred on separate grounds in EU law, and this has been explicitly acknowledged by the CJEU.³⁶⁴ Most European states recognise the possibility of invoking multiple discrimination, although only a minority of them foresee an explicit provision in this sense,³⁶⁵ and a few EU Member States still do not allow this at domestic level.³⁶⁶

The situation is different for intersectional discrimination. In the *Parris* case, the CJEU found that Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation “must be interpreted as meaning that a national rule [...] is not capable of creating discrimination as a result of the combined effect of sexual orientation and age, where that rule does not constitute discrimination either on the ground of sexual orientation or on the ground of age taken in isolation”.³⁶⁷

Multiple and intersectional discrimination should be recognised explicitly but this should happen at national level to overcome the existing difficulties at EU level, especially in the case of intersectional discrimination

In conclusion, if intersectional discrimination is not prohibited in EU law, multiple discrimination is in any case prohibited, and it should be recognised as such by EU Member States, at least for what concerns the six grounds enshrined in Article 19 TFEU. However, it would be better if EU law explicitly enshrined this prohibition along with the prohibition of intersectional discrimination, although the unanimity rule

contained in Article 19 TFEU remains an important barrier, as mentioned above.³⁶⁸

There is a broad consensus among most of the survey participants on the fact that multiple and intersectional discrimination should be recognised explicitly but this should happen at

³⁶³ Ibid.

³⁶⁴ Court of Justice of the European Union (First Chamber), Judgment of 24 November 2016, *David L. Parris v. Trinity College Dublin and Others*, ECLI:EU:C:2016:897.

³⁶⁵ For instance, it is the case in Norway and in Bulgaria. For a complete overview, I. Chopin and C. Germaine, *A comparative analysis of non-discrimination law in Europe 2020. The 27 EU Member States, Albania, North Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia Turkey and the United-Kingdom compared* (European network of legal experts in gender equality and non-discrimination, 2021), pp. 35-36. <https://op.europa.eu/en/publication-detail/-/publication/a88ed4a7-7879-11ea-a07e-01aa75ed71a1>.

³⁶⁶ It is the case in Poland and Czech Republic.

³⁶⁷ Court of Justice of the European Union (First Chamber), Judgment of 24 November 2016, *David L. Parris v. Trinity College Dublin and Others*, ECLI:EU:C:2016:897.

³⁶⁸ This was underlined by Dorothea Staes (DG JUST of the European Commission).

national level to overcome the existing difficulties at EU level, especially in the case of intersectional discrimination.³⁶⁹ As mentioned above, there is a strong case for open-ended clauses, which would make it possible to find intersectional discrimination when it is not explicitly prohibited, or multiple discrimination when some of the grounds at stake are not explicitly enshrined.³⁷⁰

In a case related to the conscientious objection of medical practitioners and personnel in relation to abortion services, the ECSR considered that “the allegation that discrimination exists on the grounds of health status between women seeking access to lawful abortion services and others seeking access to other lawful forms of medical procedures, which are not provided on a restricted basis, are closely linked and constitute a claim of ‘overlapping’ or ‘multiple’ discrimination, whereby certain categories of women are allegedly subject to less favourable treatment in the form of impeded access to lawful abortion as a result of the combined effect of their, health status, territorial location and socio-economic status”.³⁷¹ It is worth noting that territorial location and socio-economic status are not explicitly enshrined among the grounds mentioned in Article E RESC, although its Article 30 contains an explicit right to protection against poverty and social exclusion.

Moreover, the concepts of multiple and intersectional discrimination seem to be increasingly used in countries which recognise them.³⁷²

In Bulgaria, the Commission for Protection against Discrimination is divided in different panels, respectively responsible for specific grounds, with a five-person panel which examines complaints dealing with multiple grounds of discrimination (instead of the usual composition of three members).³⁷³

³⁶⁹ According to the CoE’s Department of the European Social Charter and the FRA.

³⁷⁰ This was underlined by the CoE’s Department of the European Social Charter and Poland.

³⁷¹ European Committee of Social Rights, *International Planned Parenthood Federation – European Network (IPPF EN) v. Italy*, Collective complaint no. 87/2012 (10 September 2013), European Committee of Social Rights, *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy*, Collective complaint no. 91/2013 (12 October 2015), para. 205. See also European Committee of Social Rights, *European Roma Rights Centre (ERRC) v. Bulgaria*, Collective complaint no. 151/2017 (5 December 2018).

³⁷² Such as in Romania and Georgia.

³⁷³ Bulgarian Protection Against Discrimination Act, Article 48(3).
<https://www.refworld.org/docid/44ae58d62d5.html>.

A case in Georgia concerned the physical barriers faced by pregnant women with disabilities when receiving reproductive health care services. Under a specific state programme, pregnant women are entitled to several free visits to medical institutions which provide pre-natal services. However, the applicant could not avail herself of this programme as the relevant hospital was not accessible—the office of the gynaecologist was not on the ground floor and there was neither a ramp in the entrance nor an elevator in the building. She therefore had to turn to a private hospital, which was expensive. The Public Defender (Ombudsman) qualified this as a case of intersectional discrimination on the grounds of disability and sex/gender.³⁷⁴

However, the difference between additive and intersectional discrimination is not always clear-cut, and some interviewees have underlined the difficulty of having a legally binding definition of intersectional discrimination, which constitutes a hard concept to work with.³⁷⁵ In particular, it is seen as very case-specific and difficult to prove:³⁷⁶ there is not a frequent or recurring combination of grounds but rather every case is unique.³⁷⁷ Furthermore, going in front of a judge and claiming a number of grounds or a combination of them will not in itself favour or facilitate the implementation of anti-discrimination law.³⁷⁸

Finally, additive/cumulative discrimination has also been linked to individual compensation and damages. In some countries, applicants receive greater damages when they have been victims of additive/cumulative discrimination, rather than discrimination based on a single ground, like in Austria, but not systematically.³⁷⁹ Requesting higher damages for multiple acts of discrimination is an important avenue to further develop and explore.³⁸⁰ The question of whether intersectionality cases beyond additive/cumulative discrimination should lead to more compensation and damages is still under discussion within some equality bodies.³⁸¹

In summary, to combat all instances of discrimination, discriminatory situations must be considered in a comprehensive manner, which includes additive/cumulative and intersectional discrimination. Additive/cumulative discrimination means that discrimination takes place on the basis of several grounds operating at the same time but separately, whereas intersectional discrimination arises where the grounds cannot be separated because there is a

³⁷⁴ See Public Defender (Ombudsman) of Georgia, “Public Defender Addresses Minister of Health relating to Avoidance of Discrimination on grounds of Disability” (2021).

<https://ombudsman.ge/eng/shezghuduli-shesadzlebloba/sakhalkho-damtsvelma-jandatsvis-ministrs-shezghuduli-shesadzleblobis-nishnit-diskriminatsiis-tavidan-atsilebis-sakitkhze-mimarta>.

³⁷⁵ Such as Belgium.

³⁷⁶ This was underlined by Olivier De Schutter, Ireland, Austria, Sophie Latraverse (independent expert for France) and the CoE’s Department of the European Social Charter.

³⁷⁷ According to Bulgaria.

³⁷⁸ According to Sophie Latraverse (independent expert for France).

³⁷⁹ Such as in Belgium.

³⁸⁰ K. Wladasch, *The Sanctions Regime in Discrimination Cases and Its Effects* (Equinet, 2015), p. 33. https://www.archive.equineteurope.org/IMG/pdf/sanctions_regime_discrimination_-_final_for_web.pdf.

³⁸¹ It is the case in Belgium.

synergy between them. EU law should explicitly prohibit additive/cumulative discrimination as well as intersectional discrimination. However, in light of the unanimity requirement at EU level, there is a broad consensus among most equality bodies surveyed on the fact that additive/cumulative and intersectional discrimination should be also recognised explicitly at national level where this is not yet the case.

VI. The role of equality bodies

Equality bodies have a central role to play in the expansion of grounds in European anti-discrimination law. In their mission as public organisations assisting victims of discrimination, monitoring and reporting on discrimination issues, and contributing to an awareness of rights and a societal valuing of equality, they are uniquely positioned to develop a series of strategies aiming to increase the protection of novel grounds, be it explicitly through recognition, through an open-ended clause, or via a combination of both.

As a first caveat, it must be noted that each equality body “has its own very specific combination of mandate, functions, independence, effectiveness, accessibility, and institutional practices of cooperation and collaboration, alongside the political climate in which it operates”.³⁸² Bearing this in mind, it is difficult to propose one-size-fits-all solutions: the outcomes will certainly vary depending on national context and the mandate of the relevant equality body, and diverging strategies may have to be adopted from a strategic perspective as a result of each unique combination of factors.³⁸³

Equality bodies play a decisive role in pushing for the introduction of new grounds and in anchoring newly introduced “other” grounds in the domestic legal system

Moreover, as already mentioned, equality bodies throughout Europe have come under harsh criticism by proponents of illiberal values, with a notable antagonism to issues related to gender and LGBTQI+ people, religion and belief, migration, the treatment of Roma and other minorities, etc. Although this criticism takes different forms depending on the national

political and social contexts, this is a phenomenon which can be observed in all countries.³⁸⁴ The resistance within some sectors of public opinion to strengthening anti-discrimination law protection may render it more difficult from a political and policy perspective to recognise and implement new grounds.

With regard to these novel grounds, equality bodies play a decisive role in at least two important respects: on the one hand, in pushing for the introduction of new grounds and, on the other hand, in anchoring newly introduced “other” grounds in the domestic legal system.

Firstly, equality bodies are uniquely placed to push for the introduction of new grounds. They can play an impulse role by developing interpretation practices and expanding the legal room for manoeuvre with regard to novel grounds and open-ended clauses, by engaging the judiciary directly through capacity-building or indirectly through supporting test and strategic litigation.³⁸⁵ These novel developments and ways of thinking will then permeate into other

³⁸² European Union Agency for Fundamental Rights, *Equality in the EU: 20 Years on from the Initial Implementation of the Equality Directives* (2021), p. 61.

https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-opinion-equality-directives-01-2021_en.pdf; Equinet, “Standards for Equality Bodies” (2021). <https://equineteurope.org/what-are-equality-bodies/standards-for-equality-bodies/>; European Commission, “A Europe that protects: Commission calls for stronger national equality bodies to fight discrimination” (2018). https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4000.

³⁸³ As evoked by Sophie Latraverse (independent expert for France).

³⁸⁴ According to Poland, Romania, Georgia, and Belgium.

³⁸⁵ Such as in Belgium.

sectors and fields and into the reasoning of various other legal actors, like anti-discrimination practitioners, social partners, civil society organisations focused on bringing cases to court, etc.

Where available, the possibility to issue general proposals in case of systemic problems or incitement to discrimination has an important added value to create a favourable public opinion towards adding new prohibited grounds of discrimination.³⁸⁶ Finally, engaging with legislators and policy-makers through recommendations and evaluation of the anti-discrimination legislation also constitutes an important element to develop new grounds.³⁸⁷

Along the same lines, approaching cases in an additive/cumulative or an intersectional manner requires a particular way of thinking and a particular legal reasoning that is still often unfamiliar to legal actors within NGOs and civil society organisations, law enforcement, the judiciary, policy-makers, etc. Finding ways to raise awareness and to provide training about these distinct forms of discrimination may lead to their becoming progressively anchored in the legal landscape of that country and to their being increasingly recognised and deployed to combat more complex instances of discrimination where a single-ground approach might prove problematic.

Actively making use of open-ended clauses where available is another valuable strategy to progressively make way for the incorporation of novel grounds and to push for the application of anti-discrimination law in situations where no other ground is otherwise available.³⁸⁸ In deploying these various strategies, equality bodies can again successfully rely on their policy advice functions, for instance by proposing legislative changes building on international and European human rights law and by liaising with social partners, labour inspectorates, NGOs, and civil society.

Secondly, equality bodies are also key to anchor and develop novel grounds which have recently been introduced in national legislation. One strategy to achieve this is for equality bodies to qualify or requalify certain situations to find discrimination on these novel grounds even when a certain ground is not explicitly invoked by a complainant, but where the facts of the case clearly reveal such ground as one that could reasonably have formed the basis for discrimination.³⁸⁹

This would allow for novel grounds to be further mobilised and explored, developing new interpretations, and consolidating their usage into the everyday practice of equality bodies, which could then progressively make way into the practice of courts and other public and private actors. This is especially relevant for quasi-judicial equality bodies, who can adjudicate cases which, upon appeal, are reviewed by the courts. In this way, the novel legal interpretations developed by those equality bodies directly interact with judicial reasoning and can more directly influence judicial practices.

In some countries, “naming and shaming” also plays an important role through the publication of decisions and through external communication, with due respect to the protection of personal data especially when natural persons are concerned.³⁹⁰ This may constitute a

³⁸⁶ As evoked by Georgia.

³⁸⁷ As noted by Ireland.

³⁸⁸ As mentioned by Poland and Austria.

³⁸⁹ It is the case in Georgia for LGBTQI+ people.

³⁹⁰ As mentioned by Georgia and Belgium.

particularly relevant strategy for new grounds to become progressively consolidated. Another observed practice is that complainants sometimes use the decision issued by an equality body in their case to then reinforce their arguments in court, thus showing how certain advancements and developments fostered by equality bodies may then be directly introduced into judicial circuits.³⁹¹

The fact that equality bodies in some countries lack a mandate to act when there is no concrete person being affected by discrimination renders more difficult the enforcement of non-traditional grounds, where public awareness is lower and based on which less complaints are brought.³⁹²

This notably affects the ground of socio-economic status, as this ground is generally still under-developed and many public and private actors and the general public may not perceive that socio-economic discrimination is at stake in a given situation.³⁹³ Moreover, socio-economic status is particularly likely to be entangled with many structural and systemic factors that are not always easy to ascertain in the context of an individual case in a sufficiently contextualised manner.

Furthermore, in some countries, the fact that equality bodies do not have the mandate to act on some grounds which are enshrined in the law makes their tasks and mission even more difficult, since they are not able to act to protect people who are discriminated on the basis of these specific grounds.³⁹⁴

By virtue of their nature, equality bodies are exceptionally positioned for extra-judicial work and to explore extra-judicial ways. Victims of discrimination may be more likely to complain to equality bodies than to law enforcement forces on some occasions, as they might feel safer or better understood.³⁹⁵ Furthermore, people often do not want to go to court, as the damages they may obtain are too low and court fees too high, and as they would first and foremost like to have access to the specific good in question (a job, an apartment, healthcare, etc.), and not necessarily want to litigate.³⁹⁶

In this connection, the FRA recently found that the most evoked reason for victims not to report incidents of discrimination is that nothing would happen or change if they did report.³⁹⁷ For new grounds, reporting becomes even less evident, as no general awareness or practice of finding discrimination linked to these grounds is yet established in all countries. In addition, most interviewees evoked that complainants before equality bodies usually come from relatively advantaged groups in society, as previously explained.³⁹⁸ Crucially, launching own initiative cases where possible is a valuable tool for equality bodies to counter this

³⁹¹ As mentioned by Georgia.

³⁹² As mentioned by Poland.

³⁹³ According to ATD Fourth World.

³⁹⁴ See *supra*, *Tour d'horizon* section.

³⁹⁵ As evoked by the FRA.

³⁹⁶ As mentioned by Belgium and Sophie Latraverse (independent expert for France).

³⁹⁷ European Union Agency for Fundamental Rights, *Equality in the EU: 20 Years on from the Initial Implementation of the Equality Directives*, pp. 52, 55.

https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-opinion-equality-directives-01-2021_en.pdf.

³⁹⁸ As mentioned by Poland.

phenomenon and to raise awareness and generate new legal doctrines regarding novel grounds.

Dedicated work on socio-economic status and on intersectional discrimination by equality bodies is also needed to counterbalance under-reporting. In this vein, it is important to carry out extensive outreach to increase the knowledge about anti-discrimination law and the remedies available to victims, therefore combatting under-reporting and non-take-up and raising awareness about what discrimination means, which prohibited grounds are recognised in legislation, the functioning of equality bodies, and the avenues available to file complaints and to obtain redress.

This outreach should be targeted at precarious and disadvantaged groups and to those suffering from the digital divide, and be geographically focused in areas harder to reach, for instance the countryside, the outskirts of large cities, etc.³⁹⁹ Along the same lines, the outreach work should also focus on making equality bodies more visible and their function better known by individuals and groups, as this is not always yet the case.⁴⁰⁰

Finally, in some countries, we rather see the existence of quite a robust anti-discrimination legal framework but problems arise more at the level of interpretation and implementation.⁴⁰¹ This is exacerbated with regard to grounds other than the traditional ones, since their interpretation and application is not always clear from the outset. For proper enforcement, a more developed interpretative framework should be developed while a proper training of officers, lawyers, and judges guarantees a better enforcement of anti-discrimination protections where these are already existing.⁴⁰²

To conclude, a link between the expansion of the list of grounds and the need for more funding was often made in the interviews and survey.⁴⁰³ This was labelled as a key point, since the inclusion of more grounds would mean more competences for equality bodies, making it more difficult for them to manage the workload and to prioritise their actions.⁴⁰⁴ The incorporation of new grounds, in this sense, might entail making decisions as to what grounds are prioritised in which contexts, which may in turn lead to societal or governmental backlash if such priorities are not aligned with social or political priorities at a given moment in time.⁴⁰⁵

However, this is not an issue that is specifically linked to the expansion of grounds, as some interviewees evoked that they find already a general difficulty to prioritise and to communicate externally about their priorities, which leads to the need to work with a social vision and looking at the social impacts of their work.⁴⁰⁶

The crucial role of equality bodies must therefore be accompanied by strong safeguards as regards their independence and appropriate resources, both financial and logistical, to ensure

³⁹⁹ According to Georgia, where this strategy has been successfully deployed.

⁴⁰⁰ See for instance Belgium: EU Commission, *Eurobaromètre : Perception de la discrimination dans la société (Belgium)* (2015).

https://www.unia.be/files/Documenten/Publicaties_docs/ebs_437_fact_be_fr.pdf.

⁴⁰¹ According to Romania.

⁴⁰² According to the FRA.

⁴⁰³ As mentioned, among others, by Poland, Bulgaria, Ireland, Austria, Georgia, the UK's Trades Union Congress, the FRA and Dorothea Staes (DG JUST of the European Commission).

⁴⁰⁴ According to the Belgium and the FRA.

⁴⁰⁵ As evoked by Belgium.

⁴⁰⁶ As mentioned by Ireland and Belgium.

that they can correctly fulfil their tasks.⁴⁰⁷ In this sense, the appointment of unprepared, non-independent persons to the management board of equality bodies and the multiplication of grounds and competences without adequate resources were evoked as strategies that might be deliberately deployed by governments to weaken equality bodies.⁴⁰⁸

In summary, equality bodies have a central role to play in the expansion of grounds in European anti-discrimination law. While it is difficult to propose one-size-fits-all solutions given the diversity of mandates and national contexts, equality bodies play a decisive role in at least two important respects: on the one hand, in pushing for the introduction of new grounds and, on the other hand, in anchoring and developing newly introduced “other” grounds in the domestic legal system. To be able to properly carry out their functions and face issues related to internal prioritisation and the risk of political backlash, equality bodies need strong safeguards as regards their independence and appropriate resources, both financial and logistical.

⁴⁰⁷ This point was raised by all equality bodies and the vast majority of stakeholders.

⁴⁰⁸ This possibility was evoked by Romania.

VII. Recommendations

To national legislators and policy-makers⁴⁰⁹

National legislators and policy-makers should expand the list of protected grounds in all fields covered by anti-discrimination legislation to at least the following grounds: socio-economic status, health status, and gender identity, gender expression, and sex characteristics, in order to avoid these categories being left out of the scope of protection of anti-discrimination law.

National legislators and policy-makers could consider providing a definition of each ground which remains relatively open (presented as encompassing “at least” certain situations but not exclusively those), thus avoiding restrictive interpretations and uncertainty as to the interpretation of both established and new grounds. Wherever applicable, these definitions should take into account international and European sources, like the Yogyakarta Principles Plus 10 for the grounds of gender identity, gender expression, and sex characteristics.

National legislators and policy-makers could consider avoiding the multiplication of grounds when these cover the same substantive characteristics or statuses, and could instead consider embedding these grounds in the definition of the main characteristic/status (e.g., the following characteristics could be encompassed by the ground of socio-economic status: source of income, illiteracy, level of education, homelessness, employment status, accent, etc.).

National legislators and policy-makers should harmonise the list of protected grounds in existing domestic anti-discrimination norms to avoid the material fragmentation of anti-discrimination law, which generates confusion and unintelligibility.

National legislators and policy-makers should enshrine an open-ended clause of grounds which is strictly defined and allows to tackle additional discriminatory situations, and, where not yet recognised, intersectional discrimination. A definition of a ground recognised under the open-ended clause could be the following: an objectively identifiable characteristic, whether real or perceived, shared by others which serves as a basis for social prejudices and stigma engrained in social, political, or institutional practices.

National legislators and policy-makers should explicitly prohibit additive/cumulative and intersectional discrimination in all fields covered by anti-discrimination legislation, prioritising the latter as it constitutes a specific form of discrimination which is not prohibited as such otherwise. They should also provide clear definitions of additive/cumulative and intersectional discrimination.

⁴⁰⁹ We refer to national legislators in our recommendations for the sake of convenience. However, it must be noted that these recommendations are also addressed to any legislators competent in the field of anti-discrimination law at subnational level.

National legislators and policy-makers should extend the mandate of equality bodies to novel grounds and, if it is not the case yet, to all grounds enshrined in domestic law, including open-ended clauses where available. This mandate is indispensable for the implementation and effectiveness of anti-discrimination law.

National legislators and policy-makers should ensure the complete independence, broadest possible mandate, and all necessary powers and resources for equality bodies to ensure their effective functioning. In line with the European Commission against Racism and Intolerance's General Policy Recommendation No.2 (revised) on Equality Bodies, the persons holding leadership positions in equality bodies should be selected and appointed by transparent, competency-based and participatory procedures, and the executive should not have a decisive influence in any stage of the selection process.

National legislators and policy-makers should systematically mainstream anti-discrimination considerations linked to all grounds in legislation and policy-making, as a way to prevent indirect discrimination, especially concerning the ground of socio-economic status. In this regard, the widely established practice of gender mainstreaming at EU and national level constitutes an example of how anti-discrimination mainstreaming can be implemented. As part of any mainstreaming strategy, national legislators and policy-makers should systematically involve and consult with equality bodies.

National legislators and policy-makers could consider adopting positive action measures for socio-economically disadvantaged people, supporting their access to higher education and to sectors of employment in which they are under-represented, which would help to overcome their limited "aspirations window" and their lack of social networks. Positive action also remains an important tool with regard to the other grounds examined in this report, notably health status and gender identity, gender expression, and sex characteristics.

National legislators and policy-makers should consider anti-discrimination legislation prohibiting socio-economic discrimination as complementary to anti-poverty policies and measures, developing both in parallel and securing implementation in a mutually reinforcing manner.

To EU legislators and policy-makers⁴¹⁰

EU legislators and policy-makers should raise awareness regarding Article 21 CFREU as a possibility to enhance protection against discrimination, by stretching this provision to its limits (especially for the ground of SES) when a situation comes under the scope of Article 51 CFREU.

EU legislators and policy-makers should lead by example on anti-discrimination and equality mainstreaming in all fields of EU action, considering that the open-ended clause contained in Article 21(1) CFREU applies to all EU institutions and agencies.

⁴¹⁰ It must be noted that the recommendations to EU institutions and policy-makers are rather limited due to the EU's current lack of competences linked to Article 19 TFEU.

EU legislators and policy-makers should strengthen data collection in fields where discrimination on the basis of novel grounds is likely to occur, to the extent of their competences. They could consider requiring or helping Member States to collect such data in order to shed light on various types of discriminations which are under-reported and under-researched, especially regarding discrimination on grounds of socio-economic status.

EU legislators and policy-makers could consider tabling and defending a proposal to move from the unanimity rule contained in Article 19 TFEU towards qualified majority voting, to be discussed at the next Treaty modification round or through the *passerelle* clause enshrined in Article 48(7) TEU.

EU legislators and policy-makers could consider providing, even in the absence of legislative competences, a useful platform for information exchange on these new grounds among EU institutions, Member States, and possibly other European states, including their equality bodies, linking it where relevant to the European Pillar of Social Rights.

EU legislators and policy-makers should adopt more *soft law* instruments and campaigns to combat phenomena linked to discrimination—including the specific questions of stigma, stereotypes, and prejudice in public opinion against some specific groups—when they are part of their competences and could potentially be linked to other grounds, especially socio-economic status.⁴¹¹

EU legislators and policy-makers should extend the funding and operative resources in the field of non-discrimination in general, selecting initiatives and projects especially linked to this field which relate to awareness campaigns, data collection, and equal opportunity programmes (especially for socio-economically underprivileged people).

EU legislators and policy-makers should introduce standards for equality bodies that truly guarantee their independence, ability to provide adequate legal assistance to victims of discrimination, sufficient resources and staffing, and effective coordination and cooperation within Member States, across the EU, and internationally. These standards should recognise and strengthen equality bodies' role regarding the incorporation and implementation of new grounds, in light of the other recommendations contained in this report.

To equality bodies

Equality bodies should recognise that different grounds of discrimination may call for a different pedagogy and for different tools to foster recognition and implementation, and adapt their strategy and functioning according to such differences. The grounds examined in this report, which are less consolidated than traditional grounds, may require the adoption of a more inclusive approach to interpreting existing grounds in order to protect situations not explicitly covered by the current national anti-discrimination legislation,

⁴¹¹ See, for instance, the LGBTIQ Equality Strategy 2020-2025, the CERV programme, Roma coordination, social cohesion, the Social Pillar in the area of employment, the Disability Strategy linked to socio-economic inclusion, etc.

heightened levels of awareness-raising through targeted outreach, and more proactive engagement with national legislators and policy-makers to introduce changes at the national level. The following recommendations reflect the different tools and strategies mentioned in this first recommendation.

Regarding the need for legislative and policy changes

Equality bodies could consider using the following arguments outlined in different chapters of this report where changes in national law and policy regarding the recognition *of new grounds* are advisable: expanding the list of grounds allows to name social groups in need for protection, sending a symbolic message; if grounds are not named, they will not be covered by judicial interpretation and by policy and decision-making; there are studies, data, and academic literature regarding systemic discrimination against some specific groups and calling for the inclusion of explicit grounds related to these groups; explicitly recognised grounds provide a legal basis for and catalyse data collection and research; explicitly protecting a ground implies that there is no necessity for equality bodies and courts to develop protracted arguments in individual cases; some equality bodies have a mandate only for grounds that are explicitly covered.

Equality bodies could consider using the following arguments outlined in different chapters of this report where changes in national law and policy regarding the recognition *of an open-ended clause* are advisable: it addresses the concern that the law cannot sufficiently follow the quick changes of social reality and, as a result, explicit new grounds are not foreseen sufficiently fast; it removes occasional doubts about whether potentially unfair treatment falls within the remit of equality bodies; it shifts the evaluation of discrimination cases from a more legalistic perspective to actually considering issues of legitimacy and proportionality; it makes it easier to argue and invoke additive/cumulative discrimination when one or all of the grounds at stake are not explicitly enshrined; it means that there is no longer a hierarchy between different grounds of discrimination, which would be a positive development; it offers sometimes an alternative route when there are political tensions surrounding some specific grounds; several equality bodies whose mandate encompasses an open-ended clause have reported that this clause has value, is useful in practice, and does not raise any particular difficulties or entail an overwhelming additional workload.

Within existing legislative and policy frameworks

Equality bodies should encourage practitioners to systematically invoke discrimination on grounds of socio-economic status, health status, and gender identity, gender expression, and sex characteristics on the basis of domestic law when they constitute protected grounds (either implicitly or under an open-ended clause) and on the basis of Article 21(1) CFREU in cases where Member States are implementing EU law.

Equality bodies should focus on the national level as their main focus of engagement and persuasion, given the difficulties related to decision-making at EU level and the fact that national contexts are very diverse and there are limits to the common goals that we can achieve through a European-wide approach.

Equality bodies should, insofar as possible, have access to and the ability to leverage strong data collection, indicators, and testing systems, which are especially important for novel grounds. This is particularly the case for socio-economic status, which is linked to multiple structural and systemic factors that may not be easy to ascertain in the framework of a single case in a sufficiently contextualised manner, but also for health status, gender identity, gender expression, and sex characteristics, and grounds like genetic heritage.

Equality bodies should clarify the existing confusion between socio-economic rights and socio-economic discrimination, explaining the distinction between them. They should also combat the false belief that socio-economic situation can be changed and is related to individual responsibility, recalling that poverty is linked to structural reasons beyond a persons's control. They should also clarify the overlap between health status and disability, as well as the difference between gender identity, gender expression, and sex characteristics in line with the Yogyakarta Principles Plus 10.

Equality bodies should launch extensive outreach, information, and awareness-raising campaigns regarding novel grounds of discrimination when they are recognised (explicitly or through an open-ended clause) and under-developed, or regarding ancillary aspects of recognised grounds that may be under-developed to date (for example, the link between socio-economic status and traditional grounds, between health status and disability, and between gender identity and gender expression). These campaigns should be targeted at precarious and disadvantaged groups to combat under-reporting and non-take-up, and at those living in remote areas or affected by the digital divide, or respectively at persons with health conditions or with a non-normative gender identity or expression.

Equality bodies could consider redefining certain grounds where they are already recognised albeit in a partial or incomplete manner (e.g., from social origin to socio-economic status, from disability to health status, from sex/gender to gender identity, gender expression, and sex characteristics), by developing an expansive interpretation in their decisions, opinions, and external communications, including by actively considering the role of prejudice and bias and of general negative perceptions in society. This entails developing interpretation practices and expanding the legal room for manoeuvre with regard to novel grounds and open-ended clauses, by engaging with the judiciary directly through capacity-building or indirectly through supporting test and strategic litigation. Where available, the possibility to issue general proposals in case of systemic problems has an important added value.

Equality bodies could consider, where possible, qualifying or requalifying certain situations to find discrimination on novel grounds even when such grounds have not been explicitly invoked by a complainant, but where the facts of the case clearly reveal such grounds as ones that could reasonably have formed the basis for discrimination in each case. Actively making use of open-ended clauses where available is another valuable strategy to progressively make way for the incorporation of novel grounds and to push for the application of anti-discrimination law in situations where no other ground is otherwise available.

Equality bodies should launch extensive outreach, information, and awareness-raising campaigns regarding multiple and intersectional discrimination in order for these tools to be progressively mobilised by legal actors at different levels, including NGOs and civil society, law enforcement, judiciary, and policy-makers, as well as the public in general. This could be done through bespoke campaigns, training, and advocacy in various instances of political representation. More specifically, the role of the open-ended clause, which is likely to protect against any form of discrimination, should be emphasised when domestic law does not enshrine any protection against intersectional discrimination.

Equality bodies could consider engaging with the political level by pointing to areas where new or amended legislation would be necessary, building on international and European human rights law and liaising with social partners, labour inspectorates, NGOs, and civil society, and through participation in coordination platforms and working groups of both a political and a policy-based nature.

Tables & Annexes

Synthetic table of protected grounds and countries⁴¹²

Countries	SES	GIESC	Health status	Open-ended clause
MT	NO	YES	NO	NO
PL	NO	NO (but sex as a proxy)	NO	NO
NL	NO	YES	YES	Not in the main ADL law; through the Constitution, only for public bodies
AT	NO	NO (but <i>Geschlecht</i> as a proxy)	NO (but disability as a proxy)	NO
DE	NO	NO	NO	NO
IE	NO, except for the ground of housing assistance	NO (but gender as a proxy)	NO (but disability as a proxy)	NO
UK	NO	YES	NO (but disability as a proxy)	NO
BULG	YES	NO (but gender as a proxy)	NO (but disability as a proxy)	YES (+ the ground of of “personal status”)
LT	YES	NO	NO	NO
BE	YES	YES	YES	Not in the main ADL law; OEC in the Constitution (but no competence for the EB)
RO	YES	YES (but limited to non-contagious chronic illness, HIV-positive status)	YES	YES (+belonging to a disadvantaged group)
FI	NO	YES	YES	YES
EL	YES	YES (but limited to chronic illness)	YES	NO
RS	YES	YES	YES	YES
GE	YES	YES	YES	YES
XK*	YES	YES	YES	YES (+ personal status)
CZ	Limited to education, employment, judicial process	YES	Not in the main ADL law but protected in specific acts (education and employment) and disability also serves as a proxy	Not in the main ADL law, but in the Constitution
FR	YES	YES	YES	NO
MD	YES	YES but protection limited to the ground of HIV-positive status in the field of employment and to the ground of state of health in the field of social inclusion of persons with disabilities	NO	YES

⁴¹² Limited to survey participants and interviewees.

Survey to equality bodies

A1. To what extent do you agree or disagree with the following statement? “Certain disadvantaged groups/persons are currently left out of the protection of anti-discrimination legislation, and this would not happen if the list of grounds were to be explicitly expanded”.

A2. To what extent do you agree or disagree with the following statement? “Adding new grounds would weaken the overall protection provided by anti-discrimination legislation”.

A3. What proposal do you believe is the best to combat discrimination in general in your country?

A4. In your view, are there any advantages or added value to an open-ended clause of protected grounds in the anti-discrimination legislation of your country? If so, what are they?

A5. In your view, are there any disadvantages or risks to an open-ended clause of protected grounds in the anti-discrimination legislation of your country? If so, what are they?

A6. In your view, are there any advantages or added value to explicitly expanding the list of protected grounds in the anti-discrimination legislation of your country? If so, what are they?

A7. In your view, are there any disadvantages or risks to explicitly expanding the list of protected grounds in the anti-discrimination legislation of your country? If so, what are they?

A8. In your view, what other specific grounds should be explicitly added to the anti-discrimination legislation of your country? Please explain.

A9. In your view, should the genetic heritage ground (or any related ground) be explicitly added to the anti-discrimination legislation of your country? Please explain (*Genetic heritage means “real or perceived genetic conditions, genetic predispositions, genetic risk factors related to health and disease traits, or ancestry”*).

A10. Does the anti-discrimination legislation of your country allow to invoke multiple grounds at the same time in front of courts and/or administrative bodies?

If your answer to Question A10 is “NO” or “I DO NOT KNOW”, please move to Question S1.

A11.1. Does the anti-discrimination legislation of your country allow to invoke multiple grounds at the same time in front of courts and/or administrative bodies in a multiple or in an intersectional manner? (*Multiple discrimination means that discrimination takes place on the basis of several grounds operating at the same time but separately. For instance, multiple discrimination describes the situation of Black women who are likely to suffer from practices which discriminate on grounds of race, on the one hand,*

and on grounds of gender, on the other hand. In these situations, the grounds of race and gender on which the discrimination occurs can be identified separately. Intersectional discrimination means that discrimination takes place on the basis of the combination of two or several grounds which are inextricable and, together, produce a unique discrimination distinct from any form of discrimination on the basis of those same grounds taken separately. For instance, intersectional discrimination describes the situation of Black women who are discriminated against as Black women: the grounds of gender and race cannot be identified separately, but they operate as a whole).

A11.2. If applicable, please provide a reference to the exact article(s) and the full name of the law, if you have a link with an electronic version of this document (even in a language different from English) please also provide it.

S1. Does the anti-discrimination legislation of your country foresee explicitly the ground of socio-economic status (or any related grounds such as ‘social origin’, ‘social status’, ‘property’, ‘wealth’, ‘economic vulnerability’, ‘financial status’, ‘housing assistance’, ‘education’, ‘social standing’, etc.)?

If your answer to Question S1 is “NO” or “I DO NOT KNOW”, please move to Question S12.

S2. If so, what is/are this/these ground(s)?

S3. What fields are covered by this/these ground(s)?

S4. What legislation enshrines this/these ground(s)?

S5. Has/have this/these ground(s) been defined in the legislation or in the case law? If so, what is the definition?

S6. In your view, is the scope of this/these ground(s) encompassing enough to protect people who are discriminated against on grounds of their socio-economic situation? Please explain (*i.e., Do(es) this/these ground(s) cover enough dimensions and situations where discrimination on the basis of socio-economic status is likely to occur?*).

S7. How often is the ground of socio-economic status (or any related ground) invoked in your country?

S8. Has this ground (or any related ground) been invoked in front of courts and/or administrative bodies?

S9.1. If this ground (or any related ground) has been invoked in front of courts and/or administrative bodies, in which field(s)?

S9.2. If this ground (or any related ground) has been invoked in front of courts and/or administrative bodies, by whom?

S9.3. If this ground (or any related ground) has been invoked in front of courts and/or administrative bodies, in front of what jurisdiction(s)/body(ies)?

S10. If this ground (or any related ground) has not been invoked in front of courts and/or administrative bodies, what do you think are the main reasons and obstacles/barriers?

S11.1. In your view, how effective is the ground of socio-economic status (or any related ground) to protect socio-economically underprivileged people or people perceived as such in your country?

S11.2. Please explain.

S12. Regardless of the situation in your country (e.g. the national anti-discrimination legislation already incorporates socio-economic status or any related ground), to what extent do you agree or disagree with the following statement?: “Socio-economic status (or any related grounds such as ‘social origin’, ‘social status’, ‘property’, ‘wealth’, ‘economic vulnerability’, ‘financial status’, ‘housing assistance’, ‘education’, ‘social standing’, etc.) should be incorporated as an explicit discrimination ground into anti-discrimination legislation”.

S13. Regardless of the situation in your country (e.g., the national anti-discrimination legislation already incorporates socio-economic status or any related ground), to what extent do you agree or disagree with the following statement? “Incorporating the ground of socio-economic status (or any related ground) allows to improve the effectiveness of anti-discrimination legislation”.

If your answer to Question S1 was “YES” (i.e., the anti-discrimination legislation of your country foresees the ground of socio-economic status or any related ground), please move to Question H1.

S14.1. In your view, if the socio-economic status ground (or any related ground) has not been explicitly recognised in the anti-discrimination legislation of your country, would there be any obstacles/barriers for such a recognition?

S14.2. Please explain.

S15.1. In your view, if the socio-economic status ground (or any related ground) has not been explicitly recognised in the anti-discrimination legislation of your country and happened to be recognised at one point in the future, would there be any obstacles/barriers for its effective use?

S15.2. Please explain.

H1. Does the anti-discrimination legislation of your country foresee explicitly the ground of health status (or any related grounds such as ‘actual or future state of health’, ‘state of health’, ‘chronic illness’, ‘health condition’, ‘non-contagious chronic disease’, ‘HIV positive status’, etc.)?

If your answer to Question H1 is “NO” or “I DO NOT KNOW”, please move to Question H12.

H2. If so, what is/are this/these ground(s)?

H3. What fields are covered by this/these ground(s)?

H4. What legislation enshrines this/these ground(s)?

H5. Has/have this/these ground(s) been defined in the legislation or in the case law? If so, what is the definition?

H6. In your view, is the scope of this/these ground(s) encompassing enough to protect people who are discriminated against on grounds of their health? Please explain (*i.e., Do(es) this/these ground(s) cover enough dimensions and situations where discrimination on the basis of health status is likely to occur?*).

H7. How often is the ground of health status (or any related ground) invoked in your country?

H8. Has this ground (or any related ground) been invoked in front of courts and/or administrative bodies?

H9.1. If this ground (or any related ground) has been invoked in front of courts and/or administrative bodies, in which field(s)?

H9.2. If this ground (or any related ground) has been invoked in front of courts and/or administrative bodies, by whom?

H9.3. If this ground (or any related ground) has been invoked in front of courts and/or administrative bodies, in front of what jurisdiction(s)/body(ies)?

H10. If this ground (or any related ground) has not been invoked in front of courts and/or administrative bodies, what do you think are the main reasons and obstacles/barriers?

H11.1. In your view, how effective is the ground of health status (or any related ground) to protect persons with health issues or persons perceived as such in your country?

H11.2. Please explain.

H12. Regardless of the situation in your country (e.g. the national anti-discrimination legislation already incorporates health status or any related ground), to what extent do you agree or disagree with the following statement?: “Health status (or any related grounds such as ‘actual or future state of health’, ‘state of health’, ‘chronic illness’, ‘health condition’, ‘non-contagious chronic disease’, ‘HIV positive status’, etc.) should be incorporated as an explicit discrimination ground into anti-discrimination legislation”.

H13. Regardless of the situation in your country (e.g., the national anti-discrimination legislation already incorporates health status or any related ground), to what extent do you agree or disagree with the following statement? “Incorporating the ground of health status (or any related ground) allows to improve the effectiveness of anti-discrimination legislation”.

If your answer to Question H1 was “YES” (i.e., the anti-discrimination legislation of your country foresees the ground of health status or any related ground), please move to Question G1.

H14.1. In your view, if the health status ground (or any related ground) has not been explicitly recognised in the anti-discrimination legislation of your country, would there be any obstacles/barriers for such a recognition?

H14.2. Please explain.

H15.1. In your view, if the health status ground (or any related ground) has not been explicitly recognised in the anti-discrimination legislation of your country and happened to be recognised at one point in the future, would there be any obstacles/barriers for its effective use?

H15.2. Please explain.

G1. Does the anti-discrimination legislation of your country foresee explicitly the ground of gender identity and/or gender expression and/or sex characteristics (or any related ground)?

If your answer to Question G1 is “NO” or “I DO NOT KNOW”, please move to Question G12.

G2. If so, what is/are this/these ground(s)?

G3. What fields are covered by this/these ground(s)?

G4. What legislation enshrines this/these ground(s)?

G5. Has/have this/these ground(s) been defined in the legislation or in the case law? If so, what is the definition?

G6. In your view, is the scope of this/these ground(s) encompassing enough to protect people who are discriminated against on grounds of their non-normative gender identity and/or expression and/or sex characteristics? Please explain (*i.e., Do(es) this/these ground(s) cover enough dimensions and situations where discrimination on the basis of gender identity and/or gender expression and/or sex characteristics is likely to occur?*).

G7. How often is the ground of gender identity and/or gender expression and/or sex characteristics (or any related ground) invoked in your country?

G8. Has this ground (or any related ground) been invoked in front of courts and/or administrative bodies?

G9.1. If this ground (or any related ground) has been invoked in front of courts and/or administrative bodies, in which field(s)?

G9.2. If this ground (or any related ground) has been invoked in front of courts and/or administrative bodies, by whom?

G9.3. If this ground (or any related ground) has been invoked in front of courts and/or administrative bodies, in front of what jurisdiction(s)/body(ies)?

G10. If this ground (or any related ground) has not been invoked in front of courts and/or administrative bodies, what do you think are the main reasons and obstacles/barriers?

G11.1. In your view, how effective is the ground of gender identity and/or gender expression and/or sex characteristics (or any related ground) to protect persons with a non-normative gender identity and/or expression and/or sex characteristics or persons perceived as such in your country?

G11.2. Please explain.

G12. Regardless of the situation in your country (e.g., the national anti-discrimination legislation already incorporates gender identity and/or gender expression and/or sex characteristics), to what extent do you agree or disagree with the following statement? “Gender identity and/or gender expression and/or sex characteristics should be incorporated as an explicit discrimination ground into anti-discrimination legislation”.

G13. Regardless of the situation in your country (e.g., the national anti-discrimination legislation already incorporates gender identity and/or gender expression and/or sex characteristics), to what extent do you agree or disagree with the following statement? “Incorporating the ground of gender identity and/or gender expression and/or sex characteristics allows to improve the effectiveness of anti-discrimination legislation”.

If your answer to Question H1 was “YES” (i.e., the anti-discrimination legislation of your country foresees the ground of gender identity and/or gender expression and/or sex characteristics), please move to the end of the survey.

G14.1. In your view, if the gender identity and/or gender expression and/or sex characteristics ground (or any related ground) has not been explicitly recognised in the anti-discrimination legislation of your country, would there be any obstacles/barriers for such a recognition?

G14.2. Please explain.

G15.1. In your view, if the gender identity and/or gender expression and/or sex characteristics ground (or any related ground) has not been explicitly recognised in the anti-discrimination legislation of your country and happened to be recognised at one point in the future, would there be any obstacles/barriers for its effective use?

G15.2. Please explain.

Equinet Member Equality Bodies

ALBANIA

Commissioner for the Protection from Discrimination
www.kmd.al

AUSTRIA

Austrian Disability Ombudsman
www.behindertenanwalt.gv.at

AUSTRIA

Ombud for Equal Treatment
www.gleichbehandlungsanwaltschaft.gv.at

BELGIUM

Institute for the Equality of Women and Men
www.igvm-iefh.belgium.be

BELGIUM

Unia (Interfederal Centre for Equal Opportunities)
www.unia.be

BOSNIA AND HERZEGOVINA

Institution of Human Rights Ombudsman of Bosnia and Herzegovina
www.ombudsmen.gov.ba

BULGARIA

Commission for Protection against Discrimination
www.kzd-nondiscrimination.com

CROATIA

Office of the Ombudsman
www.ombudsman.hr

CROATIA

Ombudsperson for Gender Equality
www.prs.hr

CROATIA

Ombudswoman for Persons with Disabilities
www.posi.hr

CYPRUS

Commissioner for Administration and Human Rights (Ombudsman)
www.ombudsman.gov.cy

CZECH REPUBLIC

Public Defender of Rights
www.ochrance.cz

DENMARK

Danish Institute for Human Rights
www.humanrights.dk

ESTONIA

Gender Equality and Equal Treatment Commissioner
www.volinik.ee

FINLAND

Non-Discrimination Ombudsman
www.syrjinta.fi

FINLAND

Ombudsman for Equality
www.tasa-arvo.fi

FRANCE

Defender of Rights
www.defenseurdesdroits.fr

GEORGIA

Public Defender of Georgia (Ombudsman)
www.ombudsman.ge

GERMANY

Federal Anti-Discrimination Agency
www.antidiskriminierungsstelle.de

GREECE

Greek Ombudsman
www.synigoros.gr

HUNGARY

Office of the Commissioner for Fundamental Rights
www.ajbh.hu

IRELAND

Irish Human Rights and Equality Commission
www.ihrec.ie

ITALY

National Office against Racial Discrimination - UNAR
www.unar.it

KOSOVO*

Ombudsperson Institution
www.oik-rks.org

LATVIA

Office of the Ombudsman
www.tiesibsargs.lv

LITHUANIA

Office of the Equal Opportunities Ombudsperson
www.lygybe.lt

LUXEMBURG

Centre for Equal Treatment
www.cet.lu

MALTA

Commission for the Rights of Persons with Disability
www.crpdp.org.mt

MALTA

National Commission for the Promotion of Equality
www.equality.gov.mt

MOLDOVA

Council on Preventing and Eliminating Discrimination and Ensuring Equality
www.egalitate.md

MONTENEGRO

Protector of Human Rights and Freedoms (Ombudsman)
www.ombudsman.co.me

NETHERLANDS

Netherlands Institute for Human Rights
www.mensenrechten.nl

NORTH MACEDONIA

Commission for Prevention and Protection against Discrimination
www.kszd.mk

NORWAY

Equality and Anti-Discrimination Ombud
www.ldo.no

POLAND

Commissioner for Human Rights
www.rpo.gov.pl

PORTUGAL

Commission for Citizenship and Gender Equality
www.cig.gov.pt

PORTUGAL

Commission for Equality in Labour and Employment
www.cite.gov.pt

PORTUGAL

High Commission for Migration
www.acm.gov.pt

ROMANIA

National Council for Combating Discrimination
www.cncd.ro

SERBIA

Commissioner for Protection of Equality
www.ravnopravnost.gov.rs

SLOVAKIA

Slovak National Centre for Human Rights
www.snspl.sk

SLOVENIA

Advocate of the Principle of Equality
www.zagovornik.si

SPAIN

Council for the Elimination of Ethnic or Racial Discrimination
www.igualdadynodiscriminacion.igualdad.gob.es

SPAIN

Institute of Women
www.inmujer.es

SWEDEN

Equality Ombudsman
www.do.se

UNITED KINGDOM - GREAT BRITAIN

Equality and Human Rights Commission
www.equalityhumanrights.com

UNITED KINGDOM - NORTHERN IRELAND

Equality Commission for Northern Ireland
www.equalityni.org

** This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.*



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