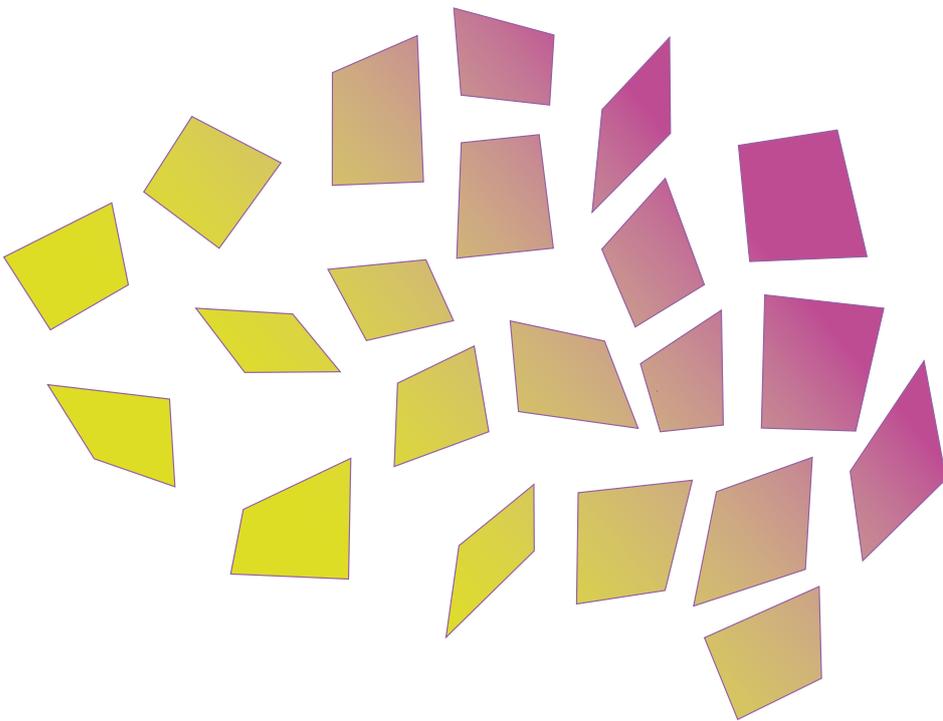




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European network of legal experts in
gender equality and non-discrimination



Instructions to discriminate under EU and National Law

Including summary

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Instructions to Discriminate under EU and National Law

Authors

Elaine Dewhurst and Ricardo Buendia

2025

Detailed information on the 27 Member States was provided by the country experts in the non-discrimination field in the form of 'country briefs' based on a standardised questionnaire. This report has been coordinated by Catharina Germaine and Isabelle Chopin from the Migration Policy Group, for the European network of legal experts in gender equality and non-discrimination.

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Members of the European network of legal experts in gender equality and non-discrimination

Management team

General coordinator	Yvonne van Leeuwen-Lohde	Human European Consultancy
Specialist coordinator gender equality law	Linda Senden	Utrecht University
Lead Coordinator gender equality law	Franka van Hoof	Utrecht University
Specialist coordinator non-discrimination law	Isabelle Chopin	Migration Policy Group
Project managers	Jamie Kaan Anne Meynaar Tobin den Blijker	Human European Consultancy
Content coordinator gender equality law	Birte Böök	Utrecht University
Assistant coordinator gender equality law	Luana Almeida	Utrecht University
Content coordinator non-discrimination law	Catharina Germaine	Migration Policy Group
Senior Coordinator Gender equality law	Alexandra Timmer	Utrecht University

Senior experts

Senior expert on gender equality law	Susanne Burri
Senior expert on age	Elaine Dewhurst
Senior expert on sexual orientation/trans/intersex people	Peter Dunne
Senior expert on racial and ethnic origin	Lilla Farkas
Senior expert on EU and human rights law	Christopher McCrudden
Senior expert on social security	Frans Pennings
Senior expert on religion or belief	Isabelle Rorive
Senior expert on EU law, CJEU case law, sex, gender identity and gender expression in relation to trans and intersex people	Christa Tobler
Senior expert on disability	Lisa Waddington
Senior expert on equality bodies and enforcement	Niall Crowley
Senior expert on violence against women	Sara de Vido
Senior expert on gender, trans and intersex equality rights	Marjolein van der Brink
Senior expert on pregnancy, maternity, work-life balance rights and social security	Miguel de la Corte Rodríguez
Senior expert on artificial intelligence and human rights, algorithmic discrimination, bias and data-driven inequality	Raphaële Xenidis

National experts

	Anti-discrimination	Gender Equality
Albania	Irma Baraku	Entela Baci
Austria	Dieter Schindlauer	Marion Guerrero
Bosnia and Herzegovina		Adnan Kadribasic
Belgium	Sébastien Van Drooghenbroeck*	Nathalie Wuiame
	Pieter Cannoot	
Bulgaria	Dilyana Giteva	Genoveva Tisheva
Croatia	Ines Bojić	Adrijana Martinović
Cyprus	Corina Demetriou	Vera Pavlou
Czechia	Jakub Tomšej	Kristina Koldinská
Denmark	Pia Justesen	Tine Birkelund Thomsen
Estonia	Mari-Liis Sepper	Anu Laas
Finland	Rainer Hiltunen	Kevät Nousiainen
France	Sophie Latraverse	Marie Mercat-Bruns
Germany	Matthias Mahlmann	Jule Mulder
Greece	Athanasios Theodoridis	Panagiota Petroglou
Georgia		Tamar Dekanosidze
Hungary	András Kádár	Lídia Hermina Balogh
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Ireland	Judy Walsh	Frances Meenan
Italy	Chiara Favilli	Simonetta Renga
Kosovo		Iliriana Islami
Latvia	Anhelita Kamenska	Kristīne Dupate
Liechtenstein	Patricia Hornich	Nicole Mathé
Lithuania	Monika Guliakaitė	Tomas Davulis
Luxembourg	Tania Hoffmann	Nicole Kerschen
Malta	Tonio Ellul	Romina Bartolo
Moldova		Nadja Hriptievschi
Montenegro	Maja Kostić-Mandić	Vesna Simović Zvicer
Netherlands	Karin de Vries	Fleur van Leeuwen
North Macedonia	Biljana Kotevska	Biljana Kotevska
Norway	Lene Løvdal	Marte Bauge
Poland	Łukasz Bojarski	Anna Cybulko
Portugal	Dulce Lopes and Joana Vicente	Catarina de Oliveira Carvalho and Luísa Andias Gonçalves
Romania	Romanița Iordache	Iustina Ionescu
Serbia	Ivana Krstić Davinic	Ivana Krstić Davinic
Slovakia	Vanda Durbáková	Zuzana Magurová
Slovenia	Katarina Vučko	Katarina Vučko
Spain	Fernando Camas Roda	Dolores Morondo Taramundi
Sweden	Paul Lappalainen	Jenny Julén Votinius
Türkiye	Ulaş Karan	Kadriye Bakirci
Ukraine		Oleksandra Golub
United Kingdom	Lucy Vickers	Rachel Horton

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Executive Summary

Recent years have seen a number of crises, including economic and health-related (namely the Covid-19 pandemic) crises. These crises have increased the possibility for those in authority (such as State or local government officials) or those with particular self-interests to protect (such as landlords, employers or business owners) to identify certain groups and to attempt to marginalise and discriminate against them in an effort to protect these interests.¹ Often this discrimination is performed through an intermediary instructed to do so by others, either explicitly through a clear instruction or order or more implicitly by way of persuasion or encouragement. This amounts in effect to an instruction to discriminate which is prohibited under EU and national law to various extents and is analysed in this report.

A classic example is the Covid-19 pandemic where hospital officials, local authority executives and even State officials contemplated, and sometimes actually activated, policies and issued instructions which would exclude older persons from life-saving treatment and healthcare support.² Post-pandemic the rapid rise in AI applications which utilise proxies, whether directly (by excluding certain disabilities or health conditions) or indirectly (by redlining certain residential areas) to exclude certain groups, such as those with disabilities or those from particular racial or ethnic groups, indicates that this problem will only become more significant in the years ahead. Questions also arise as to whether statements made in the media which are discriminatory in nature can amount to an instruction to discriminate under certain conditions, particularly where they discourage individuals from protected groups from accessing services or employment. Therefore, strong and robust protection against this particular form of discrimination is needed to not only support the existing equality acquis within the EU but also to ensure that such discrimination is tackled before it becomes a form of direct or indirect discrimination or a form of harassment.

Instructions to discriminate arise when a party (the instructor) instructs another party (the instructee) to discriminate in some way against a third party on certain prohibited grounds (Figure 1 below). The instruction does not necessarily need to lead to discrimination, although this is most often the outcome. In these cases, the third party will have claims under other forms of discrimination (e.g. direct, indirect or harassment) but will also have a claim based on an instruction to discriminate. Where the instruction does not lead to some other form of discriminatory act, the third party will still have a claim under discrimination law for an 'instruction to discriminate'. The rationale for the inclusion of this additional protection is threefold: firstly, it ensures that such forms of discrimination do not lead to social exclusion of certain marginalised groups from society e.g. in accessing housing or employment; secondly, it complements and supports the existing equality regime by

¹ The impact of Covid-19 on discrimination and stigma has been evidenced in various reports and academic publications. See, for example: UNESCO, *Covid-19 related discrimination and stigma: a global phenomenon* (2020); Seyed Alinaghi, S., Afsahi, A. M., Shahidi, R., Afzaljan, A., Mirzapour, P., Eslami M., Ahmadi, S., Matini, P., Yarmohammadi, S., Saeed Tamehri Zadeh, S., Asili, P., Paranjkhoo, P., Ramezani, M., Nooraliooghi Parikhani, S., Sanaati, F., Amiri Fard, I., Emamgholizade Baboli, E., Mansouri, S., Pashaei, A., Mehraeen, E. and Hackett, D. (2023), 'Social stigma during COVID-19: A systematic review', *SAGE Open Med*, doi: 10.1177/20503121231208273; Bhanot, D., Singh, T., Verma, S. K. and Sharad, S. (2021), 'Stigma and discrimination during COVID-19 pandemic', *Front Public Health*, doi: 10.3389/fpubh.2020.577018. Economic Crises also bring an increase in discrimination and stigma, according to various reports. See, for example, ILO (2011), *Equality at work: The continuing challenge - Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*; Stewart, A. J. (2023), 'How stereotyping increases during economic crises', *The Conversation*; Stewart, A. J. and Raihani, N. (2023), 'Group reciprocity and the evolution of stereotyping', *Proc. R. Soc. B* 29020221834.

² Amnesty International (2020), *Italy: Violations of the human rights of older residents of care homes during COVID 19 pandemic*. See also Matteo, C. and Proietti, M. (2020), 'COVID-19 in Italy: Ageism and decision making in a pandemic', Editorial, *Journal of the American Medical Directors Association*, 21(5), 576–577.

identifying inequality before it is activated by some form of direct or indirect discrimination or harassment and; finally, it ensures that individuals who are the subject of such discriminatory acts have a source of redress and compensation for discriminatory actions.



Figure 1

The very first mention of an ‘instruction to discriminate’ within the EU acquis came during the drafting of Directive 2000/43/EC (ensuring equal treatment across a variety of fields on grounds of racial or ethnic origin) in the opinion of the European Economic and Social Committee.³ It was stated in that opinion that it was regrettable that there was no mention of instructions to discriminate or pressure to discriminate in the proposal.⁴ The subsequent amended proposal, and the enacted Directive, did include such a provision. The original proposal for Directive 2000/78/EC (ensuring equal treatment in employment and occupation on grounds of age, disability, religion and sexual orientation) also did not contain any mention of instructions to discriminate,⁵ although it did make its way into the subsequent proposal⁶ and the final Directive. The approval of this provision in both Directives indicates the central importance of the provision to supporting and consolidating the equality acquis within the EU.

This report essentially asks **four distinct questions**:

- (1) What is the law in the EU on instructions to discriminate?
- (2) What is the national law of the Member States on instructions to discriminate?
- (3) What is the significance and potential of the prohibition on instructions to discriminate and what are the implications for EU law arising from this?

³ Opinion of the Economic and Social Committee on: the ‘Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain Community measures to combat discrimination’, the ‘Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation’, the ‘Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin’, and the ‘Proposal for a Council Decision establishing a Community Action Programme to combat discrimination 2001-2006’ *Official Journal C 204*, 18/07/2000 P. 0082 – 0090.

⁴ Opinion of the Economic and Social Committee on: the ‘Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain Community measures to combat discrimination’, the ‘Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation’, the ‘Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin’, and the ‘Proposal for a Council Decision establishing a Community Action Programme to combat discrimination 2001-2006’ *Official Journal C 204*, 18/07/2000 P. 0082 – 0090, Para 4.2.

⁵ Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation/* COM/99/0565 final - CNS 99/0225 */ *OJ C 177E*, 27.6.2000, pp. 42–46.

⁶ Amended proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation (presented by the Commission pursuant to Article 250 (2) of the EC-Treaty) /* COM/2000/0652 final - CNS 99/0225 */ *OJ C 62E*, 27.2.2001, pp. 152–163.

- (4) What recommendations can be made to ensure more robust protection against instructions to discriminate at an EU level?

The report answers these questions in three chapters, beginning with the law in the European Union (Chapter 2), moving on to an analysis of both legislative initiatives and case law at the national level (Chapter 3) and followed by an analysis of significance, potential and recommendations (Chapter 4).

Chapter 1) introduces the concept of instructions to discriminate and provides background information on what we already know about it (Section 1.1). This section also identifies the main gaps in knowledge with respect to the concept at an EU and national law level and how the report intends to fill these particular knowledge gaps. The chapter then moves on to consider the content and aims of the report and in particular provides an overview of EU law (including an assessment of ECHR law within this), national law with respect to individual aspects of the scope and definition of the concept as well as enforcement and sanctions, and national case law which solidifies and clarifies the gaps in knowledge and where harmonisation of EU law would be most effective (Section 1.2).

The methods of the report are also addressed (Section 1.3) which are essentially doctrinal in nature, reviewing both primary and secondary sources, supported by 27 reports from national experts qualitatively assessing the law in their respective Member States. These national reports are essential evidence of the existing levels of consensus on national laws with respect to instructions to discriminate, as well as areas of dispute where clarification from the EU level would be most beneficial. The last section of Chapter 1 examines the context of the report (Section 1.4) which is the fact that EU law needs to expand in scope and in definitional certainty so that the equality regime within the EU can be harmonised and meet its aims of ensuring equality for all across the EU. This section of the report highlights the lack of quantitative data on this issue which is reflective of the limited importance given to this form of discrimination.

The results drawn from Chapter 1 reveal a significant need for expansion of EU law more generally to ensure greater harmonisation of the prohibition across national Member States. The analysis conducted in this chapter indicates that prohibition of instructions to discriminate is important for three distinct reasons: (a) it ensures greater social inclusion of certain marginalised groups; (b) it prevents discrimination before it can be activated into other forms of discrimination such as direct or indirect discrimination or harassment; and (c) it ensures that intermediaries are not used to exclude the liability of instructors for discrimination or to fudge the legal claims which may arise in a particular case.

The analysis raises pertinent questions about what constitutes an instruction to discriminate, who is liable for such a form of discrimination and whether a hierarchical relationship is required in order to establish that an instruction to discriminate has taken place. Chapter 1 reveals that the EU law on this matter is limited in its scope by virtue of the existing material scope of the equality directives, but that there is textual support for a broad interpretation of the provision. The ECHR law on this matter is conversely wider in scope and also supports a broad interpretation of the concept.

National law is fragmented, as a result of some unanswered questions at the EU level, but there are identifiable areas of consensus such as material scope where more than half (n=17) of all Member States have already extended the material scope of protection beyond that of EU law. However, there are very distinct areas of disagreement between Member States particularly with respect to the form of discrimination which arises from an instruction to discriminate, what an 'instruction' includes within its terms and who is liable for an instruction

to discriminate (although in this respect consensus is emerging in favour of liability for an instruction to discriminate attaching to both the instructor and the instructee). National case law is sparse but where it does exist it indicates that instructions to discriminate occur in all fields and across all grounds of discrimination. The most prevalent fields where cases arise are in relation to access to services and employment but there is a growing number of cases with respect to access to housing. Race and ethnicity are the most common grounds of discrimination invoked by claimants, followed by disability.

In conducting this analysis, the report relies on doctrinal legal research of both primary and secondary sources but also a thematic report produced by the national non-discrimination experts of the European Network of Legal Experts in Gender Equality and Non-Discrimination. Chapter 1 concludes that an expansion and clarification of EU law with respect to the prohibition of instructions to discriminate is necessary, as is greater awareness of the phenomenon at a national level, in order to overcome the exclusion and discrimination caused by potential instructions to discriminate.

Chapter 2 analyses the concept of instruction to discriminate under EU law. The chapter begins with an examination of EU law itself and particularly the two main Directives (2000/43/EC and 2000/78/EC) (Section 2.1). This examination reveals that a number of pertinent challenges exist in EU law.

Firstly, there is a clear gap in protection in EU law with respect to the scope of protection. While on the ground of race and ethnicity all fields of application are protected (employment, social security, including social advantages, healthcare, education, housing, and access to, and the provision of goods and services), the same cannot be said for the other grounds of discrimination (age, disability, sexual orientation and religion or belief). On these latter grounds there is no protection outside of the employment field, leaving a large gap in protection.

Secondly, there is no case law emanating from the Court of Justice of the European Union (CJEU) on the matter of instructions to discriminate which means that there is no clarity on a lot of definitional issues related to this concept. A textual analysis of the relevant legislative provisions in the Directives indicates that the concept may have a wide definition, including application not only to individuals but to groups of persons, and that it may not be a form of direct or indirect discrimination but may, in fact, constitute its own unique *sui generis* form of discrimination. However, the textual analysis also opens up a lot of questions as to whether a form of hierarchy with respect to the instructor and the instructee is essential or what form of instructions would be covered by the prohibition. The analysis certainly opens more questions than it answers.

Section 2.2 examines the law of the ECHR and, in particular, the decision of the ECtHR in *Bączkowski and Others v. Poland* (2007).⁷ There is no express protection in the ECHR but there is an implicit protection arising primarily from Article 14 or Article 1 of Protocol 12 (where ratified) which protects the right to equality. There is only one relevant case which deals with the issue of instructions to discriminate and this case does provide some clarity regarding some definitional aspects of the prohibition, namely that it can cover groups of persons, rather than just a specific named individual, and that an expression of opinion may be sufficient to constitute an instruction, which indicates a wide interpretation of what an instruction to discriminate might entail. However, it does not resolve the issue of whether an instruction to discriminate is *sui generis* a form of discrimination or whether it is in essence a form of direct and indirect discrimination or whether hierarchy is needed to found a claim (due to the fact that there was a clear hierarchical relationship at play in the case).

⁷ *Bączkowski and Others v. Poland*, No. 1543/06, 3 May 2007, ECLI:CE:ECHR:2007:0503JUD000154306.

Chapter 2 proceeds then to compare the EU and ECHR regimes with other regional protections, namely those emanating from the Inter-American Commission on Human Rights (IACHR) and its court, the Inter-American Court of Human Rights (IACtHR) (Section 2.3). Once again there is no express protection in the IACHR system and cases are exceedingly rare. However, the IACHR has examined some cases on this issue and national courts have emulated this approach. The regional comparison reveals that in this region, instructions to discriminate are commonly viewed as a form of direct or indirect discrimination (given the lack of an express reference to an instruction to discriminate) and are compensated accordingly. There is a wide scope of protection available with cases covering fields such as employment, access to goods and services and education. Most of the cases involve explicit instructions but some are more implicit. There has been a hierarchical relationship involved in the majority of the decisions, although the IACtHR did not suggest that this was a necessary element. It is unclear from the case law who would be liable for an instruction to discriminate under the system as no such prohibition expressly exists, but for the most part it was the instructor who was held liable for the discrimination which arose in the relevant cases.

The analysis in Chapter 2 reveals a number of key conclusions (Section 2.4). Firstly, it reveals that the EU is at the forefront of express protection against instructions to discriminate (whereas other regimes have merely implicit protection). Secondly, although it has an express protection, this is rather more limited in scope than other regimes and is in need of significant expansion. Finally, there is a distinct lack of definitional clarity as regards important aspects of the prohibition which need to be addressed to ensure adequate protection across the EU.

Chapter 3 of the report moves on to a close analysis of the laws of Member States derived from the 27 expert reports and from other secondary sources. The analysis begins with an overview of the scope of protection afforded at a national level (Section 3.1). This indicates that there is a rather strong consensus among Member States that the existing gap in the EU acquis with respect to the fields of application of the Directives should be closed. Over half of all Member States (n=17) have already closed this gap and have ensured full protection on all grounds across all fields of application. There are other Member States which provide a greater level of protection than the Directives but which include some scope and definitional limitations which reduce protection to some degree. However, the state of consensus that the scope of EU law should be wider in this field is clear.

In Section 3.2 the report moves on to an assessment of the form of discrimination which this particular prohibition entails. There is some dispute at national level whether it is a form of direct or indirect discrimination or whether it is a more unique form of discrimination in its own right. Just over half of all Member States indicated a preference for this form of discrimination to have its own position within anti-discrimination law and provide that it is a unique form of discrimination within its own right (n=17). This removes the prohibition from the strictures and challenges of trying to fit it within the scope of direct and indirect forms of discrimination, which the secondary literature would also seem to support.

How an instruction to discriminate is to be defined is considered in Section 3.3, especially with respect to whether it comprises merely express instructions or whether it has a wider construct including preferences, suggestions, encouragements or pressures. There is a strong consensus that it naturally includes express instructions (n=23) but beyond this consensus the national laws vary a great deal. There are a number of Member States (n=11) which do include more implicit forms of instruction but there are many other states which limit it to express instructions. This is an important issue as it determines to what extent the prohibition can limit and prevent discrimination and there is an urgent need for clarity from the EU level.

The section also includes an analysis of whether some sort of hierarchy between the instructor and the instructee is needed to ensure that an instruction can be prohibited. There does not appear to be a clear consensus on this at a national level, which indicates again that there is a need for clarity on this from the EU. This section also includes an assessment of who is liable if an instruction to discriminate is found. There is full consensus that the instructor will always be liable, with many Member States indicating that the instructee would also be liable. The rationale for including an instructee within the liability for an instruction to discriminate is threefold: (a) it ensures from a practical perspective that the claimant does not need to identify the relevant respondent in advance of the claim but can pursue a claim against either or both parties, relieving the evidential burden on the claimant; (b) it has the potential to prevent further acts of discrimination such as direct or indirect discrimination or harassment from occurring by making the instructee think more carefully before acting on the instruction and; (c) arising from (b) it acts as a form of positive duty on the instructee not to act on discriminatory instructions. There is a potential for a responsibility gap arising where agencies or subcontractors are used and there is some ambiguity over the instructing party. However, there is a real move at a national level, particularly obvious from the case law, that national courts are alive to the possibility of a gap in protection arising and a strong consensus that such agencies and subcontractors would be found liable where appropriate.

Section 3.4 examines the enforcement mechanisms and sanctions attendant upon such a prohibition. The impact of the Directives in limiting the scope of protection is evident most acutely with respect to enforcement and sanctions and there is a clear gap in protection in some Member States. Compensation is generally the sanction of choice which is rarely capped, although there are some limited examples of this.

The case law analysis in Section 3.5 demonstrates a paucity of case law at a national level, with 12 Member States reporting no case law on this issue at all. However, this is not due to a lack of such instructions to discriminate arising, rather it is more likely to arise from a lack of understanding of the provisions and the availability of clearer, more defined forms of discrimination which can be utilised once the instruction is carried out (such as direct or indirect discrimination or harassment). The difficulty with the latter is that instructions may discriminate against many other individuals who may or may not be directly or indirectly affected by the carrying out of the instruction. For example, if an employer instructs an agency not to employ a person of a particular race, there may be many people who are discouraged from even applying for the role even before the instruction (not to hire) is carried out.

The case law analysis also reveals some other fascinating insights. Cases arise on all grounds and in all fields of life. The analysis provides unique case examples by ground and field. In the context of employment, it demonstrates that cases have arisen in relation to disability, race and ethnicity, age and religion and that these are often related to instructions given to, or by, employment agencies. In the context of services (the most commonly cited field of application in case law), the cases reveal discrimination on grounds of race and ethnicity as well as religion and sexual orientation, not just in relation to accessing services (such as night clubs and financial services) but also in the administration of services (e.g. television broadcasts). In housing the ground of race was the most commonly cited ground of discrimination, often involving agencies. The interesting aspect of this case law was the fact that, despite there being no hierarchical relationship (the relationship was purely contractual), an instruction to discriminate was still found. Finally, in education and healthcare, the ground of disability is the most cited ground, although race and ethnicity also appear. The case law indicates that the law on instructions to discriminate has a threefold effect: it brings an end to discriminatory behaviour, it provides redress and it removes discriminatory effects.

What Chapter 3 really highlights, however, is the wide degree of consensus around many of the issues which are ill-defined at the EU level. It is recommended, arising from this analysis, that the EU should capitalise on the consensus where it exists by amending EU law to reflect this consensus and to clearly regulate where there is some disagreement so as to ensure harmonisation of these issues across Member States.

Finally, Chapter 4 undertakes a broader and more general analysis of the overall legal position as well as recommendations for change which could be implemented. It begins with an assessment of the significance and potential of the prohibition of instructions to discriminate (Section 4.1). The analysis reveals that there is a significant degree of discrimination arising from instructions to discriminate across all Member States, in all fields of life and across all grounds of discrimination. Improved, harmonised and clear laws at an EU level would tackle a wide variety of potentially discriminatory behaviours which would have a distinct impact on individuals and groups and a beneficial impact on society in general.

The potential significance of AI is discussed in Section 4.2 as a type of discrimination which can take the form of an instruction to discriminate. It is argued that AI can deny access to individuals or groups based on the use of pre-programmed proxies having a widespread discriminatory effect in a variety of fields of life and on a variety of grounds of discrimination. The prohibition of instructions to discriminate can be a useful tool in tackling discriminatory AI applications and strengthening EU non-discrimination law.

Section 4.3 provides an overview of the implications of the analysis undertaken in the report, starting with the analysis of EU law. The analysis indicates that the lack of clarity and scope of the law means that instructions to discriminate are being ignored or under-reported across the EU. The analysis cites the case of *Feryn*,⁸ and a subsequent line of cases, which potentially involve an instruction to discriminate which was creatively determined to be a form of direct discrimination. However, recognising these cases as involving an instruction to discriminate could have had a more protective impact on individuals, groups and society in general. The analysis of national laws highlights areas both of consensus but also of fragmentation and this is replicated in the case law analysis, which is limited. However, the lack of case law reflects the fact that the law is uncertain and the lack of awareness of the available protection, rather than any lack of instructions to discriminate arising within Member States.

Recommendations as to how to overcome these issues of fragmentation, lack of harmonisation and paucity of case law, as well as the increasing impacts of issues such as AI, are addressed in Section 4.4. This section provides 12 clear recommendations which call for the expansion of the scope of EU law, a much higher level of clarity on crucial issues, a greater awareness of the significance and potential of a clear prohibition on an instruction to discriminate and a recommendation on the use of AI. These recommendations are focused primarily at the EU legal order, as well as Member States, and hope to bring about an end to discriminatory behaviour, remove the discriminatory impacts of an instruction to discriminate and provide redress to individuals affected. The ultimate aim is to ensure that the EU equality acquis is robust enough to ensure equality for all within the EU.

⁸ Judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NY*, C-54/07, ECLI:EU:C:2008:397.

1 Introduction

1.1 Background

An instruction to discriminate arises where an intermediary party is instructed in some manner to discriminate (either directly, indirectly or by harassment) against another party on one of the prohibited grounds (see Figure 2 below).



Figure 2

EU non-discrimination directives (namely, Directive 2000/43 and Directive 2000/78) state that an instruction to discriminate will constitute discrimination.⁹ As a result, the prohibition to give instructions to discriminate has a wide application across all grounds of discrimination and is applicable in a variety of fields. The idea of including a prohibition of instructions to discriminate was originally introduced in order to ensure more comprehensive protection against discrimination within the EU social order. Including such a prohibition has a threefold effect on promoting equality within the EU. It (a) ensures that social exclusion of marginalised groups is reduced; (b) prevents the activation of discriminatory practices (whether direct or indirect discrimination or harassment) before they arise and; (c) ensures that intermediaries are not used to limit the liability or create a legal distance between the discriminator and the discriminated against.

However, the concept remains relatively undefined at an EU level and there has been no case law at the EU level to bring clarity to the meaning of the term, although there has been case law before the European Court of Human Rights (ECtHR). In addition, national case law is relatively sparse and to date understudied. The role that the prohibition to give instructions to discriminate plays as a form of discrimination is, as a result, rather 'obscure'¹⁰ and has been limited as a result of this vagueness.

There are lots of potential questions and possibilities as to the scope of the protection against discrimination which may be afforded by the idea of instructions to discriminate. For instance, the European Union Agency for Fundamental Rights (FRA) and the Council of Europe (CoE) have indicated that the term 'instructions to discriminate' should not be confined to merely dealing with instructions which are mandatory in nature but should have a wider remit to cover situations where there is an expressed preference or even an encouragement

⁹ Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 2(4); Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 2(4).

¹⁰ Belavusau, U., Henrard, K. (2019), 'A bird's eye view on EU anti-discrimination law: The impact of the 2000 Equality Directives', 20(5) *German Law Journal* 614.

to treat individuals less favourably due to one of the protected grounds.¹¹ It is also questionable, as shown by some of the cases examined in this report,¹² whether an instruction to discriminate requires some form of intent or whether it has a wider definition. There is also evidence that a wider definition, including exerting pressure or persuading someone to engage in discrimination, is accepted in certain national jurisdictions, although this has caused a good deal of confusion in some jurisdictions.¹³

There is also the question of who is liable for the act of discrimination in such cases. Across Member States, there are varying answers to this conundrum, with some including both the instructor and the instructee within this liability. This then also raises the nature of the relationship between the instructor and the instructee and what impact an unequal power dynamic has in such circumstances.¹⁴ In some countries, a hierarchical relationship between the instructor and the instructee is required in order for discrimination to be found. Other groups of questions concern whether actions to tackle instructions to discriminate should be of an individual or collective nature, or both. In addition, it is unclear whether the victim of instructions to discriminate should be paid compensation or whether there is also room for administrative or even criminal sanctions.

Given the lack of case law at an EU level, the limited analysis of this topic by field and ground of discrimination more generally, and the variety of applications at a national level, the time is ripe for a deeper understanding of the concept and its impact in various fields across a variety of protected grounds.

Overall, this report aims to enhance understanding and awareness of EU and national law at a Member State level concerning instructions to discriminate. It seeks to map and discuss the limits and potential of the concept, providing practical guidance on its central role in tackling discrimination. The report also provides 12 recommendations for the development of the concept at an EU level in order for it to be more effective in achieving its aim of combating discrimination.

For clarity, the report addresses all grounds and fields of discrimination (except gender) provided for under the EU non-discrimination directives in a comprehensive manner.

1.2 Content and aims

This report contains an analysis of the main protections against instructions to discriminate under EU law and national law and an analysis of case law.

1.2.1 Instructions to discriminate under EU law

The relevant EU Directives (2000/43 and 2000/78) both provide in Article 2(4) that an instruction to discriminate will constitute discrimination for the purposes of the Directives. However, beyond this rather short article there is very little information or guidance provided either by the Directives themselves or through case

¹¹ European Union Agency for Fundamental Rights, European Court of Human Rights and Council of Europe (2018), *Handbook on European non-discrimination law*, p 67.

¹² See Section 3.5, Case law analysis.

¹³ Böök, B., Burri, S., Timmer, A. and Xenidis, R. (2024), *A comparative analysis of gender equality law in Europe*, European network of legal experts in gender equality and non-discrimination / Publications Office of the European Union, pp. 24-25. See also Section 3.5 of this report: Case law analysis.

¹⁴ Petersen, L.-E. and Dietz, J. (2000), 'Social discrimination in a personnel selection context: The effects of an authority's instruction to discriminate and followers' authoritarianism', 30(1) *Journal of Applied Social Psychology* 206-220.

law of the Court of Justice of the European Union (CJEU) as to what this concept actually means and in what contexts it may be applicable.

The scope of protection, as set out in the Directives, is limited on certain grounds (namely age, religion, disability and sexual orientation) to the employment field. Only in the case of race and ethnicity is the full scope of EU law available to a wide variety of fields of application (including social security, social advantages, healthcare, housing, education and access to goods and services). This limitation on scope is a significant hurdle for claimants affected by instructions to discriminate on grounds such as age, religion, disability or sexual orientation. It also explains the scarcity of case law at a national level on these grounds and in these fields.

In addition, no guidance is available on the definition of the concept of instructions to discriminate, whether the concept is a form of direct or indirect discrimination (which references to Article 2(1) in Article 2(4) strongly imply) or something which is a discriminatory act in its own right, whether the concept is wider than express instructions and can extend to include preferences and suggestions and whether the concept requires the instructor to have some form of authority over the instructee. There are also key questions which have not been clarified by the Directives, such as whether it is only the instructor who is liable for an instruction to discriminate or whether this can also be extended to the instructee in a positive manner.

No guidance to answer these questions is available from the CJEU, as no cases have been brought regarding instructions to discriminate at an EU level. There is textual support for a wide reading of Article 2(4) which would allow for a greater number of potentially discriminatory acts to fall within the scope of the Directives, but there is no certainty on this point at present. There is a risk that cases are being missed due to the discriminatory acts falling under other forms of discrimination, and this is even more possible at a national level.

Essentially, the lack of clear guidance and direction from the EU level has led to fragmentation at the national level, which can be identified from the national law analysis. This might impact public authorities' capacity to ensure certainty in this area and access to relief for the victims.

It is also not possible to draw much guidance from the European Convention on Human Rights (ECHR). There has only been one clear case, *Bączkowski and Others v. Poland* (2007),¹⁵ which has addressed instructions to discriminate at the ECtHR level and this case has also left several questions unanswered. This is particularly true with respect to the nature of the discriminatory act. It did, however, provide some guidance on the scope of protection (grounds and fields of application covered) under the ECHR. This is rather wide and would cover all grounds and fields of application, which is not the case in EU law. Despite the unanswered elements of this case, it does provide some limited clarity on the nature of instruction to discriminate and proposed a rather wide definition of such a concept. It also clearly placed the responsibility on the instructor in this case as well as on the instructee. What is interesting about this case is that the ECtHR clearly felt that the position of the instructor (as a mayor) had an influence on those making the decisions in the case (the instructees) even though there was no suggestion in the case that any compulsion had actually taken place. This indicates that while hierarchy is important, this is to a lesser extent than might be considered necessary at an EU level. Because of the incomplete development of the idea of instructions to discriminate at the EU level, it has been left to the

¹⁵ *Bączkowski and Others v. Poland*, No. 1543/06, 3 May 2007, ECLI:CE:ECHR:2007:0503JUD000154306. For further analysis of this case, see den Bogaert, S.V. (2007), 'ECHR rules on illegal ban of Warsaw equality parade: The case of Bączkowski and Others v. Poland', *German Law Journal*, 8(9): 889-902.

discretion of the Member States to fill the gaps discussed as they have seen fit. This has led to some natural fragmentation of protection at an EU level.

1.2.2 Instructions to discriminate under national law

The situation under national law is one which is generally in compliance with Directives 2000/43 and 2000/78. However, in the absence of harmonisation on crucial issues regarding this concept, Member States have been left to fill these gaps to ensure effectiveness of their equality laws.

Regarding scope, which is more limited at an EU level, Member States have been more generous, with over half (n=17) extending the scope of protection to all fields and all grounds of discrimination. There appears to be a strong consensus that this is a very simple way to improve the efficacy of equality laws, foster social integration and improve diversity.

However, there is some confusion about the nature of the concept of an 'instruction to discriminate'. Member States are divided as to whether such an instruction to discriminate is merely a form of direct or indirect discrimination (or both) or whether an instruction to discriminate is actually a *sui generis* act of discrimination (n=17) which should not be conflated with other forms of discrimination and their associated complexities. The consequences of the choice of format are considered further in this report but it would appear that where the act is treated in a *sui generis* manner there is more scope for the concept to be used as a standalone form of discrimination without the need to prove that any discriminatory action has arisen from the instruction.

There is also some dispute about what the term 'instruction' means and whether it is required that such an instruction be express or whether more implicit forms of instruction (such as preferences, suggestions, encouragements, pressures or persuasions) might also be encapsulated within its terms. There is a general consensus that the term instruction means an express instruction, order or command (n=23) but there is also some measure of support for the adoption of a broader definition. A sizeable number of Member States (n=11) include more implicit forms of instruction with their definitions creating a wider field of application. Another aspect of the term 'instruction' is whether it requires the instructor to be in a position of authority in relation to the instructee such that they are in a position to compel the instructee to discriminate. In the absence of clarity on this at an EU level, Member States are relatively divided on whether this is a requirement of the prohibition or not (n=12 of Member States agree that some form of hierarchy is required whereas n=11 of other Member States agree that none is required).

There is more clarity at a national level about who can be liable for an instruction to discriminate. All Member States naturally provide that the instructor is liable. In addition, more than half propose that the instructee should also be liable (n=16). There is also a great deal of consensus with respect to the liability of agents and subcontractors, most of whom will also be liable as instructors or instructees where relevant.

There are a great variety of enforcement mechanisms and sanctions across Member States but as the Directives are limited in scope, this also limits the potential for sanctions and enforcement beyond the employment field. Harmonisation at an EU level, particularly the adoption of the 2008 proposal on equal treatment, would alleviate these gaps in protection effectively.

1.2.3 Analysis of national case law

National case law is very limited on the issue of instruction to discriminate and tends to be clustered around the fields of application protected by the Directives (mainly the employment field in the context of the grounds of age, religion, sexual orientation and disability and all other fields in the context of race and ethnicity). However, this does not mean that instructions to discriminate do not arise on those grounds and in those fields of application which are beyond the scope of the Directives. On the contrary there are plenty of reports from Member States illustrating that this is a particular issue beyond employment in many fields of application including housing, healthcare and education. Extension of the scope of EU law and a greater awareness of the potential of this prohibition would certainly improve access to justice for victims of instructions to discriminate.

Evidence from the national reports indicates that there is a wide spread of cases arising across different fields and across multiple grounds of discrimination.

The table below indicates the number of cases identified in the national reports over the past 23 years (2002-2025) based on the fields in which they arise. As can be seen from this table, the highest number of cases are brought in respect of access to services, followed by the employment field. There are no cases reported in relation to social security, including social benefits, so these are not included in the chart below.

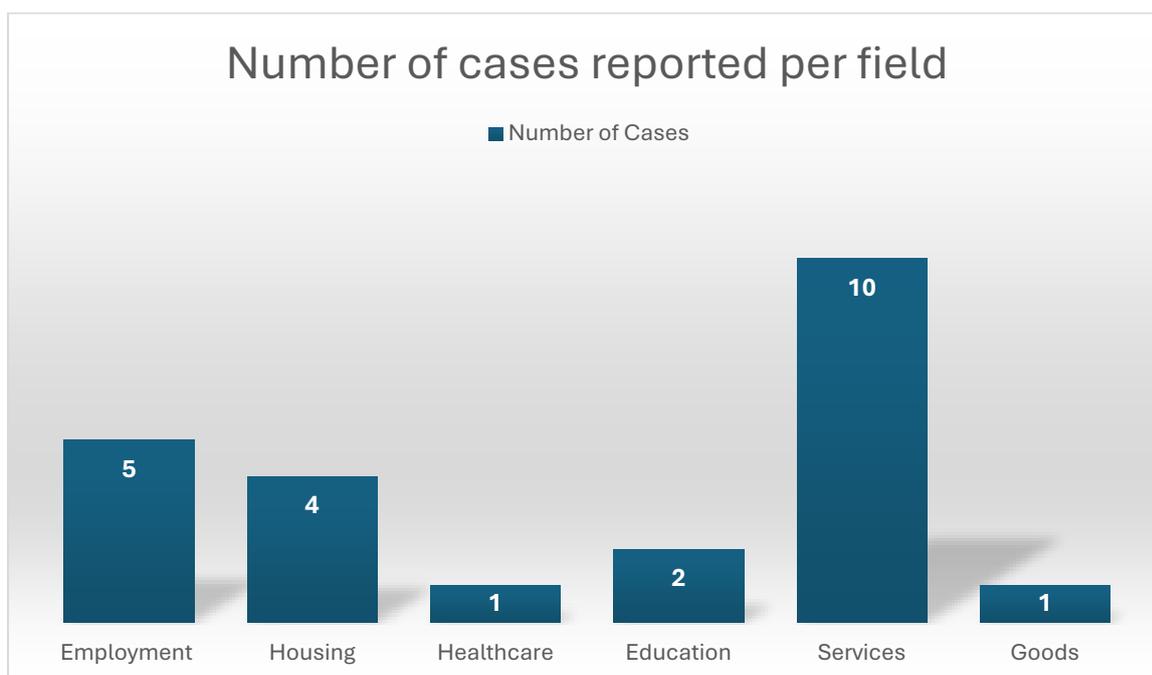


Chart 1

The following chart indicates the most common grounds on which reported cases are founded. The chart reveals that race and ethnicity is the most common ground, which reflects the protection available in EU law on the ground of race or ethnicity. The next most common ground is that of disability and these cases of disability-based discrimination tend to arise across a variety of fields, not just employment.

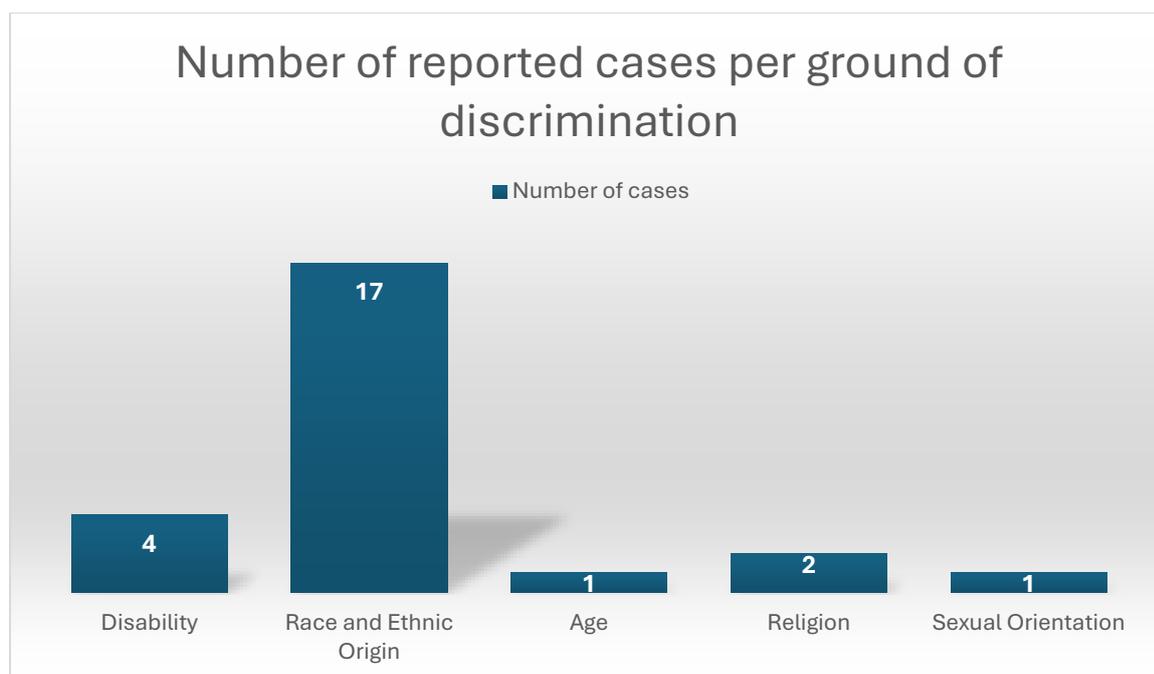


Chart 2

1.3 Methods

The report uses a doctrinal approach to analyse legal provisions and case law on instructions to discriminate. It aims to systematise and clarify the law by analysing authoritative texts consisting of primary and secondary sources. Secondary sources include a body of scholarship addressing key concepts within EU law, the jurisprudence of the ECtHR and under national law across the Member States.

To obtain further information on the EU Member States' legal positions with respect to instructions to discriminate, a thematic survey ('country fiche') was circulated among the national non-discrimination experts of the European network of legal experts in gender equality and non-discrimination (the experts). The questionnaire focused on (1) the definition and scope of the concept of instruction to discriminate; (2) potential case studies across all grounds derived from national case law; and (3) the impact of EU law at national level.

1.4 Context: Expanding the scope of EU law

There is very little existing data available on the concept of instructions to discriminate in the EU and on the extent to which such instructions are prevalent within a variety of fields of application, although crises such as the Covid-19 pandemic and issues relating to housing discrimination illustrate that it is relatively widespread. The only information which can be gleaned from quantitative studies on discrimination in the EU pertain to Roma and Traveller groups or relate specifically to housing discrimination. These studies do not specifically ask about instructions to discriminate but they do record specific discriminatory experiences which have occurred in the past five years which may include instances of instructions to discriminate. The Roma and Traveller Survey 2019¹⁶ is a study by the European Fundamental Rights Agency on Roma and Travellers in **Belgium, France, Ireland, the Netherlands, Sweden** and the **United Kingdom**. Over 4 700 Roma and Travellers were

¹⁶ European Union Agency for Fundamental Rights (2020), *Roma and Travellers in six countries*, Luxembourg: Publications Office of the European Union.

interviewed and information was collected on more than 8 200 individuals living in their households. The questions in this survey which may indicate the presence of instructions to discriminate involve those which relate to agencies where the agency may have been instructed not to have dealings with Roma or Travellers or to advertisements which exclude or discourage applicants with a Roma or Traveller background. One of the questions asks whether a person was prevented from buying an apartment or house because of their Roma or Traveller background by the owner or an estate agency. It was reported that 17 % of Roma and Travellers had experienced this form of discrimination. With respect to adverts for housing, 10 % had experienced advertisements which excluded or discouraged them.

Another survey is the Roma Survey 2021¹⁷ which looked at Roma in **Croatia, Czechia, Greece, Hungary, Italy, North Macedonia, Portugal, Romania, Serbia** and **Spain**. It collected information from 8 461 respondents living in private households who self-identify as Roma, are 16 or older and have lived in the survey countries for at least the 12 months before the survey. In addition, information was collected on 20 212 people living in the survey respondents' households and on the infrastructure of their neighbourhoods. The fieldwork took place between February and August 2021 through face-to-face interviews, with trained interviewers using a computerised questionnaire. Once again, the only question which could indicate an instruction to discriminate was that on specific discriminatory situations experienced when looking for housing in the past five years and specifically those related to agencies or advertisements. Overall, 21 % of Roma participants indicated that they were prevented from buying an apartment or house because of their Roma background by the owner or an estate agency. In addition, 18 % had come across adverts for housing that excluded or discouraged applicants with a Roma background. This could indicate that instructions to discriminate are preventing Roma from accessing housing more generally. The survey also asked about discriminatory job adverts in the country in the past five years. Advertisements are usually an indication of an instruction being made to exclude certain applicants either to an advertising agency or within an organisation. Of the Roma surveyed, 12 % indicated that they had experience of such discriminatory job adverts in their country in the past five years.

The 2024 Roma Survey collected comparable data in ten selected EU Member States (Bulgaria, Czechia, France, Greece, Hungary, Ireland, Italy, Portugal, Romania and Spain) and three accession countries (Albania, North Macedonia and Serbia).¹⁸ The Roma and Travellers (in France and Ireland) were also asked a wide range of questions about their everyday life, including experiences of discrimination, harassment and violence, as well as including any racially-motivated incidents. Specific incidences of discrimination in the housing market indicated potentially that there are instructions to discriminate operating within this sector. In the EU-10 it was reported that 26 % were prevented from renting an apartment/house by a private landlord due to their Roma background, 9 % were prevented from renting municipal/social housing by officials working for public housing as a result of their Roma background and 15 % were prevented from buying an apartment/house because of their Roma background by an owner or estate agent. More indicative of instructions to discriminate is the fact that 16 % had come across adverts for housing that excluded or discouraged Roma applicants. In employment, 11 % of respondents indicated that they had come across adverts for jobs that excluded or discouraged

¹⁷ European Union Agency for Fundamental Rights (2023), *Roma in 10 European countries: Main Results. Roma Survey 2021*, Luxembourg: Publications Office of the European Union.

¹⁸ European Union Agency for Fundamental Rights (2025), *Rights of Roma and Travellers in 13 countries. Perspectives from the Roma Survey 2024*, Luxembourg: Publications Office of the European Union; European Union Agency for Fundamental Rights (2020), *Roma and Travellers in six countries*, Luxembourg: Publications Office of the European Union.

applicants who are Roma. This report highlights once again that the issue of instructions to discriminate is a live one in the housing and employment sectors.

While based in the UK and specifically relating to UK data, Generation Rent, an NGO committed to assisting renters in the UK, noted a strong correlation between access to housing and ethnicity.¹⁹ In its recent report (2025) it discovered that racism cut off minority ethnic renters from access to safe and secure homes. Using data from a mystery shopper exercise in 2023, the NGO reported that white profiles were 17 % more likely than black profiles to receive a response to a viewing request while white profiles were also 36 % more likely to receive a positive response to a renting enquiry. Generation Rent's 2024 Rent Survey found that renters from a minority ethnic background were more likely to face obstacles in accessing new tenancies. In addition, they were almost twice as likely to have been refused a tenancy when they attempted to move home. These statistics reveal real inequalities in the manner in which housing is accessed and utilised and reveals substantial housing discrimination arising from potential instructions to discriminate.

These data are also mirrored at an EU level. The European Website on Integration Report in 2024 on migrant access to medium and long-term housing in the EU reveals similar barriers.²⁰ The report suggests that landlords are often unwilling to lease to foreigners and cite instances in **Belgium, Croatia, Poland** and **Romania** where migrants were refused leases on the basis of their names and/or their family status.²¹

These studies, in addition to the information collected in this report, indicate that there is both a strong consensus and evidence in favour of widening the scope of EU law to capture incidences of instructions to discriminate before they are activated into forms of direct or indirect discrimination or harassment. In order to ensure that the European equality acquis is capable of achieving its aims of ensuring equal opportunities and fostering diversity, the authors of this report make a number of key recommendations to overcome some of the significant challenges highlighted here. The report demonstrates the need for certain recommendations to be adopted in order to strengthen and support the existing equality acquis in Chapter 4.

¹⁹ Generation Rent (2025), '[A cycle of inequality: minority ethnic renters' experiences of discrimination](#)'.

²⁰ European Website on Integration (2024), '[Migrants' access to medium- and long-term housing in the EU: Barriers, governance and good practice](#)'.

²¹ European Website on Integration (2024), '[Migrants' access to medium- and long-term housing in the EU: Barriers, governance and good practice](#)', p. 7.

2 Instruction to discriminate under EU and ECHR law

The aim of this section of the report is to set out in detail existing EU law concerning the term ‘instruction to discriminate’. The report also examines the case law of the ECtHR, noting that there is currently no case law at a CJEU level. This section concludes with a synthesis of the law as it stands.

The following table provides an overview of the scope of protections afforded under both EU and ECHR law. The table indicates that the current protection at the EU level is more limited in material scope than that of the ECHR (Table 1).

Scope v Ground	Employment	Social security	Social advantages	Healthcare	Housing	Education	Goods and services
Race / Ethnicity	EU/ECHR	EU/ECHR	EU/ECHR	EU/ECHR	EU/ECHR	EU/ECHR	EU/ECHR
Age	EU/ECHR	ECHR	ECHR	ECHR	ECHR	ECHR	ECHR
Disability	EU/ECHR	ECHR	ECHR	ECHR	ECHR	ECHR	ECHR
Religion	EU/ECHR	ECHR	ECHR	ECHR	ECHR	ECHR	ECHR
Sexual orientation	EU/ECHR	ECHR	ECHR	ECHR	ECHR	ECHR	ECHR

Table 1

2.1 Instruction to discriminate under EU law

Under EU law, both Directives 2000/43 and 2000/78 provide that an ‘instruction to discriminate’ shall constitute discrimination covering all protected grounds, including race and ethnic origin, sexual orientation, age, religion and disability (in Article 2(4) of both Directives). Directive 2000/43 only applies to the ground of racial and ethnic origin but it covers all fields of application mentioned in this report. Directive 2000/78 covers the grounds of age, disability, sexual orientation and religion but only covers the field of employment. This means that the scope is limited depending on the ground of discrimination.

No further definition of the concept is provided, other than the fact that it constitutes discrimination within the meaning of Article 2(1) which protects against both direct and indirect discrimination. There has been no CJEU case law to date on the concept (although later in the report the possibility is raised that certain cases before the CJEU may potentially have included elements of an instruction to discriminate and could have included this form of discrimination within the relevant claims). In the absence of any further clarification on the concept, a further textual examination of Article 2(4) yields some interesting conclusions, or at least questions for further exploration.

Firstly, Article 2(4) refers to an instruction to discriminate ‘against persons’. This is in contrast to other prohibited forms of discrimination such as direct discrimination, harassment or victimisation where the provisions are aimed at a ‘person’. While this may not appear to be textually significant, it does indicate that the provision has a potentially wide interpretation in that falling foul of this provision may not require reference to ‘specific individuals but can be seen as “instructing discrimination” even where they refer to general groups’.²²

²² Quinn, P. (2017), ‘The problem of stigmatizing expressions: The limits of anti-discrimination approaches’, 17 *Int’l J. Discrimination & L.* 23, p. 39.

This opens up the potential for the prohibition to include not just specific references to discriminate against an individual but also more general references to discriminate against a particular group. This is important because, as this report shows, the scarce national case law available suggests Roma or North African people are particularly targeted with instructions to discriminate in fields such as access to housing or social spaces. It also potentially opens advertisements or statements made in the media up to scrutiny as potential instructions to discriminate against groups of persons.

Secondly, Article 2(4), in comparison to Article 2(3) which prohibits harassment, provides that an instruction to discriminate shall 'be deemed to be discrimination'. This is in contrast to the general prohibition on harassment in Article 2(3) where harassment is defined as a 'form of discrimination'. While this may not seem to be significant at first glance, it does raise an interesting question as to whether an instruction to discriminate is a form of direct or indirect discrimination or whether it is something more *sui generis* which has its own unique meaning and interpretation. The reference in Article 2(4) to Article 2(1) which prohibits both direct and indirect discrimination would suggest that there is some connection to these forms of discrimination or that an instruction to discriminate requires the elements of direct or indirect discrimination to be present. However, an analysis of national laws and practices, and the textual differences with respect to Article 2(3), perhaps indicate that there is something more unique about this particular discriminatory practice which warrants the development of its own interpretation and application.

Finally, the term 'instruction' in itself potentially implies some form of hierarchy or, at the very least, some supervisory mechanism whereby the instruction can be enforced. This is more obvious in the employment context whereby an employer may instruct an employee to discriminate in some way, for example, in a recruitment exercise. However, it is not clear exactly what is meant by an 'instruction' and whether it needs this level of hierarchy to operate. The term instruction is undefined but at its widest interpretation could include both express instructions and orders or more implicit forms of pressure or encouragement. Liability for the prohibition is also not indicated in the Directives: the question therefore remains of whether it is only the instructor who can be liable for a violation of the prohibition of instructions to discriminate or whether both the instructor and the instructee could be liable. The EU law as set out in the Directives is unclear on these latter issues but national law and practice, as analysed later in this report, do indicate a preference for a wider reading of the provision.

2.2 Instruction to discriminate under ECHR law

There is no express reference to the concept of instructions to discriminate in the ECHR. However, the ECtHR has found that an instruction to discriminate can constitute a particular manifestation of discrimination protected under Article 14 ECHR (and presumably the newer, standalone, Article 1, Protocol 12) in conjunction with other protected rights, such as Article 11 ECHR concerning the right to peaceful assembly.

A very useful case example is that of *Bączkowski and Others v. Poland* (2007)²³ which is one of the few cases in which an instruction to discriminate has been raised. The case raises interesting issues of the interpretation of the concept under the ECHR. The case concerned homophobic comments by the mayor of Warsaw made in a public announcement in which he stated that he would refuse permission to hold a march to raise awareness about sexual orientation discrimination. Permission was then refused by the local authority, based on reasons

²³ *Bączkowski and Others v. Poland*, No. 1543/06, 3 May 2007, ECLI:CE:ECHR:2007:0503JUD000154306.

related to public safety more generally. The ECtHR essentially held that the mayor's statements may have influenced the decisions of the relevant authorities and constituted a breach of Article 14 ECHR on grounds of sexual orientation in conjunction with Article 11 ECHR concerning the right of peaceful assembly.²⁴ The case raises some interesting questions surrounding the boundaries of the concept of instructions to discriminate under the ECHR.

Firstly, it indicates that under the ECHR, as a textual interpretation of Article 2(4) the EU Directives also indicates, the instruction to discriminate does not need to specifically be aimed at a particular person but can be aimed at a group of persons on a particular ground. In this case, an interview with the mayor was published in which he stated that he would refuse permission to hold the assemblies and no instruction to discriminate was issued against an individual. This suggests a wide interpretation of the concept of instruction to discriminate under the ECHR.

Secondly, the ECtHR did not deal expressly with the question of whether this was a form of direct or indirect discrimination. The applicants in the case had argued that this was essentially a form of direct discrimination,²⁵ that there had been a clear difference in treatment (they were refused permission to organise demonstrations while other organisations had received such permission) and that there was no legitimate aim which would justify this difference in treatment. The Government also based its defence on an interpretation of direct discrimination principles. It argued that 'no provisions, acts or omissions of the public authorities had exposed the applicants to treatment less favourable than that to which other persons in an analogous situation would have been subjected' or that the claim had not been based on a prohibited ground. However, the ECtHR did not engage with these arguments directly, although the tenor of the judgment appears to reflect a leaning towards this being a direct form of discrimination for which no justification was forthcoming. Nevertheless, in the absence of an express statement on whether there was direct or indirect discrimination, or perhaps a *sui generis* idea of discrimination, it is unclear how the ECtHR might deal with such a decision in future cases.

Thirdly, the question of whether the instruction needs to be issued by someone in a superior or hierarchical position was a moot point in this case due to the fact that the mayor was obviously in a hierarchical position to the relevant authorities. However, what is interesting about the decision is that the ECtHR held that, despite the fact that the statement was not a formal instruction, the statement by the mayor could still have been influential in the decision-making of the relevant authorities, given that they were acting on his behalf in making these decisions and that these views were expressed at a time when the request for permission to hold the assemblies was already pending before the municipal authorities.²⁶ This indicates that the hierarchy was somewhat relevant in this particular case, where the instruction was not a formal one but rather a more implicit form of instruction.

Finally, the case indicates that the ECtHR considers the concept of an 'instruction' to be a rather wide one which can include both explicit instructions or orders and more implicit forms of instructions such as persuasion or encouragement. The statement by the mayor was not an 'instruction' but rather expressed an opinion or preference on the part of the mayor that he would not allow the marches to take place. This indicates further

²⁴ See also European Union Agency for Fundamental Rights (2018).

²⁵ *Bączkowski and Others v. Poland*, No. 1543/06, 3 May 2007, ECLI:CE:ECHR:2007:0503JUD000154306, at para. 97.

²⁶ *Bączkowski and Others v. Poland*, No. 1543/06, 3 May 2007, ECLI:CE:ECHR:2007:0503JUD000154306, at para. 100.

that the concept of an ‘instruction’ under the ECHR is at least to be interpreted rather widely, ensuring the greatest number of discriminatory actions are brought within the scope of ECHR law.

2.3 Comparison with other regional systems

Given the fact that there is limited information available under the EU and ECHR regional systems, this report examines the law from the Inter-American Court of Human Rights in an effort to extrapolate some interesting comparisons with respect to how the phenomenon is dealt with within other regional systems.

In the Americas, non-discrimination cases are dealt through the Inter-American Human Rights System (IAHRS). The IAHRS was founded under the Organization of American States (OAS) to oversee the protection and promotion of human rights in the Americas. Legally founded by the American Declaration of the Rights and Duties of Man (1948) and the American Convention on Human Rights (1969), the protection and promotion of non-discrimination by the IAHRS is central. In addition, specialised anti-discrimination instruments in the Americas are the Inter-American Convention Against Racism, Racial Discrimination, and Related Forms of Intolerance; the Inter-American Convention Against All Forms of Discrimination and Intolerance; the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities; and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará).

The main operational bodies of the IAHRS are the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR). The IACHR monitors compliance with human rights obligations. In 2019, the IACHR published a Compendium on Equality and Non-Discrimination (the Compendium),²⁷ which consolidates standards on this matter. In turn, the IACtHR issues binding judgments on human rights, including non-discrimination, having developed a rich jurisprudence on equality and non-discrimination.

The Compendium has made clear that States must:

‘refrain from carrying out actions that might in any way be aimed to create, whether directly or indirectly, situations of discrimination and must adopt positive measures to reverse or change discriminatory situations in their societies, on the basis of the idea of equality and the principle of non-discrimination.’

After analysing selected IACtHR and national case law, this report has found that, even though there is usually no explicit mention of the prohibition of instructions to discriminate, victims of such a form of discrimination seem to be covered by a broad prohibition of direct and indirect discrimination against discriminatory laws, public or private policies or the specific instructions of an agent. The following subsections explain how such rationale is interpreted in selected IACtHR and national case law, particularly with respect to some of the more challenging issues in the European regional context.

²⁷ Inter-American Commission on Human Rights (2019), *Compendium: Equality and non-discrimination inter-American standards*, OEA/Ser.L/V/II.171 Doc. 31.

2.3.1 Selected Inter-American Court of Human Rights case law

In the *Gonzales Lluy v Ecuador* (2015)²⁸ case, Talía, a three-year-old toddler, received a blood transfusion infected with HIV. When she turned five, she was registered in the local public school in Cuenca, Ecuador. Talía attended the school regularly for two months until one of the teachers (APA) learned about her HIV status and spoke about it with the Director. The Director decided to suspend Talía ‘until he has seen what the educational authorities w[ould] say, or found a solution to the problem’ (para. 133). The Director claimed he acted according to school policy:

‘on the requirements that [Talía] should have presented in order to enroll in the school, one of which [was] a medical certificate that the child [did] not suffer from any infectious or contagious disease.’

Lastly, the director indicated that,

‘while at school, [Talía] had several haemorrhages due to an illness called idiopathic thrombocytopenic purpura; this illness meant that the risk of transmission [was] greater, because [Talía] was enrolled in the first year of basic education where the children work with sharp objects.’ (para. 138)

Talía’s mother complained before the Third District Contentious-Administrative Court of Cuenca against the Ministry of Education and Culture, the director of the school and the teacher. The Contentious-Administrative Court rejected the complaint on the grounds that:

‘there [was] a conflict of interests between the individual rights and guarantees of [Talía] and the interests of a group of students, a conflict that mean[t] that the societal or collective interests, such as the right to life, outweighed the right to education’.

The IACtHR found that Talía’s exclusion from the education system (the instruction to discriminate) because of her condition was a form of forbidden discrimination based on Article 1.1. of the American Convention. The IACtHR did not explicitly address the instruction to discriminate against Talía by the Director, the school policy or the public authorities in the treatment of this case. Instead, it seems the Court’s rebuke of such discriminatory instruction is contained within the general prohibition to discriminate.

Importantly, the Court also found that Ecuador was responsible for the discrimination for not adapting the education system to Talía’s situation (para. 395). The Court’s approach to make Ecuador responsible for the discriminatory instruction of the school policy executed by the Director and the lower court judgment could also be seen as a broad prohibition of discrimination, which contains prohibitions to discriminate through norms and policy as well as instructions to discriminate, in this case, because of health and social conditions.

Lagos del Campo v Peru (2017)²⁹ is another IACtHR paramount case with some reference to instructions to discriminate. In this case, Alfredo Lagos del Campo, a Peruvian worker and elected representative of an Industrial Community (a form of worker representation in Peru) was dismissed after publicly criticising his employer for using coercive tactics against trade unions. Lagos del Campo claimed that he was being dismissed for his comments as well as for his role as a worker representative. The IACtHR found Lagos del Campo’s

²⁸ Inter-American Court of Human Rights, *Gonzales Lluy v Ecuador*, judgment of 1 September 2015.

²⁹ Inter-American Court of Human Rights, *Lagos del Campo v Peru*, judgment of 31 August 2017.

dismissal amounted to a violation of a series of rights enshrined in the American Convention on Human Rights, including Article 1.1. ‘Obligation to respect rights without discrimination’.

Again, the IACtHR does not explicitly mention instructions to discriminate in this case. However, the employer clearly instructed management to dismiss Lagos del Campo on the grounds of his labour activism. Indeed, the Court found that the employers’ dismissal of Lagos del Campo amounted to an indirect form of instruction to silence labour activism by creating a chilling effect in the industrial community:

‘The Court also notes that, since Mr. Lagos del Campo’s dismissal was carried out in reprisal for his representation work, this could have had an intimidating and threatening impact on the other members of the Industrial Community.’ (para. 162)

In addition, as in *Gonzales Lluy v Ecuador*, the Court reinforced the idea that States are ultimately responsible for avoiding such forms of discrimination by adapting laws to effectively avoid discriminatory practices, including the prevention of discriminatory practices by private or public agents (such as judges).

These seminal IACtHR cases demonstrate a path where the Inter-American Human Rights System aims to address discrimination without directly confronting situations where instructions to discriminate are present. Instead, the System is ready to impose sanctions for instructions to discriminate by sanctioning discrimination more broadly and holding States responsible for discriminatory practices.

2.3.2 Selected national case law

Through the analysis of selected national case law at the regional level, this report seems to confirm the path of the IACtHR outlined above.

Judgment 14.852³⁰ issued by the Constitutional Chamber of the Supreme Court of Justice of Costa Rica deals with an explicit instruction to discriminate. The claimant, T.W.Y., was in the defendant’s hardware store (Ferreterías El Mar Sociedad Anónima) when he was approached by the employee O.C. The employee said to T.W.Y. ‘we don’t want Orientals to enter our store’ and asked T.W.Y. to leave the store. T.W.Y. replied asking for the reasons for being asked to leave, but O.C. ignored T.W.Y. and called an armed guard to force T.W.Y. to leave the store. This case indicates an instruction to discriminate by an employer to an employee to discriminate against a particular racial group. The case indicates that such instructions can arise through the explicit instructions of an employer to employees to discriminate against customers or third parties in general. The court held that the treatment received by the applicant was discriminatory which was contrary to the Political Constitution and the International Human Rights Treaties to which Costa Rica is a signatory. This essentially amounted to a violation of the right to equality. Although the concept of an instruction to discriminate was not specifically addressed, the case indicates that such instructions will fall under the general principles of non-discrimination.

A similar rationale can be found in the Argentinian case, *Alvarez y otros v Cencosud SA* (CSJN, 2010).³¹ This case concerns instructions to discriminate issued by an employer against trade unionists. However, the judgment does not explicitly deal with the instructions to discriminate issue. Once again, the judgment refers

³⁰ Costa Rica, Sala Constitucional de la Corte Suprema de Justicia, *Resolución 14.852-2006* (06-007608-0007-CO) of 6 October 2006.

³¹ Argentina, Corte Suprema de Justicia de la Nación, *Álvarez Maximiliano y otros c/ Cencosud S.A.*, 7 December 2010.

to a general ban on discriminating against trade unions, making the employer and the State responsible for the discriminatory act.

In this case, six workers from the Latin American retail giant CENCOSUD S.A. decided to create their own trade union to ask the employer to make up for wage differences. One of the company managers asked for a list of the representatives of the new trade union. After a few days, the trade union representatives were dismissed. Upon reaching the Argentinian Supreme Court, it was found that this was a case of discrimination against trade union activity.

This case also concerns instructions to discriminate as it becomes clear the employer used the information provided by the new trade union to issue an instruction to employees to dismiss the new trade union representatives. However, the case did not address this instruction element but focused instead on addressing non-discrimination in general by making references to the national Constitution and international human rights standards on discrimination incorporated by Argentina.

A similar rationale for treating instructions to discriminate can be found in the Supreme Court of Mexico.³² In 2007, Mariana Diaz, a law student with cerebral palsy, found a job offer to work at a hotel through her university's job centre. However, the job offered explicitly rejected disabled applicants using the following formula: 'The job offer envisages the hiring of disabled people: No'. This case therefore involved a clear instruction by the employer to the university job agency not to hire persons living with disabilities.

In this case the Supreme Court of Mexico found that Mariana had been discriminated against on grounds of disability. As in Argentina, the Supreme Court recognised that even private parties must respect fundamental rights such as the right not to be discriminated against. However, despite instructions to discriminate playing a distinctive role in this case, the Court did not focus on instruction to discriminate as an infraction per se. Instead, it focused on non-discrimination as a founding principle of Mexican law based on international human rights standards on non-discrimination adopted by Mexico.

Judgment T-031 of 2021 by the Colombian Constitutional Court shows a similar trend.³³ In this case, the claimant, named Juan, was engaged in a job interview process for the company Díaz y Restrepo S.A.S. (Sr. Wok). After passing many stages, Juan undertook a health check, including a blood test, revealing that Juan had HIV, after which Juan was disqualified from the job process without reason.

The defence argument was that Juan was not discriminated against because of HIV but because the job was better suited for a female candidate. However, the Constitutional Court of Colombia found that Sr. Wok discriminated against him based on health, including HIV tests that were not necessary for the role.

Instructions by Sr. Wok to take HIV tests and stop the job interview process could be seen as instructions to discriminate against Juan. However, the Colombian Constitutional Court does not explicitly prohibit instructions to discriminate. Instead, it recognised a violation of the right not to be discriminated against and ordered Sr.

³² Mexico, Suprema Corte de Justicia de la Nación, *Expediente 1387/2012* of 22 January 2014. For a commentary, see (in Spanish): Carlos de la Rosa Xochitiotzi and Velia Fernanda Márquez Rojas, *Temas Selectos de Derecho. Derecho de daños. Responsabilidad extracontractual*, Colección Cuadernos de Jurisprudencia, SCJN, ed SCJN / Suprema Corte de Justicia de la Nación, Mexico (2024) pp. 100-102, 123-124.

³³ Colombia, Corte Constitucional de la República de Colombia, *Sentencia T-031/21* of 12 February 2021.

Wok and the Colombian State and their agencies to take actions to prevent the reoccurrence of such discriminatory actions.

‘FOURTH.- URGE the MINISTRY OF LABOR, in accordance with the methodology it normally employs to fulfill its functions: (i) to strengthen the response and operational capacity of the personnel responsible for addressing complaints arising within the scope of labor selection processes due to alleged discriminatory conduct and (ii) to establish guidelines for employers, both public and private, regarding the duties and obligations they must comply with within the framework of labor selection processes, in accordance with the constitutional, legal, and jurisprudential guidelines that regulate the matter and that were reiterated in this ruling.’

Another relevant case is judgment T-375-2006 from the Colombian Constitutional Court on discrimination in access to education based on ethnicity.³⁴ In this case, the student Nellys Marina Mejia Moreno (Nellys) complained to the University of Magdalena about it not admitting her to study medicine after she had met all the admission requirements for afro-descendent applicants — an affirmative action policy in favour of applicants of African descent. The University of Magdalena argued that her physiognomy did not correspond to a person of African descent which the Colombian Constitutional Court considered an act of discrimination.

The Colombian Constitutional Court ruled that the University of Magdalena must guarantee a place for Nellys in the Medicine School and ordered the University of Magdalena that ‘henceforth, it cannot use physiognomic criteria as a means of determining whether an aspiring student does not belong as an Afro-Colombian.’

This is another case where there is no direct reference to instructions to discriminate in the judgment. However, the act of discrimination stems from a general university policy, which would amount to an indirect instruction to discriminate based on ethnicity.

2.4 General analysis on instructions to discriminate in EU law

Three overall conclusions can be drawn from the analysis of instructions to discriminate under EU law which also draws on the experiences of the ECtHR and other regional court systems.

Firstly, EU law has the most restricted scope of application of any of the comparative regional systems. Despite other limitations, the ECtHR and the IACtHR have a much wider field of application. In particular, the ECtHR does not expressly limit the scope of the field of application in which it can be invoked with respect to the prohibition of instructions to discriminate. This means that it can have much wider application and a much greater impact on combating discrimination, unlike EU law which is more limited outside the context of the grounds of race and ethnicity.

Secondly, and on a more positive note, EU law is at the forefront of providing explicit protection against instructions to discriminate. Neither the ECHR nor the IACHR mention such a prohibition expressly and, therefore, the regional courts have been required to develop this through a creative analysis of existing anti-discrimination provisions. This can be limiting and can also have a chilling effect on claimants to whom such a claim may not be immediately apparent.

³⁴ Colombia, Corte Constitucional de la República de Colombia, *Sentencia T-375/06* of 18 May 2006.

Finally, all three systems fail to provide clarity on the definitional aspects of instructions to discriminate. There is little clarity on what type of instructions are included within the definition, whether some form of hierarchy is necessary or whether both the instructor and the instructee can be jointly or severally liable for such a form of discrimination, although in all systems it would appear that a broad interpretation is supported. Given this lack of clarity at an EU level, national courts have been left to fill these gaps, leading to a fragmentation of the law and a lack of harmony between Member States as to how these definitional issues should be resolved. Chapter 3 will analyse national law and identify some of the answers to these questions, identify consensus where it exists and highlight areas of contention between Member States.

3 Instructions to discriminate under national law

3.1 Overview

To ensure compliance with both Directives 2000/43 and 2000/78, all Member States have implemented prohibitions on instructions to discriminate on the grounds protected under these Directives, namely age, religion, disability, sexual orientation and race and ethnic origin. However, as noted above, the scope varies widely as Directive 2000/43, which prohibits instruction to discriminate in the context of race and ethnic origin, has a much wider scope and remit than Directive 2000/78. Therefore, there will be an obvious discrepancy between the grounds protected and the fields in which they can be enforced at a national level.

Nevertheless, the gap between the grounds and the scope protected is narrowing. The thematic review of the 27 Member States indicates that the majority (n=17) of Member States now prohibit instructions to discriminate on all grounds and across all fields. Of the remaining Member States which do not implement such a wide range of protection, (n=10: **Austria, Cyprus, Denmark, Estonia, Hungary,³⁵ Latvia, Lithuania, Netherlands, Poland, Portugal**), instructions to discriminate are naturally still prohibited but only in specific fields or only on certain grounds within specific fields. The following table indicates where Member States have implemented protection across all five grounds of discrimination either fully (indicated in green), partially (indicated in yellow) or not at all (indicated in red). Where partial protection is identified, every effort has been made to clarify on what grounds protection is available within each field (Table 2)

Country / Field of Application	Employment	Social Protection	Social advantages	Education	Healthcare	Housing	Access to goods and services
Austria³⁶	Green	Yellow (Race and ethnic origin, disability only)					
Belgium³⁷	Green	Green	Green	Green	Green	Green	Green
Bulgaria	Green	Green	Green	Green	Green	Green	Green
Croatia	Green	Green	Green	Green	Green	Green	Green
Cyprus³⁸	Green	Yellow (Race and ethnic origin only)					

³⁵ As Section 3.1.2 discusses, given the specifics of Hungarian law it is not possible to say with clarity that instructions to discriminate are prohibited in all these areas as it will depend on the nature of the discriminator.

³⁶ Austria is an interesting case where at provincial level there are wider protections but at federal level only employment is covered across all grounds of discrimination. The other fields are only covered with respect to the grounds of race and ethnic origin and disability.

³⁷ In Belgium, education and housing are not a federal competence but all grounds are protected in all federated entities.

³⁸ Outside of employment, where all grounds are covered, there are more limited protections in other fields where only the race and ethnicity ground is covered.

Country / Field of Application	Employment	Social Protection	Social advantages	Education	Healthcare	Housing	Access to goods and services
Czechia							
Denmark³⁹		Race and ethnic origin, disability only	Race and ethnic origin, disability only	Race and ethnic origin, disability only	Race and ethnic origin, disability only	Race and ethnic origin, disability only	Race and ethnic origin, disability only
Estonia⁴⁰		Race and ethnic origin only	Race and ethnic origin only	Race and ethnic origin only	Race and ethnic origin only	Race and ethnic origin only	Race and ethnic origin only
Finland							
France							
Germany							
Greece							
Hungary⁴¹							
Ireland							
Italy							
Latvia⁴²				Race, ethnic origin, religious and political belief only	Limited to race, ethnic origin and disability in the context of privately provided services	Limited to race, ethnic origin and disability in the context of privately provided services	Limited to race, ethnic origin and disability in the context of privately provided services

³⁹ The prohibition of instructions to discriminate outside the employment field only applies on grounds of race and ethnic origin or disability across the fields marked in yellow. Denmark, Act on Ethnic Equal Treatment (*Lov om etnisk ligestilling*), Consolidated Act No. 438 of 16 May 2012 with later amendments (Section 3(5)) and Act on the Prohibition of Discrimination due to Disability (*Lov om forbud mod forskelsbehandling på grund af handicap*), Consolidated Act No. 1071 of 10 August 2023 (Section 5(5)). Estonia, Equal Treatment Act (*Võrdse kohtlemise seadus*), RT I 2008 (various provisions).

⁴⁰ In Estonia, outside the employment field, the prohibition of instructions to discriminate only applies on grounds of race and ethnic origin.

⁴¹ As Section 3.1.2 discusses, given the specifics of Hungarian Law it is not possible to say with clarity that instructions to discriminate are prohibited in all these areas as it will depend on the nature of the discriminator.

⁴² In Latvia, there are more closed grounds in relation to education, housing, healthcare and access to goods and services (whereas there is an open-ended list of grounds applicable to the employment, social protection and social advantages fields). In the context of the education field, there is only protection on grounds of race, ethnic origin, religious and political belief. In the context of public (state/municipal) healthcare, there is protection on grounds of race, colour, age, disability, religious, political or other belief (open-ended list), whereas this is limited to race, ethnic origin and disability in the context of privately provided services. In the field of housing, the list is limited to grounds of race, ethnic origin and disability (if private), whereas in the context of state and municipal housing, the grounds of race, colour, age, disability, religious, political or other belief (open-ended list) are available. In the context of access to goods and services, the grounds are again more open-ended in the context of state and municipal services (race, colour, age, disability, religious, political or other belief (open ended list), whereas private services are limited to the grounds of race, ethnic origin and disability.

Country / Field of Application	Employment	Social Protection	Social advantages	Education	Healthcare	Housing	Access to goods and services
Lithuania ⁴³							
Luxembourg							
Malta ⁴⁴							
Netherlands		Race, ethnic origin, disability, sexual orientation, religion	Race and ethnic origin only	Race, ethnic origin, disability, sexual orientation, religion			
Poland ⁴⁵		Race, ethnic origin and nationality only	Race, ethnic origin and nationality only	Race, ethnic origin and nationality only	Race, ethnic origin and nationality only	Race, ethnic origin and nationality only	Race, ethnic origin and nationality only
Portugal ⁴⁶		Race and ethnic origin only	Race and ethnic origin only	Race and ethnic origin only	Race and ethnic origin only	Race and ethnic origin only	Race and ethnic origin only
Romania							
Slovakia							
Slovenia							
Spain							
Sweden							

Table 2

As can be identified from this table, 17 Member States provide full protection across all fields and on all five grounds covered by the Directives 2000/43 and 2000/78. This indicates a **rather strong consensus** that such a prohibition should be protected on a much wider scale than currently exists at an EU level and demonstrates a great deal of support for an extension of such provisions across all fields. There are 10 remaining Member States where more limited protections are available due to the grounds or fields covered, or as in the case of **Hungary** depending on the nature of the discriminator. These limitations are all either scope-related, in that

⁴³ In Lithuania, there is no express provision in the Law on Equal Treatment (*Lietuvos Respublikos Lygių galimybių įstatymas*, 2003, No. 114-5115, entry into force 1 January 2005) which prohibits instructions to discriminate in the areas of social protection, including social security and healthcare, although there is a general duty to implement equal opportunities which may provide some limited protection.

⁴⁴ References to the law in Malta in this report are based on the law as interpreted by the national expert through an analysis of country-specific laws and case law interpretations.

⁴⁵ In Poland, outside the employment field, the prohibition of instructions to discriminate only applies explicitly on grounds of race, ethnic origin and nationality.

⁴⁶ In Portugal, outside the employment field, the prohibition of instructions to discriminate only applies explicitly on grounds of race and ethnic origin across all fields. Regarding disability, sexual orientation or age, there is no express provision in the law which prohibits instructions to discriminate in the areas of social protection, social advantages, education, healthcare, housing and access to goods and services.

where limitations exist these are due to the fact that the Member State in question does not extend the scope of protection equally across all fields, or are related to definitional uncertainties.

3.1.1 Scope-related limitations

In **Lithuania**, there is no express provision in the Law on Equal Treatment which prohibits instructions to discriminate in the areas of social protection, including social security and healthcare, although there is a general duty to implement equal opportunities which may provide some limited protection.⁴⁷ Despite this, any instruction to discriminate in the context of social benefits (despite the lack of express protection) are still likely to be investigated by the Ombudsperson under this general duty.⁴⁸ The same issue applies in **Denmark** and **Estonia** where, outside the employment field, the prohibition of instructions to discriminate only applies on grounds of race and ethnic origin (in **Denmark** and **Estonia**) or disability (**Denmark**).⁴⁹ In the **Netherlands**, there is a general exclusion of the age ground outside the employment field and the prohibition arises only in respect of race and ethnic origin in the field of social advantages. Prohibition in healthcare is limited in **Portugal** to the grounds of race and ethnicity.

3.1.2 Definition-related limitations

In **Ireland**, it is reported that there is no express provision prohibiting instructions to discriminate outside the employment sphere, although there is a provision which prohibits procurement or an attempted procurement of prohibited conduct in all other fields of application.⁵⁰ Whether this definition is sufficient to replace an express prohibition of instructions to discriminate is far from clear, although it would appear from case law interpretation that full protection is ultimately available. A similar situation arises in **Hungary**.⁵¹ Likewise, in **Romania**, the limitation comes from the definition which includes only 'orders to discriminate' so there is some lack of clarity as to whether this is sufficient to fully cover the term 'instruction to discriminate' (an issue which will be discussed in more detail below).

3.2 Instruction to discriminate as a form of discriminatory conduct

As discussed earlier, both Directives 2000/43 and 2000/78 include a prohibition on instructions to discriminate. These prohibitions are included in Articles 2(4) of both Directives and essentially provide that an instruction to

⁴⁷ Lithuania, Law on Equal Treatment (*Lietuvos Respublikos Lygių galimybių įstatymas*), 2003, No. 114-5115, entry into force 1 January 2005, Article 5.

⁴⁸ In Lithuania, social benefits are likely to be investigated by the Ombudsperson, based on the duty of the state and municipal institutions and agencies to ensure that equal rights and opportunities are enshrined in all legal acts irrespective of gender, race, 'nationality', citizenship, language, origin, social status, belief, convictions or views, age, sexual orientation, disability, ethnic origin or religion, as established by Article 5 or Article 8 of the Law on Equal Treatment (*Lietuvos Respublikos Lygių galimybių įstatymas*), 2003, No. 114-5115, entry into force 1 January 2005, which contains an obligation to ensure equal treatment in the field of consumer protection. These provisions could be interpreted as covering social benefits, since they are not mentioned among the exceptions.

⁴⁹ Denmark, Act on Ethnic Equal Treatment (*Lov om etnisk ligestilling*), Consolidated Act No. 438 of 16 May 2012 with later amendments (Section 3(5)) and Act on the Prohibition of Discrimination due to Disability (*Lov om forbud mod forskelsbehandling på grund af handicap*), Consolidated Act No. 1071 of 10 August 2023 (Section 5(5)). Estonia, Equal Treatment Act (*Võrdse kohtlemise seadus*), RT I 2008 (various provisions).

⁵⁰ Ireland, Equal Status Act, Section 13 does not explicitly prohibit instructions to discriminate but rather procurement or an attempted procurement of prohibited conduct (discrimination). Arguably this might amount to instructions to discriminate but it is far from clear.

⁵¹ Again, given the specifics of Hungarian Law it is not possible to say with clarity that instructions to discriminate are prohibited in all these areas as it will depend on the nature of the discriminator. The Hungarian expert provides the following example: a co-worker who does not otherwise exercise employer's rights, will not fall under the scope of the Equal Treatment Act, and therefore, an instruction to discriminate issued by this person may not be sanctionable even though it occurs in the field of employment.

discriminate against persons on grounds of racial or ethnic origin, age, disability, religion or sexual orientation 'shall be deemed to be discrimination' within the meaning of Article 2(1). Article 2(1) in both Directives refers to a prohibition of both direct and indirect discrimination. Therefore, even within the main framework Directives there is no clear direction given as to whether an instruction to discriminate will be considered an act of direct or indirect discrimination (or potentially both) or whether it constitutes an act of discrimination in its own right (Figure 3).

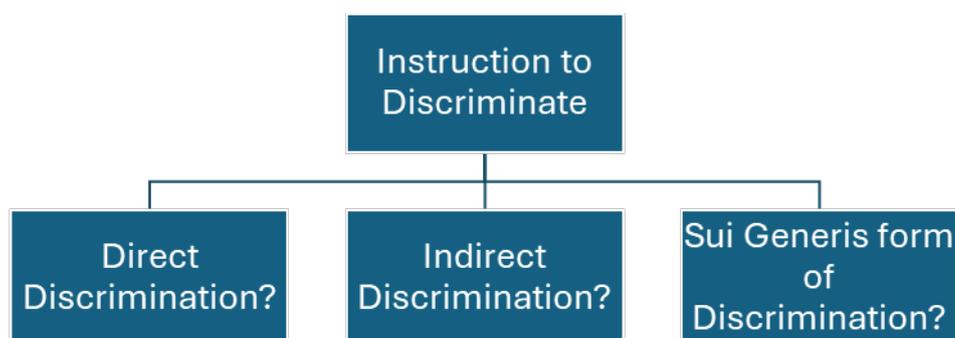


Figure 3

Determining the answer to this question is not simple. In the context of the Gender Directive (2006/54) where a similar definition is employed, Ahtela argues that an instruction to discriminate can be neither a form of direct nor indirect discrimination.⁵² Her argument is that an instruction will not constitute direct discrimination as no person will have as yet been treated less favourably. When they are treated less favourably as a result of the instruction, then this will amount to a direct form of discrimination. Her argument continues that an instruction to discriminate can also not be a form of indirect discrimination. Her main concern in this respect is that an instruction to discriminate in itself can never be an apparently neutral provision, criteria or practice given that its primary focus will be on a particular person or group based on a particular ground of discrimination. Her view is that the Directive creates 'a third type of discrimination that is neither direct nor indirect, but just deemed to be discrimination'.⁵³ This accords in some respect with the textual interpretation of the Directives presented earlier in this report where the wording of the Directive appears to imply that an instruction to discriminate might be something more than a form of direct or indirect discrimination. The distinction is an important one as it may well determine the manner in which the impact of an instruction to discriminate is interpreted, as can be seen in the ECtHR case law.

The lack of clarity at an EU level has led to very differing national views on whether an instruction to discriminate is a form of direct or indirect discrimination or, as in the Directives, can be considered some more *sui generis* form of discrimination. The view at a national level appears to be that the prohibition of instructions to discriminate is *sui generis* and thus distinct from other forms of discrimination.

There are six Member States which interpret an instruction to discriminate as a form of both direct and indirect discrimination (**France, Germany, Lithuania, Luxembourg, the Netherlands and Slovenia**) and one where there is no explicit reference either way (**Portugal**). There are only two Member States which interpret it purely as a form of direct discrimination and do not consider it to be a form of indirect discrimination (**Czechia** and

⁵² Ahtela, K. (2005), 'The revised provisions on sex discrimination in European law: A critical assessment', 11 *Eur. L.J.* 57, p. 68.

⁵³ Ahtela (2005), p. 68.

Malta). **Denmark** and **Latvia** do not specify the position of instructions to discriminate in national law. The remaining Member States view the prohibition of instructions to discriminate as a unique and *sui generis* provision which sits distinct from other prohibited conduct, or as a combination of all three as in the case of **Greece**. This means that **more than half of all Member States view the prohibition of issuing instructions to discriminate as a third category of discrimination**, distinct in its own right and capable of being interpreted in a very wide manner. The benefit of this latter approach is that the prohibition can be examined on its own terms and will not be conflated with the complexities of other prohibited conduct.

The following table (Table 3) provides a contextual overview of the approach adopted in each Member State. The two Member States which did not provide any definitive conclusion on this issue are highlighted in yellow. The X indicates which category of discrimination each Member State considers that instructions to discriminate fall into.

Member State	Direct discrimination	Indirect discrimination	Distinct category of discrimination
Austria			X
Belgium			X
Bulgaria			X
Croatia			X
Cyprus			X
Czechia	X		
Denmark			
Estonia			X
Finland			X
France	X	X	
Germany	X	X	
Greece	X	X	X
Hungary			X
Ireland			X
Italy			X
Latvia			
Lithuania	X	X	
Luxembourg	X	X	
Malta	X		
Netherlands	X	X	
Poland			X
Portugal	X	X	
Romania			X
Slovakia			X
Slovenia			X
Spain			X
Sweden			X

Table 3

3.3 Scope of the definition of instruction to discriminate at a national level

As previously discussed, there is a great deal of definitional uncertainty surrounding the concept of instruction to discriminate at a regional level in respect of (a) what an instruction to discriminate actually entails and (b) whether an instruction to discriminate must be issued by an individual in a hierarchical or superior position.

The same is true for certain Member States at a national level where there is no express definition of what an instruction to discriminate actually means either in laws or through the interpretation of the courts.

To compensate for this lack of clarity there are some Member States which have attempted to provide their own definition in an effort to provide some greater certainty at a national level.

In this section the report will address these express definitions in more detail before providing an overarching analysis of the general scope of these definitions.

3.3.1 What does the term 'instruction' mean?

There is considerable doubt as to the breadth of the term 'instruction', which could be construed as including a variety of different forms of behaviour. This is certainly true at the national level where definitions identify a wide variety of behaviours which can amount to an instruction to discriminate. Commonly cited behaviours in national laws, practices and judicial interpretations include encouraging, instructing, commanding, ordering, pressuring or inducing an individual to discriminate against persons, groups or communities. Such behaviour is considered by many Member States to include an element of hierarchy (which will be discussed below) and should be conducted in a manner which is concrete, direct and effective in causing another person to act in a discriminatory manner. Definitions including some or all of these elements can be found in 13 Member States arising either from legislative provisions or from judicial interpretations.

Member State	Law	Definition	Relevant case interpretations / national expert comments
Belgium	Federal Act designed to combat certain forms of discrimination (General Anti-Discrimination Federal Act), OJ (Moniteur belge), 30 May 2007; last modified on 28 June 2023, OJ 20 July 2023(Article 4(13))	'any behaviour consisting of an instruction to discriminate, on the basis of one or more of the protected criteria, against a person, a group, a community or one of their members'	
Bulgaria	Protection Against Discrimination Act (Paragraph 1, point 5 of the Additional Provisions)	'incitement to discriminate': '... direct and purposeful encouragement, instruction, exertion of pressure or prevailing upon someone to discriminate when the instigator is in a position to influence the instigated'	In 2023, the Sofia City Administrative Court (SCAC) found that hate speech may amount to incitement to discriminate. However, in that case 'the statement in question did not reveal an intention to encourage, instruct, pressure or induce discrimination' so was not considered to be an instruction to discriminate. ⁵⁴ Nevertheless, other cases have indicated that hate speech does fall within an incitement to discriminate. ⁵⁵
Czechia	Anti-Discrimination Act (Section 4(4))	'as the conduct of a person who abuses their superior position to induce a subordinate to discriminate against a third party'	The Czech definition of instructions to discriminate emphasises the prohibition of explicit orders in a context where the person receiving the instruction feels they have to obey due to their inferior position. The national expert mentioned that less explicit orders are likely to meet such a definition, but the emphasis will be on whether the instructed party felt they have to obey due to their inferior position.
France	Law No 2008, 496 of 27 May 2008 relating to the Adaptation of National Law to Community Law in Matters of Discrimination (Article 1(5)). ⁵⁶	Discrimination includes: 2° The act of ordering anyone to adopt behaviour prohibited by Article 2.	Even though there is no reference to whether there must be a hierarchical relationship between the instructor and the instructed party, the respondent expert argues that

⁵⁴ SCAC, Decision No. 8064 of 21 December 2023 in Case No. 9841/2023.

⁵⁵ For instance, PADC, Decision No. 450 of 20 November 2018 in Case No. 180/2017.

⁵⁶ France, Law No. 2008-496 of 27 May 2008 on the Adaptation of National Law to Community Law in Matters of Discrimination (Article 1(5)). The 27 May 2008 law acts as umbrella legislation for the rest of the French system. This means that the definition of instructions to discriminate apply in other legislative bodies even if they are not explicitly included and in all the situations covered by this report. In this regard, the responding expert cited the following articles: Article L1132-1 et seq regarding the prohibition of discrimination in the Labour Code regulating private employment; Articles L131-1 et seq of the Code of Public Service regulating public employment; Articles L 1110-3 and R 4127-7 of the Code of Public Health regarding access to healthcare; Article 7 of the Medical Code of Ethics; Article 1 of the Law 89-462 of 6 July 1989 on relations between landlords and tenants ('Loi Mermaz'); Article L111-1 of the Code of Education; Article 225-1 and 225-2 of the Penal Code that qualifies as a criminal offence any

			there is no need to discuss hierarchy to establish the legal responsibility of the instructor.
Germany	General Act on Equal Treatment (AGG) (Section 3(5))	The prohibition on issuing instructions to discriminate is in particular taken to apply in relation to section 2 (1) nos. 1 to 4 'where a person instructs an employee to engage in conduct which discriminates or can discriminate against another employee'.	
Greece	Law 4443/2026 (Article 2(2)(d))	'any order to the effect of carrying out the discriminatory treatment of a person based on any of the grounds mentioned in Article 1'.	The national expert commented that such a definition is probably linked to express instructions to discriminate as the definition uses the term 'any order' and there is no reference to preferences, suggestions, encouragement, pressure, persuasion or other related activity. From this definition, it also stems that there must probably be a hierarchical relationship between the instructor and the person instructed to discriminate. In addition, there is no relevant case law clarifying such definitional boundaries. This definition covers all the activities included within this report, especially after the introduction of Article 9 of Law 5089/2024, extending the scope of the Equal Treatment Law, ensuring the applicability of the definition of instructions to discriminate for discrimination based on race and national or ethnic origin, disability, religion, social security, healthcare, social benefits, education, housing, and access to the provision of goods and services available to the public.

distinction on the grounds of real or supposed race, ethnic origin, national origin, age, disability, religion and 25 other grounds in relation to hiring, employment sanctions, dismissal, access to vocational training, access to goods and services, as well as interfering with normal economic activity; and Article 432-7 of the Penal Code provides for the liability of any public official who denies access to a right provided by law on a discrimination ground prohibited by law. Apart from its scope, the French definition of instructions to discriminate seems to cover forms of direct and indirect discrimination as well as express instructions to discriminate; preferences or suggestions with discriminatory impact; encouragement, pressure or persuasion to treat individuals less favourably; as well as complicity and public as well as non-public provocation, all of which under civil and criminal law rules. There are also criminal sanctions in France, Article 225-2 Penal Code.

Luxembourg	Law of 29 November 2006 (articles 1(4) and 18, articles 1(3) and Article 2(3)): Article 1(4) of the 'Act of 28 November 2006 on 1. transposition of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; 2. transposition of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; 3. amendment of the Labour Code and introducing into Book II a new Title V on equal treatment in employment and occupation; 4. amendment to Articles 454 and 455 of the Criminal Code; 5. amendment of the Act of 12 September 2003 on persons with disabilities.' (28 November 2006 Act).	'Any conduct of an order to discriminate against persons on any of the grounds referred to in subsection (1) shall be considered discrimination.' ⁵⁷	
Malta	In Malta, instructions to discriminate are not explicitly defined by one piece of legislation. Instead, their elements and contours have been shaped through a series of laws. <ul style="list-style-type: none"> - Article 45(3) of the Maltese Constitution establishes a general prohibition of discrimination - Regulation 3(4) of the Equal Treatment in Employment Regulations (2004) provides that there will also be discrimination when a person instructs another person to discriminate: 3.(1) 		Even though there is not an all-encompassing definition of instructions to discriminate applicable to all situations covered in this report, the respondent expert argues that there is a general prohibition of discrimination stemming from the national Constitution, from which it can be inferred that at least direct and express instructions to discriminate would fall into this constitutional prohibition and without a hierarchical relationship required.
Netherlands	Dutch legislation does not include a specific legislative definition of instructions to discriminate. There are only references to direct, indirect and instructions to make 'distinctions' which amounts to		The discussion process for the ADA sheds some further light on the contours of the prohibition of instructions to discriminate. The prohibition to issue instructions to discriminate were meant to apply against the active (as

⁵⁷ Article 18 of the 28 November Act includes similar provisions against discrimination within the Luxembourg Labour Code, including the aforementioned dispositions on instructions to discriminate (Articles 251-1, particularly subsection (4)). In addition, Luxembourg has introduced similar dispositions within Articles 1(3) (introducing Article 1-bis (1)(b) into the amended Law of 16 April 1979 establishing the general statute of state civil servants) and 2(3) (introducing Article 1-bis (1)(b) into the amended Law of 24 December 1985 establishing the general statute of municipal civil servants) of the Law of 29 November 2006).

	<p>discrimination. Instructions to discriminate are prohibited 'distinctions' under Article 1(a) of the General Equal Treatment Act (GETA), Article 1(a) of the General Discrimination Act (ADA), and Article 1(a) of the Disability Discrimination Act (DDA).</p>		<p>opposed to the passive) behaviour of the instructor and in the cases covered by Article 7:400 of the Dutch Civil Code, which regulates contracts for services linked to consultants, professionals and freelance work, as opposed to contracts of service, which are linked to Employment Law regulations. The Explanatory Memorandum to the ADA gives the example of an employer who hires an employment agency, instructing it to hire only people below the age of 30.⁵⁸ Within this debate, Equal Treatment Commission, predecessor of the Netherlands Institute for Human Rights (NIHR), recommended including not just active, but also passive behaviour within instructions to discriminate. However, it was dismissed during the debate. The national expert mentioned that ADA developments around the definitional contours of instructions to discriminate can be extrapolated to the contours of instructions to discriminate for the GETA and DDA. Even though these definitional developments on the contours of the definition of instructions to discriminate do not seem to be explicitly applied by key bodies such as the NIHR, in its case law there are elements of an existing contractual relationship. This case law is examined in more detail in the case law analysis below. Lastly, instructions to discriminate are not necessarily linked to private contractual relationships. There is one piece of case law where the NIHR applied the prohibition of issuing instructions to discriminate around public law. A foundation exercising public authority in the Netherlands hired an agency to pay unemployment benefits to former employees. The NIHR declared that an applicant had been unlawfully denied employment benefits</p>
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⁵⁸ Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28 170, No. 3, p.18.

			because of his age as a result of an instruction to discriminate by the respondent. ⁵⁹
Poland	Equal Treatment Act, Article 9 and Article 18 of Labour Code	‘Encouraging unequal treatment or ordering unequal treatment, as specified in art. 6, art. 7 and art. 8 sec. 1 shall be prohibited.’ In particular, Article 18 3a § 5 point 1 of the Labour Law Code says: § 5. Within the meaning of § 2, other forms of discrimination shall also be: 1) actions which consist of encouraging another person to break the principles of equal treatment in employment or forcing them to do so.	Polish law does provide a wide definition and applicability of the prohibition of issuing instructions to discriminate, covering all situations for this report as well as not only direct but also more indirect forms of instructions to discriminate and not just express instructions to discriminate but also including situations where the instructor might ‘encourage’ the instructee, going beyond the scope of the Directives. In addition, there is no need to demonstrate a hierarchy around instructions to discriminate.
Slovenia	Protection Against Discrimination Act (Article 9 in conjunction with Article 7(2) and Article 4(2))	Article 9 PADA states that ‘instructions to discriminate shall be any instructions that have, had or might have the effect of discrimination within the meaning of this Act, including the instruction not to prevent or eliminate discrimination’. In turn, Article 7 indent 2 PADA defines what constitutes discrimination, including ‘order, command or any other instruction to discriminate against a person on the grounds of their personal circumstance (hereinafter: instructions to discriminate’. Lastly, Article 4(2) PADA states that ‘discrimination	This is a broad definition of what constitutes instructions to discriminate, encompassing forms of direct and indirect discrimination by virtue of the given definition and Article 6 PADA, which provides clear standard guidelines of what constitutes direct and indirect discrimination. Such a broad understanding of instructions to discriminate is reaffirmed in the employment law field by Article 6(3) of the Employment Relationship Act, which states that instructions to discriminate can be forms of direct or indirect discrimination. Lastly, this broad definition of instructions to discriminate shows there is no need for a hierarchical relationship between the instructor and the instructee. This broad understanding of instructions to discriminate has been confirmed by the Advocate of the Principle of Equality and the case law which will be discussed in more detail below.

⁵⁹ NIHR Opinion 2016-26 of 29 March 2016.

		based on any personal circumstance shall be prohibited’.	
Spain	Law 15/2022 of 12 July on Equal Treatment and Non-discrimination (Article 6.5).	Inducement, order or instruction to discriminate for any of the reasons established in this law. The inducement must be concrete, direct, and effective enough to provoke discriminatory behaviour in another person.	For the respondent expert, the Spanish definition of instructions to discriminate includes express instructions to discriminate, as the law requires the discriminatory instruction to be concrete, direct and effective. Despite this apparent narrow definition, the respondent expert convincingly argues that the Spanish definition would also include preferences and suggestions which have a discriminatory impact as well as encouragement, pressure and persuasion to treat individuals less favourably. This is because Article 6 of the 12 July 2022 Law establishes that the instruction to discriminate must be effective ‘...in causing discriminatory behaviour in another person’. As the respondent expert says, ‘therefore, it must entail an “impact of discrimination”’. In addition, this definition of instructions to discriminate would not include a form of dependence or hierarchical relationship and covers all situations discussed in this report. In addition, Article 8 of the 12 July 2022 Law establishes a particular prohibition to issue instructions to discriminate or commit an act of intolerance broadly. In particular, this Article mentions inducement, order or instruction to discriminate or commit an act of intolerance. Any inducement, order or instruction to discriminate or commit an act of intolerance for any of the reasons established in this law is discriminatory. For the respondent expert, Article 8 establishes a specific definition of instruction to discriminate as this would be a specific prohibition to issue instructions to discriminate concerning an act of intolerance.
Sweden	Discrimination Act (Section 2a(6))	In particular, Chapter 1, section 4, number 6 of the Discrimination Act defines instructions to discriminate as: ‘orders or instructions to discriminate against someone in	The Swedish definition of instructions to discriminate is bound to a hierarchical relationship between the instructor and the instructed parties. In addition, the national expert report argues the Swedish definition of instructions to discriminate concerns only express instructions. However, there is some controversy. The law

		<p>a manner referred to in points 1–4 that are given to someone who is in a subordinate or dependent position relative to the person who gives the orders or instructions or to someone who has committed herself or himself to performing an assignment for that person.’</p>	<p>clearly covers express orders or instructions. In addition to the definition in Chapter 1 Section 4 (6), Government Bill Prop. 2007/08:95, p 494-495 provides some additional detail regarding instructions. In the explanatory text the Bill uses the term pressure or pressures (<i>påtryckningar</i>), in addition to the term instructions, which seems to indicate that the legal text in the law does not limit instructions to discriminate to <u>express</u> instructions. But there is not much more to specifically clarify when suggestions, encouragement etc can constitute an order or instruction. Nevertheless, as the order must be given to someone in a subordinate or dependent position, it does seem that even if the instruction is not express, there is room for determining that a preference or suggestion constitutes an order or instruction when given to someone in a subordinate or dependent position. The Government Bill does point out that the instruction must have led to discrimination. In other words, if discrimination does not result from the instruction, there is no violation of the provision prohibiting instructions to discriminate. However, the Bill points out an exception concerning when the instruction did not result in discrimination (p. 495): ‘Exceptionally, disadvantage may occur even if an instruction is not obeyed by the person who received it. This may be the case when the instruction was directed at a certain person or several persons who are thus particularly designated as intended objects of discrimination. In such a case, the individual was exposed to a violation of the Act already by being singled out’.</p>
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Table 4

Essentially, the behaviours indicated in national law which will constitute an instruction to discriminate can take three distinct forms (Figure 4):

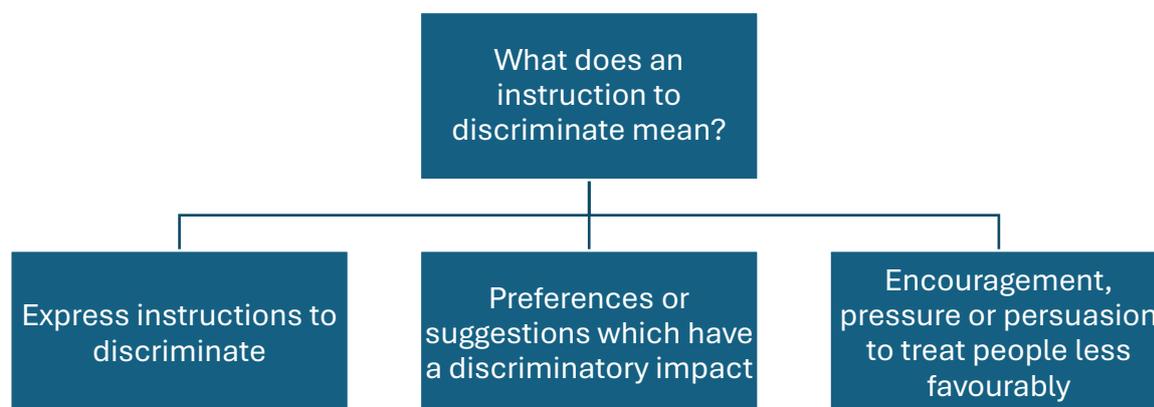


Figure 4

The table below (Table 5) outlines what is included in the Member States’ national definitions of an instruction to discriminate or what can be derived from their case law. Yellow indicates that the law in that jurisdiction is too unclear to make a definitive conclusion on the matter. Green indicates that the Member State includes protection within that particular category. Red indicates that the definition in that Member State definitely does not include protection within that category.

Member State	Express instructions to discriminate	Preferences or suggestions which have a discriminatory impact	Encouragement, pressure or persuasion to treat people less favourably
Austria	Green	Yellow	Yellow
Belgium	Green	Green	Green
Bulgaria	Green	Green	Green
Croatia	Green	Yellow	Yellow
Cyprus	Green	Red	Red
Czechia	Green	Yellow	Yellow
Denmark	Green	Red	Red
Estonia	Green	Yellow	Yellow
Finland	Green	Green	Green
France	Green	Green	Green
Germany	Green	Yellow	Yellow
Greece	Yellow	Yellow	Yellow
Hungary	Yellow	Yellow	Yellow
Ireland	Yellow	Yellow	Yellow
Italy	Green	Green	Green
Latvia	Green	Yellow	Yellow
Lithuania	Yellow	Yellow	Yellow
Luxembourg	Green	Green	Green

Malta			
Netherlands			
Poland			
Portugal			
Romania			
Slovakia			
Slovenia			
Spain			
Sweden			

Table 5

The table indicates that there is a great deal of consensus that express instructions will fall within the definition of instructions to discriminate. There is less consensus on other forms of indirect instruction. Less than half of the Member States (n=10) include preferences and suggestions which have a discriminatory impact within their national definitions and a similar number (n=11) include encouragement, pressure or persuasion to treat people less favourably within their national definitions. This means there is much less agreement on the latter two options which demonstrates a lack of harmonisation among Members States on this matter. The report will now examine each of these forms of instruction in turn and how Member States have included and interpreted these within their national definitions.

(a) Express instructions to discriminate

Excluding those Member States where the law is reportedly still unclear (**Greece, Hungary, Ireland** and **Lithuania**), all other Member States (n=23) include express instructions to discriminate within their definitions of the prohibition of instructions to discriminate, whether through legislation or case law interpretation. A useful example of how this operates at national level is a case from **Latvia** regarding a Ukrainian citizen who sought a service for her Ukrainian-registered car at a carwash service station in **Latvia**.⁶⁰ She was refused service by the staff who informed her that the owner had expressly instructed them not to serve Ukrainians. When the claimant returned to ask for clarification and an apology, the staff confirmed their previous statements. Similarly, in **Slovenia** the Slovenian Equality Body has held that the owner of a property who in their communication with the property agency made it a condition that the property should be rented only to Slovenian families, and not to foreigners, fulfilled the elements of instructions to discriminate under Article 9 of the PADA.⁶¹

Examples from the **Dutch** courts indicate the potential of this prohibition to remove expressly discriminatory practices across all fields of application. In the field of employment, a project coordinator with a municipal employment agency declared that the agency would follow instructions by potential employers to select candidates by age or ethnic origin.⁶² In the context of housing, instructions by the owner of a residential building

⁶⁰ Latvia, Riga City Court (*Rīgas pilsētas tiesa*), Case No C29353322, case archive No C – 02188 – 23/8, 28 November 2023.

⁶¹ Slovenia, Decision No. 0700-48/2022/19 of 11 September 2023.

⁶² Netherlands, ETC Opinion 2009-40 of 19 May 2009.

to an intermediary to offer apartments in the building in turn to only men or women was a breach of the prohibition.⁶³

(b) Preferences / suggestions which have a discriminatory impact

There is also a distinct possibility that a preference or suggestion which has a discriminatory impact could, particularly where made by a person in authority, have the effect of amounting to an instruction to discriminate. A discriminatory impact in this context could refer to either a real impact or a potential impact. Certain Member States (n=4: **Cyprus, Denmark, Malta** and the **Netherlands**) have expressly stated that this is not included within their definition of an instruction to discriminate and others indicate that it has not yet been decided at a national level (n=13). However, just under half of all Member States (n=10) do include preferences and suggestions which have either a real or potential discriminatory impact within their definition of an instruction to discriminate (whether through legislation or an interpretation of case law). In certain Member States, the law only protects against preferences and suggestions on grounds of race. It is likely that many States do not include preferences and suggestions more generally because of the fact that it is more nebulous a concept than express instructions and as a result would require national courts to assess both the real and potential impact of such concepts.

Where preferences and suggestions are included within the definition of an instruction to discriminate, the rationale for doing so is clearly linked to improving the efficacy of national anti-discrimination provisions. It is plainly identified as a way of ensuring that discriminatory practices can be validly combated at a national level. In a case in **Belgium**, the Labour Court of Brussels in 2021 defined instructions to discriminate as including not just instructions or guidelines to a third party leading to a discriminatory practice based on a protected ground, but also 'situations in which a person expresses a preference or encouragement for persons to be treated less favourably than others, by reason of the favourable treatment of others, because they have one of the protected characteristics'.⁶⁴

(c) Encouragement, pressure, persuasion to treat individuals less favourably

The results with respect to the behaviours outlined in (b) are repeated with respect to the behaviours of encouraging, pressuring or persuading others to treat individuals less favourably. These behaviours may also have real or potential discriminatory impacts as in the case of (b). The difference between the behaviours in (b) and (c) lies not in their impact but in the level of support or direction given by the instruction itself. While the behaviours in (b) indicate ideas or opinions that others might consider acting upon to create real or potential discriminatory impacts, the behaviours in (c) indicate a more direct form of instruction often aimed at motivating or giving a more formal instruction to someone to take specific forms of action. It is more likely that behaviours in (c) will lead to real discriminatory impacts.

Once again there are 11 Member States which include such behaviours within their definition of instructions to discriminate. Once again four Member States expressly stated that their definitions did not include such behaviours. Where the situation is unknown or undecided (n=10 Member States), there is some suggestion that the law may well include such behaviours. An example of this is the case of **Sweden** where although the law

⁶³ Netherlands, ETC Opinion 2010-180 of 8 December 2010. See also NIHR Opinion 2022-82 which concerned a similar relationship but where the alleged instructions concerned the nationality of the tenant.

⁶⁴ Belgium, Labour Court of Brussels, decision of 3 May 2021.

expressly refers to orders and instructions, the explanatory memorandum of the legislation indicates that a much broader range of behaviours may be included.⁶⁵ These may, for example, include ‘pressure or pressures’ in addition to the term ‘instructions’. In the case of **Portugal**, Law 93/2017 of 23 August (which establishes the legal regime for the prevention, prohibition and combating of discrimination on the grounds of racial and ethnic origin, colour, nationality, ancestry and territory of origin within the scope of social protection, including in social security and healthcare, social benefits, education, access to and the supply of goods and services, housing and culture) provides that the scope of the prohibition against instructions to discriminate is broader and includes encouragement or persuasion to treat individuals less favourably.

3.3.2 Is some form of hierarchy required in an instruction to discriminate?

As previously discussed, there is no clear indication given in the Directives as to whether the instruction to discriminate must be issued by a person in a position of hierarchy or superiority who will have the authority to ensure that the instruction can be carried out. This lack of clarity trickles down to the national level where there is **no clear consensus on this particular issue**.

There are two contrasting viewpoints on this matter.

There are those Member States which firmly provide that the **instructor should be in a position of power or superiority** to the instructee so that they can ensure compliance with the instruction. Only in these cases can an instruction to discriminate arise. Quinn argues, in the context of the EU Directives and based on the textual wording of the Directives, that had the drafters wanted to include something wider than a command or instruction, they would have used the term ‘incitement’ which is a term commonly used across European countries particularly in the context of hate crimes.⁶⁶ ‘Incitement’, Quinn argues, would have encapsulated a wider concept than an ‘instruction’, allowing for simple calls to discriminate by those who have no power to compel others to comply to fall within the definition. In the absence of such a wider definition, the term ‘instruction’ necessarily invokes a measure of authority. Quinn also argues that this interpretation is even more pertinent given that the Directives have application to private individuals and preventing such individuals from being able to voice opinions could be considered a ‘major curtailment of free speech’.⁶⁷

There are, however, those Member States which **do not insist on any measure of hierarchy within their definition of an instruction to discriminate**. The fields in which the Directives are focused are fields which have important social purposes and any potential discrimination in those fields, even if it is merely an opinion can have the potential to influence others, even if the person issuing that instruction has no power to compel others to do anything. Indeed, preferences and suggestions even in the absence of authority can still have discriminatory impacts. The potential for undermining the effectiveness of the anti-discrimination protections is then high. It may be that the point may be fairly moot in practical terms, given that such an instruction (whether issued by someone with authority or not) is unlikely to be litigated unless there is some measure of action taken by the instructed party. In this case it is also likely to lead to some measure of direct or indirect discrimination which is also actionable in its own right. This practical aspect will be discussed below. The lack of clarity at the regional level on this question is reflected at the national level, with a clear equal divide between those Member States which do require some hierarchy (n=12) and those that do not (n=11). There

⁶⁵ Government Bill Prop. 2007/08:95, pp. 494-495.

⁶⁶ Quinn (2017), p. 40.

⁶⁷ Quinn (2017), p. 40.

are certain Member States where the law is still unclear on this issue (n=5: **Austria, Cyprus, Ireland, Lithuania** and **Portugal**). In Member States where no hierarchy is required, no mention of authority/superiority etc is mentioned in the national laws. Where some sort of authority is required, the law is very clear. An example of this is **Sweden** where the law clearly states that any instruction must have been given to someone in a 'subordinate or dependent position' such as an employee.⁶⁸

The following table (Table 6) indicates the Member States in which hierarchy is, or is not, required (X indicates which status the Member State has chosen, yellow indicates uncertainty in the law which does not allow for a determination to be made definitively on this issue).

Member State	Hierarchy required	Hierarchy not required
Austria		
Belgium		X
Bulgaria		X
Croatia		X
Cyprus		
Czechia	X	
Denmark	X	
Estonia	X	
Finland	X	
France		X
Germany	X	
Greece	X	
Hungary	X	
Ireland		
Italy		X
Latvia	X	
Lithuania		
Luxembourg		X
Malta		X
Netherlands		X
Poland		X
Portugal	X ⁶⁹	
Romania	X	
Slovakia	X	
Slovenia		X
Spain		X
Sweden	X	

Table 6

⁶⁸ Sweden, Discrimination Act (*Diskrimineringslagen*), Chapter 1, Section 4 (6).

⁶⁹ In the field of employment, it is thought that this hierarchical requirement should exist.

3.3.3 Liability for instruction to discriminate

The issue of liability is a pertinent one from both a practical and theoretical perspective. From a practical perspective it identifies the individual or organisation responsible for the instruction who can be the respondent in any potential claim. From a theoretical perspective it places clear responsibility on parties within organisations to take particular care in issuing or receiving instructions which may have the potential to discriminate and may have a chilling impact on them in respect of their subsequent actions. Those who may be responsible for an instruction to discriminate are shown here in Figure 6.

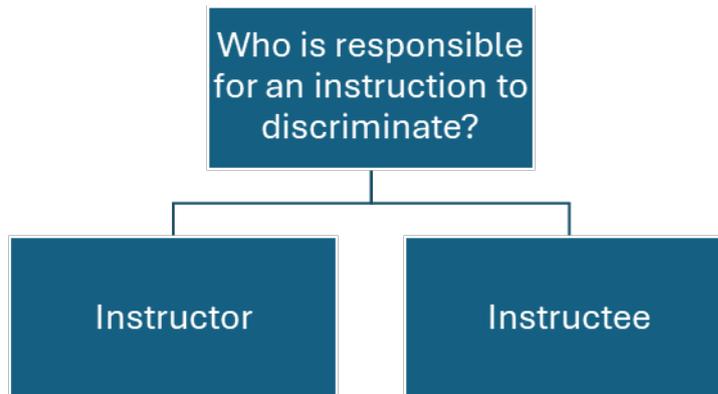


Figure 6

There are potentially two liable parties in the context of an instruction to discriminate: the instructor and the instructee. In some cases, both of these parties could potentially be liable. The instructor, the person who issues the instruction, can be liable for the instruction. The bigger, and more difficult question, is whether the instructee (who receives and carries out the instruction) can be liable for the instruction or whether they are merely liable for any ensuing discrimination (direct, indirect or harassment).

The following table identifies those Member States which provide that liability lies with the instructor, the instructee or both. There is **full consensus that the instructor will always be the party liable for an instruction to discriminate**. There is a less clear consensus on the issue of whether the instructee can be held liable for an instruction to discriminate and not just for the ensuing discrimination. Although **over half of all Member States support liability with respect to the instructee**.

Only in the case of **Latvia** is the position of the instructee unclear. According to the Latvian Ombudsperson, the current wording of the Law on Equal Treatment does not suggest that it could be enforced against a broad spectrum of parties. Tenants, customers and employees cannot, therefore, be held liable, although they would be liable for any ensuing discrimination (direct, indirect or harassment). However, there are difficulties in this approach and, in its annual reports for 2009 to 2011, the Latvian Ombudsperson recommended amending the Law on Equal Treatment to introduce provisions explicitly extending the scope of liability of instructees, although this has yet to be implemented.

In this table (Table 7), X indicates that the Member State includes liability in that particular category. Yellow indicates that the situation is unclear.

Member State	Instructor liability	Instructee liability
Austria	X	
Belgium	X	X
Bulgaria	X	
Croatia	X	X
Cyprus	X	X ⁷⁰
Czechia	X	
Denmark	X	
Estonia	X	
Finland	X	X
France	X	X
Germany	X	X
Greece	X	
Hungary	X	X
Ireland	X	X
Italy	X	X
Latvia	X	
Lithuania	X	
Luxembourg	X	X
Malta	X	X
Netherlands	X	X
Poland	X	
Portugal	X	X
Romania	X	X
Slovakia	X	X
Slovenia	X	X
Spain	X	
Sweden	X	

Table 7

(a) Liability of instructors

The Directives are silent on this particular issue although it is assumed that the instructor will always be liable. The instructor is the person who is issuing the instruction so will be the person primarily responsible for the instruction to discriminate. Naturally, there is a great deal of consensus at Member State level that the instructor will always be liable in these circumstances (n=27). This is both a theoretical and practical solution, given that it is the instructor who has instigated the instruction to discriminate and in many cases they are easily identifiable as either the legal entity (employer or service provider) or an individual in a position of responsibility who can act on behalf of that legal entity. **France**, for example, has reported that in labour court proceedings it is normally the employer who is sued for these types of actions regardless of which individual

⁷⁰ In Cyprus, instructee liability depends on whether the employee had the choice of ignoring the instruction and chose to apply it instead.

within the organisation has instigated the instruction.⁷¹ Instructors of impugned measures, such as landlords' explicit directions to letting agents not to accept tenants in receipt of social protection benefits,⁷² have also been held liable for instructions to discriminate. There is rarely any dispute as to who the instructor is in such cases.

(b) Liability of instructees

The liability of instructees is less clear. There are Member States (n=16) where the instructee may be considered liable for an instruction to discriminate, either jointly with the instructor or severally. The practical rationale for inclusion of the instructee in such cases is that it does not force the claimant to choose one party to whom to address their claim (reducing the burden on the claimant). There is also a good theoretical argument for their liability in such cases. The prohibition of an 'instruction to discriminate' is not only to prevent individuals and organisations from instructing others to discriminate but also to prevent those receiving such instructions from acting on them. Where there is liability imposed on the instructee, this creates an additional duty not to act upon such instructions and widens the scope of protection against discrimination. It may also prevent further acts of discrimination from arising, such as direct or indirect discrimination or harassment.

Practically, however, there is some overlap with other forms of discrimination which can arise from an instruction to discriminate where the instructee implements the instruction and either direct or indirect discrimination or harassment arise as a result. Sometimes, the instruction itself cannot be firmly established and in such cases reliance will be placed on other discriminatory acts. Examples from the **Netherlands** indicate that there are situations where the respondent party claims to have acted upon instructions by another party, but the existence of such instructions cannot be firmly established. In such cases the decision-maker can still hold the instructee liable for other forms of discrimination but not the alleged instructor. The Dutch NIHR has, for this reason, established a duty on instructees to actively appeal to the instructor when faced with discriminatory instructions. In practical terms, where both the instructee and the instructor are addressed as respondents, the courts can choose to review the case jointly or severally, issuing separate or joint opinions on both actions (see, for example, the practice in the **Netherlands**⁷³). The inclusion of the instructee does make it practically easier for claimants to take such claims and has the additional benefit of strengthening the prohibition on instructions to discriminate.

Some very useful examples of instructee liability can be gleaned from across the case law deriving from the Member States. In the **Netherlands**, both the instructor and the instructee were found liable for an instruction to discriminate in the employment context. In this case, a subcontractor (the instructee) was hired to clean nursing homes and was instructed by the employer (the instructor), which was a foundation that managed several nursing homes, not to hire employees who wore a headscarf. This was held to constitute an instruction to discriminate on grounds of ethnicity but also potentially **religion** for which both the instructor and the instructee were liable.⁷⁴ In **France**, an agency was hired by an employer to manage the recruitment of hostesses for a promotion campaign in supermarkets. A fax was sent by the recruitment manager to all

⁷¹ France, High Judicial Court of Paris 14 November 2002 No. 0019304084 *Cantuel Horbette (Hotel La Villa), Essindi et al.* Court of Appeal of Paris 17 October 2003. Appeal from High Judicial Court of Paris 22 November 2002, D.O. July 2003 p. 284, 'Moulin Rouge' *SOS Racisme and Marega v. Beuzit et Association du Moulin*.

⁷² Ireland, Workplace Relations Commission, *O'Gara v. Keenan Property Management*, ADJ-00033813, 5 April 2023; Workplace Relations Commission, *A Service User v. A Letting Agency*, ADJ-00004073, 20 March 2017. See also Equality Tribunal, *Forde v. The Body Clinic*, DEC-S2007-085, 28 November 2007.

⁷³ For example, NIHR Opinion 2012-8 of 17 January 2012 and NIHR Opinion 2014-140 of 14 November 2014.

⁷⁴ Netherlands, Equal Treatment Commission (predecessor of the NIHR), ETC Opinion 2010-95, 28 June 2010.

recruiters with the code BBR (*Bleu, Blanc, Rouge* (Blue, White, Red)) which indicated that the hostesses were to be mainly of French origin. While the recruitment manager admitted that this had not been the instruction of the employer directly but rather her own personal initiative, it was held by the Court of Cassation that this did not limit the liability of all the corporate entities (instructors and instructees) involved for instructing discriminatory recruitment.⁷⁵ However, these cases are rare and in most cases only the instructor is found liable and/or the instructee is found to have violated another discrimination prohibition such as direct or indirect discrimination or harassment.

Overall, where both instructor and instructee liability is available it has the dual benefit of making such claims practically easier for the claimant and also strengthening the prohibition on instructions to discriminate. It also does not prevent the claimant from additionally claiming for other forms of discrimination arising from the instruction (e.g. direct or indirect discrimination or harassment).

3.3.4 Responsibility gaps

Potentially, a gap in legal responsibility can arise in certain circumstances where the identity of the instructor or the instructee is unclear due to the use of agencies or subcontractors.

This might happen where agencies or subcontractors are used and it is unclear where the instruction to discriminate may have arisen from. Generally, in such circumstances, **Member States have taken a strongly consistent approach where liability is essentially extended to agencies and subcontractors.** In **Germany**, the general rule on the responsibility of agents applies to the extension of liability.⁷⁶ In **Slovenia**, decisions by the Advocate for the Principle of Equality indicate that both the instructor and the instructed agency will be responsible.⁷⁷ In a very famous case in **France**, Gemey Maybelline Garnier and the interim employment broker Adecco were jointly held liable, together with the manager in charge of recruiting a number of hostesses for a promotion campaign in supermarket chains, of racial discrimination on the ground of certain instructions given during the recruitment process.⁷⁸ The Court of Cassation referred to Article 121-2 of the Penal Code to trigger the penal liability of legal persons for acts committed by their representatives in subordinating an employment offer to discriminatory conditions contrary to Article 225-3 para. 3 of the Penal Code.

The Labour Court in **Ireland** has suggested that both a provider of agency work and an employer (an employment agency) could potentially be held liable as ‘concurrent wrongdoers’ for the issuing and implementation of an instruction to discriminate.⁷⁹

It should also be noted that the generic provisions on vicarious liability in **Ireland**, and in other Member States, make it clear that persons cannot discriminate through an intermediary. Both the Irish Equal Status Act and Employment Equality Act specify that: ‘Anything done by a person as agent for another person, with the authority (whether express or implied and whether precedent or subsequent) of that other person shall, in any proceedings brought under this Act, be treated for the purposes of this Act as done also by that other person’.⁸⁰

⁷⁵ France, Court of cassation, Criminal Chamber, Case No. 07-85109, [decision of 23 June 2009](#).

⁷⁶ Most importantly, Sections 31, 278 and 831 German Civil Code (BGB).

⁷⁷ Slovenia, Advocate for the Principle of Equality, decision No. 0700-48/2022/19 of 11 September 2023.

⁷⁸ France, Court of cassation, Criminal Chamber, 23 June 2009 no 07 – 85109.

⁷⁹ Ireland, Labour Court, *A Worker v. Two Respondents*, EDA1129, 22 November 2011.

⁸⁰ Ireland, [Section 15\(2\) EEA](#); [Section 42\(2\) ESA](#).

Consequently, where a principal directs or instructs an agent to engage in prohibited conduct, and the agent implements that instruction, both parties can potentially be found liable.

The analysis of national case law in Section 3.5 below highlights a strong consensus towards avoiding responsibility gaps in these contexts and to fixing liability to agencies and subcontractors where necessary.

3.4 Enforcement and sanctions

3.4.1 Enforcement overview

In the specific context of enforcing prohibitions on instructions to discriminate, enforcement varies for each country depending on the field of application and the grounds covered by the law in that particular Member State.

From the gathered data, employment is understandably the field of application most covered by enforcement, reflecting the provisions of the Directives. For instance, all 27 Member State experts report that claimants can enforce their right to non-discrimination in the employment field through either judicial or administrative procedures. In addition, in all 27 countries, claimants of instructions to discriminate in the employment field can be assisted by public or private organisations to enforce their rights to non-discrimination. In several cases, claimants can be assisted by NGOs or trade unions, provided their objectives are employment-related, showing a significant connection between employment and equality law (see Table 8).

Under the existing Directives, full enforcement should also be available in all fields of application on grounds of race and ethnicity. Based on the results provided by the national experts, there is almost full compliance across Member States in this respect, except in certain fields of application in the case of Malta and Ireland. This suggests a potential gap in the transposition of the Directives in the case of both of these jurisdictions on grounds of race and ethnicity, where all fields of application should be covered. However, the situation is not sufficiently clear to confirm such a transposition gap.

In Ireland and Malta, the position is complicated by the fact that while in the employment context there is an explicit prohibition of instructions to discriminate,⁸¹ the prohibition is more implicit in the case of other fields of application.⁸² The national experts do point to case examples in other fields of application where claims have been enforced but it cannot be expressly stated for the purposes of this table that the answer is clearly positive given the potential for discretion here. Therefore, Ireland and Malta have been recorded as not having an explicit means of enforcement despite potential implicit protection.

Beyond the scope of the Directives, there is a **great deal of consensus that where protections exist in the law these should be enforced**. This means that, generally, if a Member State provides for protection in

⁸¹ Ireland: Section 2(1) of the Employment Equality Acts 1998-2021 (EEA); Malta: Article 10 and 11, Equal Treatment in Employment Regulations.

⁸² Ireland: Section 42(2), Equal Status Act 2000. Section 13 of the 2000 Act provides for the criminal offence of procurement of discrimination, however such proceedings may only be initiated by the Workplace Relations Commission or by the national equality body; Malta: Article 2 of the Equal Treatment of Persons Order where the prohibition on giving instructions to discriminate arises out of the definition of harassment; Article 1044, Civil Code which refers to damage unjustly caused to others by persons who wilfully contributed thereto with advice, threats or commands and Article 42, Criminal Code dealing with complicity by providing the basis for judicial action against a person who allegedly gave instructions to another person to discriminate.

a particular field of application on a particular ground (as detailed in Table 2), it will also provide for a corresponding enforcement mechanism.

As to whether claimants can be assisted by public or private organisations in enforcing their right to non-discrimination in fields outside employment, the vast majority of national experts indicated that this was possible in their respective Member States.

These figures show that some Member States might need to clarify or improve access to claimants to enforce their right to non-discrimination and to be assisted by public or private organisations beyond employment. The concept of assistance is very broad and would include submitting observations, acting on behalf or acting in support of, claimants and could also include collective action.

The following table (Table 8) reflects the results of the national expert surveys on enforcement within their jurisdiction and reflects the law as it currently applies in each Member State. Reference should be made to Table 2 for a full list of the grounds protected under each field of application for each Member State.

Enforcement action / field of application	Can claimants enforce their right to non-discrimination through either judicial or administrative procedures?	Can claimants be assisted by public or private organisations in enforcing their right to non-discrimination?
Employment	YES: Austria; Belgium; Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Luxembourg; Malta; Netherlands; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Sweden (27) NO: (0)	YES: Austria; Belgium; Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Luxembourg; Malta; Netherlands; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Sweden (27) NO: (0)
Social protection (including social security and social advantages)	YES: Austria; Belgium; Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Italy; Latvia; Lithuania; Luxembourg; Netherlands; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Sweden (25) NO: Ireland, Malta (2)	YES: Austria; Belgium; Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Luxembourg; Netherlands; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Sweden (26) NO: Malta (1)
Education	YES: Austria; Belgium; ⁸³ Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Italy; Latvia; Lithuania; Luxembourg; Netherlands; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Sweden (25) NO: Ireland, Malta (2)	YES: Austria; Belgium; ⁸⁴ Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Italy; Ireland; Latvia; Lithuania; Luxembourg; Netherlands; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Sweden (26) NO: Malta (1)

⁸³ In Belgium, education and housing are not a federal competence but administrative procedures are available on all grounds in all federated entities.

⁸⁴ In Belgium, education and housing are not a federal competence but administrative procedures are available on all grounds in all federated entities.

Healthcare	YES: Austria; Belgium; Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Italy; Latvia; Lithuania; Luxembourg; Netherlands; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Sweden (25) NO: Ireland, Malta (2)	YES: Austria; Belgium; Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Luxembourg; Netherlands; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Sweden (26) NO: Malta (1)
Housing	YES: Austria; Belgium; ⁸⁵ Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Italy; Latvia; Lithuania; Luxembourg; Netherlands; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Sweden (25) NO: Ireland, Malta (2)	YES: Austria; Belgium; ⁸⁶ Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Italy; Latvia; Lithuania; Luxembourg; Malta; Netherlands; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Sweden (26) NO: Malta (1)
Access to and supply of goods and services which are available to the public	YES: Austria; Belgium; Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Italy; Latvia; Lithuania; Luxembourg; Netherlands; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Sweden (25) NO: Ireland, Malta (2)	YES: Austria; Belgium; Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Luxembourg; Netherlands; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Sweden (26) NO: Malta (1)

Table 8

3.4.2 Sanctions overview

Sanctions reveal a more diverse picture than enforcement.

In the employment field, all Member States (n=27) declared compensation is payable in cases of instructions to discriminate. Ireland is the only Member State to cap compensation in certain contexts.

Compared to the other fields, employment ensures access to compensation in the majority of cases. In addition, 19 respondents declared there is some form of criminal or administrative sanction available. This last figure is the highest compared to the other fields of application, suggesting there are more criminal or administrative sanctions for instructing to discriminate in the employment field than in the others, reflecting the provisions of the Directives. However, some Member States also mentioned that, even though there can be no specific rules for compensation or administrative or criminal sanctions, the general rules on compensation or sanctions may apply. For example, in **Germany**, contract, tort or criminal law rules may apply for the actions of agents.

The rest of the fields of application show common figures with respect to whether compensation is payable in instruction to discriminate cases and on whether there is an upper limit for such compensation. **In each of the remaining fields (social protection, education, healthcare, housing, and access to and supply of**

⁸⁵ In Belgium, education and housing are not a federal competence but administrative procedures are available on all grounds in all federated entities.

⁸⁶ In Belgium, education and housing are not a federal competence but administrative procedures are available on all grounds in all federated entities.

goods and services which are available to the public) 25 respondents reported that some compensation is payable in instruction to discriminate cases, whereas Ireland and Malta responded in the negative. In addition, no respondent reported that there is an upper limit on compensation. The only partial exception is Slovenia, where there seems to be an upper limit based on specialised legislation. However, the respondent noted that it is unclear whether this limit complements or replaces the general rules on compensation, which do not include an upper limit.

Regarding whether there are criminal or administrative sanctions, the rest of the fields of application (social protection, education, healthcare, housing, and access to and supply of goods and services which are available to the public) exhibit a more varied distribution. In social protection, education and access to and supply of goods and services which are available to the public, 18 respondents reported that there is a form of criminal or administrative sanction for instructing to discriminate, whereas nine (Austria, Croatia, Denmark, Estonia, Germany, Italy, Malta, Poland and Sweden) declared there was not. In the remaining fields of application, healthcare and housing, the picture is slightly different. In healthcare, Slovakia is added to the nine stating there is no criminal or administrative sanction, whereas in housing, Slovakia and Czechia are added to the nine respondents replying in the negative.

To conclude this section, two general notes must be highlighted. Firstly, the respondents from Croatia, Cyprus, Czechia, Germany, Greece, Hungary, Ireland, Lithuania, Poland and Romania outlined potential for compensation as well as administrative and criminal sanctions at least for some protected fields analysed in this report through interpretation of general legal principles (as opposed to specific laws on instructions to discriminate), whether at the constitutional or normative levels. Secondly, this report aims to provide a general landscape of the national situation on instructions to discriminate. However, the respondents for Austria and Belgium noted that there might be complementary approaches to instructions to discriminate at the level of federated entities which are highlighted in Table 2 above. The following table (Table 9) reflects the results of the national expert surveys on sanctions within their jurisdiction and reflects the law as it currently applies in each Member State. Reference should be made to Table 2 for a full list of the grounds protected under each field of application for each Member State.

Sanction / field of application	Is compensation payable in 'instruction to discriminate' cases?	If compensation is payable, is there an upper limit on the compensation payable?	Are there criminal or administrative sanctions for instructing to discriminate?
Employment	YES: Austria; Belgium; Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Luxembourg; Malta; Netherlands; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Sweden (27)	YES: Ireland (1) NO: Austria; Belgium; Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Italy; Latvia; Lithuania; Luxembourg; Malta; Netherlands; Poland; Portugal;	YES: Austria; Belgium; Bulgaria; Cyprus; Czechia; Finland; France; Greece; Hungary; Ireland; Latvia; Lithuania; Luxembourg; Netherlands; Portugal; Romania; Slovakia; Slovenia; Spain (19) NO: Croatia, Denmark, Estonia, Germany, Italy, Malta, Poland, Sweden (8)

	NO: (0)	Romania; Slovakia; ⁸⁷ Slovenia; Spain; Sweden (26)	
Social protection (including social security and social advantages)	YES: Austria; Belgium; Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Italy; Latvia; Lithuania; Luxembourg; Netherlands; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Sweden (25) NO: Ireland, Malta (2)	YES: (0) NO: Austria; Belgium; Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Luxembourg; Malta; Netherlands; Poland; Portugal; Romania; Slovakia; ⁸⁸ Spain; Sweden (26) Unclear: Slovenia (1)	YES: Belgium; ⁸⁹ Bulgaria; Cyprus; Czechia; Finland; France; Greece; Hungary; Ireland; Latvia; Lithuania; Luxembourg; Netherlands; Portugal; Romania; Slovakia; Slovenia; Spain (18) NO: Austria, Croatia, Denmark, Estonia, Germany, Italy, Malta, Poland, Sweden (9)
Education	YES: Austria; Belgium; Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Italy; Latvia; Lithuania; Luxembourg; Netherlands; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Sweden (25) NO: Ireland, Malta (2)	YES: (0) NO: Austria; Belgium; Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Luxembourg; Malta; Netherlands; Poland; Portugal; Romania; Slovakia; ⁹⁰ Spain; Sweden (26) Unclear: Slovenia (1)	YES: Belgium; Bulgaria; Cyprus; Czechia; Finland; France; Greece; Hungary; Ireland; Latvia; Lithuania; Luxembourg; Netherlands; Portugal; Romania; Slovakia; Slovenia; Spain (18) NO: Austria, Croatia, Denmark, Estonia, Germany, Italy, Malta, Poland, Sweden (9)
Healthcare	YES: Austria; Belgium; Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Italy; Latvia; Lithuania; Luxembourg; Netherlands; Poland;	YES: (0) NO: Austria; Belgium; Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy;	YES: Belgium; Bulgaria; Cyprus; Czechia; Finland; France; Greece; Hungary; Ireland; Latvia; Lithuania; Luxembourg; Netherlands; Portugal; Romania; Slovenia; Spain (17)

⁸⁷ It is important to note that in Slovakia there is no upper limit for compensation claimed within court proceedings. However, there are some limits for administrative sanctions imposed by administrative bodies.

⁸⁸ It is important to note that in Slovakia there is no upper limit for compensation claimed within court proceedings. However, there are some limits for administrative sanctions imposed by administrative bodies.

⁸⁹ It is important to note that the focus in Belgium is on civil and administrative rather than criminal enforcement. At a federal level there are criminal sanctions on all grounds for all civil servants or public officials across all fields (except education and housing which are not within the federal competence). Criminal sanctions are foreseen at a federal level for instructions to discriminate on racial and ethnic origin grounds in employment and access to goods and services but not on grounds of age, religion and belief, sexual orientation or disability, where sanctions are reserved for civil servants and public officials.

⁹⁰ It is important to note that in Slovakia there is no upper limit for compensation claimed within court proceedings. However, there are some limits for administrative sanctions imposed by administrative bodies.

	Portugal; Romania; Slovakia; Slovenia; Spain; Sweden (25) NO: Ireland, Malta (2)	Latvia; Lithuania; Luxembourg; Malta; Netherlands; Poland; Portugal; Romania; Slovakia; ⁹¹ Spain; Sweden (26) Unclear: Slovenia (1)	NO: Austria; Croatia; Denmark; Estonia; Germany; Italy; Malta; Poland; Slovakia; Sweden (10)
Housing	YES: Austria; Belgium; Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Italy; Latvia; Lithuania; Luxembourg; Netherlands; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Sweden (25) NO: Ireland; Malta (2)	YES: (0) NO: Austria; Belgium; Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Luxembourg; Malta; Netherlands; Poland; Portugal; Romania; Slovakia; ⁹² Spain; Sweden (26) Unclear: Slovenia (1)	YES: Belgium; Bulgaria; Cyprus; Finland; France; Greece; Hungary; Ireland; Latvia; Lithuania; Luxembourg; Netherlands; Portugal; Romania; Slovenia; Spain (16) NO: Austria; Croatia; Czechia; Denmark; Estonia; Germany; Italy; Malta; Poland; Slovakia; Sweden (11)
Access to and supply of goods and services which are available to the public	YES: Austria; Belgium; Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Italy; Latvia; Lithuania; Luxembourg; Netherlands; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Sweden (25) NO: Ireland; Malta (2)	YES: (0) NO: Austria; Belgium; Bulgaria; Croatia; Cyprus; Czechia; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Luxembourg; Malta; Netherlands; Poland; Portugal; Romania; Slovakia; Spain; Sweden (26) Unclear: Slovenia (1)	YES: Belgium; Bulgaria; Cyprus; Czechia; Finland; France; Greece; Hungary; Ireland; Latvia; Lithuania; Luxembourg; Netherlands; Portugal; Romania; Slovakia; Slovenia; Spain (18) NO: Austria; Croatia; Denmark; Estonia; Germany; Italy; Malta; Poland; Sweden (9)

Table 9

3.5 Case law analysis

There is a paucity of case law and practice around instructions to discriminate in the European Union, which is also reflected at a European regional level (there have been no cases before the European Court of Justice and

⁹¹ It is important to note that in Slovakia there is no upper limit for compensation claimed within court proceedings. However, there are some limits for administrative sanctions imposed by administrative bodies.

⁹² It is important to note that in Slovakia there is no upper limit for compensation claimed within court proceedings. However, there are some limits for administrative sanctions imposed by administrative bodies.

there has only been one relevant case before the European Court of Human Rights). This is not to suggest that there is very little discriminatory practice involving instructions to discriminate across the European region. On the contrary, analysis of the national case law which does exist indicates that this is a particular problem across the European Union and contributes to undermining the effectiveness of the European equality agenda. The more likely reason for the lack of case law stems from a lack of understanding of the nature of the provision and the fact that once an instruction causes discrimination, a claimant is more likely to pursue an action for either direct or indirect discrimination rather than challenging the instruction itself. A lack of clarity as to the nature of the prohibition contributes to this.

At a national level, 12 Member States (**Cyprus, Estonia, Finland, Germany, Hungary, Lithuania, Luxembourg, Malta, Portugal, Romania, Spain and Sweden**) reported no case law or practice on instructions to discriminate. Among the other Member States (n=17), there are 29 cases reported, averaging 1.074 cases per country. **France** is the country with the most reported cases⁹³ (n=5), followed by **Bulgaria** (n=3), **Croatia** (n=3), **Czechia** (n=3), the **Netherlands** (n=3) and **Slovenia** (n=3), and only one case each in **Austria, Belgium, Denmark, Greece, Ireland, Italy, Latvia, Poland and Slovakia**. However, as one of the respondent experts highlighted, low presence of case law and practice does not mean instructions to discriminate do not happen. It is interesting to note that instructions to discriminate are likely to occur in a variety of settings, including employment, clubs and access to housing. As shown in this report, in addition to access to services, we found similar conclusions when analysing data across the EU27 respondent experts.

3.5.1 Case law analysis by field

Where Member States did report on national case law, there were some distinct trends in this reporting.

(a) Employment

Many of the cases (n=5) involve the employment field, which is to be expected given the scope of protection afforded at EU level which is mirrored at national level. An instruction to discriminate in employment often arises in the following manner (Figure 7):

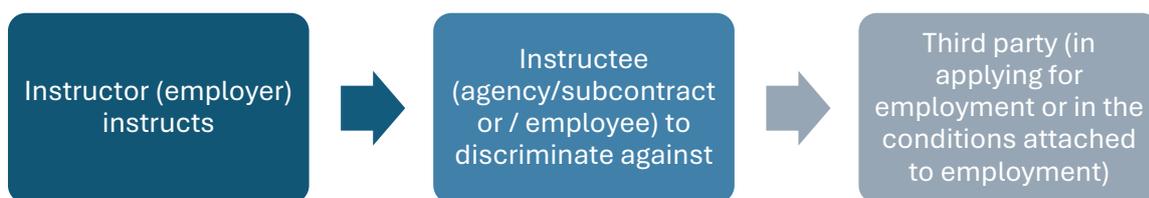


Figure 7

The four most prominent grounds for instructions to discriminate in employment were **race and ethnicity, disability, religion and age**. With respect to disability, this invariably involved a poor employment record due to chronic illness and sickness leave. With respect to age, this could involve an employer seeking employees who were neither too young nor too old. Race and ethnicity is a more complex ground in the employment context and covers a variety of issues from instructions not to hire individuals who dress in certain ways (e.g. wear headscarves) or not to hire those who are not of a particular national origin. In the employment context,

⁹³ In fact, in France, since the 2000s, there have been hundreds of penal cases regarding access to goods and services (e.g. access to discos, planes, swimming pools, campsites, hotels or housing) which entail instructions to discriminate. However, there are no statistics and it is not possible to identify them all for the purposes of this report.

indications of religion (e.g. headscarves) reflected the main content of an instruction to discriminate on grounds of religion.

The cases in the employment context invariably involved instructions to discriminate by agencies on behalf of employers rather than directly by employers themselves (n=5). In some cases these instructions arose from the agency itself advising employers not to hire individuals on certain grounds, but in the majority of cases (n=4) the agency was instructed directly to discriminate by an employer. The most interesting aspect of all these cases was that the use of an agency was not a means for an employer or the agency to escape liability for their actions. In a case where an employer had been instructed not to employ an individual by an agency hired to recommend employees to them, an **Irish** court opined that ‘where a prospective employer is instructed by another not to employ a particular person, and it transpires that the reason upon which that instruction is grounded is tainted with discrimination, liability cannot be avoided by merely pleading that the recipient of the instruction accepted it without question’.⁹⁴ This indicates that either actual or imputed knowledge of the discrimination is sufficient ground for a complaint of an instruction to discriminate. In addition, both the agency and the employer can be liable for the instruction to discriminate in these contexts.⁹⁵

Employment field case law examples

In **Ireland**, an agency instructed an employer not to hire a worker on the grounds that the person had a poor employment record as a result not of their own **ill-health/disability** but that of their wife (discrimination by association). While the Labour Court did not find the employer or the agency liable for an instruction to discriminate in this case based on the facts, the Labour Court did state that legal liability for such actions could be applicable to both the employer and the agency in such cases.⁹⁶

In **France**, an agency was hired by an employer to manage the recruitment of hostesses for a promotion campaign in supermarkets. A fax was sent by the recruitment manager to all recruiters with the code BBR (*Bleu, Blanc, Rouge* (Blue, White, Red)) which indicated that the hostesses were to be mainly of French **origin**. While the recruitment manager admitted that this had not been the instruction of the employer directly but rather her own personal initiative, it was held by the Court of Cassation that this did not limit the liability of all the corporate entities involved for instructing discriminatory recruitment.⁹⁷

In **Greece**, a temporary agency hired by the European Asylum Support Office (EASO) was held to have issued an instruction to discriminate on the grounds of **disability**. The employee in question had taken sick leave due to a chronic illness and in her absence her position (and only her position) in the employer’s organisation had been abolished. Subsequently, when a call for expressions of interest for posts was issued by the agency, her application was rejected. While the EASO attempted to limit its liability by stating that it had not rejected her application, rather the agency had done so, the Ombudsman came to the conclusion that the EASO could not limit its liability in this way. It was the EASO that had abolished the position, with the result that she was not able to renew her employment contract with them (unlike all other colleagues in a similar employment situation). In addition, the EASO had the final say on the selection of employees, determined the number of

⁹⁴ Ireland, Labour Court, *A Worker v. Two Respondents*, EDA1129, 22 November 2011.

⁹⁵ France, Court of Cassation, Criminal Chamber, Case No. 07-85109, decision of 23 June 2009.

⁹⁶ Ireland, Labour Court, *A Worker v. Two Respondents*, EDA1129, 22 November 2011.

⁹⁷ France, Court of cassation, Criminal Chamber, Case No. 07-85109, decision of 23 June 2009.

posts available and specialities required. The conclusion was that there had been an instruction to discriminate on grounds of disability / chronic ill-health.⁹⁸

In the **Netherlands**, an agency followed the instructions of potential employers to select candidates purely by reference to their **age** and their **ethnicity**. This was sufficient to establish a presumption of an instruction to discriminate.⁹⁹

Also in the **Netherlands**, a subcontractor hired to clean nursing homes was instructed by the employer (a foundation which managed several nursing homes) not to hire employees who wore a headscarf, constituting an instruction to discriminate on grounds of **ethnicity** but also potentially **religion**.¹⁰⁰

(b) Provision of services

The majority of cases at a national level relate to the provision of services and either access to those services or the manner in which particular services are administered (n=10). In this section, access to housing, education and healthcare are not considered, as these are examined separately below. Most of these cases involve the ground of **ethnicity**, reflecting once again the scope of EU protection in this field. However, there are other reported cases related to the grounds of **religion** and **sexual orientation**.

An instruction to discriminate in the provision of services can arise in the following manner (Figure 8).

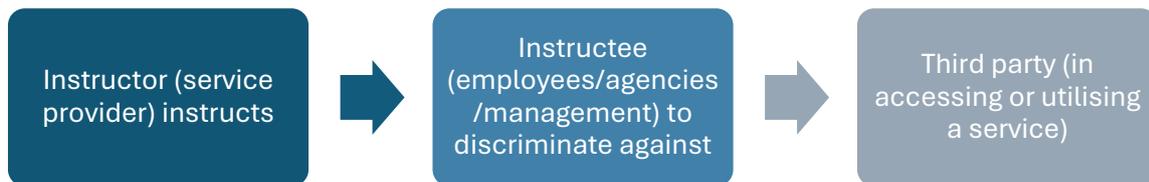


Figure 8

In the case of **accessing services**, a classic dilemma faced is in relation to the denial of access to those services to individuals or groups on a variety of protected grounds. This includes access to discotheques, restaurants, night clubs or services such as carwashes. Access is usually denied on the basis that the service provider instructs either employees or subcontractors to discriminate on certain grounds so as to exclude certain individuals or groups from their services on specific grounds. In most cases, both the employer and the subcontractor would be found liable for the instruction to discriminate, although this is not a settled question. There were also cases where the service provider indicated that they did not issue an instruction to discriminate but that the agency worker or subcontractor had acted of their own volition in discriminating. The court in **Austria** indicated in one such case that the service provider would still be liable in such a situation as they had given too much discretion to the subcontractors to make their own decisions on who to allow to access the services and that the service provider should have made clear to the subcontractor that they should act in an objective and non-discriminatory manner.¹⁰¹

⁹⁸ Greece, Ombudsman (as Equality Body), 253914/2020, 7 February 2020.

⁹⁹ Netherlands, Equal Treatment Commission (predecessor of the NIHR), ETC Opinion 2009-40, 19 May 2009.

¹⁰⁰ Netherlands, Equal Treatment Commission (predecessor of the NIHR), ETC Opinion 2010-95, 28 June 2010.

¹⁰¹ Austria, District Court of St. Pölten, Nr.4C 480/09x-12, 29 January 2010.

Instructions to discriminate can also arise in the **administration of services**. There is a series of cases involving negative statements made by individuals in their official capacity as politicians¹⁰² against certain protected groups (mainly Roma) and which are then broadcast nationally. While these statements have been held to perpetuate stereotypes and to be generally problematic, it has been difficult for the courts to establish that these amount to instructions to discriminate in the absence of particular actions against the affected groups. To date, none of the cases brought on these grounds have yielded a positive result for the claimants, indicating that either there is insufficient understanding of the scope of instruction to discriminate or that the evidence in these cases was not strong enough to establish such an instruction.

Case examples in the services field

In **Austria**, a man of Egyptian origin was denied entry to a local discotheque on two occasions. The man claimed that this was due to his **race or ethnic origin**. While the discotheque owner denied issuing any instructions in this regard to their subcontracted doormen, the court nevertheless ruled that the owner of the establishment was liable for an instruction to discriminate on grounds of race and ethnic origin. The court indicated that the owner had given too much discretion to the doormen and had not ordered them to clearly respect the equality provision. The court stated: 'As the doormen have not been instructed to conduct the access control strictly based on objective criteria and refrain from decisions motivated on ethnic criteria, breaches of the Equal Treatment Act were predictable'.¹⁰³

In **Lithuania**, Roma women and a young girl were refused access to a café on the grounds that **Roma** were not welcome in the café and could only order take-away food. When the group expressed their dissatisfaction at this particular rule, they were forcibly removed from the premises. While the manager of the café originally denied that he had instructed the café staff to discriminate against Roma specifically, evidence emerged during the court hearing that the staff had indicated to the Roma group at the time that the 'manager told us not to accept Gypsies because Gypsies are pigs, they come to litter' and that the father of the manager had told the café staff that they should serve take-away only. The court held that this amounted to discrimination on grounds of ethnic origin.¹⁰⁴

In **Poland**, two men of **Roma origin** were asked to leave a night club. This was repeated again some days later and the refusal was recorded on a hidden camera. The club's security guards, as well as the owner, admitted that the security guards (hired by a subcontractor) had been instructed not to admit Roma customers. At first instance the Poznań Regional Court dismissed the claim on the basis that the owner could not be responsible for the actions of the subcontracted employees. However, the appellate court reversed the ruling and held that, even though the security was provided by an external company, the owner bore responsibility for the actions and the harms caused.¹⁰⁵

In **Latvia**, a Ukrainian citizen sought services for her Ukrainian-registered car at a carwash. She was refused service by the staff who had noticed the registration number was from Ukraine and they informed her that the owner had instructed them not to serve Ukrainians. The owner denied the claim and said that he had only instructed his staff not to provide free services or services to people without them waiting for their turn.

¹⁰² Bulgaria, Supreme Administrative Court of Bulgaria - Fifth Division, Case No 11591/2021, 9 September 2021.

¹⁰³ Austria, District Court of St. Pölten, Nr.4C 480/09x-12, 29 January 2010.

¹⁰⁴ Lithuania, Kaunas Regional Court, No. 1A-26-1049/2025, 8 January 2025.

¹⁰⁵ Poland, Poznań Appellate Court, I ACA 1162/11, 29 February 2012, A.G. v. K. L.-B.

Riga City Court held that the owner had committed direct discrimination on grounds of **ethnic origin** in denying service to the claimant and had breached the prohibition on instruction to discriminate.¹⁰⁶

In **Slovakia**, a **Roma** man was denied access to services by a mobile operator. The instruction had been given by the operator but actioned by an agency worker. The Supreme Court concluded that a violation of the principle of equal treatment has a personal character and that the employee of a company which provides services under a contract with the mobile operator has an obligation to refuse to act in accordance with potentially discriminatory instructions. In this case the mobile operator was not found responsible for discrimination.¹⁰⁷

In **France**, a case was brought by an NGO (SOS Racisme) after observations were made of the systematic refusal to grant access to night clubs to young people of North African origin. The NGO carried out situation testing to demonstrate the discriminatory policy of the night club in question refusing access on grounds of **ethnic origin**. The court agreed that the testing demonstrated systematic refusal of access for persons of North African origin and found the three night club owners to be in violation of the discrimination laws.¹⁰⁸

In **Slovenia**, a provider of marketing services terminated a contract for a marketing campaign by a pro-life association. The campaign had involved advertising on city buses and the advertisements were removed after a social media outcry alleging that they were contrary to Article 55 of the Constitution guaranteeing the right to abortion. The Advocate of the Principle of Equality found that the removal of the advertisements amounted to discrimination on grounds of **religion**. The pro-life association was effectively prevented from accessing marketing services. The Advocate found that it had been the bus company which had instructed the marketing agency to remove the advertisements and this amounted to an 'instruction to discriminate'. The decision was appealed to the Administrative Court on the grounds that the decision interfered with the bus company's constitutional freedom of enterprise (Article 74 of the Constitution). The Court annulled the decision and ordered a rehearing before the Advocate, taking into consideration the following issues: (a) the weighing of the opposing rights that were at stake in the case concerned; (b) the verification of the extent to which the right of association was violated; and (c) to consider whether the advertisement itself would have to express intolerance in order for the company to have the right to remove it. The Advocate held that an instruction to discriminate had occurred. The order to remove the advertisement had come after some transport users had raised a debate as to whether it was appropriate for an advertisement by an organisation that advocates the right to life from conception on the basis of religion to be placed on a bus. The advertisement was only promoting counselling services for people in need and did not contain any intolerant language. The premature removal of the advertisement was deemed to amount to discrimination on grounds of religion and belief. The Advocate found that the bus company violated Article 9 of the PADA by giving 'instructions to discriminate', thus violating the association's right to freedom of expression in connection with its beliefs.¹⁰⁹

In **Bulgaria**, public statements were made by Deputy Prime Minister Krassimir Karakachanov with negative comments about people of **Roma origin** ('Gypsies have become extremely insolent' and that Bulgarian society's tolerance for Roma was 'running out' and 'we should not tolerate this any longer'). These were then

¹⁰⁶ Latvia, Riga City Court (*Rīgas pilsētas tiesa*), Case No C29353322, case archive No C – 02188 – 23/8, 28 November 2023.

¹⁰⁷ Slovakia, Supreme Court, 3 Cdo 405/2015 – 773, 8 December 2016.

¹⁰⁸ France, Court of cassation, criminal chamber, No. 01-85, [decision of 11 June 2002](#).

¹⁰⁹ Slovenia, Advocate of the Principle of Equality, Case no. 0700-2/2019/98, 16 June 2022.

broadcast on national television (BTV) over three days. They were held by the Supreme Administrative Court not to constitute an instruction to discriminate against Roma individuals. The association Unity had alleged that the statements generalised negative stereotypes, incited ethnic discrimination and created a hostile environment. While the court considered that the statements were problematic and could perpetuate stereotypes, they were not deemed sufficient to amount to a breach of the equality laws.¹¹⁰

In **Bulgaria**, a member of Parliament and host of TV programme 'New Horizons' on SKAT television was accused of incitement to discrimination and harassment based on **Roma ethnicity**, personal status and property status. The accusations stemmed from a 2020 broadcast entitled 'Can Gypsies feed Bulgarians?' where the content allegedly incited public attitudes of contempt and disgust towards the Roma community. A Roma individual filed a complaint, alleging that the broadcast stigmatised Roma individuals and perpetuated stereotypes. At first instance the PADC found the respondent liable for incitement to discrimination and harassment and issued a recommendation asking him to refrain from making such statements. However, the Burgas Administrative Court annulled the decision. The Supreme Administrative Court overturned the decision of the Burgas Administrative Court and remitted the case to the lower court to evaluate whether the statements constituted harassment or incitement to discriminate, assessing each protected ground individually.¹¹¹

In **Croatia**, the association Rainbow Families, which represents the family and parental rights of LGBTIQ people, filed a joint complaint against the Vigilare association, claiming that the association in question discriminated against, encourage discrimination against and harassed LGBTIQ people and their families by launching a petition called 'Stop homopropaganda on state television. Let's stop fake rainbows, protect children and families!' and by publishing inappropriate content on its website, regarding multiple other similar statements. The County Court in Zagreb rejected the claim at first instance on the grounds that Vigilare was merely expressing its criticism in accordance with freedom of speech and expression. Upon appeal, the Supreme Court of the Republic of Croatia overturned the decision on the grounds that the public invitation to sign the petition amounted to an incitement to discriminate and harassment on grounds of **sexual orientation**.¹¹²

(c) Housing

Case law on housing is emerging as a growing area within the Member States (n=4) particularly on grounds of ethnicity and is a key element of contributing to housing discrimination across the EU. Many of these cases involve access to the housing market being restricted or denied to individuals on grounds of their **race or ethnicity**.

¹¹⁰ Bulgaria, Supreme Administrative Court of Bulgaria - Fifth Division, Case № 11591/2020, 9 September 2021.

¹¹¹ Bulgaria, Supreme Administrative Court of Bulgaria - Fifth Division, Case № 12307/2023, 25 June 2024.

¹¹² Croatia, Supreme Court of the Republic of Croatia, GŽ-10/21, decision of 14 December 2021.

An instruction to discriminate in the housing context can arise in the following manner (Figure 9):

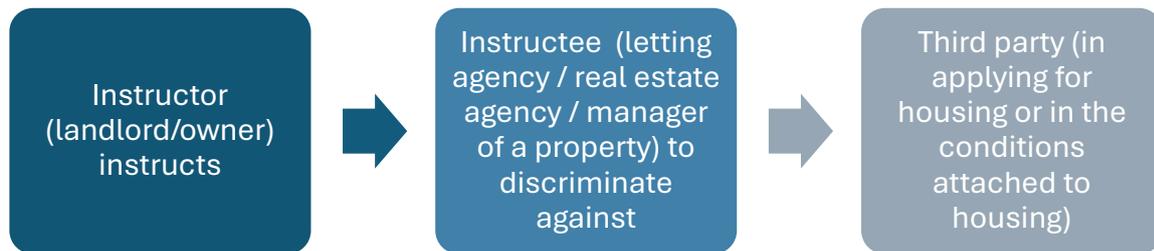


Figure 9

Instructions to discriminate appear to arise most commonly where housing agencies or estate agencies restrict access to housing on the basis of instructions issued by owners or landlords. What is interesting about these cases is that even though there is no real evidence of subordination in many of these cases (the relationship is merely contractual between an agency and a property owner / landlord), instructions to discriminate can still occur. Knowledge of the discrimination appears to be key to attaching liability to instructors and instructees in these cases.

Case examples in the housing field

In **Czechia**, a woman contacted a real estate agency to arrange a viewing of an apartment. She disclosed that her fiancé was of a foreign nationality after which the agency refused the viewing, stating that the property owner preferred Czech tenants. The agency justified their actions by claiming that they were merely following the owner's instructions. The Public Defender of Rights found that the agency's compliance with a discriminatory request constituted unlawful discrimination based on **nationality**.¹¹³

In **France**, a prospective tenant's name was of North African origin. She recorded her conversation with an estate agent who mentioned that they had instructions not to 'sign a lease with persons of colour with this client'. The court admitted this recording in evidence and it was sufficient to infer an instruction to discriminate on grounds of **race / ethnicity**.¹¹⁴

Also in **France**, a motion was presented to quash a ministerial instruction of 5 August 2010 from the Minister of Interior, instructing security forces to evacuate Roma camps. The court held that targeting Roma was a violation of the principle of equality which forbids instructing public action on the ground of **ethnic origin**.¹¹⁵

In **Slovenia**, an advertisement for a rental apartment was published on a web portal by an estate agency which stated that the apartment was to be rented out exclusively to Slovenian families, at the owner's request. The Advocate of the Principle of Equality held that the company that owns and operates the portal, as well as the natural and legal persons who advertise on the portal or offer apartments for rent on the market, are obliged to ensure protection against discrimination. The Advocate found that because the property owner made it a condition that his property was not to be rented out to foreigners, this amounted to an instruction to the estate agency to discriminate on grounds of **race and ethnicity**. The Advocate held that instructions to discriminate are instructions of any kind, which have resulted in, are resulting in or are

¹¹³ Czechia, Public Defender of Rights, Case no. [172/2013/DIS](#), 1 September 2015.

¹¹⁴ France, Court of cassation, criminal chamber, No. 04-87354, [decision of 7 June 2005](#).

¹¹⁵ France, Supreme administrative Court, 4th and 5th sections, No. 343387, [decision of 7 April 2011](#).

likely to result in discrimination. This includes instructions not to prevent or eliminate discrimination. The effect of this instruction was to exclude foreigners, which in practice made it impossible to rent the apartment to foreigners who, according to the landlord's own declaration, were considered by the landlord to be unsuitable tenants. The agency here had uncritically followed the property owner's instructions and had amended the advert to add this particular condition. The Advocate found that the estate agency had violated the prohibition of direct discrimination under Article 4 in conjunction with Article 6(1) of the PADA. The Advocate did not find the advertising agency to be in violation of the legislation because they were not aware of the change of conditions attached to the property which were made exclusively by the estate agency.¹¹⁶

(a) Access to goods

There was only one reported case in the Member States with respect to accessing goods and instructions to discriminate and it tends to reflect the EU scope in that the main ground cited is that of **race or ethnic origin**.

An instruction to discriminate can arise in accessing goods in the following manner (Figure 10):

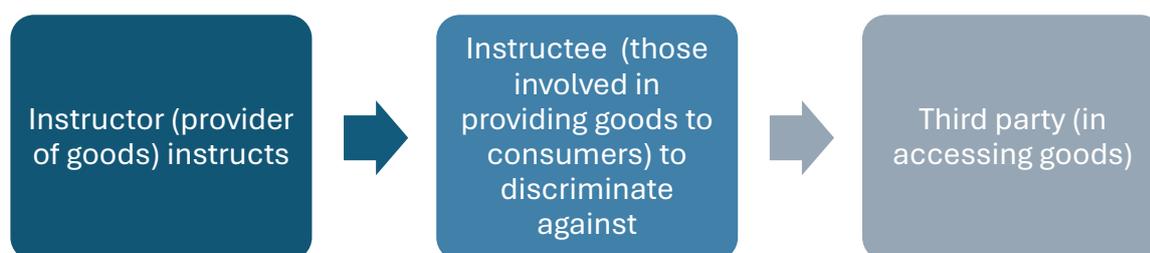


Figure 10

Overall, the case law reflects the main principles which have already been highlighted in the cases on service provision. In the one reported case, cited by **Denmark**, the claimant was not successful in their claim due to a technicality, but the reasoning of the court provided some useful information on the determining of these cases in that particular jurisdiction. Namely, that some form of hierarchy in the relationship between instructor and instructee was necessary in that jurisdiction and where this did not exist, an instruction to discriminate could not arise. This raises an important question about the importance of having some clarity on this particular issue of hierarchy as it can cause different decisions in different Member States and reduces the overall effectiveness of the Directives.

Case example on goods

In **Denmark**, a private individual advertised the sale of her allotment garden. She refused the sale to a man with a foreign-sounding name, citing his ethnic origin as the reason for her refusal. The man alleged this amounted to discrimination on grounds of **ethnic origin**. The seller contended that she was merely following the instructions of the garden association who had established guidelines for the maximum number of members with an ethnic minority background. However, the garden association argued that the seller did

¹¹⁶ Advocate of the Principle of Equality, 0700-48/2022/19, 11 September 2023.

not have the legal right to use the garden (or make sales) and therefore there was no connection between their instruction and her decision not to sell it to a particular person. The Board of Equal Treatment agreed with the garden association. The Board found that the seller had not, at the time she rejected the complainant, acquired the right of use of the garden in the garden association. The Board held that there was a prerequisite requirement for an instruction to discriminate that the person giving the instruction has the power to instruct or supervise the person receiving the instruction, so that there is a certain relationship of subordination or superiority. The complainant failed in their claim.¹¹⁷

(b) Education

Despite limited protection at an EU level, in the education field a number of cases concerning educational settings have arisen at a national level (n=2). These cases have involved instructions to discriminate on grounds of both **disability** and **ethnicity**.

Discrimination in the education context can arise in the following manner (Figure 11):

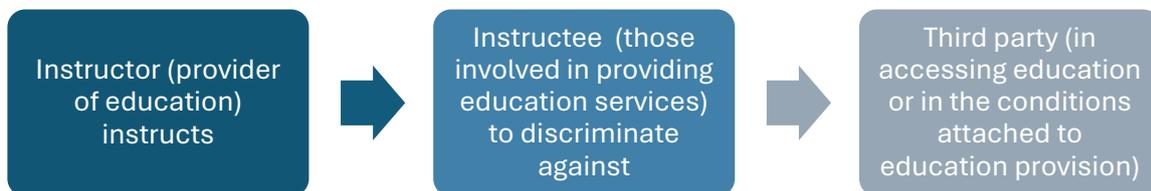


Figure 11

The cases revealed strong statements in support of the prohibition of instructions to discriminate as having a tripartite purpose of putting an end to discriminatory behaviour, removing discriminatory effects and providing redress. These examples also indicate that cases involving instructions to discriminate will often not be identified as such and will instead be identified as cases of direct or indirect discrimination, ignoring potential claims of an instruction to discriminate. It is important to ensure that national authorities are sufficiently skilled to identify such acts as instructions to discriminate as well as cases of direct or indirect discrimination where both arise.

Case examples in the education field

In **Italy**, the parents of a child with Down Syndrome attending a particular school claimed that the head teacher of the school had attempted to keep their child out of certain external activities promoted by the school and had encouraged the other students not to inform this child about these activities, otherwise these activities would be cancelled for everyone. The other students created a strong and public reaction to this notification from their head teacher and sent a letter addressed to their schoolmate stating that they would prefer to stand beside him rather than having such activities. The regional Director of the Education Office launched a formal investigation into the case and suspended the head teacher for a period of three months with remuneration. The case ended up before the Tribunal of Catanzaro (general court) where it was held that the definition of discrimination includes the order to discriminate which can be challenged through civil action against discrimination. The Tribunal indicated that the main purpose of a prohibition of instructions to discriminate is to put an end to discriminatory behaviour, remove the discriminatory effects of such

¹¹⁷ Board of Equal Treatment, Decision No. 9995, 9 October 2019.

behaviour and to claim redress for any damages caused by the discriminatory act. In this case there was an instruction to discriminate on the ground of **disability** by the head teacher. However, the effects of the instruction were limited by the fact that the child in question had not suffered any damage and the teachers and students had not followed the instruction but had rather demonstrated against it. There was therefore no actual damage in this case. In addition, the Education Office had sanctioned the head teacher for his behaviour. There was an order to discriminate which had no effects.¹¹⁸

In **France**, the mayor of a suburban town gave instructions to the service responsible for school registrations to refuse any registrations of children living in the local. The mayor justified this by reference to a lack of appropriate residential evidence. The families, supported by an NGO, alleged that this was indirect discrimination on grounds of **ethnicity** and filed complaints against the mayor. The Court of Cassation decided that there was no direct evidence of a criminal act, but that requiring official evidence of residence without providing an alternative necessarily would lead to preventing the registration of these children and could constitute a civil fault discrimination (an instruction to discriminate). The case was sent back to the Court of Appeal for adjudication. The Court of Appeal of Versailles decided that this practice was discriminatory and constituted slum a civil fault by the mayor.¹¹⁹

(a) Healthcare

The final field where case law is emerging is the area of healthcare. There are still very few cases on this (n=1) but it is a very important emerging area and has crossovers with the ground of **disability** and particularly **chronic health conditions**.

Instructions to discriminate can arise in the healthcare context in the following manner (Figure 12):



Figure 12

Instructions to discriminate can arise in this context from the fact that healthcare institutions can instruct staff not to treat certain individuals on the basis of certain health conditions which they may be carrying. During the COVID-19 pandemic, there were specific concerns identified with instructions or recommendations to discriminate on the basis of age. For example, in Lombardy in **Italy**, Amnesty International reported that ‘the regional authorities adopted a specific policy advising that older residents aged over 75 with frailty and with COVID-19 symptoms should be cared for within care homes, *de facto* limiting their access to hospital’.¹²⁰ These policies could amount to an instruction to discriminate against older persons on the basis of age.

¹¹⁸ Italy, Tribunal of Catanzaro, F and S. v. A., 15 January 2013.

¹¹⁹ France, Court of cassation, Criminal Chamber, No 17-81369, [decision of 23 January 2018](#).

¹²⁰ Italy, Amnesty International (2020), [Italy: Violations of the human rights of older residents of care homes during COVID-19 pandemic](#). See also Matteo, C. and Proietti, M. (2020), ‘COVID-19 in Italy: Ageism and decision making in a pandemic’, Editorial, *Journal of the American Medical Directors Association*, 21(5), 576–577.

In **Bulgaria**, it was reported that paramedics had received instructions from referring hospitals not to take patients over a certain age, often 75 years but sometimes as low as 65 years.¹²¹ There were no reports by Member States of any case law on this issue relating to COVID-19 but it does indicate that instructions to discriminate are potentially occurring within healthcare contexts that are not being addressed either due to lack of scope within the legislation or a lack of awareness and understanding of the law.

Case examples in the healthcare field

In **Croatia**, a claimant had been refused medical and rehabilitation treatment due to the fact that he had tested positive for hepatitis. The hospital placed him on a waiting list until he had recovered, which delayed his potential recovery. This was due to an instruction by the hospital not to treat him as a result of his illness. The court determined that this amounted to discrimination, an encouragement to discriminate and harassment on grounds of **disability / health condition**.¹²²

3.5.2 Conclusions on case law analysis

The case law analysis by field has highlighted certain grounds of discrimination which are particularly pertinent in specific fields.

Cases involving alleged instructions to discriminate on the grounds of **race and ethnicity** (including foreigners in general) were identified in eight EU Member States: **Austria, Bulgaria, Czechia, Denmark, France, Latvia, Lithuania, the Netherlands, Poland, Slovakia** and **Slovenia**. Specially affected ethnic minorities were Roma people, featuring in five Member States, (**Bulgaria, France Lithuania, Poland** and **Slovakia**) and North African people (cases in **Austria** and **France**).

Beyond race and ethnicity, other significant grounds identified in cases involving alleged instructions to discriminate were **age** (**Czechia, France** and the **Netherlands**), persons with **disabilities** (**Croatia, Greece, Ireland** and **Italy**) and **religious groups** (**Belgium** and **Slovenia**).

With respect to the fields covered by this report,¹²³ **access to and supply of goods and services** which are available to the public is the field most affected by instructions to discriminate. A myriad cases reveal private company policies containing forms of instructions to discriminate, featuring in eight Member States, namely **Austria** (access to clubs for ethnic minorities), **Czechia** (access to bank credit for the elderly), **Denmark** (purchase of a garden by ethnic minorities), **France** (access to clubs for ethnic minorities), **Latvia** (access to car services for a foreigner), **Poland** (access to clubs for ethnic minorities), **Slovakia** (access to a network operator for Roma people) and **Slovenia** (access to bus advertisement services). It is interesting to highlight that access for ethnic minorities to clubs feature in three cases.

Employment is the second field where most cases involving alleged instructions to discriminate have been reported. Employment, broadly understood as public or private employment as well as dependent, self-

¹²¹ Belgium, Amnesty International (2020), *Les maisons de repos: Dans l'angle mort* (Care homes: the blind spot), p. 25.

¹²² Croatia, Bjelovar Municipal Court, P-954/2021, 10 January 2022/31 August 2023.

¹²³ Social protection, healthcare, education, housing, employment and training, and access to and supply of goods and services in European Union Member States and under the European Convention on Human Rights and Fundamental Freedoms. The thematic report does not cover instructions to discriminate with respect to the gender ground.

employment or atypical forms of work, features in eight Member States, namely **Belgium, Czechia, France, Greece, Ireland, Latvia**, the **Netherlands** and **Poland**.

Housing is the third most significant field. Instructions to discriminate by landlords to estate agencies have been reported in cases from **Czechia, France** and **Slovenia**. The other relevant fields affected by instructions to discriminate are **education** (policies affecting access to education for economically disadvantaged children in **France**, policies affecting access to school activities for children with disabilities in **Italy**) and **access to healthcare**, with a case reported in **Croatia**.

It is also worth noting that cases in **Belgium, Croatia, France** and the **Netherlands** began through **collective action** (sometimes also including individual action), mostly through NGOs. Whereas in **Austria, Bulgaria, Croatia, Czechia, Denmark, Greece, Ireland, Italy, Latvia, Slovakia** and **Slovenia** cases began through **individual action**. This shows a tendency in favour of individual action in Member States. However, this trend is not unequivocal given the small case sample involved.

In addition, **sanctions** (including criminal, civil or administrative) were observed in the cases of **Austria, Belgium, Croatia, France, Italy, Latvia** and **Poland**, whereas no sanction was noted in cases in **Bulgaria, Czechia, Denmark, Greece, Ireland, Italy, Slovakia, Slovenia** and the **Netherlands**. This shows some correlation with whether the action was collective or individual. However, it is not conclusive. It is also significant to note that in **France** defendants face criminal charges and high fines for instructions to discriminate. However, while the provisions of the French Criminal Code indicate high fines, conviction rates are generally low.

To conclude, there seems to be a significant binary divide on the extension of instructions to discriminate in the reported Member States. On the one hand, a group of Member States make the instructor responsible for the discriminatory acts of their agents regardless of whether it is a specific instruction to discriminate. This approach can be observed in the cases of **Austria** and **France**. In addition, the **Netherlands** sits close to this approach by accepting real or theoretical presumptions of instructions to discriminate with or without a victim. A case in **Ireland** makes a slight caveat by arguing that liability by the principal cannot be avoided by merely claiming that the recipient of the instruction to discriminate accepted it without question.

This analysis shows some disparities in applying the prohibition of instructions to discriminate, leading to divergences between Member States and a lack of harmonisation in an area which yields significant discriminatory possibilities.

3.6 National law conclusions

Overall, there is a great deal of consensus at a national level about most issues relating to instructions to discriminate, despite the lack of guidance from the EU level. Firstly, there is **consensus** that the **scope of protection** should be wider than is the case at EU level and that all fields of application considered in this report should be included in this protection against instructions to discriminate. Most Member States also agree that an instruction to discriminate is a **unique form of discrimination** which should not be conflated with either direct or indirect forms of discrimination. All Member States agree that **express instructions** should be included within the definition of an instruction to discriminate and many Member States agree that **both the instructor and the instructee should be liable** for a breach of this prohibition. There is also a lot of

consensus that **agencies and subcontractors should also be liable**, closing any potential responsibility gaps in EU law. There is also almost full consensus on the need for **adequate enforcement and sanctions** at a national level.

Less consensus is found in relation to the most controversial issues such as whether **less clear forms of instructions** such as pressure, encouragement, persuasion, suggestions or preferences which treat individuals less favourably should be included within the definition of an instruction to discriminate. There is a strong argument in favour of their inclusion and where inclusion does occur at a national level this has not caused any major difficulties or confusion in the law. Clarity at the EU level on this issue would be recommended. There is also less consensus on the issue as to whether **hierarchy** or some form of imbalance of power is required between the instructor and the instructed party in order for an instruction to discriminate to occur. Member States are divided almost evenly on this question and there is no clarity in EU law. The national case law, considered in Section 3.5 above, indicates that hierarchy is not a necessary element in order to find liability in such cases, particularly where the relationship is more contractual e.g. a property owner and an agency.

Overall, there is more consensus than not at a national level and it would be recommended that the EU should capitalise on this consensus to clarify the law and strengthen the EU equality acquis significantly.

4 Further analysis and recommendations

The report to this juncture has focused on the existing EU law and national law (both legislation and case law) which exists in relation to the complex phenomenon of the prohibition of instructions to discriminate. This assessment of EU and national law has included an analysis of the operation of these laws at the EU and national level, has identified consensus and divergence between Member States and has indicated areas in significant need of clarification.

This chapter is slightly different in that it focuses instead on the significance and potential of improved harmonisation of the prohibition of instructions to discriminate in light of the analysis in Chapter 3. It also identifies potential new challenges, such as the increasing significance of artificial intelligence in the provision of a variety of services, which may benefit from strengthened and improved prohibitions of instructions to discriminate. Most importantly, it identifies what implications the analysis in Chapter 3 and in the earlier parts of Chapter 4 have for the development of the law on a prohibition of instructions to discriminate. This allows for the development further in Chapter 4 of a number of key recommendations not only for the EU equality acquis but also for national legislators, equality bodies and courts.

4.1 Significance and potential

The analysis of EU law and national law on instructions to discriminate indicates that the prohibition of instruction to discriminate is currently limited in its scope and requires some harmonisation across the EU. However, Member States have attempted to fill these gaps in order to strengthen the equality agenda and ensure greater protection for marginalised groups. The prohibition on an instruction to discriminate is hugely significant, as the case law indicates that such instructions arise in all fields of application covered by this report and appears to exist across all grounds of discrimination (race and ethnicity, age, religion, disability and sexual orientation).

This report also highlights the potential of a stronger and more harmonised legal regime, given that the case law indicates what types of behaviour can be identified as instructions to discriminate, the impact of this behaviour on individuals and the effect of such behaviour on society more generally. The protection against instructions to discriminate has the potential to provide a very important addition to the equality agenda and eliminate discrimination before it can be activated into either direct or indirect forms of discrimination or harassment.

4.2 Possible developments – the significance of artificial intelligence

Potentially, artificial intelligence can be instructed to discriminate in automated processes which are commonly used in the financial services sector but also other sectors such as employment and education. This is referred to in the literature as ‘discrimination on purpose’¹²⁴ or intentional discrimination. This occurs where an organisation intentionally uses proxies which discriminate on the basis of a protected characteristic such as age, disability or race.

¹²⁴ Zuiderveen Borgesius, F. (2018), *Discrimination, artificial intelligence, and algorithmic decision-making*, Council of Europe, Directorate General of Democracy.

Examples of discrimination caused by artificial intelligence demonstrate that these forms of discrimination can arise in both direct and indirect forms.¹²⁵ In the context of the age ground, it is commonly the case that certain online application systems are coded to eliminate or deny applications based on age proxies. The same can be said of disabilities where certain health conditions can be red-lined to automatically deny services to certain individuals based on their disability. Artificial intelligence could also be instructed to deny credit facilities to individuals living in certain areas based on training data which indirectly discriminates based on race and ethnicity.¹²⁶ Varona argues that ‘residential areas often offer a representative distribution of their inhabitants in regard to attributes such as race’.¹²⁷

Zuiderveen’s research indicates that such intentional discrimination can occur in a variety of areas of life including those covered by this analysis. He specifically mentions certain key examples such as the selection of students for education or employee recruitment. EU case law analysis in other reports¹²⁸ indicates that this can also affect access to goods and services, such as housing, banking, insurance and credit facilities. In the Irish case of *Shanahan v Laya Healthcare Ltd*,¹²⁹ the complainant was denied travel insurance on the basis of an artificial intelligence system which denied those over the age of 65 from accessing an online quotation. This meant that the complainant was unable to receive a quotation for winter sports travel insurance either online or over the telephone as a result of his age. This was held to amount to direct age discrimination. The respondent apologised for their administrative error. The case could also be identified as a case involving a service provider instructing an artificial intelligence system to discriminate and the claimant could also have potentially used the prohibition of instructions to discriminate to found an alternative claim in this case.

This analysis indicates that artificial intelligence can be instructed to discriminate by service providers, agencies, landlords and others with decision-making powers. It is therefore imperative that those who are the instructors are liable for instructions to discriminate and that artificial intelligence is recognised as a potential intentional tool which can be used to discriminate. In fact, the use of the instruction to discriminate prohibition could be useful in combating bias and discriminatory artificial intelligence applications more generally, by making instructors and developers of artificial intelligence more cautious about their actions and the manner in which they programme their services. The real challenge for claimants in such situations is identifying that artificial intelligence has been instructed to discriminate and therefore a call for the use of data which is verifiable, up-to-date and inclusive should be included within all anti-discrimination frameworks.

4.3 Implications for EU and national law

This section considers the impact of the concept of instruction to discriminate in EU and national law across all discrimination grounds. It will further consider how the law might develop at the EU level, considering a review of relevant literature and developments across the Member States as reported in the country questionnaires.

¹²⁵ Mehrabi, N., Morstatter, F., Saxena, N.A., Lerman, K. and Galstyan, A.G. (2019), ‘A survey on bias and fairness in machine learning’, *Mach. Learn.*

¹²⁶ Zhang, L., Wu, Y. and Wu, X. (2017), ‘A causal framework for discovering and removing direct and indirect discrimination’, in ‘Proceedings of the Twenty-Sixth International Joint Conference on Artificial Intelligence, Melbourne, Australia, 19–25 August 2017’.

¹²⁷ Varona, D. and Suárez, J. L. (2022), ‘Discrimination, bias, fairness, and trustworthy AI’, *Appl. Sci.*, 12, 5826. See also Zhang, Wu and Wu (2017).

¹²⁸ Dewhurst, E. (2020), *Age discrimination law outside the employment field – 2020*, Publications Office of the European Union / European network of legal experts in gender equality and non-discrimination, p. 107.

¹²⁹ Ireland, Workplace Relations Commission, *Shanahan v Laya Healthcare Ltd*, DEC-S2016-071, 23 November 2016.

4.3.1 Implications for EU protections on instructions to discriminate

An examination of EU law in respect of instruction to discriminate reveals that there are potentially three distinct problems with the existing EU law protections.

Firstly, the **scope of protection** varies widely across grounds of discrimination with the Directives essentially prioritising protections on grounds of race and ethnicity, whereas other grounds of discrimination are limited to the employment field.

Secondly, there is **no clear definition** provided within the Directives and there is no EU case law to provide any guidance on some of the essential aspects of the prohibition. This has led to lots of open questions regarding the nature of the prohibition and has led to fragmentation at a national level. A textual analysis of the provision which is identical across both Directives indicates that the provision has a potentially wide interpretation. It is not restricted to one specific person or victim and it potentially has a *sui generis* nature making it uniquely distinct from other forms of discrimination. However, this uniqueness comes with even more questions as to who is potentially liable for such an infringement, whether some form of hierarchy is required and what the concept of an 'instruction' actually means.

Thirdly, the lack of case law does not indicate that this is not a problem within the EU. On the contrary, it shows that there may be a **lack of understanding** of the provision and its contents. There have been cases which have potentially involved instructions to discriminate but which have been resolved on other grounds due to the fact that instructions to discriminate have not been raised at a national level and the CJEU has had to find alternative ways to frame these cases.

An illustrative example is the case of *Feryn*.¹³⁰ The employer in this case publicly declared that they would not recruit employees of a certain ethnic or racial origin, which the CJEU found would likely strongly dissuade candidates from submitting an application for a job. In this case, the CJEU determined that this constituted direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/43 and that the existence of direct discrimination was not dependent on the identification of a complainant who claimed to have been the victim of that discrimination. The statement issued by the employer could have been considered to be an 'instruction to discriminate' issued against persons of a certain race or ethnic origin. Despite not being issued to employees, it still had the potential effect of pressuring or encouraging employees and senior management not to recruit persons from certain racial or ethnic backgrounds. The use of Article 2(4) might potentially also have avoided the victim issue which caused the CJEU some difficulty, as Article 2(4) refers to persons and not just a specific individual. However, the case was resolved as a direct discrimination issue.

In the case of *Asociația ACCEPT*¹³¹ a similar outcome was reached. In that case a **Romanian** politician, publicly known as the patron of a football club, asserted in the media that he would never hire a gay player. ACCEPT, an NGO dedicated to the rights of LGBT individuals, submitted that this statement directly discriminated on grounds of sexual orientation, breaching the principle of equal treatment in employment and violating the dignity of homosexuals. It additionally argued that as the football club involved had not distanced itself from

¹³⁰ *Feryn*, Case C-54/07.

¹³¹ Judgment of 25 April 2013, *Asociația Accept*, Case C-81/2012, ECLI:EU:C:2013:275.

these remarks, it was therefore equally liable. Following the *Feryn* line of reasoning, the CJEU determined that Articles 2(2) and 10(1) of Directive 2000/78 must be interpreted as meaning that,

‘facts such as those from which the dispute in the main proceedings arises are capable of amounting to “facts from which it may be presumed that there has been ... discrimination” as regards a professional football club, even though the statements concerned come from a person presenting himself and being perceived in the media and among the general public as playing a leading role in that club without, however, necessarily having legal capacity to bind it or to represent it in recruitment matters.’

This essentially amounted therefore to direct discrimination against football players who identified as or were presumed to be homosexual. However, once again there was no discussion in the case as to whether this might amount to an instruction by the patron of the club to the club management to discriminate against football players on grounds of their sexual orientation. Invoking Article 2(4) here it may have been possible to avoid some of the difficulties associated with arguing direct discrimination in such cases (such as the comparators and burden of proof) as this could be concluded as having been an instruction to discriminate. The CJEU admitted that the potential instructor in this case played a leading role in the club and could therefore have sufficient authority to persuade the club officials to act in a discriminatory way.¹³²

More recently, in the case of *NH*,¹³³ a similar conclusion was reached without any reference to Article 2(4) of the Directives. NH was a lawyer who stated, in an interview given during a radio programme, that he would not wish to recruit homosexual persons to his law firm nor to use the services of such persons in his law firm. Associazione, is an association of lawyers that defends the rights of lesbian, gay, bisexual, transgender or intersex (LGBTI) persons in court proceedings. The organisation brought a claim of direct discrimination against NH. They were successful at first instance before the Employment Tribunal and the Court of Appeal dismissed any appeal against this decision. NH appealed to the referring court, the **Italian** Supreme Court of Cassation, on the grounds, inter alia, that he expressed an opinion with respect to the profession of lawyer in a situation where he was not presenting himself as an employer but as a private citizen and that the statements at issue were not made in any concrete professional context. The CJEU again determined that these comments fell within the scope of Directive 2000/78/EC but the concept of an instruction to discriminate was not considered.¹³⁴

These cases could have been interpreted in the same manner as the case law of the ECtHR in these matters which would have opened further potential avenues of redress for the claimants. It is imperative that cases of this nature should be interrogated more robustly to ensure that there is no ‘instruction to discriminate’ causing the other forms of discrimination. This will ensure that access to services and employment is not hindered and the EU equality agenda is effective in its fight against discrimination.

¹³² See further Kulak, M. (2021), ‘Does the Feryn-Accept-NH doctrine enhance a common level of protection against discrimination in the EU? A reflection on the procedural aspects of the CJEU’s concept of discriminatory speech’, *European Law Review* vol. 46, n. 4, pp. 551-563 (EN).

¹³³ Judgment 23 April 2020, *NH v. Associazione Avvocatura per i Diritti LGBTI – Rete Lenford*, C-507/17, ECLI:EU:C:2020:289.

¹³⁴ Belavusau, U., (2020), ‘The NH case: On the “wings of words” in EU anti-discrimination law’ *European papers*, 5(2) 1001-1020. See further Passalacqua, V. (2020), ‘Homophobic statements and hypothetical discrimination: expanding the scope of Directive 2000/78/EC’, *European Constitutional Law Review* Vol. 16 Issue 3 p. 513-524 and Tryfonidou, A. (2020), ‘Case C-507/18 NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford: homophobic speech and EU anti-discrimination law’, *Maastricht Journal of European and Comparative Law*, pp. 513–521.

4.3.2 Implications arising from the national law protections

While some fragmentation is to be expected across Member States, given that the Directives are limited in application and scope, there are still some general implications which can be drawn from the national laws.

Firstly, there is a **desire across Member States to extend EU law** in this area, which the majority of Member States have already done within their national legal systems. This means that the 2008 Commission proposal on equal treatment which recommends such an extension would not meet with much resistance from Member States with respect to instructions to discriminate.

Secondly, there is a **need for clarification on the definition of an ‘instruction to discriminate’**. This applies not only to the substance of the definition (with respect to the extremities of its meaning) but also to the form that it should take. Having the prohibition as a *sui generis* concept is the most appealing form for such a prohibition, as it allows the concept to evolve independently of the other forms of discrimination, such as direct and indirect discrimination, and also removes the concept from the complexities associated with these forms of discrimination.

Thirdly, in order for the prohibition to be most effective and to meet the goals of the equality acquis within the EU, **there should be a broad interpretation applied to the concept of an instruction to discriminate**. In terms of what this broad interpretation would relate to, it is clear that the need for the instruction to derive from a source of authority or hierarchy brings multiple challenges to enforcement of such a prohibition as it limits the claimant’s ability to effectively be compensated for inequalities arising (or potentially arising) from such instructions to discriminate. This broad interpretation should also apply with respect to who is liable for an instruction to discriminate. While it is axiomatic that the instructor will be liable, the instructee should also be jointly or severally liable. This ensures the integrity of the equality laws by requiring those instructed to discriminate to take responsibility for any actions or potential actions which may arise as a result of such an instruction.

4.3.3 Implications arising from national case law

The data collected on case law also show there is little case law on instructions to discriminate. However, that does not mean instructions to discriminate do not occur. As the **Swedish** expert mentioned, it is **highly likely instructions to discriminate are not tackled due to a variety of factors such as the victim’s dependency on the instructor, cumbersome processes and lack of awareness of the possibility to tackle instructions to discriminate**. It would be desirable to raise awareness of the damage instructions to discriminate create in fields beyond employment. For instance, the scattered case law shows there is a need to tackle issues of racism in particular situations, such as access to particularly sensitive goods and services available to the public including housing or communication networks or more recreational services such as access to clubs, gardening clubs or car services.

4.4 Recommendations

These recommendations are aimed primarily at EU law which has the potential to create harmonising measures in these areas which would eliminate much of the fragmentation occurring at the national level. Where recommendations are aimed at Member States, this is clearly identified.

- As proposed by the 2008 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, it is recommended that instructions to discriminate should be prohibited in all fields, including social security, social advantages, healthcare, education, housing and access to goods and services, and across all grounds of discrimination. There is some level of agreement at national level that instructions to discriminate should be prohibited on all grounds and across all fields.
- When cases come before national courts and the CJEU, they should be more robustly scrutinised to identify any potential instructions to discriminate which may arise from the facts of the case. Often, instructions to discriminate are litigated as direct or indirect forms of discrimination with potential victims of the discrimination being left without any remedy, as they have no evidence of less favourable treatment.
- National equality bodies should aim to raise more awareness, create more certainty and provide access to tools to tackle instructions to discriminate for victims and other interested organisations to avoid undermining the EU equality agenda.
- Member States should ensure that the definitions of an instruction to discriminate are clarified at the national level and, where possible, provide more detail on their form, scope and substance.
- An instruction to discriminate should be considered a discriminatory act in its own right as distinct from other forms of discrimination. This will ensure that it can act as an additional, and more precise, weapon against specific forms of discrimination rather than being conflated with other forms of discrimination.
- Case law at the EU level should clarify the definition of an ‘instruction to discriminate’ and this should contain express instructions as well as more implicit behaviours such as preferences, suggestions, pressures, persuasions and encouragements to discriminate against other persons.
- EU case law should clarify that the definition of an ‘instruction to discriminate’ does not require the instructor to have any authority or hierarchy over the instructee to compel others to comply with the instruction. This would ensure that measures which might persuade or influence others also fall within the scope of the Directives.
- Case law at the EU level should clarify that both the instructor and the instructed party are liable for a breach of the prohibition of an instruction to discriminate. It should also clarify that agencies and subcontractors will be held liable where they are complicit in the instruction to discriminate.
- Based on reasoning inherent in CJEU case law such as *Feryn*, *Asociația ACCEPT* and *NH*, and the need to ensure the integrity of the EU equality acquis, the potential harm which can arise from an instruction to discriminate should be sufficient to constitute a breach of the prohibition of an instruction to discriminate. It should not be necessary for a claimant to demonstrate actual discrimination arising from an instruction (as this in itself will often amount to either direct or indirect discrimination). It should be sufficient that the instruction to discriminate may lead to the commission of a discriminatory act or have discriminatory effects on a claimant.

- Regarding enforcement and sanctions, it would be desirable to raise awareness at a national level of the tools available and access to mechanisms to address instructions to discriminate. There is a particular need to ensure that victims can seek individual or collective relief in all fields of application equally in the form of payable compensation as well as administrative or criminal sanctions. To achieve this goal, Member States can either enact specific rules on instructions to discriminate or rely on general principles of non-discrimination to ensure compliance with the Directives.
- National case law is limited, and this is due to a lack of awareness and understanding of instructions to discriminate at a national level. It is recommended that a greater awareness of the concept is raised at a national level to improve compliance with the Directives and cases should be referred to the CJEU for a preliminary ruling in the case of doubt. There should also be a recognition that in cases of direct and indirect discrimination, a claim of instruction to discriminate may also arise.
- Developments in artificial intelligence should be identified as potentially creating risks for intentional means of discrimination. Expanding the scope of the instruction to discriminate prohibitions could ensure that artificial intelligence does not become a means through which discrimination can flourish.

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